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First Attempt to Regulate Spot Digital Asset Activities



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On March 29, the National Futures Association (“NFA”) promulgated [Compliance Rule 2-51](#), setting forth Requirements for Members and Associates Engaged in Activities Involving Digital Asset Commodities, which includes both derivatives and commodities traded on spot.

This is not the first time that the NFA stepped ahead of the Commodity Futures Trading Commission (“CFTC”) and extended its regulatory reach over products that are not yet fully regulated by U.S. federal regulatory agencies, such as the CFTC or the Securities and Exchange Commission (“SEC”).

The NFA is a self-regulatory organization (“SRO”) and an industry association that is authorized under the Commodity Exchange Act (“CEA”) to issue regulations and guidance for its members, such as registered futures commission merchants (“FCMs”), introducing brokers (“IBs”), and swap dealers (“SD”), along with commodity trading advisers (“CTAs”) and commodity pool operators (“CPOs”) and their associated persons (“APs”).

The CEA grants the CFTC regulatory jurisdiction over *derivatives* on all commodities (including digital asset commodities), while only enforcement jurisdiction over commodity *spot markets*, meaning that the CFTC can only prosecute fraud and manipulation involving digital assets, such as crypto, if these digital assets are only traded on spot (*i.e.*, for settlement within typically two business days). Even though the NFA derives its jurisdictional reach from the CFTC, from time to time it promulgates guidance and rules for its members that go beyond what the CFTC can do; for example, in the early 2000s, the NFA promulgated rules for its members on [retail forex transactions](#), which rules were subsequently codified in the CEA and CFTC [regulations](#).

Over the past five years, the NFA has taken similar actions in connection with digital asset commodities and virtual currencies.

First, in December 2017, the NFA mandated that its members report to the NFA their activities involving virtual currencies, although these reporting requirements were limited to only derivatives on crypto, and applied to [FCMs](#), [CPOs](#) and [CTAs](#) and [IBs](#). Based on these reports, as well as NFA examinations, the NFA [notes](#) that, as of March 2023, “over 100 NFA Members have reported to NFA that they engage in digital asset-related business activities, both in commodity interest [i.e., derivatives] and spot markets.”

Second, a year later, in 2018 the NFA promulgated [Interpretative Notice 9073](#) – Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities, which requires NFA members (FCMs, IBs, CTAs and CPOs) to provide specific disclosures to their customers in connection with *both* derivatives and spot virtual currency transactions. Notice 9073 also describes the specific manner in which these disclosures must be provided to members’ customers. This notice was the first NFA action extending its supervisory reach over crypto traded not only as derivatives but also in spot and cash markets.

Third, in its most recent rulemaking, the NFA set forth specific standards for members and APs engaged in activities involving digital asset commodities. Specifically, NFA Rule 2-51: (1) imposes anti-fraud, just and equitable principles of trade, and supervision requirements on NFA Members and Associates that engage in digital asset commodity activities; (2) specifically applies to derivatives (such as futures, options and swaps) on digital asset commodities, as well as spot and cash transactions involving crypto; (3) at this time is limited to only digital asset commodities involving Bitcoin and Ethereum (which are currently the only underliers to futures contracts traded on designated contract markets – commodity exchanges); (4) includes by reference Notice 9073 requiring disclosures of virtual currency activities of NFA members; and (5) applies not only to FCMs, IBs, CTAs, and CPOs but also to SDs.

This means that, as of the effective date of this rule (May 31, 2023), members will be required to implement appropriate supervisory and compliance policies and procedures with respect to members’ and their APs’ derivatives and spot digital asset commodities activities, and the NFA, as an SRO, will have the ability to discipline all of its members, including SDs, if they commit fraud or similar misconduct with respect to members’ and their APs’ spot digital asset commodity activities.

CFTC Commissioner Caroline Pham [noted](#) that this is a significant regulatory development and that the NFA may expand the scope of “digital asset commodities” subject to this rule to other than Bitcoin and Ethereum digital asset commodities.
