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**BEFORE THE COMMITTEE ON AGRICULTURE
UNITED STATES HOUSE OF REPRESENTATIVES**

***THE CFTC AT 50: EXAMINING THE PAST AND FUTURE OF COMMODITY
MARKETS***

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Chairman Thompson, Ranking Member Craig and members of the Committee, thank you for the opportunity to testify at this hearing on the important topic of the Commodity Futures Trading Commission's (CFTC or Commission) past and future at 50 years. My name is Thomas W. Sexton, and I am the President and CEO of National Futures Association (NFA). NFA is the industrywide independent self-regulatory organization (SRO) for the derivatives industry and is a registered futures association (RFA) pursuant to Section 17 of the Commodity Exchange Act (CEA). NFA is solely a regulatory body. We do not operate a market, and we are not an industry trade association. NFA is funded by the derivatives industry.

Our principal objective is to partner with and help the CFTC regulate the derivatives markets and, in doing so, we are committed to protecting customers and counterparties. The CFTC's original mandate was limited to oversight of the commodity futures markets, but its responsibilities have grown significantly over time. In response to fraud in the sale of foreign currencies (forex) to retail customers, Congress in 2008 clarified the CFTC's anti-fraud jurisdiction in this area and expanded its authority to adopt rules for these transactions. In 2010, Congress passed the Dodd-Frank Act (DFA) that gave the CFTC oversight of the previously unregulated swaps market. In doing so, Congress and the CFTC entrusted NFA with additional oversight responsibilities for these markets' participants.

Our global membership includes CFTC registered futures commission merchants (FCMs), swap dealers (SDs), commodity pool operators (CPOs), commodity trading advisors (CTAs), introducing brokers (IBs), retail foreign exchange dealers (RFEDs) and associated persons of these entities. We currently have approximately 2,850 NFA Member firms and 38,000 individual Associate Members. The CFTC requires these registered firms to be NFA Members. Without mandatory membership, those firms least likely to comply with NFA's rules would elect not to join NFA or would relinquish their

NFA membership if they did not want to follow a rule or were being disciplined for failing to follow NFA's rules.

Over fifty years ago, in October 1974, Congress amended the CEA by passing the *Commodity Futures Trading Commission Act of 1974 (1974 Act)*, which President Ford signed into law. The 1974 Act is remarkable legislation that established the regulatory framework for the derivatives industry that remains in place to this day. This structure has adapted to changing and innovative products and markets, which have experienced extraordinary growth over the years.

Of significant import, the *1974 Act* established the CFTC, which began operations on April 21, 1975. Further, the *1974 Act* contained the enabling authority to create RFAs¹, allowing for the opportunity to establish a private independent SRO. Over the next several years, industry leaders began working closely with congressional leaders, CFTC officials, and futures firms and exchanges to construct an organization that would strengthen the reputation of the markets by establishing and enforcing high standards of business conduct. The CFTC granted NFA's RFA registration in September 1981 and we officially began operations on October 1, 1982, with a clearly defined mission: safeguard the integrity of the derivatives markets, protect investors and ensure that NFA Members meet their regulatory responsibilities.

The CFTC at 50 Years

Before turning to my substantive remarks relating to the criticality of self-regulation within the derivatives markets' regulatory structure, I want to recognize the CFTC's commitment and significant efforts in promoting the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation. The CFTC's responsibilities are enormous, and its core principles regulatory approach has allowed it to adopt practical and sound regulations that safeguard the integrity of markets and allow for innovation. Over the years, the CFTC's Chairman and Commissioners have demonstrated outstanding leadership. I want to thank Acting Chairman Pham for her leadership and support of NFA and self-regulation. Further, we look forward to working with President Trump's nominee for CFTC Chairman, Brian Quintenz, once he is confirmed by the U.S. Senate. During his prior tenure as a CFTC Commissioner, Mr. Quintenz was always willing to thoughtfully engage with us to resolve the industry's regulatory issues.

NFA recognizes the derivatives markets offer vital hedging and risk management benefits to farmers, ranchers, producers and other market participants. Over the years, the CFTC has assembled a professional, talented and expert staff to advance its mission. These individuals are dedicated to public service and committed to ensuring the derivatives markets are effectively overseen. Each day, their hard work contributes to effectuating the CEA's key purposes to deter and prevent price manipulation or any other disruptions to market integrity; ensure the financial integrity of transactions and

¹ Title III of the 1974 Act added Section 17 to the CEA and provides for the registration and CFTC oversight of self-regulatory associations of futures professionals.

avoid systemic risk; protect all market participants from fraudulent or other abusive sales practices and the misuse of customer assets; and promote responsible innovation and fair competition.

NFA and the derivatives industry are extremely well-served by the CFTC, a federal regulatory agency laser focused on supporting, strengthening and safeguarding the derivatives markets. In our view, Congressional guidance and support, CFTC leadership and its exceptional employees have led to its tremendous success over the past fifty years.

NFA's Critical Role

As noted above, the *1974 Act* did not just envision the establishment of a federal regulatory agency, the CFTC, to regulate the derivatives markets. To augment the CFTC's oversight, Congress also enabled the creation of an RFA (*i.e.*, a private independent SRO). NFA is the sole RFA for the derivatives industry. Within this framework, the CFTC and NFA partner to effectively oversee the derivatives industry. Self-regulation is the first line of defense in this framework to ensure that markets and market professionals operate in a professional and ethical manner. To that end, NFA plays a critical role in regulating the derivatives markets, subject to broad CFTC oversight.²

NFA's Primary Functions

As the industry SRO for the derivatives market, our principal objective is to help the CFTC. In doing so, we perform seven primary functions—registration, rulemaking, monitoring Members, enforcement and disciplinary process, market regulation, investor protection and education, and dispute resolution. NFA's performance of these functions allows the CFTC to allocate its resources effectively and efficiently.

Registration. The CEA requires certain firms and individuals that conduct business in the derivatives industry to register with the CFTC. The CFTC delegated its registration function to NFA over 40 years ago. On behalf of the CFTC, NFA registers firms and market professionals after a thorough investigation of their background to determine if they meet specified fitness standards.

Rulemaking. The essence of self-regulation involves identifying industry best practices in certain areas and then mandating those practices for the entire industry. In developing these best practices, we involve market professionals who bring insight and perspective to examine regulatory issues and develop effective solutions. After identifying an issue or a problem that may require rulemaking, we work with our Member Advisory Committees, industry trade associations and the CFTC to develop

² Exchanges, clearinghouses and swap execution facilities also have self-regulatory responsibilities, which the CFTC oversees. The CFTC's statutory mission requires, in part, that it provide oversight of "a system of effective self-regulation of trading facilities, clearing systems, market participants, and market professionals." 7 U.S.C. 5(b).

proposed rules, and then present them to NFA's Board of Directors. All rule changes approved by the Board are subject to CFTC review and/or approval. In times of market crisis, NFA's ability to respond quickly is key to restoring and maintaining market participants' confidence. Prior to implementing a new or amended rule, NFA develops and delivers education to Members to help them understand their regulatory requirements.

Monitoring Members. NFA's largest departments are devoted to monitoring Members for compliance with NFA rules and investigating possible violations. Our key monitoring efforts include among other things: risk-based examinations; analysis of Member financial and operational data; the investigation of customer/counterparty complaints; the review of retail foreign exchange trade data; and the review of swap valuation dispute and key market and credit risk data.

Enforcement and Disciplinary Process. Adopting stringent rules and monitoring for compliance with those rules does little good if those rules are not vigorously enforced. To enforce its rules, when appropriate, NFA takes disciplinary actions against its Members.³ NFA's disciplinary panels may impose penalties against Members that include expulsion or suspension from NFA membership, fines, or any other appropriate penalties or remedial actions. All NFA disciplinary decisions are subject to CFTC review, either at the request of the disciplined Member or Commission staff.

NFA works very closely with the CFTC's enforcement division to address emergency situations and to not duplicate enforcement actions, unless necessary, so that we can properly allocate our regulatory resources. Importantly, we also work cooperatively with law enforcement agencies when we observe or suspect criminal activity. Over the years, NFA and the CFTC have brought many cases that have rapidly shut down Ponzi and fraud schemes with the individuals involved subsequently prosecuted.

Market Regulation. NFA's Market Regulation Department performs trade practice and market surveillance services on behalf of eleven swap execution facilities and two futures exchanges. Each trading venue may enter into a regulatory services agreement with NFA to perform specific outsourced compliance functions for which they remain ultimately responsible under the CEA.

Investor Protection and Education. Protecting investors has been part of the CFTC's and NFA's mandate since inception. NFA offers a variety of resources to help investors learn how the derivatives markets work and about the firms and individuals offering investment opportunities in the derivatives markets. We want investors to make informed decisions and avoid dealings with bad actors. Importantly, NFA offers a

³ Historically, NFA's enforcement efforts have focused on serious types of misconduct including Ponzi schemes, improper loans and advances from commodity pools, misleading and high-pressure sales practices, electronic trading platform abuses, abusive trading practices and anti-money laundering deficiencies, to name a few.

website tool, BASIC, that investors, the public and NFA Members can use to research the background of industry professionals.⁴

Dispute Resolution. Finally, NFA offers an affordable and efficient arbitration program to help customers resolve futures-related and forex-related disputes with Members. In general, NFA's dispute resolution program is less expensive, faster, and less formal than civil litigation or other dispute resolution forums.

Over the years, the Commission has also delegated and assigned important regulatory responsibilities to NFA that were previously performed by the Commission. In addition to the registration function noted above, the Commission has also delegated to NFA the review of CPO/CTA disclosures documents, commodity pool financial statements, commodity pool exemption notices, IB financial statements and swap valuation disputes.

The CFTC's Broad Oversight of NFA

Broad government oversight is vital to effective self-regulation, and this oversight should cover all aspects of the SRO's regulatory activity. While we may partner with the CFTC to regulate our Members, the CFTC also closely reviews and monitors NFA's activities to ensure that we fulfill our regulatory responsibilities. The *1974 Act* recognized the importance of Commission oversight and provided it with broad oversight powers, which include the ability to review NFA's disciplinary actions, review and/or approve NFA's rules, abrogate NFA's rules or require NFA to change or supplement its rules.⁵ The CFTC's oversight of NFA's activities includes both formal actions, required by the statute or regulations, and informal actions, which have evolved over time.

At the formal level, NFA's most significant actions are all subject to the CFTC's direct review and/or approval. The CFTC performs frequent rule enforcement reviews of NFA's work in our core areas to ensure that we meet our regulatory obligations. Informally, NFA is in regular contact with the CFTC to discuss ongoing investigations, registration matters, examinations, rulemaking issues, or any of the myriad issues that arise. We also have regular coordination meetings with the CFTC's Chairman and Commissioners and its CFTC's Operating Divisions (e.g., Division of Enforcement, Market Participants Division, Division of Market Oversight, Office of International Affairs and Office of Legislative Affairs) to ensure that they are aware of our activities.

The Effective Results of Our CFTC Partnership

The results of our partnership with the CFTC can be demonstrated in at least two ways—our work with them to detect and combat fraud and to develop sound regulatory oversight programs.

⁴ BASIC contains information relating to firms' and individuals' CFTC registration and NFA membership, regulatory actions, FCM financial information and dispute resolution information.

⁵ See 7 U.S.C. §21(h), (j)-(l).

Detecting and Combatting Fraud

Detecting and combating fraud is central to NFA's and the CFTC's mission. Our collective efforts working with the CFTC, the industry's other SROs,⁶ and industry participants have yielded significant results—customer complaints and single-event customer arbitrations filed at NFA, as well as CFTC reparation cases, remain near all-time lows. The following are just a few examples of how we worked with the CFTC to eradicate wrongdoers and protect retail customers.

The 1990s—Options Sales Practices. In the 1990s, NFA and the CFTC dealt with "boiler rooms" in South Florida and California that utilized misleading, high-pressure sales practices to pitch retail customers to trade exchange-traded options. NFA and/or the CFTC would take an enforcement action and shut down one of these firms, only to see a related firm open shortly thereafter under a new name with many of the same brokers. To address this situation, NFA enhanced its sales practice and supervision rules, which were approved by the CFTC, to make it difficult for these firms to continue their fraudulent operations.⁷ Due to NFA's and the CFTC's efforts, the large-scale boiler rooms that preyed on retail customers are a thing of the past.

The Early 2000s—Retail Spot Forex. In the late 1990s and early 2000s, an unregulated over-the-counter forex market aimed at retail customers grew rapidly. Many customers were victimized when firms either absconded with their funds or falsely promised them high profits. In the early 2000s, Congress passed legislation providing that off-exchange retail forex transactions were only permitted if the counterparty to the retail customer was a regulated entity (e.g., an FCM). As a result, many entities that had no intention of engaging in the usual FCM on-exchange trading activities became registered FCMs solely to act as counterparties to retail forex transactions. These FCMs performed several functions that traditionally had been performed, in part, by separate entities—they solicited customers, accepted customer funds, operated an electronic trading platform via an internet interface, and acted as counterparty (i.e., took the other side of the trade) to retail customers. At one point, there were over forty of these firms and fraud and mismanagement were rampant. Even though these firms made up less than 1% of NFA's total Members, they accounted for 20% of our arbitration cases and over 50% of NFA's emergency actions.

Although Congress gave the CFTC anti-fraud authority over these FCMs' retail forex activities and the CFTC took several fraud-related enforcement actions in this area, the CFTC lacked authority to regulate these firms' retail forex activities. Equally significant,

⁶ See Fn. 2.

⁷ Specifically, NFA placed restrictions on Members' use of radio and television advertisements and banned practices that presented a distorted and misleading view of the likelihood of customers earning dramatic profits or those that constituted high-pressure sales. Importantly, if a Member firm had brokers who were previously associated with a firm that had been shut down for sales practice fraud, we imposed enhanced requirements upon it relating to higher capital, tape recording of sales solicitations, and the pre-approval by NFA of its promotional material.

the CFTC's anti-fraud enforcement efforts were frustrated with respect to these retail forex transactions after Federal Appeals Courts found that these transactions were not futures contracts but "rolling spot transactions" that fell outside of the CFTC's jurisdiction.⁸

Therefore, the CFTC was unable to stop this fraud. Since these firms were NFA FCM Members, however, NFA was able to step in and fill this regulatory gap until Congress acted in 2008 to clarify the CFTC's anti-fraud jurisdiction and expressly grant the CFTC the necessary authority. To regulate Members' spot retail forex activities, NFA adopted—with CFTC approval—an anti-fraud provision and rules to establish enhanced capital requirements and business conduct rules for forex dealers. These efforts began to weed out the bad actors and today these firms account for very few of NFA's disciplinary and customer arbitration cases.

The Early 2010s—Customer Segregated Funds Misappropriation. In late 2011 and early 2012, personnel from two FCMs engaged in misconduct that resulted in customer funds losses. Due to the shortfall in customer segregated funds at these two firms, NFA and CME worked with the CFTC to adopt a daily customer funds verification process to more effectively monitor each FCM's compliance with its obligation to keep customer funds safe. For more than ten years, NFA and CME have confirmed daily all balances in customer segregated, secured and cleared swap bank accounts directly with the depositories holding those funds. FCMs file daily reports with NFA and CME reflecting the amounts owed to their customers and this process is designed to ensure that the accounts' balances are sufficient to cover the amount owed to customers. With the CFTC's approval, NFA and CME implemented this process in early 2013.

Developing Sound Regulatory Oversight Programs

The *1974 Act* envisioned an integrated regulatory framework in which an independent SRO and the CFTC work together to develop sound oversight programs. As the CFTC's jurisdiction grew over the years to include new markets, NFA drew upon the industry's and our Members' expertise and worked with the CFTC to develop practical and effective regulatory programs for these markets. The following are a few examples.

Post Dodd-Frank—Swaps. In 2010, the DFA mandated the registration of SDs. This led to a significant change to NFA's self-regulatory role when the CFTC, in early 2013, required these firms to register and become NFA Members. NFA currently has over 100 SD Members, the vast majority of which are either large U.S. banks or financial institutions, foreign banks, or affiliates of one of these entities.

⁸ The CFTC brought enforcement actions against several of these firms and lost these actions after federal courts found that these transactions were not contracts of sale of a commodity for future delivery. The courts recognized the leveraged and two-day "rolling" nature of these transactions but held they were spot contracts after deciding that the retail customers had no guaranteed right of offset and there was allegedly no standardization to the transactions' sizes. Consistent with the CFTC's position, NFA took the position that these transactions were futures contracts.

Prior to Dodd-Frank's passage, NFA had little, if any, experience with swaps. Therefore, NFA worked closely with the CFTC and SDs to develop an oversight program, which evolved over time. The program initially focused on reviewing each SD Member's policies and procedures relating to key CFTC rulemakings and subsequently implementing an examination program to test SDs' compliance with NFA's rules, which incorporated the CFTC's core requirements for SDs.

Our oversight program's scope grew further in 2016 when the CFTC gave NFA the responsibility to review and approve covered SDs' use of initial margin (IM) models and we subsequently developed an oversight program to assess SDs' ongoing use of an approved IM model. Finally, in 2021, NFA assumed responsibility for overseeing covered SDs' compliance with NFA's and the CFTC's SD capital rules and the CFTC gave NFA responsibility to review and approve SD market and credit risk models used for calculating capital. NFA's fully mature SD oversight program is over ten years old and our work with the CFTC in this area allowed the U.S. to lead efforts globally in swaps regulation.

The Early 2020s—Digital Assets. NFA's primary responsibility is to regulate our Members' derivatives activities and, in limited instances, their spot market activities (e.g., retail forex and digital asset commodities) when they may pose a risk to retail customers. Over five years ago, NFA became concerned, in part, that investors did not fully understand the nature of digital assets and the substantial risk of loss that may arise from trading these products. Given these concerns, in 2018, we required that Members engaging in these activities provide customers with enhanced disclosures and investor advisories.⁹

More recently, to proactively ensure that we have jurisdiction to discipline a Member and, in part, to regulate our Members' activities in this area, NFA adopted NFA Compliance Rule 2-51.¹⁰ This rule imposes anti-fraud, just and equitable principles of trade, and supervision requirements on NFA Members and Associates engaged in spot digital asset commodity activities. This rule is critical to our oversight of Members engaging in spot digital asset commodity activities since our longstanding rules cover primarily our Members' derivatives and retail forex activities.

⁹ Members are required to provide customers with an NFA Investor Advisory: *Futures on Virtual Currencies Including Bitcoin* and a CFTC Customer Advisory: *Understand the Risk of Virtual Currency Trading*.

¹⁰ NFA Compliance Rule 2-51 covers those digital assets that are commodities (e.g., Bitcoin and Ether). These two digital asset commodities have related futures contracts listed for trading on CFTC regulated exchanges. If Congress, federal regulators or the courts identify other digital assets as commodities in the future, NFA will amend this Rule to cover them.

The CFTC Beyond 50

NFA has always recognized the importance of Congress reauthorizing the CFTC and ensuring that it continues to have the necessary tools to properly regulate the derivatives industry. In the past, Congress has used momentous changes to the CFTC's responsibilities to reauthorize it.¹¹ In light of the CFTC's potential new responsibilities in the digital asset commodity area, NFA strongly encourages Congress to consider whether now may be an appropriate time to reauthorize the CFTC. If reauthorization moves forward, then NFA firmly believes that customer protection issues should again be front and center. The 2019 reauthorization bill voted out of this Committee included a key customer protection provision that amends the CEA to clarify the Commission's authority to adopt rules that provide customers with priority in the event of an FCM bankruptcy. NFA fully supports this provision, and we believe there is broad-based industry support for this approach. We hope any future CFTC reauthorization legislation includes this key statutory change.

At this time, I would also like to reaffirm NFA's willingness to assist the CFTC to the extent requested in regulating the spot digital asset commodity market if Congress moves forward with legislation in this area. The House of Representatives May 2024 bipartisan *Financial Innovation and Technology for the 21st Century Act* (FIT Act) included a significant role for an RFA in regulating the digital asset commodity market. NFA fully supports providing a role for an RFA to partner with the Commission in developing an appropriate oversight regime for this market and is fully capable of performing the responsibilities of an RFA as outlined in the FIT Act. The fact is, our Member firms have been engaging in spot digital asset commodity activities for over five years and, as explained above, we have already taken steps to regulate these Members' activities to ensure that appropriate customer protections are in place.

The *1974 Act's* regulatory framework for the derivatives industry respects the roles played by federal government agencies and an independent, industrywide SRO.¹² Congress did not place these roles at odds with each other but rather sought to weave them into an integrated regulatory fabric.¹³ The *1974 Act's* framework has stood the test of time—adapting to changing and innovative market structures and products. More than fifty years after the *1974 Act*, we can certainly say that self-regulation combined with the CFTC's regulatory oversight has been a successful and effective regulatory framework for the derivatives industry.

¹¹ For example, the *Commodity Futures Modernization Act of 2000* and *Food, Conservation, and Energy Act of 2008* each made momentous changes to the CFTC's regulatory oversight and/or jurisdiction and reauthorized the CFTC.

¹² The advantages and requirements for effective self-regulation are further detailed in an IOSCO report published in 2000 entitled "Model for Effective Regulation".

¹³ See former CFTC Chairman Heath P. Tarbert, *Self-Regulation in the Derivatives Markets: Stability Through Collaboration*, 41 Nw. J. Int'l L. & Bus. 175 (2021).

In conclusion, thank you again for the opportunity to appear before you today to commemorate this very important milestone—the CFTC's 50th Anniversary. The CFTC has been NFA's strong and effective regulatory partner since we opened our doors in 1982, and we look forward to our future together.