NFA PROPOSES GUIDANCE ON DILIGENT SUPERVISION OF ASSOCIATED PERSONS

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US Asset Management and Investment Funds Alert

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> UPDATE: On 1 May 2025, NFA withdrew Interpretive Notice 9083. The guidance remains available on NFA's website for industry participants' review.

On 21 April 2025, the National Futures Association (NFA) submitted to the US Commodity Futures Trading Commission (CFTC) a proposed interpretive notice entitled *Compliance Rules* 2-9(a) and (d), 2-36(e) and 2-51(d): *Member Supervisory Obligations for Associated Persons* (the Notice), which provides specific guidance and minimum standards related to NFA members' duty to diligently supervise their Associated Persons (APs).[1] The Notice, which affects NFA Compliance Rules 2-9(a) and (d), 2-36(e), and 2-51(d), provides NFA members with the necessary elements of an effective supervision program to oversee APs.[2] The Notice serves as a reminder of the importance of diligent supervision throughout the derivatives industry. The Notice could become effective as early as 1 May 2025. Generally, NFA issues a subsequent notice with a specific effective date. NFA members should monitor for this announcement.

In this client alert, we describe the Notice and also describe guidance from the CFTC and from CFTC-registered designated contract markets (DCMs or exchanges) concerning their duty to diligently supervise.

NFA'S REQUIREMENT OF DILIGENT SUPERVISION

Background: Overview of NFA Members' Supervision Obligations Under Rule 2-9

Pursuant to NFA Compliance Rule 2-9, NFA members (i.e., futures commission merchants (FCMs), introducing brokers (IBs), commodity trading advisors (CTAs), commodity pool operators (CPOs), swap dealers, major swap participants, and their APs) must diligently supervise all aspects of their employees' and agents' commodity interest or swap activities.[3] Generally, supervision is the oversight of persons who trade in futures or other commodity interests to ensure that their trading activities are compliant with applicable rules and regulations.[4]

The failure to maintain a sufficient supervisory program may have severe consequences. Settlements between the NFA and NFA members charged with violating NFA Compliance Rule 2-9 have included fines ranging from US$10,000 to US$1 million, depending on the severity of the supervisory failures and the nature of the other charged violations.[5] Other settlements arising from alleged violations of NFA Compliance Rules, including NFA Compliance Rule 2-9, have included bans from NFA registration that range from two years to permanent.

The Notice's New Minimum Standards for Supervisory Frameworks

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The Notice sets forth in detail NFA's expectations for the minimum standards of NFA members' written policies and procedures governing supervision (Supervisory Framework). The Notice explains that NFA will continue to provide flexibility to NFA members since no program is one-size-fits-all.[7] Although an NFA member has flexibility to develop and implement supervisory policies and procedures tailored to its particular business and risks, the minimum components detailed in the Notice are requirements for an NFA member's Supervisory Framework.[8] Failure to implement the minimum standards set forth in the Notice may be deemed a violation of NFA Compliance Rules.[9]

The Notice requires NFA members to have a written Supervisory Framework and to assess the Supervisory Framework to confirm that it is tailored to mitigate risks on an ongoing basis. The Supervisory Framework applies to an NFA member's activities related to commodity interests and digital asset commodities (i.e., Bitcoin and Ether), regardless of where an AP is located. That said, different measures may be needed for APs that work remotely. The Supervisory Framework should address whether a third-party service provider assists in the NFA member's supervisory obligations. In addition, the Supervisory Framework should identify areas within the firm that are responsible for each AP supervisory function, along with the person (by title or role) that is responsible for performing each such function. In the Notice, NFA goes on to provide that the Supervisory Framework must incorporate due diligence procedures to ensure that APs are qualified and address the NFA member's training obligations.

For each AP activity, the Supervisory Framework must identify:

1. The specific procedures used to identify potential areas of noncompliance;
2. Procedures for escalation and resolution of noncompliance matters;
3. The frequency with which tasks in the Supervisory Framework are performed; and
4. Recordkeeping policies that evidence that the Supervisory Framework was implemented, assessed, and appropriately tailored to the risks of the firm.

The Supervisory Framework must address recordkeeping of oral and written communications. For example, along with the requirement that NFA members capture and retain pre-trade communications, the Notice specifies that the written policies and procedures should specify what communication methods are approved for an AP's use, how the firm will retain the communications, and how the firm will prohibit communication methods that are not captured and retained.[10]

The Notice also highlights certain ongoing practices that NFA members should undertake to ensure compliance with the minimum standards. With regard to monitoring AP's trading activities, for instance, an NFA member's supervisory framework should include measures to review daily trade reports, monitor post-trade activities, and compare trading results among an AP's customers, along with other measures, to identify potential trading misconduct and market abuses.[11]

Other Interpretive Notices Affected by the Notice

The Notice also affects other interpretive notices. NFA has proposed to update Interpretive Notice 9019, *Supervision of Branch Offices and Guaranteed IBs*, to align those supervisory requirements with those included in the Notice and extend these requirements to members' digital asset commodity activities.[12] The changes to Interpretive Notice 9037, *Guidance on the Use and Supervision of Websites and Social Media*, streamline

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supervisory requirements related to websites and social media.[13] Finally, the NFA made changes to Interpretive Notice 9053, Forex Transactions, by referring to the Notice and specifying that an adequate supervision program includes day-to-day monitoring of the firm's operations.[14]

DUTY OF DILIGENT SUPERVISION IN THE DERIVATIVES INDUSTRY

The concept of “diligent supervision”—a cornerstone of customer protection—requires the creation and implementation of a compliance program that is reasonably appropriate for the business of the registrant, member, or trader.[15] In addition to the NFA, the CFTC and DCMs impose a duty to diligently supervise on CFTC registrants and all other market participants, respectively.[16] In light of the Notice, a refresher on market participants' supervisory obligations may be instructive.

CFTC Registrants' Duty to Diligently Supervise

The CFTC requires its registrants—which generally are also NFA members—to diligently supervise the handling of commodity interest accounts “carried, operated, advised or introduced by the registrant” and all activities relating to the registrant's business by its partners, officers, employees, and agents.[17]

A violation of CFTC Regulation 166.3, which applies to all CFTC registrants except APs with no supervisory duties, is demonstrated by showing either that (1) the registrant's supervisory system was generally inadequate, or (2) the registrant failed to perform its supervisory duties diligently.[18] A supervisory system's adequacy depends on the facts and circumstances of the registrant's activities.[19] The CFTC generally alleges that that supervisory systems are inadequate when there is a lack of written policies and procedures, a failure to provide adequate training on a registrant's trading activities, or a failure to ensure that agents and employees follow the established procedures (or all of the above).[20]

It is important to note that, according to the CFTC, a violation of Regulation 166.3 may be found even in the absence of an underlying violation of the Commodity Exchange Act (CEA) or CFTC regulations. Based on past CFTC enforcement actions, orders, and settlements, supervisory failures could be found if a registrant does not adhere to its internally developed policies and procedures.[21] For example, the CFTC filed and simultaneously settled a case where the CFTC alleged that an FCM did not ensure that its employees and agents followed written procedures in its compliance manual.[22] The FCM, without admitting or denying the charge, settled the stand-alone failure-to-supervise claim for US$200,000.[23]

Futures Exchange Approaches to the Duty to Diligently Supervise

As CFTC-registered DCMs, ICE Futures U.S., Inc. (ICE) and the four CME Group exchanges (CBOT, CME, COMEX, and NYMEX) (collectively, CME) are required by the CEA to establish, monitor, and enforce compliance with rules designed to prohibit abusive trading practices.[24] Parties that trade on ICE or CME, and those that benefit from such trading, are deemed to agree to being bound by exchange rules, including those requiring diligent supervision of employees and agents.[25] Put simply, any person who executes a trade, or even places a bid or offer, on the exchanges is deemed to consent to exchange jurisdiction.

ICE and CME have similar expectations for traders' supervision programs.[26] The disciplinary actions described below provide details and context about traders' conduct that led to alleged violations of the exchanges' rules related to diligent supervision.

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Trading firms' supervisory systems, policies, and procedures need to suit the trading activities of the trading firm.[27] For example, if a firm engages in block trading subject to ICE's rules, the firm must implement policies designed to address block trading or risk a disciplinary action related to a violation of ICE Rule 4.01(b).[28] Failure to supervise charges may be brought against individuals and, thus, not only against firms. CME brought a disciplinary action against a trader who failed to diligently supervise his employee, because appropriate policies and procedures were not in place prohibiting frontrunning.[29]

ICE and CME require that traders regularly monitor their employees and agents for compliance with their rules.[30] Both exchanges consider fully and semi-automated trading systems (each, an ATS) to be agents of firms trading on their exchanges and, thus, subject to such firms' supervisory obligations.[31] For example, ICE charged a trading firm with violating ICE Rule 4.01 after it allegedly deployed an ATS on ICE without adequately testing the ATS, resulting in the ATS entering orders at prices far from the prevailing bid or offer and without intent to execute bona fide transactions.[32] Similarly, when a trader on CME used an ATS without monitoring it (which resulted in disruptive price movements in certain futures markets), CME charged him with a violation of CME Rule 432.W (i.e., making it an offense to fail to supervise).[33]

The duty of diligent supervision on these exchanges includes the duty to take corrective action to address noncompliance and deficiencies in its supervision program.[34] In one disciplinary action, a trading firm allegedly violated ICE Rule 4.01 when it redeployed a malfunctioning ATS that previously disrupted crude oil markets, even though the firm had knowledge that the ATS was not updated to prevent future disruptions.[35] As another example, a trading firm allegedly violated CME Rule 432.W when its employees failed to detect account changes and trade transfers between customer accounts—despite customer complaints putting the trading firm on notice of these changes and transfers—thus allowing brokers to allocate gains to accounts they controlled and avoid losses in those same accounts for years.[36]

Each exchange has also exercised its disciplinary authority in idiosyncratic ways that traders should be aware of. The disciplinary actions described below show circumstances that led to alleged violations of supervisory duties.

ICE has brought a disciplinary action on a stand-alone failure-to-supervise claim, similar to how the CFTC has brought claims based on stand-alone violations of CFTC Regulation 166.3.[37] ICE may pursue failure-to-supervise charges even if it may believe that it cannot prove that other violations occurred.[38] CME Rule 433 establishes strict liability for employers and individuals, making them liable for the acts of their employees, even if the employers themselves are not negligent.[39] In one disciplinary action, CME charged a trader with a violation of CME Rule 433, and not CME Rule 432.W (i.e., CME's supervisory obligation), because his employee, on multiple occasions, used credentials assigned to the employer to engage in allegedly disruptive trading.[40] This CME case is unusual because it charged an individual instead of a firm with failing to diligently supervise an employee.

CONCLUSION

Robust compliance is good for business. It helps protect the firm, its employees, and its customers. It minimizes the risk of enforcement actions and private litigation. NFA members should review the guidance and minimum standards contained in the Notice and the revisions to Interpretive Notices 9019, 9037, and 9053 to ensure their supervisory program satisfies the minimum standards. NFA members should also remember that their duty to diligently supervise is ongoing: An adequate supervisory program requires routine assessment of the supervision framework to ensure it is appropriate to mitigate risks specific to the firm's business.

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The publication of the Notice is also a good opportunity for all derivatives market participants—not just NFA members—to review their policies and procedures and consider whether their supervisory programs align with their trading activities and satisfy regulatory requirements.

FOOTNOTES

[1] Nat'l Futures Ass'n, Interpretive Notice 9083 – NFA Compliance Rules 2-9(a) and (d), 2-36(e) and 2-51(d): Member Supervisory Obligations for Associated Persons (proposed Apr. 21, 2025), https://www.nfa.futures.org/news/PDF/CFTC/2020-2029/20250421-Proposed-Interp-Notc-CR2-9-2-36-2-51-Amend-Impacted-Interp-Notices.pdf [hereinafter Notice 9083].

[2] An AP is a natural person who solicits or accepts the customer orders or supervises persons soliciting or accepting customer orders on behalf of FCMs, IBs, CTAs, CPOs, and leverage transaction merchants. *See* 17 C.F.R. § 1.3 (defining "associated person"). An AP must be registered with the NFA unless it falls within an exemption. *See*, e.g., *id*. § 3.12(h).

[3] NAT'L FUTURES ASS'N, COMPLIANCE RULES R. 2-9. NFA Compliance Rule 2-36(e) applies the duty to diligently supervise to forex dealers, while NFA Compliance Rule 2-51(d) applies the duty to diligently supervise to NFA members engaged in activities involving digital commodities (i.e., Bitcoin and Ether). See NAT'L FUTURES ASS'N, COMPLIANCE RULES R.R. 2-31(e), 2-51(d).

[4] *See*, e.g., Adoption of Customer Protection Rules, 43 Fed. Reg. 31,886, 31,889 (July 24, 1978) (nonprescriptive guidelines of CFTC Regulation 166.3 include the detection and prevention of "any violation of the act or rules thereunder, or of any bylaw, rule, regulation, or resolution of each contract market and registered futures association").

[5] *See* NFA Case No. 24-BCC-007 (July 26, 2024), https://www.nfa.futures.org/BasicNet/regulatory-actions-detail-doc.aspx?docid=5248 (entering into a settlement without admitting or denying the NFA's allegations, the registrant was fined US$10,000). In one matter, a swap dealer was charged with a failure to supervise, a failure to provide timely disclosures, a failure to maintain an enforce an adequate risk management program, and a failure to maintain records. Without admitting or denying the charges, the swap dealer was fined US$1 million. NFA Case No. 23-BCC-001 (Jan. 12, 2023), https://www.nfa.futures.org/BasicNet/regulatory-actions-detail-doc.aspx?docid=5095.

[6] See, e.g., NFA Case No. 24-BCC-014 (Mar. 5, 2025), https://www.nfa.futures.org/BasicNet/regulatory-actions-detail-doc.aspx?docid=4657 (imposing a two-year ban on a CPO that violated NFA Compliance Rule 2-9 and failed to uphold recordkeeping requirements and timely file forms required by NFA Compliance Rules); NFA Case No. 20-BCC-004 (Oct. 20, 2020), https://www.nfa.futures.org/BasicNet/regulatory-actions-detail-doc.aspx?docid=4867 (imposing a permanent ban on a CPO that, in addition to allegedly violating NFA Compliance Rule 2-9, violated NFA Compliance Rules prohibiting sending misleading or deceptive materials to commodity pool participants and the NFA).

[7] *See* Notice 9083, at 2.

[8] *See id*.

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[9] *See id*. at 3.

[10] *See id*. at 7.

[11] *See id*. at 11–12.

[12] *See id*. at 13–22.

[13] *See id*. at 22–27.

[14] *See id*. at 28–29.

[15] Note that the compliance program need not be perfect and that "the performance of a wrongful act by an employee of a commodity firm in the course of his employment does not necessarily mean that the employee was improperly supervised." Protection of Commodity Customers: Standards of Conduct for Commodity Trading Professionals, 42 Fed. Reg. 44,742, 44,747 (Sept. 6, 1977). See also Adoption of Customer Protection Rules, 43 Fed. Reg. 31,886, 31,889 (July 24, 1978) (in adopting CFTC Regulation 166.3, the CFTC stated that "[t]he basic purpose of the rule is to protect customers by ensuring their dealings with the employees of registrants will be reviewed by other officials in the firm").

[16] *See* 17 C.F.R. §§ 166.3, 23.602; see, e.g., CHI. MERCANTILE EXCH. INC., CME RULEBOOK R. 432.W; ICE FUTURES U.S., INC., TRADING RULES R. 4.01.

[17] *See* 17 C.F.R. § 166.3. See also id. § 23.602 (titled "Diligent Supervision" and applying similar requirements to swap dealers and major swap participants, requiring them to diligently supervise their partners, members, officers, employees, and agents in their business of trading swaps and ensuring that their supervisory systems are reasonably designed to comply with the CEA and CFTC regulations). The CFTC considers caselaw interpreting CFTC Regulation 166.3 instructive in its application of CFTC Regulation 23.602 in light of the regulations' similarities and the long-standing history of CFTC Regulation 166.3. *See* CFTC Docket No. 15-27, at *3 (Aug. 19, 2015), https://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/enforcementaction/enffcstoneorder081915.pdf. The CFTC has filed and simultaneously settled charges against swap dealers for violations of CFTC Regulation 23.602 as a result of failures to diligently supervise reporting required by the CEA, which is not tied expressly to the swap dealer's swap dealing activity with customers. *See* CFTC Docket No. 23-58 (Sept. 29, 2023), https://www.cftc.gov/media/9411/enfgoldmansachsorder092923/download; CFTC Docket No. 24-18 (Aug. 26, 2024), https://www.cftc.gov/media/11141/enfthebankofnewyorkmellonorder082624/download. These settlements indicate that the scope of CFTC Regulation 23.602 may be wider than that of CFTC Regulation 166.3, which is intended for the direct protection of customers. *See* 43 Fed. Reg. at 31,889.

[18] *See* CFTC Docket No. 13-19 (Apr. 9, 2013), https://www.cftc.gov/idc/groups/public/%40lrenforcementactions/documents/legalpleading/enfinteractiveorder040913.pdf; CFTC Docket No. 20-70, at 3 (Sept. 29, 2020), https://www.cftc.gov/media/4836/enfgaincapitalorder092920/download (citing CFTC Docket No. 85-29, 1995 WL 523563, at *9 (Sept. 1, 1995)).

[19] *See*, e.g., Modlin v. Cane, No. 97-R083, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,392, 1998 WL 354709096, at *16 (July 30, 1998), aff'd, No. 97-R-83, 2000 WL 36108104 (Mar. 15, 2000).

[20] *See* CFTC Docket No. 18-03, at 12 (Nov. 6, 2017),

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https://www.cftc.gov/idc/groups/public/%40lrenforcementactions/documents/legalpleading/cargillorder110617.pdf. CFTC registrants must also take action to implement the written policies and procedures and maintain them to ensure compliance with the CEA. See CFTC Docket No. 23-05, at 10–11 (Dec. 19, 2022), https://www.cftc.gov/media/8011/enfchshedgingorder121922/download (citing *Interactive Brokers LLC*, 2020 WL 4734993, at 8–9) (noting that a violation of CFTC Regulation 166.3 was the result of a failure "to comply with existing policies regarding investigation of customer account activity").

[21] *See* CFTC Docket No. 19-13 (July 12, 2019), https://www.cftc.gov/media/2236/enfvisionfinancialorder071219/download (citing CFTC Docket No. 15-21, at 3 (May 1, 2015)).

[22] *See id*. at 2–5. The CFTC claimed that, according the FCM's compliance manual, employees and agents were required to monitor allocation processes for unusual or suspicious activity. *Id*. at 4–5. Allegedly, the FCM's employees and agents failed to perform the required monitoring, despite receiving notice that its guaranteed IB's orders may be suspicious and not compliant with the CEA and CFTC regulations. *Id*. at 5.

[23] *See id*. at 6.

[24] *See* 7 U.S.C. § 7(d)(2)(A).

[25] *See* ICE TRADING RULES R.R. 4.00 and 4.01; CME RULEBOOK R.R. 418 and 432.W.

[26] *Compare* Market Regulation Advisory Notice, CME Group, Advisory Number RA2403-5: Supervisory Responsibilities for Employees and Agents (July 16, 2024), https://www.cmegroup.com/rulebook/files/cme-group-Rule-432-433-444-501.pdf (noting that trading parties' duty to diligently supervise includes developing and diligently enforcing "supervisory programs that are reasonably designed to detect and deter violations of [CME] Rules") [hereinafter CME MRAN], *with* ICE TRADING RULES R. 4.01, and ICE, Advisory on Duty to Supervise – Amendment to Rule 4.01 (Dec. 9, 2019) (requiring trading firms "to establish, administer and enforce systems, policies and procedures … which are reasonably designed to achieve compliance with [ICE] rules"). Although the CME MRAN is not binding, it should be considered strongly persuasive, as shown through CME's disciplinary actions for failure to diligently supervise. *See*, e.g., CME 22-1585-BC (Feb. 29, 2024), https://www.cmegroup.com/notices/disciplinary/2024/02/CME-22-1585-BC-CHUNYU-MAO.html (citing the CME MRAN's predecessor as part of the CME Rule Violation).

[27] *See* CME MRAN, *supra* note 26 (a party trading on CME must have a supervisory program that is appropriate for the "size and complexity of the party's [CME]-related activities"); TRADING RULES R. 4.01 (codifying a flexible supervisory standard requiring a firm trading on ICE to create and enforce supervisory systems that are "based on the nature and size of its [ICE]-related activities").

[28] ICE Case No. 2022-029 (Oct. 18, 2023), https://www.ice.com/publicdocs/futures_us/disciplinary_notices/ICE_Futures_US_Tullett_Prebon_Energy_Singapore_Pte_Ltd_20231018.pdf (A trader allegedly violated ICE Rules 4.01(a) and 4.01(b) by failing to diligently supervise the block trading activities of its employees and failing to establish a supervisory program related to block trades that would be in compliance with ICE rules. Without admitting or denying the alleged rule violations, the trader was fined US$40,000.).

[29] CME 21-1510-BC-2 (Aug. 12, 2024), https://www.cmegroup.com/notices/disciplinary/2024/08/cme-21-1510-bc-

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2.html (after not submitting a written answer to the charges, the trader was deemed to have admitted the charges, fined US$100,000, and suspended from accessing any CME Group DCM, derivatives clearing organization, and swap execution facility for five years).

[30] *See* CME MRAN, *supra* note 26; Advisory on Duty to Supervise, *supra* note 26.

[31] *See* ICE TRADING RULES R. 4.01(a); CME MRAN, *supra* note 26.

[32] ICE Case No. 2017-047 (Dec. 4, 2018), https://www.ice.com/publicdocs/futures_us/disciplinary_notices/ICE_Futures_Uncia_Energy_LP_Series_I_20180 1204.pdf (the trader, which neither admitted nor denied the Rule 4.01 violation and other trade practice violations included in ICE's disciplinary action, paid a US$37,500 fine).

[33] CME 22-1585-BC (the trader, who neither admitted nor denied the rule violations, settled CME's claims for US$20,000 and served a 30-business-day suspension from access to exchanges or facilities owned or controlled by the CME Group).

[34] *See* CME MRAN, *supra* note 26 (CME "expects that all parties, at a minimum … take reasonable corrective action to address noncompliance."); Advisory on Duty to Supervise (explaining that, at a minimum, firms trading on ICE should "review and investigate any apparent issues [and] … take corrective action to address any identified instances of noncompliance by its employees/agents.").

[35] ICE Case No. 2020-014 (Dec. 14, 2021), https://www.ice.com/publicdocs/futures_us/disciplinary_notices/ICE_Futures_US_Tanius_Technology_20211214.pdf (without admitting or denying the alleged rule violations, the trading firm paid a US$37,500 penalty).

[36] CME 20-1401-BC (Sept. 21, 2023), https://www.cmegroup.com/notices/disciplinary/2023/09/CBOT-20-1401-BC-ADM-INVESTOR-SERVICES-INC.html (without admitting or denying the charges, the trading firm settled with the CME and paid a US$100,000 fine).

[37] *See* ICE Case No. 2017-030 (Sept. 28, 2018), https://www.ice.com/publicdocs/futures_us/disciplinary_notices/ICE_Futures_US_Traditum_Group_LLC_2018091 8.pdf (although ICE observed conduct that may have been disruptive trading or spoofing, it did not allege either of offense, and only charged a violation of ICE Rule 4.01(a)).

[38] *See generally id*.

[39] CME RULEBOOK R. 433.

[40] CME 21-1475-BC-2 (Aug. 12, 2022), https://www.cmegroup.com/notices/disciplinary/2022/08/CME-21-1475-BC-2-GEORGE-HASEOTES.html. The employer, neither admitting nor denying the alleged violations of CME Rules 433 and 576 (Identification of Globex Terminal Operators), was fined US$15,000 and suspended from CME markets for 15 days; the employee trader was also fined. *Id*.

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