

ALERTS

NFA Excludes Certain Remote Work Arrangements From Its Branch Office Definition

October 7, 2021

On September 23, 2021, National Futures Association (“NFA”) rule amendments became effective that will permit NFA-member managers to authorize certain “work from home” and “flex work” arrangements for their Associated Persons (“APs”) without incurring an obligation to register the AP’s remote work location as a branch office. The NFA’s updated rules will allow many — but not all — COVID-19-related remote working accommodations adopted under managers’ business continuity policies to become ordinary course operations. Managers who are not NFA members (such as unregistered commodity pool operators or unregistered commodity trading advisors who manage funds under Rule 4.13(a)(3) relief) are unaffected by the NFA’s branch office rules and their recent amendments.

How Have the NFA’s Branch Office Registration Requirements Changed?

Prior to the NFA’s recent rule amendments, NFA-member managers, such as Commodity Futures Trading Commission (“CFTC”)-registered commodity pool operators and commodity trading advisors, were generally required to register any location aside from the manager’s main business address as a branch office if activities requiring registration as an AP (such as marketing and solicitation) were being conducted there. Subsequent COVID-19-related relief clarified that this requirement would not apply to temporary remote-working accommodations adopted

pursuant to activation of a member's business continuity policy in response to the COVID-19 pandemic, provided that sufficient, documented supervisory and recordkeeping contingencies were adopted.[1]

The NFA's September 23 amendments to Interpretive Notice 9002, governing branch office registration, have formalized a general exclusion to the prior branch office definition for, in essence, APs' personal home (or flex-work) offices, **provided** that in-person customer meetings or physical handling of customer funds does not occur at the work site, all records associated with the remote work location are available at the manager's main business address, and the location is not otherwise held out to the public as the firm's office.[2] Specifically, the branch office definition now excludes:

[A]ny location where one or more APs from the same household live or rent/lease provided the location is not held out to the public as an office of the Member; the AP(s) does not meet in-person with customers or physically handle customer funds at the location; and any CFTC or NFA required records created at the non-branch office location are accessible for inspection at the Member firm's main or applicable listed branch office as required under CFTC Regulation 1.31 and NFA Compliance Rule 2-10.

What Remote Work Arrangements Are Covered by the New Exclusion?

Notably, the NFA's branch office exclusion only applies to locations "where one or more APs from the same household live or rent/lease." The NFA has advised that its new branch office definition is "designed to capture both work from home arrangements as well as flexible shared workspace arrangements." [3] Based on the NFA's guidance and new branch office definition:

- A typical home office, or "flex-work" space (such as a WeWork™ cubicle), mortgaged or rented by one or more cohabiting Associated Persons for personal work use will not be deemed a branch office (provided that the other requirements of the new branch office exclusion are satisfied); but
- A firm satellite office, serving multiple APs who would not be deemed part of the same household, or that is leased or mortgaged by the firm itself (for the use of one or more APs), would remain liable to branch

office registration, even if no in-person investor meetings are conducted at the site.

Action Steps

NFA-member managers with registered branch offices, as well as managers with unregistered remote work arrangements adopted pursuant to the NFA's prior COVID-19-related relief, and managers who are considering adopting a remote work policy going forward, should carefully review the NFA's updated branch office definition and guidance.

- Managers may immediately update their NFA registration documents to delist locations that are presently identified as branch offices if those locations fall outside of the NFA's amended branch office definition.
- Managers relying on the NFA's COVID-19-related relief to avoid branch office registration should note the new branch office exclusion is more particular, and, therefore, less extensive, than the NFA's COVID-19-related relief.
- Managers should seek counsel before relying on the NFA's new branch office rule amendments to avoid registering any remote work site that that is not clearly excluded under the revised definition.
- Finally, Managers should be reminded that APs utilizing remote work arrangements that are eligible for the NFA's branch office exclusion remain subject to all applicable supervisory requirements of the NFA's bylaws and interpretive notices, including NFA Rule 2-9 ("Supervision") [4] and Interpretive Notice 9074 ("CPO Internal Controls System") [5]. Managers should have documented policies and procedures that ensure APs using "work from home" and similar accommodations remain in compliance with NFA rules.

Authored by Marc E. Elovitz, Heather N. Wyckoff and Joshua B. Wright.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] See NFA Notice I-20-12 (March 13, 2020), available here.

[2] See NFA Interpretive Notice 9002: Registration Requirements; Branch Offices (amended Sept. 23, 2021), available here.

[3] See NFA Proposed Amendments: 9002 – Registration Requirements: Branch Offices (Aug. 23, 2021), p.4, available here.

[4] See NFA Rule 2-9, available here.

[5] See NFA Interpretive Notice 9074: CPO Internal Controls System, available here.

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Related People



**Marc
Elovitz**

Partner
New York



**Heather
Wyckoff**

Partner
New York



**Joshua
Wright**

Associate
New York

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