

December 12, 1988

Ms. Jean A. Webb  
Secretariat  
Commodity Futures Trading  
Commission  
2033 K Street, N.W.  
Washington, D.C. 20581

Re: National Futures Association: Proposed Amendments to Sections 4, 6, 7, 8, 9, 10, 11 and 12 of NFA's Code of Arbitration; Proposed New Section 15 to NFA's Code of Arbitration; and Proposed New Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms.

Dear Ms. Webb:

Pursuant to Section 17(j) of the Commodity Exchange Act as amended (the "Act"), National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission ("Commission") proposed amendments to Sections 4, 6, 7, 8, 9, 10, 11 and 12 of NFA's Code of Arbitration ("Code"), proposed new Section 15 to the Code, and proposed new Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms ("Rules"). The amendments to the Code, proposed new Section 15 to the Code, and the Rules were approved by NFA's Board of Directors (the "Board") at its meeting on November 17, 1988. NFA respectfully requests Commission review and approval of the proposed amendments to the Code, the proposed new section of the Code and the proposed Rules.

I. PROPOSED AMENDMENTS TO SECTIONS 4, 6, 7, 8, 9, 10, 11 and 12 OF NFA'S CODE OF ARBITRATION.

- A. Amendments to NFA's Code of Arbitration, Sections 4, 6, 7, 8, 9, 10, 11 and 12 to incorporate substantive changes in order to further NFA's goal of administering an economic, equitable and expeditious arbitration forum (additions are underscored and deletions are [bracketed]):



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CODE OF ARBITRATION

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Section 4. Arbitration Panel.

(a) Appointment of Panel.

All arbitration proceedings under this Code shall be conducted before an arbitration Panel consisting of three NFA Members or individuals connected therewith (one such Member or individual designated as [p]Panel Chairman) appointed by the President, except that where the aggregate amount of the customer's claims (exclusive of interest and costs) plus the aggregate amount of any counterclaims (exclusive of interest and costs) do not exceed [\$5,000] \$10,000.00, the Panel shall consist of one such person unless the Secretary directs otherwise: Provided, however, if the customer in an arbitration under Section 2(a) of this Code so requests in the Demand for Arbitration (see Section 6(c) of this Code), the Chairman and at least one other member of the Panel, and the Panel member where there is a single-member Panel, shall not be connected with an NFA Member or NFA (except as NFA arbitrators). For purposes of this Section, any individual who performs a significant amount of work on behalf of NFA Members or Associates or any individual who was a Member or Associate or who was an employee of a Member within the past two years shall be considered to be connected with an NFA Member.

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Section 6. Initiation of Arbitration.

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(m) Computation of Time.

(1) [For purposes of satisfying the timeliness requirements of Sections 6(c), 6(e), 6(f), and 6(g),] Except as otherwise provided in this Code, service shall be deemed to occur on the earlier of the date[s] that documents are mailed [by NFA or the date that documents are delivered by NFA and service on NFA shall be deemed to occur on the earlier of the dates that documents are mailed to NFA], as evidenced by postmark or affidavit of service, or the date personally delivered [to NFA.], as evidenced by affidavit of service.

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(n) Service of Process.

Unless otherwise indicated, service may be accomplished by hand delivery, or by first class or certified mail, or by use of a generally recognized overnight delivery service to the party's last known address on record with NFA. All documents which are served on the Secretary shall be concurrently served on each party who has filed a Demand or Answer. Service on a party's representative shall be service on the party.

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Section 7. Right to Counsel.

(a) A party may be represented at any time throughout the arbitration proceeding by an attorney-at-law or other representative and shall serve timely notice in writing on the Secretary and the other parties of the name and address of any such representative. The Panel may bar from the proceeding any representative for dilatory, disruptive or contumacious conduct.

(b) A representative of a party may withdraw upon submitting to the Secretary an affidavit that the party represented has actual knowledge of the withdrawal or that the representative has made a good faith effort to provide such notice.

Section 8. Pre-Hearing.

(a) [Cooperation of the Parties.] Exchange of Documents and Written Information.

The parties shall cooperate, without resort to issuance of subpoenas, in the voluntary exchange of material and relevant documents and written information [(reasonably in advance of the hearing)] which may serve to facilitate a fair, equitable and expeditious hearing. [The parties shall also cooperate with the Secretary or the Secretary's designee in the formulation of a written hearing plan.] All requests for documents and written information shall be served on the responding party by the requesting party no later than 30 days after the Answer is due, or no later than 30 days after the Reply is due if a counterclaim has been asserted. The responding party shall serve the requesting party with the documents and written information, including written objections, no later than 30 days after the request is due. Written requests to compel production of documents and written information must be served on the Secretary and all parties no later than 10 days after the written objections are due, and written responses to the request to compel must be served on the Secretary and all parties no

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later than 10 days after the request to compel was served. Unless the Panel directs otherwise, requests to compel will be decided on the written submissions of the parties.

**(b) Documents To Be Introduced Into Evidence.**

(1) At least 15 days prior to the date assigned for an oral hearing, each party shall serve on every other party all documents in such party's possession which the party intends to introduce into evidence at the hearing as part of its direct case and shall concurrently serve sufficient copies of the documents on the Secretary.

(2) At least 15 days before the date assigned for a summary proceeding to commence, each party shall serve on the Secretary sufficient copies of all documents in such party's possession which are to be submitted to the Panel as part of the party's case and shall concurrently serve copies on every other party. At least 5 days before the date assigned for a summary proceeding to commence, each party shall serve on the Secretary sufficient copies of all documents in such party's possession which are to be submitted to the Panel to rebut the documents previously served by another party and shall concurrently serve copies on every other party.

**(c) Hearing Plan**

The parties shall cooperate with the Secretary or the Secretary's designee in the formulation of a written hearing plan which shall be served on the Secretary at least 10 days before the oral hearing date.

**[(b)](d) Failure to Comply.**

The failure of any party to [respond fully and completely to a reasonable and timely request for such documents or information] comply with Sections 8(a) through 8(c) or any order of the Panel may be brought to the attention of the Panel by the Secretary or party seeking such documents or information. The Panel may take such actions in regard to the failure as are just, including, among other things, the following:

[(i)](1) finding that the matters regarding which the request was made or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party making the request;

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[(ii)](2) refusing to allow the nonresponsive party to support or oppose designated claims or defenses or prohibiting him from introducing designated matters in evidence;

[(iii)](3) striking out pleadings or portions thereof, staying further proceedings until the nonresponsive party complies with the request, dismissing the action or proceeding or any part thereof, or rendering an award by default against the nonresponsive party.

### Section 9. Hearing

#### (a) Preliminary Hearing.

The Panel may, at the written request of a party or on its own motion, schedule a preliminary hearing in extraordinary circumstances. Such hearing may be conducted orally, by telephone conference, or by written submissions.

#### [(a)](b) Place, Time and Notice of Hearing.

Except as provided in paragraph [(g)](h) of this section, the place and time of the hearing shall be determined in the sole discretion of the Secretary, who shall endeavor to accommodate, if possible, the preferences of all parties and members of the Panel. Upon setting the initial hearing date, the Secretary shall give notice to each party at least [15]20 days before the hearing of the date, time and place. The Secretary shall give reasonable notice of any rescheduled hearing date.

#### [(b)](c) Procedure.

- (1) Each party may appear personally at the hearing to testify and produce evidence.
- (2) Each party (or the party's representative) may present opening and closing arguments, and may examine any other party or witness at the hearing and any evidence produced at the hearing.
- (3) The Panel need not apply the technical rules of evidence.
- (4) Unless waived by the parties, the Panel shall cause a verbatim record to be made of the hearing, but no party shall be required to bear the costs of making the record unless the party requests a transcript, in which case a transcript must be furnished.
- (5) All testimony at the hearing shall be given under oath.



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(6) The Panel may allow stipulations and establish other procedures as appropriate to expedite the proceeding. The Panel may consider affidavits but shall give them such weight as it deems appropriate after considering objections to them.

(7) The Panel may direct Members and persons connected therewith to testify and produce documentary evidence.

(8) The party requesting the appearance of a non-party witness shall bear all reasonable costs of such appearance. For purposes of this section, an employee or an Associate of any party shall be considered a party witness.

(9) In all other respects, the hearing procedure shall be determined by the Panel. The Panel shall afford the parties every reasonable opportunity to present their case completely.

**[(c)](d) Extensions and Postponements.**

Extensions of time or postponements of the hearing may be granted by the Panel when the interests of justice so require, but a hearing in progress shall not be adjourned or interrupted except in compelling circumstances.

**[(d)](e) Failure to Comply.**

The failure of any party to appear at any hearing or any session thereof, or to comply with any notice, order, or procedure in connection therewith, may subject the party to such adverse action as the Panel deems appropriate, including the entry of an award or the dismissal of a claim or counterclaim.

**[e](f) Reopening the Record.**

The record may be reopened by the Panel on their own motion or on the motion of a party for good cause at any time prior to the issuance of the award. A motion to reopen the record shall stay automatically the time period in which the award shall be issued.

**[(f)](g) Waiver of Defects.**

Where appropriate, the Panel may excuse any failure to comply with any provision of this section, or any Panel notice, order, or procedure.

**[(g)](h) Summary Proceeding.**

The proceeding shall be conducted entirely through written submissions when:



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(1) the aggregate amount of the customer's claims (exclusive of interest and costs) plus the aggregate amount of counterclaims (exclusive of interest and costs) is under \$2500.00, unless the Secretary or the Panel directs otherwise; or

(2) the Panel has consented to the written agreement of the parties to waive the oral hearing.

Section 10. Award.

\* \* \*

(b) Relief.

The award may grant or deny any of the relief requested, and may include an assessment of interest, costs or fees (see Sections 11 and 12). [Relief requested shall not include punitive damages.]

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Section 11. Arbitration Fees.

(a) Filing Fees.

(1) For claims involving disputes between customers and Members or employees thereof, or Associates, each party claiming or counterclaiming shall pay a filing fee based on the amount claimed or counterclaimed (exclusive of interest and costs) as follows:

<u>Amount of Claim or Counterclaim</u>	<u>Fee</u>
\$ 0.00 - \$ 2,499.99	\$ 50.00
\$ 2,500.00 - \$ 5,000.99	\$100.00
\$ 5,001.00 - \$10,000.99	\$150.00
\$10,001.00 - \$15,000.00	\$175.00
More than \$15,000.00	\$200.00 (plus 1% of excess over \$15,000.00 <u>not to</u> <u>exceed \$1,550.00</u> ).

(2) For claims involving disputes between Members or employees thereof, or Associates, each Member or employee thereof, or Associate claiming or counterclaiming shall pay a filing fee



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based on the amount claimed or counterclaimed (exclusive of interest and costs) as follows:

<u>Amount of Claim or Counterclaim</u>	<u>Fee</u>
\$ 0.00 - \$ 2,499.99	\$ 62.50
\$ 2,500.00 - \$ 5,000.99	\$125.00
\$ 5,001.00 - \$10,000.99	\$187.50
\$10,001.00 - \$15,000.00	\$218.75
More than \$15,000.00	\$250.00 (plus 1.25% of excess over <u>\$15,000.00 not to exceed</u> <u>\$2,000.00</u> ).

\* \* \*

(c) Postponement Fees.

Each party causing an adjournment or postponement of any scheduled oral hearing shall pay to the Secretary a postponement fee of \$250.00. This fee may be waived at the discretion of the arbitrators. The arbitrators also may assess reasonable and necessary expenses incurred by the parties and their witnesses, including reasonable attorneys' fees, as a result of a postponement. No fee shall be assessed if an arbitrator becomes ineligible or otherwise unable to serve, or if a hearing extends over the expected time period.

Section 12. Arbitration Costs.

Costs which may be included in an award shall normally be limited to the cost of any transcript which a party may request (see Section 9[(b)](c)4 above). A Panel may, however, assess against a party any one or more of the following other costs, upon a finding that such party's claim, counterclaim, or defense was frivolous or was made in bad faith, or that the party engaged in willful acts of bad faith during the arbitration: Reasonable and necessary expenses incurred by (a) the arbitrators or (b) any other party or witness, including reasonable attorneys' fees.

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- B. Explanation of the proposed amendments to Sections 4, 6, 7, 8, 9, 10, 11 and 12 of NFA's Code of Arbitration.





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The proposed amendments to NFA's Code of Arbitration arose in the wake of the recent Supreme Court decision in Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 945 (1987). This decision rekindled public debate regarding the fairness of securities arbitration. Although that debate has focused on the securities industry rather than the futures industry, both NFA and the Commission felt that NFA's program should be re-examined in light of some of the issues involved in that debate. This examination has resulted in a number of amendments to the Code which amendments NFA believes will further its goal of administering an economic, equitable, and expeditious forum for the resolution of futures related disputes. A description and explanation of each of these amendments follows.

1. Section 4. NFA's Code currently provides for the appointment of one arbitrator in matters where the aggregate amount of the claims and counterclaims, exclusive of interest and costs, does not exceed \$5,000.00. The amendment to this Section of the Code would allow one arbitrator to hear claims and counterclaims where the aggregate amount, exclusive of interest and costs, does not exceed \$10,000.00.

NFA proposed this change for several reasons. In the first place, claims involving less than \$10,000.00 tend to be less complicated. In fact, many people who have served on three member panels have suggested that three persons are unnecessary to decide those claims.

Moreover, because the dollar amount of claims is steadily escalating and NFA anticipates increasingly expensive and complex claims in the future, it is important that NFA conserve its arbitrator resources for those claims which actually require a three person panel. Currently, approximately 30% of the claims filed at NFA require the appointment of one arbitrator. Because approximately 50% of the claims filed at NFA are under \$10,000.00, appointing one arbitrator to hear those claims will substantially reduce the drain on NFA's pool of arbitrators.

Raising the dollar limit for claims to be heard by one arbitrator also is consistent with the practices of other arbitration forums which hold hearings nationwide. For example, the National Association of Securities Dealers appoints one arbitrator to hear claims of \$10,000.00 or less. The AAA appoints one arbitrator to hear claims of \$20,000.00 or less.

2. Section 7. NFA's Code provides that any party may be represented by an attorney or other representative at any time throughout the arbitration proceeding. The party must notify NFA's Secretary and the other parties of the name and address of

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its representative. The Code, however, does not currently require notice when a party's representative withdraws from the arbitration.

Unexpected withdrawal of a party's representative seriously disrupts the arbitration proceeding, inconveniencing not only the represented party, but NFA's staff and arbitrators as well. To avoid these problems, new Section 7(b) requires a representative to submit to the Secretary an affidavit stating that the party represented has actual notice of withdrawal or that the representative has made a good faith effort to provide such notice to his client.

3. Section 8. NFA's Code requires parties to cooperate in the voluntary exchange of documents reasonably in advance of the hearing and authorizes the Panel to take such action as is just when a party fails to cooperate. Despite these provisions, parties often fail to exchange written evidence in a timely manner. In fact, it is common for a party to produce documents and written information for the first time at the hearing. Such practices are unfair to both the opposing party and the arbitrators.

To reduce delay, promote fairness and eliminate "surprise" tactics, the amendments to Section 8 of the Code establish a specified time period in which parties must request documents and written information and thereafter respond to such requests. Under the proposed amendments, parties must request written information and documents no later than 30 days after the Answer or Reply is due. The responding party has 30 days after that date to satisfy the request or to file an objection. When an objection is presented, a party has 10 days to file a motion to compel with the Secretary, and the objecting party has 10 days to answer such motion. Unless the Panel directs otherwise, requests to compel shall be decided on the written submissions of the parties. Thus, these amendments should ensure the resolution of discovery disputes well in advance of the hearing.

The proposed amendments also require the parties to exchange documents which they intend to introduce into evidence at least 15 days prior to the hearing or summary proceeding and concurrently to provide sufficient copies of such written evidence to the Secretary. Additionally, at least 5 days before a summary proceeding is to commence, each party must serve its rebuttal evidence on the Secretary and every other party.

Finally, the parties are currently required to cooperate with the Secretary in the formulation of a written hearing plan but no time limit is established. The proposed amendments require that the hearing plan be served on the Secretary at least 10 days prior to the hearing date.



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The amendments to Section 8 of the Code necessitated certain technical amendments to Sections 6(m) and (n) and Section 9(b) of the Code. The technical amendments are included with this submission.

4. Section 9. The Code grants NFA's arbitrators authority to establish procedures which ensure a fair and expeditious proceeding. The amendment to Section 9 specifically grants NFA arbitrators authority to schedule a preliminary hearing in extraordinary circumstances. The preliminary hearing may be conducted orally, by telephone conference or by written submissions. NFA believes that this provision will clarify the arbitrators' authority in this area.

As proposed, preliminary hearings are within the Panel's discretion. They will be held only in extraordinary circumstances and only if the determination of a preliminary issue could terminate or substantially limit the scope of the proceeding.

NFA anticipates that preliminary hearings will most frequently be granted for the purpose of deciding arbitrability and jurisdictional issues. For example, a preliminary hearing may well be an appropriate vehicle for determining whether the claim (or counterclaim) "requires for its adjudication the presence of witnesses or other third parties over whom NFA lacks jurisdiction and who are not otherwise available." [ §§ 2(a)(1) and 2(a)(2) ] On the other hand, a preliminary hearing would not be appropriate if the facts necessary for the determination of the jurisdictional issue are so intertwined with the facts necessary to decide the merits of the case that the same evidence would be presented twice.

5. Section 10. Section 10(b) of NFA's Code currently prohibits the recovery of punitive damages. The amendment will delete this prohibition from the Code. NFA believes that prohibiting the award of punitive damages subjects Members to potential duplicative litigation and may discourage customers from filing their claims at NFA.

This prohibition was originally adopted in light of case law which stated the award of punitive damages by arbitrators violated public policy. However, recent federal cases indicate that punitive damages may be awarded in arbitration.

6. Section 11. NFA currently assesses its filing fee based on the amount of the claim or counterclaim. The Commission has expressed the concern that NFA's escalating fee structure may inhibit persons with larger claims or counterclaims from using NFA arbitration. To avoid any potential chilling effect, the amendment to Section 11(a) caps the amount of the filing fee for



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customer disputes at \$1,550.00. Consistent with the slightly higher filing fee for discretionary arbitration claims between or among Members and Associates, the proposed fee schedule caps the filing fee for Member claims at \$2,000.00.

New Section 11(c) provides for an adjournment or postponement fee of \$250.00. In addition, the arbitrators also may assess reasonable and necessary expenses incurred by the parties and their witnesses, including reasonable attorneys' fees, as a result of a postponement of a scheduled oral hearing. The postponement fee may be waived at the discretion of the arbitrators. Furthermore, no fee shall be assessed if an arbitrator becomes ineligible or otherwise unable to serve or if a hearing extends over the expected time period. NFA believes that establishing a postponement fee will reduce the requests for continuances and substantially aid the orderly resolution of disputes.

NFA respectfully requests Commission approval of the foregoing proposed amendments to Sections 4, 6, 7, 8, 9, 10, 11 and 12 of NFA's Code of Arbitration. NFA requests that the Commission declare the proposed amendments effective thirty days after approval by the Commission. This will give NFA time to provide notice of the changes to its membership and parties to pending proceedings.

In addition, NFA believes that certain of the amendments should not be applied to pending cases. Therefore, NFA intends to implement the revised procedures in the following manner.

The following amendments will be applied only to cases filed on or after the effective date:

1. Section 4 -- appointing an arbitrator for claims under \$10,000.
2. Section 8(a) -- discovery
3. Section 10(b) -- punitive damages. Since both parties should be subject to the same rules, a respondent will not be allowed to file a punitive damage claim if the claimant cannot do so (e.g., a respondent is precluded from requesting punitive damages in his response filed on or after the effective date since a claimant who filed a claim against that respondent prior to the effective date would be precluded from requesting punitive damages at that time).

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4. Section 11(a) -- filing fee cap. Again, a respondent filing a counterclaim will be required to follow the same rules as the claimant.

The following amendments will be applied to new cases and to pending cases for which an initial hearing date has not been set as of the effective date:

1. Section 8(b) and (c) -- deadlines for exchanging evidence and preparing the hearing plan.
2. Section 9(a) -- preliminary hearing.
3. Section 11(c) -- postponement fees.

Finally, Section 7(b) regarding the notice of withdrawal of representation will be applied to all cases (new and pending cases) as of the effective date.

## II. PROPOSED NEW SECTION 15 TO NFA'S CODE OF ARBITRATION.

- A. Addition of proposed new Section 15 to NFA's Code of Arbitration allowing NFA to provide a forum for resolution of disputes between U.S. customers and non-Member foreign firms (additions are underscored):

### Section 15. Disputes Between U.S. Customers and Non-Member Foreign Firms.

Pursuant to such rules as may be approved by the Board of Directors, NFA may provide an arbitration forum for the resolution of futures related disputes between and among U.S. customers and non-Member foreign firms.

- B. Explanation of proposed new Section 15 to NFA's Code of Arbitration.

New Section 15 of the Code stems from the Commission's recent adoption of the Part 30 regulations governing the purchase and sale of futures and options contracts traded on foreign exchanges. Those regulations attempt to impose comparable regulatory structures for both foreign and domestic contracts. One provision of the Part 30 regulations exempts from registration foreign firms and individuals which are subject to foreign regulation comparable to U.S. regulation. As a result of this exemption, a U.S. customer who has a dispute with a foreign exempt firm may not have any U.S. arbitration forum available to him. This could impose a



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hardship on the customer and create a regulatory disparity between U.S. and foreign firms.

This problem could be alleviated if NFA were to provide an arbitration forum whereby U.S. customers could arbitrate claims against non-Member foreign firms operating pursuant to a CFTC Part 30 exemption from registration. Proposed new Section 15 authorizes the creation of such a forum. The Rules, which have been approved by the Board in connection with Section 15, are included as part of this submission.

NFA respectfully requests Commission approval of the proposed new Section 15 to NFA's Code of Arbitration. NFA requests that the Commission declare the proposed new Section 15 effective immediately upon approval by the Commission.

**III. PROPOSED RULES GOVERNING ARBITRATION OF DISPUTES BETWEEN U.S. CUSTOMERS AND NON-MEMBER FOREIGN FIRMS.**

- A. Proposed new Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms to provide an arbitration forum for the resolution of futures related disputes between U.S. customers and non-Member foreign firms operating pursuant to a CFTC Part 30 exemption from registration (additions are underscored):

**RULES GOVERNING ARBITRATION OF DISPUTES BETWEEN U.S. CUSTOMERS AND NON-MEMBER FOREIGN FIRMS**

**Section 1. Definitions. As used in these Rules-**

**(a) "Claimant"-means a Foreign Futures or Foreign Options Customer or a Foreign Firm making a proper and timely Demand for Arbitration under these Rules.**

**(b) "Commission"-means the Commodity Futures Trading Commission.**

**(c) "Foreign Futures" and "Foreign Options"-mean futures and options transactions made or to be made on or subject to the rules of a foreign board of trade for or on behalf of Foreign Futures or Foreign Options Customers as those terms are defined in the Commission's Rules.**

**(d) "Foreign Futures or Foreign Options Customer" - means any person located in the U.S. who trades in Foreign Futures or Foreign Options.**



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(e) "Foreign Firm"-means any person not located in the U.S. who is exempt from registration under Part 30 of the Commission's Rules and is not a Member of NFA.

(f) "NFA"-means National Futures Association.

(g) "Panel"-means the arbitration panel appointed pursuant to Section 3(a) of these Rules.

(h) "Person"-includes individuals, corporations, partnerships, trusts, associations and other entities.

(i) "President"-means the President of NFA.

(j) "Respondent"-means a Foreign Futures or Foreign Options Customer or a Foreign Firm against whom a claim is asserted under these Rules.

(k) "Secretary"-means the Secretary of NFA.

(l) "U.S."-includes the United States of America, its territories and possessions.

## Section 2. Jurisdictional Limitations.

### (a) Arbitrable Disputes.

(1) Except as provided in Sections 4 and 5 of these Rules with respect to timeliness requirements, a dispute may, in the President's discretion, be arbitrated under these Rules if it:

- (i) involves Foreign Futures or Foreign Options;
- (ii) does not require for its adjudication the presence of witnesses or other third parties over whom NFA lacks jurisdiction and who are not otherwise available; and
- (iii) is sought by either a Foreign Futures or Foreign Options Customer against a Foreign Firm (or employee thereof) or by a Foreign Firm (or employee thereof) against a Foreign Futures or Foreign Options Customer.

The parties must agree or have agreed to such arbitration in writing (a copy of which has been provided to NFA).



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(2) Counterclaims. Except as provided in Sections 4 and 5 of these Rules with respect to timeliness requirements, a counterclaim may be asserted against a Claimant in an arbitration brought under paragraph (1) above if the counterclaim:

- (i) arises out of an act or transaction that is the subject of the Claimant's claim; and
- (ii) does not require for its adjudication the presence of witnesses or other third parties over whom NFA lacks jurisdiction and who are not otherwise available.

A counterclaim that does not meet condition (i) above may be asserted against a Claimant only if the Claimant thereafter consents.

### Section 3. Arbitration Panel.

#### (a) Composition of Panel.

All arbitration proceedings under these Rules shall be conducted before an arbitration Panel consisting of three NFA Members or individuals connected therewith (one such NFA Member or individual designated as Panel Chairman) appointed by the President, except that where the aggregate amount of the claims (exclusive of interest and costs) plus the aggregate amount of any counterclaims (exclusive of interest and costs) do not exceed \$20,000, the Panel shall consist of one such person unless the Secretary directs otherwise: Provided, however, if the Foreign Futures or Foreign Options Customer so requests in the Demand for Arbitration or in the Answer (see Sections 5(c) and 5(e) of these Rules), the Chairman and at least one other member of the Panel, and the Panel member where there is a single-member Panel, shall not be connected with an NFA Member or NFA (except as NFA arbitrators). For purposes of this Section, any individual who performs a significant amount of work on behalf of NFA Members or Associates and any individual who was an NFA Member or Associate or was an employee of an NFA Member within the past two years shall be considered to be connected with an NFA Member. Each Panel member shall reside in the continental U.S.

#### (b) Appointment of Panel; Disclosure and Challenge.

After the Answer is due or after the Reply is due if a counterclaim has been asserted, the President shall thereupon appoint an arbitration Panel to resolve the dispute. The Secretary shall promptly notify the parties of the names, business affiliations, and other





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information relevant to the classification of the arbitrator as an NFA Member or non-NFA Member panelist. Any objection of a party to such appointment shall be specific and for cause and submitted to the President in written form. Each member appointed shall disclose to the President any circumstances likely to affect impartiality, including any bias or any financial interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from such member or other source, the President shall communicate such information to the parties, and if the President deems it appropriate to do so, to the member and others. Thereafter, the President shall determine whether the member should be disqualified and shall inform the parties of the decision, which shall be conclusive.

**(c) Arbitrator's Oath.**

Before proceeding with the summary proceeding or oral hearing, each arbitrator shall execute an oath whereby the arbitrator promises to faithfully and fairly determine the matter before the Panel.

**(d) Replacement.**

If an arbitrator becomes ineligible or otherwise unable to serve on the Panel, the President shall (unless the parties request otherwise) appoint a replacement to the Panel. If such appointment is made after the commencement of an oral hearing, the Panel shall (unless the parties request otherwise) conduct a re-hearing.

**(e) Ex Parte Contacts.**

No party to the arbitration, or a representative thereof, shall communicate with any Panel member regarding the arbitration, other than inquiries concerning the status thereof, except at the oral hearing or in writing on notice to the other parties.

**Section 4. Time Period for Arbitration.**

No claim or counterclaim may be arbitrated under these Rules unless a notice of intent to arbitrate (see Section 5(a) below) or a statement of counterclaim (see Section 5(f) below) is received by the Secretary within two years from the date when the party asserting the claim or counterclaim knew or should have known of the act or transaction that is the subject of the controversy. The Secretary shall reject any claim or counterclaim that is not timely filed. If, in the course of any arbitration, the Panel determines that the requirements of this section have not been met as to a particular claim or counterclaim, the Panel shall

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thereupon terminate the arbitration of the claim or counterclaim without decision or award.

Section 5. Initiation of Arbitration.

An arbitration proceeding under these Rules shall be initiated as follows:

(a) Notice of Intent to Arbitrate.

A Foreign Futures or Foreign Options Customer or a Foreign Firm desiring arbitration under these Rules shall notify the Secretary, either in writing or orally, of such customer's or Foreign Firm's intent to arbitrate. If a prior notice of intent has not been received, the serving of a Demand for Arbitration shall act as notice. The Secretary shall maintain a record of the receipt of each such notice.

(b) Documents Furnished.

If a notice of intent to arbitrate is received prior to a Demand for Arbitration, the Secretary shall promptly provide such Foreign Futures or Foreign Options Customer or Foreign Firm with a copy of these Rules and a Demand for Arbitration.

(c) Demand for Arbitration.

If such Foreign Futures or Foreign Options Customer or Foreign Firm wishes to proceed with the arbitration, such customer or Foreign Firm, within 35 days after the date of transmittal by the Secretary under (b) above, shall serve the completed Demand for Arbitration on the Secretary together with the appropriate fee (see Section 11 below). The Secretary shall promptly review each Demand for Arbitration for completeness. Any Demand for Arbitration which the Secretary deems to be incomplete, or which is not accompanied by the appropriate fee, shall be returned by certified mail if the customer or Foreign Firm directs NFA to forward his mail to a location within the U.S.; otherwise, by U.S. mail, air-mail postage prepaid. In that event, such customer or Foreign Firm shall serve a completed Demand for Arbitration on the Secretary, together with any unpaid fee, within 25 days following transmittal by the Secretary. The Secretary shall reject any Demand for Arbitration which has not been timely filed, or for which the appropriate fee has not been paid.

(d) Notice to Respondent.

The Secretary shall promptly serve a copy of the completed Demand for Arbitration on the designated U.S. agent for service of pro-



Ms. Jean A. Webb

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cess required to be maintained under the Commission's Rules by each Foreign Firm named in the Demand for Arbitration as a Respondent (or, in the Secretary's discretion, the Foreign Firm may be served instead) or on the Foreign Futures or Foreign Options Customer named in the Demand for Arbitration as a Respondent.

(e) Answer.

The Respondent shall serve an Answer on the Secretary within 45 days from the date of service of the Demand for Arbitration on the Respondent by the Secretary as provided in Section 5(d). The Respondent shall concurrently serve a copy of the Answer on the Claimant. An allegation in the Demand for Arbitration that is not denied in the Answer shall be deemed by the Panel to be admitted.

(f) Counterclaim.

Any counterclaim must be asserted in the Answer, unless the Claimant consents to a later assertion of the counterclaim. If any counterclaim is asserted, the party asserting the counterclaim shall promptly remit the appropriate fee to the Secretary (see Section 11 below). Any counterclaim which the Secretary deems to be incomplete, or which is not accompanied by the appropriate fee, shall be returned by certified mail if the Respondent directs NFA to forward his mail to a location within the U.S.; otherwise, by U.S. mail, airmail postage prepaid. In that event, the Respondent shall serve a completed counterclaim, together with any unpaid fee, within 25 days following service by the Secretary. The Secretary shall reject any counterclaim which has not been timely filed, or for which the appropriate fee has not been paid.

(g) Reply to Counterclaim.

The party against whom the counterclaim is asserted shall reply to the counterclaim by serving a Reply on the Secretary within 35 days after the date of service of the Answer or counterclaim by the Secretary, and concurrently shall serve a copy of the Reply on the counterclaiming Respondent. Any allegation in the counterclaim that is not denied in the Reply shall be deemed by the Panel to be admitted.

(h) Amendments to Claim or Counterclaim.

After the appointment of a Panel, no new or different claim or counterclaim may be filed except with the Panel's consent.

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(i) Late Answer or Reply.

The Secretary shall accept any Answer or Reply filed prior to the summary proceeding or the oral hearing. However, the Secretary or any party may present an objection to the Panel with regard to the timeliness of any filing.

(j) Consolidation.

When Demands for Arbitration involving common questions of fact or arising from the same act or transaction are received by the Secretary, the Secretary may, whether or not at the request of any party, order any or all of the proceedings to be consolidated in the interest of providing a fair, equitable, and expeditious procedure and may take such action concerning the proceedings herein as may tend to avoid unnecessary or unreasonable delay.

Section 6. Right to Counsel.

(a) A party may be represented at any time throughout the arbitration proceeding by an attorney-at-law or other representative and shall serve timely notice in writing on the Secretary and the other parties of the name and address of any such representative. The Panel may bar from the proceeding any representative for dilatory, disruptive or contumacious conduct.

(b) A representative of a party may withdraw upon submitting to the Secretary an affidavit that the party represented has actual knowledge of the withdrawal or that the representative has made a good faith effort to provide such notice.

Section 7. Discovery and Related Matters.

(a) Exchange of Documents and Written Information.

The parties shall cooperate, without resort to issuance of subpoenas, in the voluntary exchange of material and relevant documents and written information which may serve to facilitate a fair, equitable and expeditious summary proceeding or oral hearing. All requests for documents and written information shall be served on the responding party by the requesting party no later than 35 days after the Answer is due, or no later than 35 days after the Reply is due if a counterclaim has been asserted. The responding party shall serve the requesting party with the documents and written information, including written objections, no later than 35 days after the request is due. Written requests to compel production of documents and written information must be served on the Secretary and all parties no later than 15 days after the written objections are due, and written responses to the request

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to compel must be served on the Secretary and all parties no later than 15 days after the request to compel was served. Requests to compel will be decided on the written submissions of the parties.

**(b) Documents To Be Introduced Into Evidence.**

Documentary evidence shall be exchanged as follows:

(1) At least 25 days before the date assigned for a summary proceeding to commence, each party shall serve on the Secretary sufficient copies of all documents in such party's possession which are to be submitted to the Panel as part of the party's case and shall concurrently serve copies on each other party. At least 15 days before the date assigned for a summary proceeding to commence, each party shall serve on the Secretary sufficient copies of all documents in such party's possession which are to be submitted to the Panel to rebut the documents previously served by another party and shall concurrently serve copies on every other party.

(2) At least 25 days prior to the date assigned for an oral hearing, each party shall serve on every other party all documents in such party's possession which the party intends to introduce into evidence at the oral hearing as part of its direct case and shall concurrently serve sufficient copies of the documents on the Secretary.

**(c) Hearing Plan.**

The parties to an oral hearing shall cooperate with the Secretary or the Secretary's designee in the formulation of a written hearing plan which shall be served on the Secretary at least 15 days before the oral hearing date.

**(d) Failure to Comply.**

The failure of any party to comply with Sections 7(a) through 7(c) or any order of the Panel may be brought to the attention of the Panel by the Secretary or party seeking such documents or information. The Panel may take such actions in regard to the failure as are just, including, among other things, the following:

(1) finding that the matters regarding which the request was made or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party making the request;

Ms. Jean A. Webb

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(2) refusing to allow the nonresponsive party to support or oppose designated claims or defenses or prohibiting him from introducing designated matters into evidence;

(3) striking out pleadings or portions thereof, staying further proceedings until the nonresponsive party complies with the request, dismissing the action or proceeding or any part thereof, or rendering an award by default against the nonresponsive party.

### Section 8. Summary Proceeding.

#### (a) Requirements.

Except as provided in Section 9(a), the proceeding shall be conducted entirely through written submissions.

#### (b) Preliminary Matters.

The Panel has discretion, at the written request of a party or on its own motion, to schedule a separate review of preliminary matters when appropriate. Such review shall be conducted by written submissions.

#### (c) Procedures.

(1) The Secretary shall give notice of the review period for the summary proceeding to each party at least 35 days prior to the commencement of the review. The documents and any written information received from each party shall be submitted to each member of the Panel prior to the start of the review period. After the review period has concluded, the record will be deemed closed.

(2) Evidence may be submitted by affidavit. The Panel may also consider written statements which are not given under oath and shall give them such weight as it deems appropriate.

(3) The Panel need not apply the formal rules of evidence in its consideration of a party's written submissions.

(4) The Panel may allow written stipulations and establish other procedures as appropriate to expedite the proceeding.

(5) The Panel may direct NFA Members and persons connected therewith to produce documentary evidence.

(6) In all other respects, the procedure for summary proceedings shall be determined by the Panel.

Ms. Jean A. Webb

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**(d) Extensions and Postponements.**

Extensions of time or postponements of the summary proceeding may be granted by the Panel when the interests of justice so require.

**(e) Failure to Comply.**

The failure of any party to comply with the procedures set forth in these Rules concerning summary proceedings, or to comply with any notice or order in connection therewith, may subject the party to such adverse action as the Panel deems appropriate, including the entry of an award or the dismissal of a claim or counterclaim.

**(f) Reopening the Record.**

The record may be reopened by the Panel on its own motion or the motion of a party for good cause at any time prior to the issuance of the award. A motion to reopen the record shall stay automatically the time period in which the award shall be issued.

**(g) Waiver of Defects.**

Where appropriate, the Panel may excuse any failure to comply with any provision of this section, or any Panel notice, order or procedure.

**Section 9. Oral Hearing.**

**(a) Requirements.**

An oral hearing may, in the discretion of the Panel, be held if:

(1) the aggregate amount of the claims (exclusive of interest and costs) plus the aggregate amount of counterclaims (exclusive of interest and costs) exceeds \$20,000; and

(2) an oral hearing is requested or agreed to by all Foreign Firms.

**(b) Preliminary Hearing.**

The Panel has discretion, at the written request of a party or on its own motion, to schedule a preliminary hearing when appropriate. Such hearings shall be conducted by written submissions unless the Panel directs otherwise with the consent of all Foreign Firms.

Ms. Jean A. Webb

December 12, 1988

(c) Place, Time and Notice of Hearing.

Except as provided in Section 8(a) of these Rules, the place and time of the oral hearing shall be determined in the sole discretion of the Secretary, who shall endeavor to accommodate, if possible, the preferences of all parties and members of the Panel. All oral hearings shall be held in the continental U.S. Upon setting the initial hearing date, the Secretary shall give notice to each party at least 35 days before the oral hearing of the date, time and place. The Secretary shall give reasonable notice of any rescheduled oral hearing date.

(d) Procedure.

(1) Each party may appear personally at the oral hearing to testify and produce evidence.

(2) Each party (or the party's representative) may present opening and closing arguments, and may examine any other party or witness at the oral hearing and any evidence produced at the oral hearing.

(3) The Panel need not apply the formal rules of evidence.

(4) Unless waived by the parties, the Panel shall cause a verbatim record to be made of the oral hearing, but no party shall be required to bear the costs of making the record unless the party requests a transcript, in which case a transcript must be furnished.

(5) All testimony at the oral hearing shall be given under oath.

(6) The Panel may allow stipulations and establish other procedures as appropriate to expedite the proceeding. The Panel may consider affidavits but shall give them such weight as it deems appropriate after considering objections to them.

(7) The Panel may direct NFA Members and persons connected therewith to testify and produce documentary evidence.

(8) The party requesting the appearance of a non-party witness shall bear all reasonable costs of such appearance. For purposes of this section, an employee of any party shall be considered a party witness.

(9) In all other respects, the oral hearing procedure shall be determined by the Panel. The Panel shall afford the parties every reasonable opportunity to present their cases completely.



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(e) Extensions and Postponements.

Extensions of time or postponements of the oral hearing may be granted by the Panel when the interests of justice so require, but an oral hearing in progress shall not be adjourned or interrupted except in compelling circumstances.

(f) Failure to Comply.

The failure of any party to comply with any notice, order, or procedure in connection therewith, may subject the party to such adverse action as the Panel deems appropriate, including the entry of an award or the dismissal of a claim or counterclaim.

(g) Reopening the Record.

The record may be reopened by the Panel on its own motion or on the motion of a party for good cause at any time prior to the issuance of the award. A motion to reopen the record shall stay automatically the time period in which the award shall be issued.

(h) Waiver of Defects.

Where appropriate, the Panel may excuse any failure to comply with any provision of this section, or any Panel notice, order, or procedure.

Section 10. Award.

(a) Issuance.

Within 30 days after the record is closed in an oral hearing or summary proceeding, the Panel shall render its award, in writing, dated and signed by the Panel members, which shall be delivered to the Secretary, who shall promptly serve a copy on each party or its representative either personally or by certified mail if the party is located in the U.S., or by the use of U.S. mail, airmail postage prepaid if the party is located outside the U.S. The award shall be that of the Panel majority.

(b) Relief.

The award may grant or deny any of the relief requested, and may include an assessment of interest, costs or fees (see Sections 11 and 12).

(c) Finality.

The Panel's award shall be final on the date thereof. The award may be modified by the Panel if a party submits a written request



Ms. Jean A. Webb

December 12, 1988

for modification which is received by the Secretary within 20 days from the date of service of the award on the parties, and the Panel deems modification necessary in the interests of justice. The timely filing of a request for modification shall stay automatically the finality of any award until the Panel either modifies the award or denies the request for modification.

(d) Appeal.

There shall be no right of appeal of the award.

(e) Award Binding.

All parties shall be bound by the award and any modification thereof.

(f) Judgment.

Without limiting the jurisdiction of any foreign tribunal to recognize and enforce the award, judgment on the award may be entered in any court of competent jurisdiction in the U.S.

(g) Satisfaction of Demand.

At any time during the course of an arbitration, a Respondent may satisfy a Demand for Arbitration by payment or settlement. A written notice of satisfaction and withdrawal of the Demand for Arbitration shall be duly executed by the parties and submitted to the Secretary.

(h) Consent Award.

If the parties agree to satisfy the Demand for Arbitration at any time during the arbitration, the Panel may, at the request of such parties, set forth the terms of the satisfied Demand for Arbitration in a consent award.

Section 11. Arbitration Fees.

(a) Filing Fees.

(1) Each party claiming or counterclaiming under these Rules shall pay a filing fee (payable in U.S. dollars only) based on the amount claimed or counterclaimed (exclusive of interest and costs) as follows:



Ms. Jean A. Webb

December 12, 1988

<u>Amount of Claim or Counterclaim</u>	<u>Fee</u>
<u>\$ 0.00 - \$ 2,499.99</u>	<u>\$ 62.50</u>
<u>\$ 2,500.00 - \$ 5,000.99</u>	<u>\$125.00</u>
<u>\$ 5,001.00 - \$10,000.99</u>	<u>\$187.50</u>
<u>\$10,001.00 - \$15,000.00</u>	<u>\$218.75</u>
<u>More than \$15,000.00</u>	<u>\$250.00 (plus</u> <u>1.25% of excess over</u> <u>\$15,000.00 not to exceed</u> <u>\$2,000.00).</u>

(b) Refunds.

A full refund of any filing fee paid under Section 11(a) above shall be made if, prior to the appointment of a Panel, a claim is found to be not arbitrable or if the President declines to arbitrate the claim.

(c) Postponement Fees.

Each party causing an adjournment or postponement of any scheduled oral hearing shall pay to the Secretary a postponement fee of \$250.00. This fee may be waived at the discretion of the arbitrators. The arbitrators may also assess reasonable and necessary expenses incurred by parties and their witnesses, including reasonable attorneys' fees, as a result of the postponement. No fee shall be assessed if an arbitrator becomes ineligible or otherwise unable to serve, or if an oral hearing extends over the expected time period.

Section 12. Arbitration Costs.

Costs which may be included in an award shall normally be limited to the cost of any transcript of a hearing which a party may request (see Section 9(d)(4) above). A Panel may, however, assess against a party any one or more of the following other costs, upon a finding that such party's claim, counterclaim, or defense was frivolous or was made in bad faith, or that the party engaged in willful acts of bad faith during the arbitration: Reasonable and necessary expenses incurred by (a) the arbitrators or (b) any other party or witness, including reasonable attorneys' fees.

Section 13. Miscellaneous.

(a) Computation of Time.

(1) Except as otherwise provided, service shall be deemed to occur on the earlier of the date that documents are mailed, as



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evidenced by postmark or affidavit of service, or the date personally delivered, as evidenced by affidavit of service.

(2) The counting of days shall include all calendar days and should a due date fall on a weekend or U.S. legal holiday, such due date will be computed as the next business day on which mail is delivered in the U.S.

(b) Service of Process.

Unless otherwise indicated, service between points within the U.S. may be accomplished by hand delivery, or by first class or certified mail, or by use of a generally recognized overnight delivery service to the party's last known address on record with NFA. Unless otherwise indicated, service from the U.S. to points outside the U.S. or service from points outside the U.S. to the U.S. may be accomplished by the use of U.S. mail, airmail postage prepaid, or in the mails of any other country, airmail postage prepaid, or by delivery to any generally recognized international air carrier to the party's last known address on record with NFA. All documents which are served on the Secretary shall be concurrently served on each party who has filed a Demand or Answer. Service on a party's representative shall be service on the party.

(c) Address of Record.

A party shall promptly notify the Secretary of any change in the party's address or the address of the party's representative on record with NFA.

\* \* \*

B. Explanation of proposed new Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms.

Pursuant to proposed new Section 15 of the Code, NFA proposes to adopt Rules governing arbitration of disputes between U.S. customers and non-Member foreign firms which are exempt from registration under Part 30 of the Commission's regulations. The Rules generally follow the existing procedures found in NFA's present Code of Arbitration with the exceptions noted below.

First, Section 8 of the Rules provides that the proceeding shall be conducted entirely through written submissions, except that an oral hearing may be held in the U.S. pursuant to Section 9 of the Rules if the aggregate amount of the claim and the counterclaim exceeds \$20,000 and an oral hearing is requested or agreed to by all non-Member foreign firms involved. NFA believes



Ms. Jean A. Webb

December 12, 1988

that these provisions will lessen the burden on foreign firms, who would otherwise be required to travel to the U.S. to participate in an oral hearing, by allowing the foreign firm to determine whether the circumstances warrant such a hearing.

Second, Section 3 of the Rules allows one arbitrator to hear claims and counterclaims (exclusive of interest and costs) which do not exceed \$20,000, thus conserving NFA's arbitrator resources. Also, certain of the time frames set forth in Sections 5, 7, 8 and 9 have been lengthened because foreign mail is involved. Furthermore, Sections 8(c)(3) and 9(d)(3) state that the panel need not apply the formal rules of evidence. The term "formal" was used instead of the term "technical" as used in the Code in order to conform with general usage. It is not intended to change the meaning of the provisions.

Lastly, the fee schedule used in such disputes will be identical to the one used for claims involving disputes between Members as set forth in the Code. This reflects the fact that disputes governed by the Rules are discretionary, as are the disputes between Members under the Code. The fees will be re-evaluated as NFA gains experience with disputes governed by the Rules.

NFA respectfully requests Commission approval of the foregoing proposed new Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms. NFA requests that the Commission declare the proposed Rules effective immediately upon approval by the Commission.

Respectfully submitted,

Daniel J. Roth  
General Counsel

cc: Chairman Wendy L. Gramm  
Commissioner Kalo A. Hineman  
Commissioner Fowler C. West  
Commissioner Robert R. Davis  
Commissioner William P. Albrecht  
Andrea M. Corcoran, Esq.  
Marshall E. Hanbury, Esq.  
Dennis A. Klejna, Esq.  
Alan L. Seifert, Esq.  
Susan C. Ervin, Esq.  
Lawrence B. Patent, Esq.  
Linda Kurjan, Esq.

AM:rh(xerox 860 - arb. codes)

UNITED STATES OF AMERICA  
**COMMODITY FUTURES TRADING COMMISSION**

2033 K Street, N.W.  
Washington, D.C. 20581



JUN 14 1989

June 12, 1989

Daniel J. Roth, Esq.  
General Counsel  
National Futures Association  
200 West Madison Street -- Suite 1600  
Chicago, Illinois 60606

Re: Proposed Amendments to Sections 2, 4, 6, 7, 8, 9, 10, 11 and 12 and Proposed New Section 15 of the Code of Arbitration, and Proposed Rules Governing Arbitration of Disputes between U.S. Customers and Non-Member Foreign Firms

Dear Mr. Roth:

By letters dated December 12, 1988, and January 16, February 1, and March 14, 1989, pursuant to section 17(j) of the Commodity Exchange Act ("Act"), the National Futures Association ("NFA") submitted the captioned proposals for Commission approval. NFA requested that the Commission declare the proposals for Sections 2 and 15 plus the entire set of rules under Section 15 effective immediately upon approval and the rest of the proposals effective 30 days after approval. Please be advised that the Commission approved the captioned amendments pursuant to section 17(j) of the Act on this date, effective according to the schedule proposed by NFA in its submissions.

The Commission observed in particular that the discovery and preliminary hearing provisions potentially will facilitate and expedite NFA arbitration proceedings. NFA, however, must ensure that parties have a fair opportunity to use those mechanisms to foster these objectives. The Commission requests NFA, as it gains experience with the new procedures, to monitor its arbitration process in light of the availability of those mechanisms and advise the Commission regarding how effective they have been and whether any refinement or expansion of the rules might improve the process further.

Separately, the Commission wishes to alert NFA that the Commission's Division of Trading and Markets is continuing to conduct a rule enforcement review of NFA's arbitration program and to examine various issues related to arbitration, including

Mr. Roth  
Page 2

some addressed by NFA's new amendments. As a consequence, and despite its approval today, the Commission or its staff may recommend that NFA adopt modifications to its arbitration rules and procedures at a later date.

Sincerely,



Jean A. Webb  
Secretary of the Commission

February 1, 1989

Linda Kurjan, Esq.  
Special Counsel  
Division of Trading and Markets  
Commodity Futures Trading  
Commission  
2033 K Street, N.W.  
Washington, DC 20581

Re: National Futures Association; Proposed Amendments  
to Section 9 of NFA's Code of Arbitration and Proposed  
Rules Governing Arbitration of Disputes Between U.S.  
Customers and Non-Member Foreign Firms

Dear Ms. Kurjan:

As you know, by letter dated December 12, 1988, National Futures Association ("NFA") submitted to the Commodity Futures Trading Commission ("Commission"), for approval, proposed amendments to various Sections of NFA's Code of Arbitration ("Code"), including proposed changes to Section 9 of the Code, and proposed new Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms ("Rules"). This letter responds to various questions you have raised regarding Section 9 of the Code and the Rules.

You requested clarification regarding the applicability of subsequent provisions of Section 9 of the Code to preliminary hearings held under Section 9(a) of the Code and of subsequent provisions of Section 9 of the Rules to preliminary hearings held under Section 9(b) of the Rules. NFA will apply the subsequent provisions of Section 9 to a preliminary hearing unless they are inapplicable on their face (e.g., Section 9(c)(1) of the Code giving the parties the right to appear personally is obviously inapplicable to a telephonic hearing or a hearing on written submissions, although the parties will be given the right to participate by telephone if the preliminary hearing is held by telephone conference).

You also asked NFA to explain the different standards for granting preliminary hearings in Section 9(a) of the Code and Sections 8(b) and 9(b) of the Rules. Proposed Section 9(a) of the Code provides that preliminary hearings may be granted or ordered "in extraordinary circumstances," while Sections 8(b) and 9(b) of the proposed Rules provide for preliminary hearings or determinations "when appropriate." Obviously,



# NFA

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Linda Kurjan, Esq.

February 1, 1989

"when appropriate" is a lesser standard than "extraordinary circumstances." NFA believes that a different standard is appropriate since oral hearings predominate under the Code while paper hearings will be the general rule under the Rules.

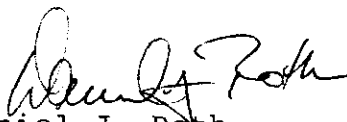
Due to the logistics of coordinating the schedules of the parties, the arbitrators, and any witnesses, oral and telephonic preliminary hearings cannot be conducted as expeditiously as preliminary hearings on written submissions. Oral hearings predominate under the Code and, therefore, we assume that most preliminary hearings held under the Code will be conducted in person or by telephone conference. In contrast, the Rules provide that preliminary hearings will be by written submissions unless all foreign parties agree. Therefore, the higher standard for preliminary hearings under the Code, which is a protection against undue delay, is not required in the Rules.

Finally, you asked NFA to provide you with copies of proposed NFA policies regarding the manner in which the Rules will interface with the regulatory policies and responsibilities of foreign regulators. Enclosed are the most recent drafts of the following NFA arbitration policies:

1. Exercise of Discretion to Reject Demands Filed Under the Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms, and
2. Notification of Foreign Regulators in Connection with Demands Filed Under the Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms.

If I can be of any further assistance, please contact me.

Very truly yours,

  
Daniel J. Roth  
General Counsel

DJR:tyd(kpcD12/26)

Enclosures

**DRAFT**

February 1, 1989

**NFA ARBITRATION POLICY**

**EXERCISE OF DISCRETION TO REJECT DEMANDS  
FILED UNDER THE RULES GOVERNING ARBITRATION OF DISPUTES  
BETWEEN U.S. CUSTOMERS AND NON-MEMBER FOREIGN FIRMS**

Policy

The purpose of the Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms (the "Rules") is to provide U.S. customers with a U.S. arbitration forum for disputes against non-member foreign firms which are exempt from registration under Part 30 of the regulations of the Commodity Futures Trading Commission (17 C.F.R. 30.1 et seq.). However, the Rules are not intended to limit the available forums, nor are they intended to provide a substitute for available forums where such other forums provide a substantially greater degree of expertise in a particular type of controversy. Therefore, it will be the policy of the President of NFA, or his designee, to exercise his discretion under Section 2(a) of the Rules to reject any Demand filed under the Rules in the following circumstances.

1. If the Demand is filed by a U.S. customer against a non-member foreign firm which is exempt from registration pursuant to an exemption granted under CFTC Regulation 30.10, and if the CFTC Order granting the exemption authorizes the foreign firm to require the customer's consent to the use of a foreign regulator's non-binding mediation or conciliation service, the President of NFA will exercise his discretion not to accept a Demand until such time as the President of NFA receives evidence that the customer has attempted to utilize the foreign regulator's mediation or conciliation service and that either such proceedings are not available, such proceedings have terminated unsuccessfully and without resort to the foreign regulator's arbitration program, or such process is not yet completed but the foreign regulator has advised the customer that the customer may pursue NFA arbitration.

NFA will extend the two-year filing period in Section 4 of the Rules by the amount of time that the dispute is in mediation or conciliation proceedings (i.e., from the date the customer requests the use of such services until the customer receives notice that such services are not available or that the proceedings have terminated unsuccessfully).

2. The President of NFA will exercise his discretion to reject any Demand involving a claim arising primarily out of delivery, clearing, settlement, or floor practices on a foreign exchange. For example, NFA will reject a claim which contests the execution of an order on the floor of the foreign exchange.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Daniel J. Roth  
General Counsel

DJR:tyd(kpcD12/23)

DRAFT

January 24, 1989

**NFA ARBITRATION POLICY**

**NOTIFICATION OF FOREIGN REGULATORS IN  
CONNECTION WITH DEMANDS FILED UNDER THE  
RULES GOVERNING ARBITRATION OF DISPUTES  
BETWEEN U.S. CUSTOMERS AND NON-MEMBER  
FOREIGN FIRMS**

Policy

In order to maintain open lines of communication with foreign regulatory organizations and cooperate with them in the performance of their regulatory duties, the Arbitration Department will notify the applicable foreign regulator if a Demand is filed by a U.S. customer against a non-member foreign firm which is exempt from registration pursuant to an exemption granted under CFTC Regulation 30.10 (17 C.F.R. 30.10). The notification to the foreign regulator will include the following information:

1. The names of the parties;
2. The date the Demand was filed;
3. The amount of the claim;
4. The nature of the claim;
5. Whether the Demand was accepted or rejected, and, if rejected, the reason the Demand was rejected.

Upon written request by the foreign regulator, the Arbitration Department will notify the foreign regulator when an arbitration proceeding terminates. The notice will include the following information:

1. The date the proceeding terminated; and
2. The disposition (e.g., settled, amount unknown; claimant awarded \$10,000).

KPC:tyd(D12/25)

January 16, 1989

Ms. Jean A. Webb  
Secretariat  
Commodity Futures Trading Commission  
2033 K Street, N.W.  
Washington, DC 20581

Re: National Futures Association: Proposed Amendments  
to Section 11(a) of NFA's Code of Arbitration and  
Proposed Rules Governing Arbitration of Disputes  
Between U.S. Customers and Non-Member Foreign Firms,  
Section 11(a)

Dear Ms. Webb:

By letter dated December 12, 1988, National Futures Association ("NFA") submitted to the Commodity Futures Trading Commission ("Commission"), for approval, proposed amendments to various Sections of NFA's Code of Arbitration ("Code"), including proposed changes to Section 11(a) of the Code, and proposed new Rules Governing Arbitration of Disputes Between U.S. Customers and Non-Member Foreign Firms ("Rules"). As explained in the submission letter, the proposed amendments to Section 11(a) of the Code and proposed Section 11(a) of the Rules are intended to cap the filing fee for customer disputes at \$1,550.00 and for other disputes at \$2,000.00. However, it has come to our attention that Section 11(a), as set forth in the submission letter, could be misread as a cap not on the total fee but on the additional fee for that portion of the claim amount which exceeds \$15,000. Therefore, the amendments to Section 11(a) of the Code and Section 11(a) of the new Rules have been revised to clear up any possible ambiguity.

The proposed amendments to Section 11(a) of the Code and proposed Section 11(a) of the Rules follow. Section 11(a) of the Code shows the amendments to the Code as currently effective, not to the amendments as submitted on December 12, 1988. (Additions are underscored and deletions are in brackets.)



Ms. Jean A. Webb

January 16, 1989

CODE OF ARBITRATION

\* \* \*

**Section 11. Arbitration Fees.**

**(a) Filing Fees.**

(1) For claims involving disputes between customers and Members or employees thereof, or Associates, each party claiming or counterclaiming shall pay a filing fee based on the amount claimed or counterclaimed (exclusive of interest and costs) as follows:

<u>Amount of Claim or Counterclaim</u>	<u>Fee</u>
\$ 0.00 - \$ 2,499.99	\$ 50.00
\$ 2,500.00 - \$ 5,000.99	\$100.00
\$ 5,001.00 - \$10,000.99	\$150.00
\$10,001.00 - \$15,000.00	\$175.00
More than \$15,000.00	\$200.00 [( ) plus 1% of excess over \$15,000.00, <u>the total fee not to exceed \$1,550.00( )</u> ].

(2) For claims involving disputes between Members or employees thereof, or Associates, each Member or employee thereof, or Associate claiming or counterclaiming shall pay a filing fee based on the amount claimed or counterclaimed (exclusive of interest and costs) as follows:

<u>Amount of Claim or Counterclaim</u>	<u>Fee</u>
\$ 0.00 - \$ 2,499.99	\$ 62.50
\$ 2,500.00 - \$ 5,000.99	\$125.00
\$ 5,001.00 - \$10,000.99	\$187.50
\$10,001.00 - \$15,000.00	\$218.75
More than \$15,000.00	\$250.00 [( ) plus 1.25% of excess over \$15,000.00, <u>the total fee not to exceed \$2,000.00( )</u> ].

\* \* \*



Ms. Jean A. Webb

January 16, 1989

RULES GOVERNING ARBITRATION OF DISPUTES BETWEEN  
U.S. CUSTOMERS AND NON-MEMBER FOREIGN FIRMS

\* \* \*

Section 11. Arbitration Fees.

(a) Filing Fees.

(1) Each party claiming or counterclaiming under these Rules shall pay a filing fee (payable in U.S. dollars only) based on the amount claimed or counterclaimed (exclusive of interest and costs) as follows:

<u>Amount of Claim or Counterclaim</u>	<u>Fee</u>
<u>\$ 0.00 - \$ 2,499.99</u>	<u>\$ 62.50</u>
<u>\$ 2,500.00 - \$ 5,000.99</u>	<u>\$125.00</u>
<u>\$ 5,001.00 - \$10,000.99</u>	<u>\$187.50</u>
<u>\$10,001.00 - \$15,000.00</u>	<u>\$218.75</u>
<u>More than \$15,000.00</u>	<u>\$250.00 plus 1.25%</u> <u>of excess over \$15,000.00,</u> <u>the total fee not to</u> <u>exceed \$2,000.00.</u>

\* \* \*

Respectfully submitted,

Daniel J. Roth  
General Counsel

DJR:tyd(kpcD12/21)

- cc: Chairman Wendy L. Gramm
- Commissioner Kalo A. Hineman
- Commissioner Fowler C. West
- Commissioner Robert R. Davis
- Commissioner William P. Albrecht
- Andrea M. Corcoran, Esq.
- Marshall E. Hanbury, Esq.
- Dennis A. Klejna, Esq.
- Alan L. Seifert, Esq.
- Susan C. Ervin, Esq.
- Lawrence B. Patent, Esq.
- Linda Kurjan, Esq.