

January 11, 1991

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

Re: National Futures Association: Proposed Amendments to NFA
Code of Arbitration Sections 6, 7, 8, 9 and 10, and Proposed
New Section 14

Dear Ms. Webb:

Pursuant to Section 17(j) of the Commodity Exchange Act, as amended ("Act"), National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission ("Commission") proposed amendments to NFA Code of Arbitration Sections 6, 7, 8, 9 and 10, and proposed new Section 14. These amendments were approved by NFA's Board of Directors ("Board") at its meeting on November 15, 1990. NFA respectfully requests Commission review and approval of the amendments.

- A. Amendments to NFA Code of Arbitration to incorporate mediation into NFA's arbitration program (additions are under-
scored and deletions are [bracketed]):

CODE OF ARBITRATION

* * *

Section 6. Initiation of Arbitration.

* * *

(k) Appointment of Panel; Disclosure and Challenge.

The President shall thereupon appoint, pursuant to Section 4(a), an arbitration Panel to resolve the dispute. No arbitrator shall have acted as the mediator in the same dispute. The Secretary shall promptly notify the parties of the names, business affiliations, and other information relevant to the classification of the arbitrator as a Member or non-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



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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 representative. 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.

* * *

Section 7. Right to Counsel.

(a) A party may be represented at any time throughout the arbitration proceeding, including a mediation conference, 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.

* * *

Section 8. Pre-Hearing.

(a) Exchange of Documents and Written Information.

(1) 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 hearing.

(2) 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 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.

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(3) Evidence that is otherwise discoverable or admissible in an arbitration proceeding shall not be rendered non-discoverable or inadmissible as a result of its use in connection with a mediation conference. However, documents and written information in the mediator's possession are not subject to discovery and may not be subpoenaed for use in the subsequent arbitration hearing.

* * *

Section 9. Hearing.

* * *

(c) Procedure.

* * *

(9) All conduct and statements, offers and promises, whether oral or written, made by the parties or their representatives in connection with a mediation conference shall be confidential and shall not be admissible for any purpose, including impeachment, in any pending or subsequent arbitration proceeding. The mediator may not be called as a witness in a pending or subsequent arbitration proceeding.

[9](10) 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.

* * *

Section 10. Award.

* * *

(h) Satisfaction of Demand.

At any time during the course of an arbitration, a Respondent may satisfy a Demand for Arbitration and a Claimant may satisfy a counterclaim by payment or settlement, including settlement through mediation. The arbitration proceeding will terminate upon receipt of written notice of satisfaction and withdrawal of the Demand for Arbitration duly executed by the parties and submitted to the Secretary. If the Secretary is notified that the Demand for Arbitration or a counterclaim has been settled, but the notification is not in writing or is not duly executed by the parties, the Secretary shall send written



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notice to the parties that the arbitration proceeding will terminate within 20 days of service of such notice unless the Secretary receives written notice that the Demand for Arbitration or counterclaim has not been settled.

* * *

Section 14. Mediation.

After the completion of the time period for the filing of all pleadings, the Secretary may, in his discretion, notify the parties of the option to proceed to mediation.

* * *

- B. Explanation of proposed amendments to NFA Code of Arbitration to incorporate mediation into NFA's arbitration program.

On an average, 35 percent of the arbitration cases closed each year at NFA settle prior to hearing. The majority of settlements occur late in the arbitration process, usually after the hearing plan conference.¹ Though the arbitration program has an acceptable record of producing settled cases, NFA wants to improve further in this regard. The Commission also has encouraged NFA to consider modifying its arbitration procedures to facilitate the early settlement of disputes. For these reasons, NFA is proposing incorporating mediation into the preliminary stages of NFA's arbitration program, where settlement would be most beneficial to all concerned.

A wide variety of forums, including some related to the securities industry, use mediation to resolve disputes. For

¹ NFA's Code of Arbitration ("Code") requires the parties to cooperate with NFA's Secretary in the formulation of a written hearing plan which must be served on the Secretary at least ten days before the oral hearing date. The hearing plan conference, which apparently acts as a catalyst for settlement discussions by focusing the parties' attention on the relative strengths and weaknesses of their cases, is the last step prior to the hearing. Unfortunately, the Code provides no mechanism to facilitate settlement earlier in the arbitration process, before the parties and NFA expend time and money preparing for a hearing which ultimately will be unnecessary.



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example, the National Association of Securities Dealers has incorporated mediation into its dispute resolution services on a pilot basis. Certain foreign self-regulatory futures organizations also utilize mediation as a dispute resolution mechanism. In addition, the recently published Securities Arbitration Rules of the American Arbitration Association ("AAA") provide for a mediation conference in securities disputes. The AAA also conducts mediation conferences in various other types of business disputes, insurance industry disputes and disputes between labor and management. Professional associations for physicians, dentists, attorneys, engineers and architects resolve disputes through mediation. Mediation also has been utilized in all types of court-related matters, including civil, criminal, bankruptcy and domestic relations. Studies indicate that mediation is an effective dispute resolution mechanism in all of these areas.

Incorporating mediation into NFA's arbitration program would benefit all concerned. Statistics indicate that eighty to ninety percent of mediated disputes settle. NFA therefore believes that incorporating a mediation conference at the inception of the arbitration process should facilitate early resolution of disputes and increase substantially the amount of cases settling prior to hearing. In turn, the early settlement of disputes will save the parties time and money. It also will conserve NFA staff and arbitrator resources for those cases where their services actually are necessary to the resolution of a dispute.

On November 15, 1990, the Board adopted several changes to NFA's Code of Arbitration ("Code") to incorporate mediation into NFA's arbitration program. Proposed new Section 14 of the Code sets forth the general provision which incorporates mediation into NFA's arbitration program. Section 14 provides that the decision whether to refer a dispute to mediation shall be at the discretion of NFA's Secretary and that the parties shall have the right to accept or reject the invitation to proceed to mediation. NFA anticipates that only a small number of carefully selected cases will be referred to mediation until we develop some experience with the process.

NFA intends to use outside mediators. The mediator would conduct the mediation conference in accordance with the rules of the outside service. The parties would bear the cost of

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the mediation conference.² The proposed amendments provide that if the mediation does not result in settlement, the mediator shall not act as an arbitrator in the same proceeding. The proposed amendments further provide that the mediator may not be called as a witness in a subsequent arbitration.

The proposed amendments specify that the parties may be represented in the mediation conference. The proposed amendments also make clear the confidential nature of mediation. On the other hand, the proposed amendments provide that evidence that otherwise is discoverable or admissible in the arbitration shall not be rendered non-discoverable or inadmissible simply because it was used in connection with the mediation conference.

NFA respectfully requests that the amendments to NFA Code of Arbitration Sections 6, 7, 8, 9 and 10, and proposed new Section 14 be declared effective upon Commission approval.

Respectfully submitted,



Daniel J. Roth
General Counsel

JJF:pjf(Ltrs/Webb)

cc: Chairman, Wendy L. Gramm
Commissioner Kalo A. Hineman
Commissioner Fowler C. West
Commissioner William P. Albrecht
Andrea M. Corcoran, Esq.
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² If the parties settle their dispute through mediation, they will save costs of discovery and preparing for and attending the hearing. The benefits of mediation over arbitration, including the opportunity to control the outcome of the dispute, may outweigh the additional costs, if any, of mediation.

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

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



June 12, 1991

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

Re: Proposed amendments to NFA Code of
Arbitration Sections 6(k), 7(a), 8(a), 9(c)
and 10(h) and proposed new Section 14

Dear Mr. Roth:

By letter dated January 11, 1991, the National Futures Association ("NFA") submitted the captioned proposals related to mediation pursuant to section 17(j) of the Commodity Exchange Act ("Act") for Commission approval. NFA requested that the Commission declare the proposals effective upon approval. Please be advised that the Commission approved NFA's rule proposals on this date.

Sincerely,

Jean A. Webb

Jean A. Webb
Secretary of the Commission

