

January 14, 1987

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

Re: Proposed Amendment to Article XVI of National Futures
Association's Articles of Incorporation with the
Addition of Section 5

Dear Ms. Webb:

Pursuant to Section 17(j) of the Commodity Exchange Act ("Act") as amended, National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission (the "Commission") a proposed amendment to Article XVI of NFA's Articles of Incorporation with the addition of Section 5 (the "amendment") and requests review and approval of this amendment. The amendment was ratified by NFA's Board of Directors on August 21, 1986, and has since been adopted by a majority vote of NFA's Members in each of the contract markets and the FCM, IB and Industry Participant categories.

I. Amendment to Article XVI (additions are underscored):

ARTICLES OF INCORPORATION
OF
NATIONAL FUTURES ASSOCIATION

* * *

ARTICLE XVI: MISCELLANEOUS

* * *

Section 5: Directors' Liability.

To the fullest extent permitted by the Delaware General Corporation Law as the same exists or may hereafter be amended, a director of this corporation shall not be liable to the corporation or its members for monetary damages for breach of fiduciary duty as a director.

NFA

Ms. Jean A. Webb

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January 14, 1987

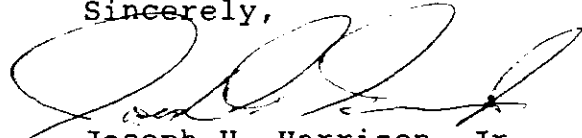
II. Explanation of the Amendment:

In response to the Corporate Directors' liability insurance problem confronting many Delaware corporations, the Delaware legislature recently amended the Delaware General Corporation Law to permit a corporation (including a non-stock corporation) to amend its Articles of Incorporation to limit the personal liability of its directors for breaches of their fiduciary duty of care. The amendment submitted herein precludes awards of money damages to NFA or Members resulting from a breach of the duty of care.

This provision does not affect liability for money damages for breaches of the duty of loyalty; for bad faith acts or omissions; for intentional misconduct or knowing violations of law; or for transactions in which a director receives an improper personal benefit. The explanation transmitted to Members in connection with the membership vote on this amendment is enclosed.

NFA respectfully requests the Commission to declare the proposed amendment effective upon approval by the Commission as authorized by Section 17(j) of the Act.

Sincerely,



Joseph H. Harrison, Jr.
General Counsel

JHH:cm(D28/F34)
Enclosure

cc: Chairman Susan M. Phillips
Commissioner Kalo A. Hineman
Commissioner Fowler C. West
Commissioner William E. Seale
Commissioner Robert R. Davis
Andrea M. Corcoran
Kenneth M. Raisler
Dennis Klejna
Kevin M. Foley
Kenneth M. Rosenzweig



I-86-16

September 16, 1986

Notice To: All NFA Members
From: General Counsel's Office
Re: IMPORTANT - BALLOT ENCLOSED
Proposed Amendment to NFA's Articles of
Incorporation

In reaction to the nation's litigation explosion and the growing problem faced by corporations in obtaining directors' liability insurance, the State of Delaware recently amended its corporation law to allow corporations incorporated in Delaware to eliminate the personal liability of their directors for breach of their fiduciary duty of care.

NFA is incorporated in Delaware. Thus, on August 21, 1986, in response to this change in Delaware law, NFA's Board of Directors ("Board") ratified a proposal to amend NFA's Articles of Incorporation ("Articles") to eliminate the personal liability of NFA Directors for breaches of their fiduciary duty of care. This amendment, if adopted, would mean that neither NFA nor any of its Members could obtain an award of money damages against an NFA Director on the grounds that the Director had breached the duty of care that the Director owes to NFA.

Under Article XVII, proposed amendments to the Articles which have been ratified by the Board are then submitted to the membership for ballot vote and are adopted upon the affirmative vote of a majority of Members in each of the Contract Market, FCM and IB, and Industry Participant categories. (The Industry Participant category includes CPO, CTA, Commercial Bank and Commercial Firm Members.) We enclose with this release a ballot for your use.

EXPLANATION OF THE PROPOSED
ARTICLES AMENDMENT

NFA, along with many other corporations nationwide, has recently been confronted with the possibility that it will not be able to maintain its former levels of directors' and officers' liability insurance coverage. The Board reviewed this issue with a view to taking such action as it deemed appropriate in light of the current uncertainty about coverage and NFA's need to continue to be able to attract qualified persons to serve on its Board.

Directors of NFA are protected in a number of ways from personal liability resulting from their activities related to

NFA. With respect to claims arising under the Commodity Exchange Act ("the Act") those protections are found principally in Section 22 of the Act, which is the sole basis for liability under the Act. In order to recover against a director of NFA under Section 22, a plaintiff would have to show that (1) NFA failed to enforce a bylaw or rule that is required under Section 17 of the Act or in enforcing any such bylaw or rule violated the Act or any Commodity Futures Trading Commission ("Commission") rule, regulation or order; (2) that the director willfully aided, abetted, counseled, induced or procured the failure to enforce the rule or the violation of the Act in enforcing the rule; (3) that the director acted in bad faith in failing to take action or in taking such action as was taken; and (4) that such failure or action actually caused the loss for which the plaintiff is seeking a recovery. Furthermore, a plaintiff may only seek recovery of actual damages caused in the course of transactions in the futures, options or leverage markets, as well as transactions involving commodity pools.

Because the Commission has exclusive jurisdiction over NFA, it could be argued that NFA's responsibilities arise exclusively under the Act and that any action seeking to impose liability for failure to meet those responsibilities must be brought under Section 22, rather than under a common law theory of negligence. However, no court has ever ruled on this argument.

If a common law action were available, directors would generally be protected against liability by the business judgment rule. The business judgment rule protects directors from liability in corporate transactions undertaken within both the power of the corporation and the authority of management where there is reasonable basis to indicate that the transaction was made in good faith. The business judgment rule essentially provides a presumption that directors exercise their business judgment with due care, in good faith, and in the honest belief that their actions have promoted the best interests of the corporation and its members.

Another protection for directors of NFA from personal liability exists in NFA Bylaw 1401, which provides that NFA shall to the fullest extent permitted by law indemnify any person who is or is threatened to be made a party to any action, suit or proceeding by reason of the fact that the person is or was a director, officer, employee or agent of NFA or a member of a committee of NFA against all reasonable expenses (including attorneys' fees), judgments, penalties, fines and amounts paid in settlement actually incurred by the person in connection with such action, suit or proceeding. NFA is a non-stock corporation organized under the law of the State of Delaware. Delaware law, which controls the extent to which indemnification is permitted, allows indemnification if the director or officer acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation. Bylaw 1401 not only provides for indemnification against personal liability for damages but also provides for NFA to pay for a defense of any

action in which it is necessary to establish the non-liability of a director or officer due, for example, to the limitations provided for in Section 22 of the Act or the business judgment rule.

Recent amendments to the Delaware General Corporation Law make it possible for a non-stock corporation (such as NFA) to limit or eliminate certain types of director liability. Generally, directors of Delaware corporations owe stockholders (members) two fiduciary duties: the duty of loyalty and the duty of care. Delaware law now provides that a corporation may, through amendment to its Articles of Incorporation, eliminate the personal liability of its directors for breaches of their fiduciary duty of care. The amendment to NFA's Articles ratified by the Board would add a new Section to Article XIV which would preclude awards of money damages to NFA or Members for breach of a Director's fiduciary duty of care. This amendment would not eliminate the duty of care; therefore, types of relief other than money damages (such as injunctions) would still be available.

The proposed amendment would not affect liability for money damages for breaches of the duty of loyalty; for bad faith acts or omissions; for intentional misconduct or knowing violations of law; or for transactions in which a Director receives an improper personal benefit.

PLEASE NOTE: The amendment set forth below requires the affirmative vote of the majority of Members in the Contract Market, FCM and IB industry Participant (CPO, CTA, Commercial Bank and Commercial Firm) categories. Please use the enclosed ballot to vote and submit it to NFA in the postage-paid self-addressed envelope which is also enclosed.

IT IS IMPORTANT THAT MEMBERS VOTE AND RETURN THEIR BALLOTS TO NFA, SO PLEASE GIVE THIS MATTER YOUR ATTENTION. RETURN YOUR BALLOT TO NFA BY OCTOBER 3, 1986.

TEXT OF PROPOSED ARTICLES AMENDMENT

ARTICLES OF INCORPORATION
of
NATIONAL FUTURES ASSOCIATION

* * *

ARTICLE XVI: Miscellaneous

* * *

Section 5: Directors' Liability

To the fullest extent permitted by the Delaware General Corporation Law as the same exists or may hereafter be amended, a director of this corporation shall not be liable to the corporation or its members for monetary damages for breach of fiduciary duty as a director.

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

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



July 1, 1987

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

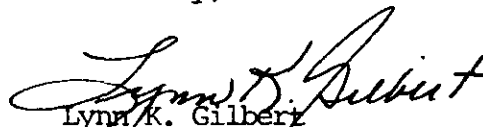
Re: Proposed Addition of Article XVI, Section 5 to the Articles of
Incorporation of the National Futures Association

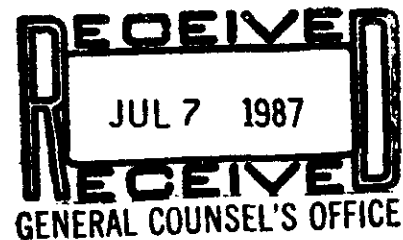
Dear Mr. Roth:

By letters dated January 14, 1987 through April 21, 1987, the National Futures Association ("NFA") submitted, pursuant to Section 17(j) of the Commodity Exchange Act ("Act"), a proposed addition to its Articles of Incorporation. The proposal provides that NFA directors would not be liable to NFA or its members for monetary damages for breach of fiduciary duty as a director to the fullest extent permitted under Delaware General Corporation Law.

The Commission understands that NFA intends to implement the proposed revision to the Articles of Incorporation upon receipt of notice of Commission approval. Please be advised that the Commission has this date approved the proposed addition of Article XVI, Section 5 to NFA's Articles of Incorporation under Section 17(j) of the Act. The Commission requests that NFA inform it of any subsequent revision to Delaware General Corporation Law which affects the applicability of Article XVI, Section 5.

Sincerely,


Lynn K. Gilbert
Deputy Secretary of the Commission



NFA NATIONAL FUTURES ASSOCIATION
200 W. MADISON ST • CHICAGO, IL • 60606 • (312) 781-1300

April 21, 1987

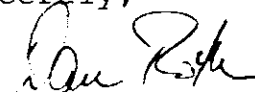
Mr. David Von Wagner
Division of Trading & Markets
Commodity Futures Trading Commission
2033 K Street, N.W.
Washington, D.C. 20581

Dear Mr. Von Wagner:

Enclosed please find Title 8, Section 102(b)(7)
of the Delaware General Corporation Law pertaining to the
recent amendment of NFA's Articles of Incorporation.

Please accept our apology for any confusion previously
sent material may have caused.

Sincerely,



Daniel J. Roth
General Counsel

DJR:cm(D31/F7)
Enclosure

Via UPS Overnight Delivery

DELAWARE GENERAL CORPORATION LAW

(Delaware Code 1953 as amended)

Ed. Note.—Extensive changes to the Delaware General Corporation Law were enacted by the 1973 and 1974 Legislatures, effective July 1, 1973 and July 11, 1974 respectively [Chapter 106, Laws of 1973 and Ch. 437, Laws of 1974].

→ Comments appearing herein relating to these amendments were prepared by the General Corporation Law Committee of the Delaware State Bar Association, and are used with its permission. ←

Title 8—Chapter 1

SUBCHAPTER I—FORMATION

101 INCORPORATORS; HOW CORPORATION FORMED; PURPOSES.—(a)

Any person, partnership, association or corporation, singly or jointly with others, and without regard to his or their residence, domicile or state of incorporation, may incorporate or organize a corporation under this chapter by filing with the Division of Corporation in the Department of State a certificate of incorporation which shall be executed, acknowledged, filed and recorded in accordance with section 103 of this title.

(b) A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.

(c) Corporations for constructing, maintaining and operating public utilities, whether in or outside of this State, may be organized under this chapter, but corporations for constructing, maintaining and operating public utilities within this State shall be subject to, in addition to the provisions of this chapter, the special provisions and requirements of Title 26 applicable to such corporations.

1 State law in federal courts.—A state's statutes and decisions of its highest courts are binding on federal courts deciding questions of that state's law in diversity suits. *Erie R. Co. v Tompkins* (1938) 304 U.S. 64, 58 S Ct 817. So are decisions of a state's intermediate appellate courts, unless the federal court is convinced by other persuasive data that the state's highest court would decide otherwise. *West v Amer. Tel. & Tel. Co.* (1940) 311 U.S. 223, 61 S Ct 179, on remand, (CA-6, 1941) 121 F2d 142, cert den (1941) 314 U.S. 672, 62 S Ct 138.

2 Same—statutes of limitations.—State statutes of limitations bind federal courts in diversity suits. *Guaranty Trust Co. v York* (1945) 326 US 99, 65 S Ct 1464.

3 Same—uniform laws.—State decisions construing uniform laws are authorities for federal courts to follow. If the federal court finds no decision in a particular state construing the section of the uniform law it's considering, it can use decisions of other states on the same section of the uniform law. *Burns Mortgage Co. v Fried* (1934) 292 US 487, 54 S Ct 813.

4 Service in diversity cases.—Service in diversity case should be made as prescribed by federal rules of civil procedure, rather than by state law, so that service on defendant executor was properly made by leaving copies of summons and complaint with defendant's wife, as permitted by fed-

eral rules of civil procedure, rather than by "in hand" method prescribed by state law. *Hanna v Plumer* (1965) 380 US 460, 85 S Ct 1136.

5 Diversity jurisdiction.—Derivative action can't be brought in federal court of state on grounds of diversity of citizenship in state of which both suing stockholder and corporation are citizens. *Lavin v Lavin* (CA-2, 1960) 182 F2d 870.

6 Promoters' contracts.—Corporation can adopt contract made by promoters for its benefit, although such contract antedates corporation's existence. *Commissioners of Lewes v Breakwater Fisheries Co.* (Ch. Ct., 1922) 13 Del. Ch. 234, 117 Atl 823.

Corporation isn't bound by promoter's contract which it hasn't adopted. *Stringer v Electronics Supply Corp.* (Ch. Ct., 1938) 2 A2d 78.

7 Promoters' liabilities.—Promoters must account to corporation for secret profit obtained at its expense and surrender for cancellation shares representing secret profit. *Birbeck v Am. Toll Bridge Co. of Cal.* (Ch. Ct., 1938) 2 A2d 158.

Corporation can maintain action against its promoters, who were also its financiers and managers, for accounting or to recover corporate property appropriated by them to their own use in breach of their fiduciary obligations as promoters. *Bouay v H.M. Byllesby & Co.* (Ch. Ct., 1940) 12 A2d 178, de-

murrer to amended bill of complaint over-ruled (Ch. Ct., 1941) 22 A2d 138, reversed (S Ct., 1944) 38 A2d 808.
Court will approve derivative suit settlement that denies recovery from promoter for

breach of fiduciary duty in underwriting transactions, when promoter bargained at arm's length with corporation and didn't make any secret profits. *Gladstone v Bennett* (Ch. Ct., 1959) 38 Del. Ch. 391, 153 A2d 677.

102 CONTENTS OF CERTIFICATE OF INCORPORATION.—(a) The certificate of incorporation shall set forth:

(1) The name of the corporation which shall contain 1 of the words "association," "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate," or "limited," or 1 of the abbreviations ["co.," "corp.," "inc.," "ltd.,"], or words or abbreviations of like import in other languages (provided they are written in roman characters or letters), and which shall be such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names of other corporations organized, reserved or registered as a foreign corporation under the laws of this State; (2) The address (which shall include the street, number, city and county) of the corporation's registered office in this State, and the name of its registered agent at such address; (3) The nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any; (4) If the corporation is to be authorized to issue only 1 class of stock, the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. *If the corporation is to be authorized to issue more than one class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class, and shall specify with respect to each class those shares that are to be without par value and those shares that are to have a par value and the par value of each share of each such class. The certificate of incorporation shall also set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by §151 of this Title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation. Such grant of authority may include the power to specify the number of shares of any series. The foregoing provisions of this paragraph shall not apply to corporations which are not organized for profit and which are not to have authority to issue capital stock. In the case of such corporations, the fact that they are not to have authority to issue capital stock shall be stated in the certificate of incorporation. The conditions of membership of such corporations shall likewise be stated in the certificate of incorporation or the certificate may provide that the conditions of membership shall be stated in the by-laws; (5) The name and mailing address of the incorporator or incorporators; (6) If the powers of the incorporator or incorporators are to terminate upon the filing of the certificate of incorporation, the names and mailing addresses of the persons who are to serve as directors until the first annual meeting of stockholders or until their successors are elected and qualify.*

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation;

(2) The following provisions, in haec verba, viz:

"Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this corporation under the provisions of §291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under the provisions of §279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation";

(3) Such provisions as may be desired granting to the holders of the stock of the corporation, or the holders of any class or series of a class thereof, the preemptive right to subscribe to any or all additional issues of stock of the corporation of any or all classes or series thereof, or to any securities of the corporation convertible into such stock. No stockholder shall have any preemptive right to subscribe to an additional issue of stock or to any security convertible into such stock unless, and except to the extent that, such right is expressly granted to him in the certificate of incorporation. All such rights in existence on July 3, 1967, shall remain in existence unaffected by this paragraph unless and until changed or terminated by appropriate action which expressly provides for the change or termination;

(4) Provisions requiring for any corporate action, the vote of a larger portion of the stock or of any class or series thereof, or of any other securities having voting power, or a larger number of the directors, than is required by this chapter;

(5) A provision limiting the duration of the corporation's existence to a specified date; otherwise, the corporation shall have perpetual existence;

(6) A provision imposing personal liability for the debts of the corporation on its stockholders or members to a specified extent and upon specified conditions; otherwise, the stockholders or members of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts¹;

(7) *A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under section 174 of this Title, or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this subsection to a director shall also be deemed to refer to a member of the governing body of a corporation which is not authorized to issue capital stock.*

(c) It shall not be necessary to set forth in the certificate of incorporation any of the powers conferred on corporations by this chapter. (Amended by Ch. 289, L. '86, eff. 7-1-86.)

Ch. 289, L. '86, eff. 7-1-86 added matter in italic and changed punctuation from period to semicolon

.1 Classification of corporations.— for religious, literary, charitable, social or
"Corporations which are not organized for eleemosynary purposes; such classification
profit" aren't synonymous with corporations doesn't necessarily exclude business, trading