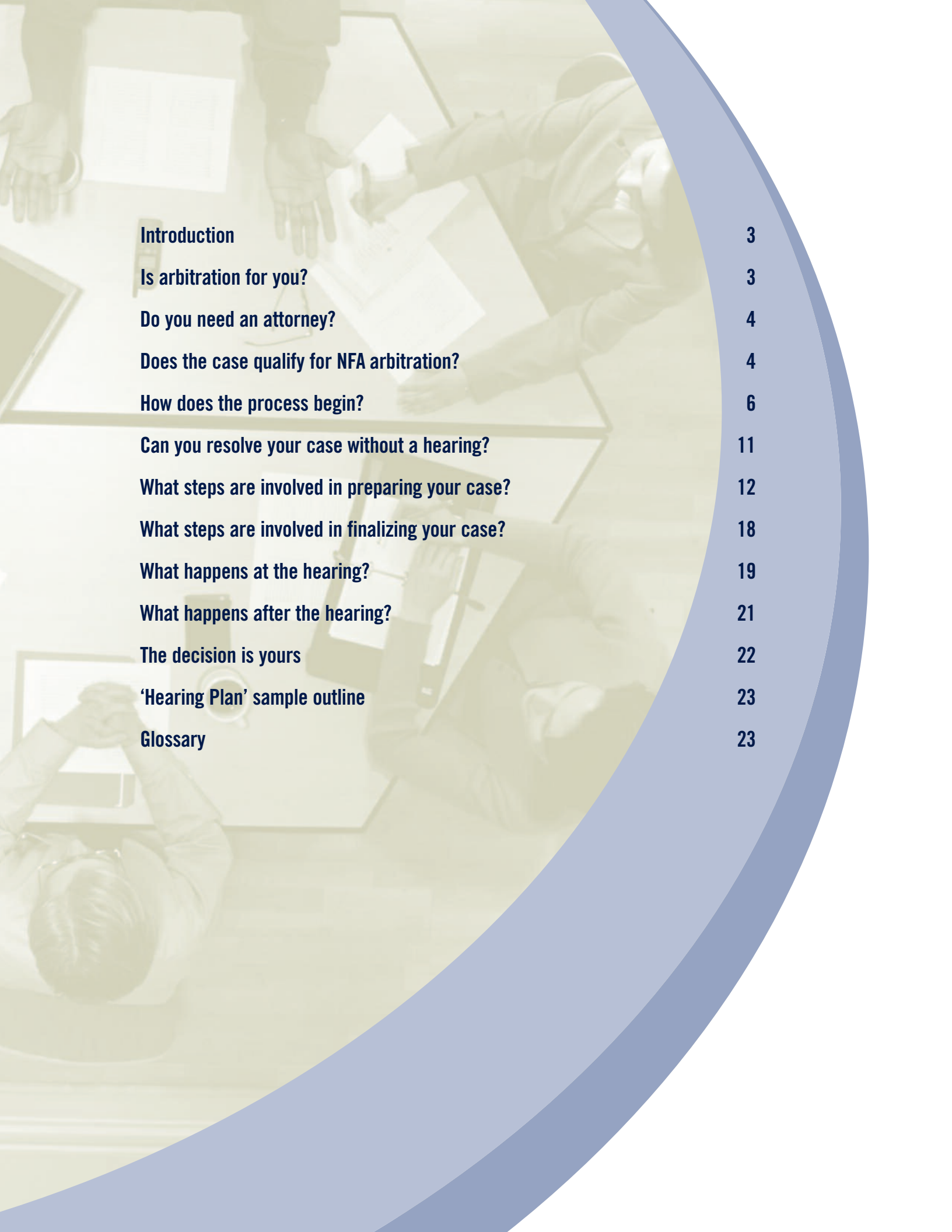




# NFA Arbitration: *Customer Arbitration Guide*



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## Introduction

**As a party to a dispute involving futures, commodity options, leverage transactions or forex transactions, you would like to have your dispute resolved fairly, quickly and as economically as possible. Up to this point, you probably have talked with the other people involved in the dispute but have been unable to arrive at a mutually agreeable solution. In all likelihood, you have considered filing a lawsuit but may be discouraged by the prospect that, with a backlogged court system, it could take years to have your case heard. You are also aware that litigation can be costly and that it could be difficult to educate a judge or jury about specific transactions involved in your dispute. Therefore, you have decided to consider what has become an increasingly popular alternative: arbitration.**

Arbitration can be used—if certain conditions are met—by individuals who believe they have a bona fide claim against a person or firm that is a Member or Associate of National Futures Association (NFA). Arbitration is also available—again, if certain conditions are met—to Members or Associates who may be involved in a dispute with a customer, possibly over a debit balance.

Whether you are the party who initiates the arbitration or the party who has had a claim filed against you, it is essential that you have an understanding of how NFA's arbitration program works. Such an understanding can be helpful in deciding whether arbitration is the best way to resolve your dispute. One purpose of this guide is to assist you in making that decision by providing helpful information and advice.

The decision to file an arbitration claim is, of course, only the first step. Once you've made that decision, you need to understand the procedures that must be followed. And here, too, you'll find this guide helpful.

First, though, you should read the glossary located on page 23 of this booklet. The glossary will acquaint you with various terms that are used throughout this guide and that you will encounter in routine communications with members of NFA's Arbitration Department.

Although this guide is intended to offer useful and practical information, NFA's Code of Arbitration officially sets forth the rules to be followed in arbitration proceedings. Should information in this publication be inconsistent with some provision in the Code—which could occur if there have been recent Code changes—it is the Code that is the final word. Accordingly, be sure you have a current copy of the Code, including any changes that NFA may have recently made. The most updated version of the Code is always available on NFA's Web site. You can find out whether you have a current copy of the Code by calling NFA's Information Center at 800-621-3570. Sections of NFA's Code of Arbitration are referred to throughout the guide as **"Code Section xx."**

<sup>1</sup> Grounds on which a court can review and vacate an arbitration award are very limited. A court cannot vacate an arbitration award just because it disagrees with the arbitrators' decision, but it can vacate an award if it determines the proceeding was conducted unfairly. See Section 10 of the United States Arbitration Act [9 U.S.C. Sec.10 (1970)] for the grounds for vacating an award.

<sup>2</sup> For information on reparations proceedings, contact: Proceedings Clerk, Office of Proceedings  
Commodity Futures Trading Commission  
1155 21st Street, NW  
Washington, DC 20581

You can also call the CFTC at (202) 418-5170 or visit its Web site at [www.cftc.gov](http://www.cftc.gov).

## Is arbitration for you?

The increasing popularity of arbitration is due in large measure to its advantages over litigation and because it does not have the disadvantages of litigation. Arbitration is usually faster and less expensive. Arbitrators who are already familiar with the futures markets may decide your case. Furthermore, arbitration doesn't require you to know what the law is to successfully prove your claim. It is, however, your responsibility to prove that you have incurred a monetary loss and deserve to be compensated for all or some portion of the loss. Because arbitration is less formal and has fewer procedural requirements than litigation, you may not need to hire an attorney to prepare and present your case. (Even if you do decide to employ an attorney, the attorney's fee is likely to be less than with litigation because of the relative speed of arbitration and its fewer procedural requirements.)

Against this, however, you should weigh what may be drawbacks of arbitration. Once you have submitted your claim to arbitration, it is rarely possible to change your mind. Therefore, be sure you are willing to forego the somewhat broader rights to discovery that litigation can provide, the protection provided by formal rules of evidence and other procedural rights that may not exist in arbitration, the right to a jury and the right to appeal the "rightness of the decision" (as opposed to the fairness of the proceeding).<sup>1</sup>

Another alternative that may be available to you—more formal than arbitration but less formal than litigation—is to file a reparations claim with the Commodity Futures Trading Commission (CFTC). This is limited, however, to disputes involving violations of the Commodity Exchange Act and CFTC Regulations.<sup>2</sup>

Assuming you decide to submit your dispute to arbitration, the next step is to choose an arbitration forum—the specific organization or agency that will conduct the arbitration proceedings. Start by obtaining and reviewing the rules of all arbitration forums that have jurisdiction over your particular type of dispute. If you have previously signed a pre-dispute arbitration agreement, you should review the rules of all the arbitration forums available under the agreement.

As you review the different forums' rules, you should determine the answers to such questions as:

- Does the forum have jurisdiction? That is, will it hear cases involving the type of transactions involved in your dispute? (For example, a futures exchange might hear cases involving only trades on that exchange.)
- Will you be able to file your claim within the time limit provided by the forum's rules?
- Does the forum have jurisdiction over the people you want to make a claim against? If so, is the other party required to submit to arbitration, or does it have a choice?
- Where will the hearing be held? Can it be held at a location that's convenient for you?

The pages that follow provide answers to these and similar questions regarding NFA arbitration.

## Do you need an attorney?

### Code Section 7

Whether you hire an attorney is entirely up to you.<sup>3</sup> You may want to consider such things as the complexity of the issues in dispute, the amount of money involved, whether the other party intends to be represented by an attorney and your own skills as a communicator. And although arbitration hearings are informal, following certain procedures in presenting your case may give the arbitrators a clearer understanding of your claim.

While NFA staff will be glad to explain NFA procedures and serve as your go-between with the arbitrators, NFA cannot act as your attorney. It's your responsibility—and that of your attorney if you hire one—to prepare and present your case.

You can decide to hire an attorney—or, for that matter, to terminate the services of an attorney if you've previously hired one—at any point in the arbitration process. For example, you can file the case by yourself but hire an attorney to represent you at the hearing. Or you could hire an attorney to file the case and represent yourself at the hearing. You can also change your attorney at any time.

Once you have notified NFA that you have an attorney and have provided his name and address, NFA and the other parties will communicate (both orally and in writing) with your attorney rather than you. For that reason, make sure you keep us currently informed. If you hire an attorney, notify us. If you change attorneys or decide to no longer be represented by an attorney, let us know that.

One caveat: Don't wait until the last minute—such as shortly before a proceeding is scheduled—to hire an attorney. Arbitrators generally don't accept the argument that you've just hired an attorney as a valid reason for delaying a proceeding, even though the attorney may want more time to prepare for it.

If you have an attorney and he withdraws from the case, he is required to make a reasonable effort to notify you of his withdrawal in advance. If you plan to hire another attorney, do so promptly. Again, the arbitrators may not be inclined to grant a continuance of a scheduled hearing if you wait until the last minute to hire a new attorney.

Although you have the right to be represented by an attorney of your own choosing, the arbitrators have the right to exclude from the hearing any attorney who disrupts the hearing, uses tactics that serve no purpose other than to delay the hearing or defies the arbitrators' authority. Since you are responsible for the conduct of your attorney, the arbitration panel is not required to postpone the hearing to give you time to hire a different attorney. The panel may do so, however, if it believes a postponement is necessary to give you a fair opportunity to present your case.

<sup>3</sup> The person who represents you may not have to be an attorney. For example, a family member or other person who is not receiving compensation and does not have an interest in the outcome of the proceeding can represent you even if that person is not an attorney. See Code Section 7(a).

<sup>4</sup> NFA may, but is not required to, hear an unrelated claim involving securities if it is between the same parties as a claim involving futures transactions. See Code Section 2(b)(1).

<sup>5</sup> For example, a respondent may assert that a shorter time limit in the customer agreement applies.

## Does your case qualify for NFA arbitration?

Before filing your case at NFA, you should attempt to determine whether NFA has the authority to hear the case. The discussion that follows will help you make that determination.

### *For NFA to have authority to hear the case:*

NFA must have jurisdiction over the subject of the dispute; your claim for arbitration must be filed within a specified time; and NFA must have jurisdiction over the parties you want to recover money from.

### ■ Jurisdiction Over the Dispute

#### Code Sections 1(m), 2(a) and 2(b)

NFA has broad jurisdiction to hear disputes that involve futures contracts and options on futures contracts traded on domestic exchanges, dealer options, futures transactions and commodity option transactions on foreign exchanges for U.S. customers, and leverage transactions. On the other hand, NFA does not have jurisdiction over disputes involving stocks, stock options, or physical commodities that are not part of or directly connected with a futures transaction.<sup>4</sup>

As mentioned, NFA's jurisdiction is broad. While the dispute must involve the futures-related activities of an NFA Member, it does not have to involve any specific transactions.

### ■ Filing of the Claim

#### Code Section 5

You must file your claim within two years from the date that you knew—or should have known—of the acts or transactions that form the basis for your claim. If the claim is not filed within the two-year period, NFA does not have jurisdiction over the dispute. (Section 5 of the Code says that NFA must reject the claim if the arbitration claim clearly shows that the claim was not filed within the two-year period.)

If the two-year period may be an issue in your case (for example, if the other party will probably contend that you didn't file the claim in time), you should certainly consider whether you'll be able to convince the arbitrators that you did, in fact, file on time. Consider also how you might be harmed, having wasted your time and money, if the arbitrators decide that NFA lacks jurisdiction.

NFA's limitation period is not a statute of limitation in the traditional sense. If NFA rejects the claim, you may still be able to go somewhere else. Even if NFA accepts the claim, the respondent may argue to the arbitrators that some shorter statute of limitation applies.<sup>5</sup>

In most cases where the timeliness of your filing is an issue, the focus will be on when you "knew or should have known" of the acts or transactions that are the basis for your claim. For example, if you are complaining about unauthorized trading in your account, the day you knew is the date you found out that the trades had been made. However, if you don't read your confirmation statements, the arbitrators could decide that you should have known on the date you received the confirmation statement. On the other hand, if you are complaining about being misled by

untrue statements, the day you knew is probably the day you discovered the statements were false, not the day the statements were made.

NFA will reject the claim if it clearly states that it was not filed within the two-year period. However, disputes about when you knew or should have known are decided by the arbitrators, not NFA.

## ■ Jurisdiction Over the Parties

### Code Sections 1(c), 1(p), 2(a) and 2(b)

Once you have concluded that NFA has jurisdiction over the subject of the dispute and that you could file your claim by the required date, the next determination is whether NFA has jurisdiction over the parties you want to recover money from. In general, NFA can hear disputes involving customers, NFA Members, NFA Associates and, in some cases, employees of NFA Members.

The first step is to determine whether you meet the definition of a “customer,” and whether the party you want to make a claim against meets the definition of “NFA Member, Associate or employee of an NFA Member.”

In general, you are a customer if your claim involves your own account, your participation in a commodity pool or your purchase of managed account or trading advisory services.<sup>6</sup> For example, suppose you opened an account and deposited funds with a Member firm that you believe lied to you and pressured you into opening the account, and you'd now like to file a claim for a refund of the money. You are obviously a customer in this example since your claim clearly involves your own account. On the other hand, suppose you believe a Member owes you money for referring other customers to the Member. You would not be a customer in this case—even if you happened to have a trading account with the Member—since the dispute does not involve your account.

The definition of “Member or Associate” includes firms and individuals who are NFA Members and Associates at the time the claim is filed. However, it also includes firms and individuals who were NFA Members or Associates at the time of the events involved in the dispute. Firms and individuals cannot escape jurisdiction by withdrawing their memberships in NFA. You can find out whether a particular person is or was an NFA Member or Associate by calling NFA's Information Center at 800-621-3570 or accessing NFA's Background Affiliation Status Information Center (BASIC) at NFA's Web site ([www.nfa.futures.org](http://www.nfa.futures.org)).

In order for NFA to have jurisdiction over an employee of a Member, the Member must have employed the individual at the time of the events involved in the dispute, and the dispute must have something to do with the individual's employment with the Member. NFA does not have jurisdiction over someone just because that person got a job with an NFA Member later.

Even after you've decided that all the requirements have been met for NFA to have jurisdiction, there's still one further hurdle to be cleared: the question of whether, under the Code, your claim is mandatory or discretionary. The answer to this question determines whether the other party is required to arbitrate or whether it's optional on their part.

If your claim is considered a mandatory claim, NFA can and will hear your dispute against Members, Associates and employees of Members without their specific consent. (There are occasional

exceptions to this rule. For example, NFA cannot hear a claim against any person who has filed for bankruptcy.)

On the other hand, if your claim is considered discretionary, arbitration requires the consent of both NFA and the other parties to the dispute.

An obvious next question is which category does your claim fit into: mandatory or discretionary? The following discussion should help you answer the question.

## ■ Mandatory Claims

### Code Section 2(a)

A claim is mandatory if it is brought by a customer against a Member, Associate or employee of a Member for events directly involving the customer's own account, participation in a commodity pool or purchase of managed account or trading advisory services that caused the claimant to suffer a monetary loss.

It should be emphasized that mandatory refers only to whether arbitration is mandatory for the person the claim is being made against. As a customer, unless you have signed a pre-dispute arbitration agreement, you do not have to file your claim with NFA and no one can force you to. However, once you've filed a claim with NFA, you generally cannot change your mind (and, for example, decide you'd rather use a different arbitration forum or file a lawsuit).

Once you have filed a mandatory claim against a Member, Associate or employee of an NFA Member, the person you have filed the claim against is required to submit to arbitration at NFA. This does not guarantee that the person will file an Answer, attend the hearing, participate in the arbitration proceeding in any way or even that you will be able to collect money from that person. Even so, the arbitrators' decision will be just as good and just as binding as any judge or jury's decision in a lawsuit. Moreover, NFA bylaws provide that severe sanctions can be taken against any current Member or Associate that fails to comply with the rulings of an NFA arbitration panel.

## ■ Discretionary Claims

### Code Sections 2(b) and 10(b)

All other claims are discretionary and usually require the consent of at least three parties: the person filing the claim, the party the claim is filed against and NFA.<sup>7</sup> If everyone consents to arbitration, the arbitrators' decision is every bit as valid and binding as a decision involving a mandatory claim.

The most common type of discretionary claim is a claim by a Member against its customer to collect a debit balance. NFA accepts these cases when all parties consent to have the dispute heard by NFA. If the customer has signed a valid pre-dispute arbitration agreement and the Member has complied with the notice requirements under CFTC Regulation 166.5, NFA will accept the agreement as the customer's consent.

<sup>6</sup> A person who has purchased an interest in a commodity pool is a customer of the pool and the pool operator. However, that person is not normally a customer of the brokerage firm the pool uses or the commodity trading advisor who makes trades for the pool.

<sup>7</sup> A claim involving securities that is filed under Section 2(b)(1) only requires the consent of one party and NFA.

**Note:** Not all debit balance claims are initiated by a Member. A customer may make the claim requesting, in effect, a finding that he does not have to pay the debit balance (called “declaratory relief”). Claims for declaratory relief are discretionary—NFA will hear claims for declaratory relief only if the other party consents.

## ■ Jurisdiction: A Summary

As discussed in the preceding paragraphs, you must meet a number of requirements in order for NFA to have jurisdiction over your case and in order for you to determine whether the other party’s consent is needed for an arbitration claim to proceed. Here’s a brief summary.

- NFA must have jurisdiction over the subject of the dispute (discussed on page 4).
- You must file your claim within the two-year time limitation (discussed on page 4).
- NFA must have jurisdiction over the parties you intend to make a claim against (discussed on page 5).
- If your claim is “mandatory,” consent of the other parties to arbitration isn’t required; if the claim is “discretionary,” their consent is required (discussed on pages 5 and 6).

Assume at this point that you decide you would like to have NFA hear your case and you have determined that NFA has jurisdiction. The next section of this guide provides assistance in filing your claim.

## How does the process begin?

If you were to file your case in a court of law, the first step would be to file a complaint. The people you filed against would then respond by filing an answer and possibly a claim against you or another party involving the same act or transaction. And, if any other claim was filed, the party the claim was against would then file an answer or reply to the claim. These documents are called “pleadings.”

Except for the fact that, at NFA, a complaint is called a “claim,” an arbitration case at NFA is initiated the same way. This section provides step-by-step help in meeting the requirements for initiating an arbitration case and filing pleadings at NFA.

## ■ Notice of Intent

### Code Sections 6(a) and (b)

Before you file a claim (which we’ll discuss next), you may or may not want to file what is called a Notice of Intent. Upon receipt of this Notice, NFA will send you a copy of the Code, a blank claim form and information about NFA’s arbitration program.

Whether to file a Notice of Intent is up to you. While it doesn’t obligate you to subsequently file a claim, you probably should submit a Notice of Intent if you are approaching the two-year time limit for making a claim. The reason for this is the Notice of Intent temporarily tolls (or stops) the two-year time limit and provides a little extra time to file your claim. However, since the Notice of Intent is effective upon

receipt, NFA must receive it within the two-year limitation period in order to stop the time limit from running out.

If you decide to file a Notice of Intent, no special form is required. It can be by letter, phone call, in person at NFA’s offices or using the online form located on NFA’s Web site. But be certain you specifically identify it as a Notice of Intent so NFA knows it’s not simply a request for information. You must provide us with your name and address and, if you are representing someone else, you must tell us who you are representing and provide us with that person’s name and address. If a corporation will file the claim, we need the name of the corporation, not just the name of a corporate officer. You must also tell us who the claim is against. The Notice of Intent will not apply to any person you don’t identify.<sup>8</sup> Finally, since NFA must receive the Notice of Intent before the two-year period expires, you must tell us when you first knew that a dispute existed.

There’s an important deadline to be aware of. A Notice of Intent will stop the two-year limit on filing a claim only for 35 days (with no extension of time allowed). If you do not mail or hand-deliver a claim to NFA within 35 days after the date of NFA’s letter confirming that we have received your Notice of Intent, NFA will dismiss the Notice. If you are within the two-year limitation period, however, you may still file a claim or new Notice of Intent. The point is that simply filing a Notice of Intent (with no subsequent claim) will not postpone indefinitely the date the two-year limitation expires.

If you decide not to file a separate Notice of Intent (perhaps because the two-year limit is not approaching), you can obtain arbitration information by writing, phoning NFA or visiting NFA’s Web site. NFA will send you a copy of the Code, a blank claim form and information about NFA’s arbitration program.

If you request arbitration information, NFA does not require you to tell us who you might be considering a claim against, whether you are representing someone else, or any information other than the name and address to which NFA should mail the requested material.

## ■ The Claim Form

### Code Section 6(c)

When you are ready to make your claim, you will need to complete the online form or send NFA the claim form that you received. The claim form accomplishes two things. It describes your claim, and it provides NFA with the information we need to perform our administrative role in the arbitration proceeding. To answer questions that are commonly asked about the claim form, and to help you avoid mistakes in filling it out, the next few pages discuss some of the questions on the form in the order that they appear.

**Part I** of the claim form is self-explanatory. It asks for information that will help us contact you and your attorney (if you have one).

**Part II** asks for information that describes your claim and helps us determine whether NFA has jurisdiction over the dispute and the people you are filing against. It is extremely important that you complete Part II as accurately as possible.

Be specific about whom you are making a claim against. Separately identify each person you are filing against (called a “respondent”) in Question 1 of Part II. For example, if your claim is against both Mr. ABC and XYZ Corp., you should list each of them as respondents. If you simply listed Mr. ABC of XYZ Corp., NFA would assume

<sup>8</sup> NFA does not notify the party the claim is against that a Notice of Intent was filed. If, however, you expect someone might file a claim against you and you haven’t heard from NFA within two years, don’t assume you are necessarily home free. The other party may have filed a Notice of Intent, temporarily stopping the two-year time limit from running out. You can call NFA and ask if a Notice of Intent was filed against you.

the claim is against Mr. ABC but not XYZ Corp. Be certain also that you list each person you are filing against wherever it is asked for on the form. You cannot recover money from anyone you do not name in Question 1 of Part II.

**Note:** When NFA notifies you that we have served your claim, the notice will list the respondents. If any person that you want to file a claim against is not individually and specifically listed, you should notify NFA immediately.

Question 2 asks for the dates of the acts or transactions that are the subject of your dispute. These are usually the dates that the trades were made (if specific trades are in dispute) or the date the account was opened.

In answering Question 3, indicate the date you first suspected that something was wrong. (It is not enough to simply refer to the attachments—you must provide the specific month, day and year.) If this date is more than two years prior to NFA's receipt of your claim (and if there's no pending Notice of Intent), NFA will reject your claim for lack of jurisdiction. It is not to your advantage to lie about the date simply to get NFA to accept the claim initially. Nor is it to your advantage to file for arbitration if, during the course of the proceeding, the arbitrators are likely to determine that you should have known something was wrong more than two years before the date you said you first knew. If that were to occur, the arbitrators would dismiss your claim for lack of jurisdiction and you will have spent your time and money for nothing.

**Note:** Beyond the waste of time and money, if the arbitrators determine a party has filed a frivolous claim or a claim that was made in bad faith, that party is subject to sanctions (including having to reimburse the other party, arbitrators, and witnesses for their expenses and attorney's fees).

Question 4a asks for the claim amount. The claim must be stated in dollars and cents, as arbitrators will not order the respondents to do anything except pay money. If you are asking for punitive damages or treble damages, you must specify these damages and include them on this line. You must also provide a statutory basis for your treble damage request and provide a copy the statute you are relying on to make the request. Question 4b asks you to explain how you calculated the claim amount.

Questions 5a through 5c help you calculate the amount of filing and hearing fees that you owe NFA. In calculating the fees, include any treble damages and punitive damages in the amount of your claim. For example, if you are asking for \$15,000 in losses and for treble damages under a statute, you must base the filing and hearing fees on a \$45,000 claim. If you are asking for punitive damages, you must ask for a specific amount and include that amount in your claim.

You must send a check or a money order for the required filing and hearing fees with the Claim. If you file the claim online, you can also make arrangements to submit your payment electronically. If you do not include the correct amount of filing and hearing fees, NFA will return the claim and request that you correct the deficiency. Unless the deficiency is corrected within 20 days, NFA will reject the claim (and any fees you have paid to NFA may be forfeited).

If you are requesting attorney's fees, reimbursement of your hearing and filing fees and/or interest in connection with the matter, indicate that in your answers to Questions 6a, 6b and 6c. For attorney's fees requests based on statutory or contractual basis, you must provide a copy

of the contract or statute you are relying on to make this request. Furthermore, if there is a basis for attorney's fees, you must request them as part of the arbitration proceeding or they are waived.

The arbitrators, however, will not order the respondent to compensate you for attorney's fees just because you win the case. For the arbitrators to grant attorney's fees, the fees must be specifically authorized by a statute (which the arbitrators decide applies to your claim), or authorized by a contract, or the arbitrators must determine that the respondents acted in bad faith during the arbitration. (See Section 12 of the Code.)

Now we arrive at the crux of the claim—your description of what happened. In answering Question 7, describe your case as clearly and in as much detail as possible. You must also explain why you have named each respondent listed in Question 1 in Part II. While NFA will accept anything that provides a general idea of what the dispute is about, you are encouraged to provide more because it will help everyone. NFA is better able to anticipate problems that might arise, the respondents obtain a better understanding of what your complaint involves, and you benefit because a more detailed claim will likely evoke more detailed answers from the respondents, giving you a better idea of how they intend to respond to your claim. Besides, the more information you provide initially, the less you may be called on to add during the discovery stage.

As mentioned earlier, one important advantage of arbitration is that you do not have to know what the law is in order to successfully prove your claim. It is, however, your responsibility to prove that you have incurred a monetary loss and deserve to be compensated for all or some portion of the loss. If you believe that a particular rule was broken or law violated, say so and describe how you think it was broken or violated.

**Part III** of the claim form deals with administrative issues. The answers to these questions help NFA select an arbitration panel and help you focus on the witnesses and documents you need to present in your case.

If you are a customer, be sure to indicate in Question 1 of Part III whether you want a non-Member panel. By selecting a non-Member panel, the chairperson and at least one other arbitrator will be persons who have no connection with an NFA Member or Associate. (Or if it's a one-person panel, that person will have no connection with an NFA Member or Associate.) On a Member panel, all three arbitrators will be persons who are Member arbitrators.<sup>9</sup> Or if it's a one-person panel, that person will be a Member arbitrator. A non-Member panel may, however, have less experience with the matters involved in the dispute than a Member panel might have.

If you are a customer and you do not answer this question, NFA will appoint a Member panel.

Be certain you answer Question 2 and indicate where you would prefer NFA to hold the hearing.<sup>10</sup> You should indicate both a first and second choice, and both should be large cities in the continental U.S. Even if your case will be decided by a summary proceeding, you should still indicate two states NFA should consider for arbitrator selection. Absent extenuating circumstances, NFA usually honors the customer's location choice if we have enough qualified arbitrators in the area who are available to serve. How NFA selects a hearing site is discussed on page 15.

<sup>9</sup> A Member arbitrator may be someone who is an NFA Member or Associate or is employed by a Member, or who was a Member or Associate or was employed by a Member within the past three years. NFA also considers the following persons Member arbitrators: lawyers, accountants, consultants and similar persons who do a significant amount of work for NFA Members or Associates.

<sup>10</sup> The arbitrator will decide claims of more than \$25,000 but not more than \$50,000 based on the parties' written submissions unless a party requests an oral hearing within 30 days after the last pleading is due. Therefore, for claims between \$25,000.01 and \$50,000, you should list where you would prefer NFA to hold an oral hearing if one is necessary.

If your claim is for more than \$50,000, you also need to answer Question 4 of Part III concerning witness information. Although other witnesses can be added later, you should list the names, addresses and employers of all the witnesses you currently know about. NFA discloses these names to potential arbitrators to help them determine if a possible conflict of interest exists. Including all known witnesses on the claim form can help avoid unnecessary delays if an arbitrator has a conflict of interest with a witness not initially identified.

At the time the claim is filed, you do not have to know all of the documents you may use to support your claim. Again, though, list as many as possible in answer to Question 5, and attach copies if you have them. This listing can help you identify what additional documents you will need to obtain from the respondent during the discovery process. (See pages 12-15 for a discussion of discovery.)

**Part IV** must be signed by you. Your attorney may not sign it for you.

The person who has the legal right to file the case must sign the claim form. Usually, that's the person who lost money. If it is a corporation, a corporate officer who is authorized to sign contracts should sign the claim. If it's a partnership, a general partner should sign. Each owner of the joint account must sign a claim form involving a joint account. If the person who lost money is deceased or incompetent, the claim form should be signed by the person who has the legal right to collect debts for him or her—usually a court-appointed executor, administrator or guardian.<sup>11</sup> If the Claimant is an IRA, partnership, corporation or other entity, you must submit proof which demonstrates that you have the authority to pursue the claim on behalf of the IRA, partnership, corporation or other entity. If a claim form is not signed, or is not signed by the proper person, or if any modifications have been made to the language in Part IV, NFA will notify the person filing the case that we consider the claim deficient. If the deficiency is not corrected within 20 days, NFA will reject the claim (and any fees you have paid to NFA may be forfeited).

You must provide NFA with the original and a specific number of copies of your claim and the exhibits you include with it. If the claim is \$100,000 or less, you must send NFA the original set and four copies. If the claim amount is more than \$100,000, you must send the original set and eight copies.

If you are an NFA Member or Associate and you are filing the claim against a customer who signed a pre-dispute agreement, provide NFA with a copy of the agreement. You must also provide NFA with evidence that you have given the customer the notice required by CFTC Regulation 166.5. NFA will not proceed with the claim if you do not provide this information.

In general, separate claim forms must be filed for claims that involve different accounts owned by different people. For example, if a father owns one account and a son owns another account, they would have to file separate claims even if both accounts were with the same firm and father and son are making the same kinds of allegations against the firm.

<sup>11</sup> An executor, administrator or guardian must provide NFA with a copy of the court order making the appointment.

<sup>12</sup> If you do not file claims separately within that time, NFA will reject the entire case. When or after filing the separate claims, you can ask NFA to consolidate the cases (hear them together), but NFA makes the final decision about consolidating cases. (See discussion of consolidation on page 15.)

<sup>13</sup> A firm may choose to intervene for two reasons: 1) to help the guaranteed IB defend against the claim and 2) to argue that the guarantee agreement does not apply. By choosing to intervene, the FCM places the issue of guarantor liability before the panel.

Furthermore, you generally must file separate claim forms for claims that involve different accounts you had at different firms. For example, if Mr. ABC handled your account at LMN Company but then he went to work for XYZ Corp., you cannot file a single claim against Mr. ABC, LMN Company and XYZ Corp. Even though Mr. ABC handled both accounts, NFA still requires you to file separate claims for each account at each firm.

If separate claims are improperly filed as a single claim, NFA will treat the claim as deficient, and you would have 20 days in which to file new, separate claims.<sup>12</sup>

On the other hand, the filing of a single claim is sufficient if the same person has several accounts at one firm, or if there is only one account but it has several owners (i.e., a joint account).

If important information is missing from a claim form, or if it is not clear what you are saying, NFA will return the claim and request clarification. This could occur, for example, if you haven't indicated your preference for the hearing locations, or if you haven't included enough information for NFA to determine if it has jurisdiction. If NFA does not receive your reply to our request for clarification within 20 days of the request, NFA will send the claim to the respondent as it is. NFA will not reject your claim just because you didn't respond to a request for clarification; however, it's to your advantage to respond. We would not ask you to clarify something if we didn't believe it would make the arbitration go more smoothly.

## ■ The Answer

### Code Sections 6(e), 6(l) and 8(e)

Once NFA has determined that there are no deficiencies, NFA will send the claim to all of the respondents that you want to file against. In most cases, the respondents have no choice other than to arbitrate at NFA—their membership in NFA requires it. However, if your claim comes under the category of a discretionary claim (discussed on page 5), NFA will send the respondent a submission agreement. If the respondent does not sign and return the submission agreement within 20 days, NFA will not hear the case against that respondent.

If you are the respondent rather than the claimant in an arbitration case, your Answer to the claimant's claim should be served on NFA and on the other parties within 20 days following service of the arbitration claim by NFA if the claim amount does not exceed \$50,000.

If the claim amount exceeds \$50,000 but is not more than \$100,000, the Answer shall be served within 45 days following service of the arbitration claim by NFA and an arbitration service fee of \$275 must accompany each Answer.

If the claim amount exceeds \$100,000, the Answer shall be served within 45 days following service of the arbitration claim by NFA and an arbitration service fee of \$675 must accompany each Answer.

If the claim names a guaranteed introducing broker (IB) as a respondent but does not name the futures commission merchant (FCM) that guaranteed the IB, NFA will serve the claim on that FCM. The firm may intervene in the arbitration proceeding if it chooses to by filing an Answer and notice of intervention on NFA by the Answer due date discussed above.<sup>13</sup>



Any Answer that is not accompanied by the appropriate fee will be returned to the filing party by NFA. The filing party must then serve a completed Answer together with any unpaid fee within 20 days following service by NFA. NFA will reject any Answer for which the appropriate fee has not been paid. Each respondent who files an Answer but does not pay the service fee will have waived its right to an oral hearing and to otherwise participate in the proceeding. See Code Section 6(e).

NFA will accept an Answer after the due date, but arbitrators have the option of giving it less consideration than if it had been received on time. Therefore, as a respondent, it's to your advantage to file your Answer on time.<sup>14</sup>

The Answer should specifically deny any statements in the claim that you believe are untrue. Any allegation in the claim that is not denied in the Answer is admitted. If a statement isn't denied, the arbitrators will assume it is true. However, even if you admit that you did what the claim alleged you did, you can offer reasons as to why you still believe the claimant isn't entitled to any money. You should explain these reasons—called “affirmative defenses”—in your Answer.<sup>15</sup> Or you could include affirmative defenses in your Answer even if you deny the claimant's allegations, in case the arbitrators decide that the allegations are true.

A respondent's Answer may include a “motion to dismiss” (i.e., a request that the arbitrators dismiss the claimant's claim). However, NFA will not accept every motion to dismiss. For example, you may think that the claimant has failed to allege any wrongdoing on your part, but NFA will not accept a motion on the basis that the claimant has failed to state a claim.

NFA will accept motions to dismiss on other grounds if you include them in your Answer. For example, NFA will accept a motion to dismiss if you believe that the claimant did not file his claim within NFA's two-year time limit. Or NFA will accept a motion to dismiss that is based on the legal doctrine *res judicata*, where you argue that the claim is barred from NFA arbitration because it was already decided in another forum.

With rare exception, the arbitrators decide these requests, not NFA staff. If you believe that a particular issue requires a ruling from the panel early in the arbitration process, you may make a written request for a preliminary hearing. (See page 16.)

The Answer can include a request for attorney's fees, costs, and expenses. As in the case of claimants, though, respondents aren't awarded attorney's fees simply because they win their case. There must be a separate basis for attorney's fees, and if there is a basis for attorney's fees, you must request them as part of the arbitration proceeding or they are waived. (See Section 12 of the Code.)

Finally, if the claim is for more than \$25,000, the Answer should include a first and second choice of cities for holding the hearing.<sup>16</sup> NFA will only consider a party's site preference if it is indicated in a timely-filed pleading. (Even if you agree to extend a pleading due date, you must still notify NFA of your site preference by the deadline that NFA has established for filing the pleading.) It should also include the name, address and employer of any intended witnesses that you know about, plus copies of exhibits. Respondents who are customers should indicate in their Answer what kind of panel they want (i.e., Member or non-Member). (See discussion of panel type on page 7.)



## ■ Other Claims

### Code Sections 1(j), 1(x), 2(a)(2), 6(f) and 6(h)

As a respondent in an arbitration case, your Answer can include a claim against another party involving the same act or transaction that is the subject of the original claim. If the claim is included in an Answer that is filed on time, it will be mandatory. That means the party the claim is against will have to allow the arbitrators to decide the other claim when they decide the original claim. However, as a respondent, you do not have to file your claim in connection with the arbitration proceeding if you would rather have it heard somewhere else.

One type of claim that you can include in your Answer is a counterclaim: a claim filed by a respondent against the claimant requesting, for example, repayment of a deficit in the customer's account. A respondent may also file a claim against any other respondent named in the same case, which is called a cross-claim. Or a respondent may bring into the arbitration a person who is not a party to the original action but is or may be liable for all or part of the claimant's claim. This is called a third-party claim.<sup>17</sup>

Timeliness is essential. For a counterclaim or cross-claim against a customer to be mandatory, you must serve the Answer and claim to NFA no later than the Answer due date. (See page 8.) No time extensions are allowed. The claim should be included in the Answer itself—not in a separate document filed, say, two days later.

A claim that is not based on the same general set of facts as the original claim is treated as a discretionary claim. Unless the claimant consents, NFA will not hear the claim.<sup>18</sup>

Requests for attorney's fees, expenses, interest and costs can be—but don't have to be—included as part of the claim itself. The requests can be made as part of the claim or in a separate section of the Answer, which is often called a “prayer for relief.” However, if attorney's fees and costs are part of the counterclaim, cross-claim or third-party claim, you have to include them in calculating the filing and hearing fees.

<sup>14</sup> NFA will not accept a late notice of intervention unless the party filing the late notice explains in writing why the notice is late and obtains the arbitrators' permission to file the late notice.

<sup>15</sup> In general, there are two types of affirmative defenses. The first challenges jurisdiction—such as that the claim wasn't filed within the two-year limitation period. The second type argues that some act or omission makes it unfair for the claimant to be granted an award. For example, the trades in dispute were unauthorized but the claimant ratified each one by remaining silent and accepting the trades.

<sup>16</sup> An arbitrator will decide claims between \$25,000 and \$50,000 based on the parties' written submissions unless a party requests an oral hearing within 30 days after the last pleading is due. Therefore, you should list where you would prefer NFA to hold the oral hearing in case one is necessary.

<sup>17</sup> If, however, the third-party in a third-party claim is not a Member or Associate, such person must agree or have agreed to submit to arbitration.

<sup>18</sup> If the claim is not based on a customer relationship between the parties, NFA's consent is also required.

A counterclaim, cross-claim or third-party claim should contain most of the information that an original claim contains. In this regard, you can be guided by the discussion of claims on pages 6-8.

Finally, you must pay the required filing and hearing fees when you file a claim with your Answer. See Section 11 of the Code for the fee schedule.<sup>19</sup>

## ■ Answers and Replies to Other Claims

### Code Sections 6(g), 6(i), 6(j) and 6(l)

Once NFA has determined that there are no deficiencies, NFA will send the claim to all the respondents that you want to file against. If a counterclaim or a cross-claim is filed against you, you must serve your Reply on NFA and concurrently serve a copy on the counterclaiming or cross-claiming respondent within 10 days following service of the Answer, counterclaim or cross-claim by NFA if the aggregate claim amount does not exceed \$50,000. Where the aggregate claim amount exceeds \$50,000, the Reply must be served within 35 days following service of the Answer, counterclaim or cross-claim by NFA. The time period starts when NFA sends you a copy of the counterclaim or cross-claim, not when the respondent sends it to you. Otherwise, you could be replying to an incomplete claim or to one that NFA is going to reject.

If a third-party claim is filed against you and the aggregate claim amount does not exceed \$50,000, the Answer must be served within 20 days following service of the third-party claim by NFA. If the aggregate claim amount exceeds \$50,000, the Answer must be served within 45 days following service of the third-party claim by NFA. As is the case with a counterclaim or cross-claim, the time period starts when NFA sends you a copy of the third-party claim.

If you file your Answer or Reply late, NFA will still accept it but, as with a late Answer to a claim, the arbitrators may not give it as much consideration. Also, as with an Answer to a claim, any statement in a counterclaim, cross-claim or third-party claim that is not denied in the Answer or Reply is considered admitted and the arbitrators will assume it is true. You should also describe any affirmative defenses (see page 9) in your Answer or Reply.

## ■ Attestation

### Code Section 6(p)

Any claim, answer, counterclaim, cross-claim, reply to a counterclaim or cross-claim third-party claim, or answer to third-party claim must include the following attestation. "The undersigned certifies that, to the best of his/her knowledge, information and belief, formed after a reasonable inquiry, the statements set forth in this pleading are true and correct."

## ■ Amended Claims

### Code Section 6(k)

Once a party has filed a claim, certain types of changes can be made to it by filing an amended claim. For example, as a claimant, you could file an amended claim to include additional allegations or parties,

or to increase the amount of your original claim. You cannot, however, include anything in the amended claim that you could not have included in the original claim. You cannot, for instance, amend a claim for arbitration to add a new claimant with a separate account since someone with a separate account couldn't have been included in the original claim

An amendment that increases the claim amount must be accompanied by a check for the additional arbitration fees, if there are any.

NFA will determine what constitutes an amended claim. Just because you may call it an amended claim doesn't make it one, and we might decide that a filing is an amended claim even if you call it something else. A document that simply provides new information or uses different terminology to describe an allegation made in the first claim is not an amended claim. On the other hand, a document that adds allegations that require an entirely different type of evidence is an amended claim.

NFA will accept amended claims (provided it has jurisdiction over any new claims or respondents) at any time prior to the appointment of arbitrators. Once NFA appoints arbitrators, they will decide whether you can file your amended claim.

If you amend your claim to add new parties or totally new matters, you should do so within two years of the time you knew or should have known of the new party or the new matter. NFA will generally reject amended claims adding new parties or involving totally new matters if the two-year limitation period has already passed. For example, if you amend your claim to add issues involving transactions in a different account, you have filed a claim involving a totally new matter, and NFA will reject it if you did not file it within the two-year limit.

The fact that you may be able to file an amended claim should not be viewed as a substitute for making your original claim as complete as possible. The problem with amended claims is that they make the arbitration take longer. Respondents get the time allowed under the Code to file an Answer or a Reply to the amended claim, and a new discovery period (see pages 12-15) starts for documents and written information based on new claims or new respondents.

## ■ Service of Process

### Code Section 6(b)

Finally, as a party to the arbitration (or as a party's representative), you should keep the following points in mind as the case moves through the arbitration process. NEA's arbitration rules require that all pleadings, documents and correspondence that you serve on NFA are to be served on every other party (or representative) at the same time they are served on NFA. NFA can accept and serve filings (e.g., letters and motions) in the arbitration process by electronic mail or facsimile. Documents can only be served on a party by e-mail or fax if the party has agreed. Furthermore, a party may simultaneously use different service methods (e.g., e-mail to NFA and fax to the other party). However, the filing party must ensure that the method used means everyone will receive the document on the same day. For example, if you are going to send a letter by e-mail but the other party does not have e-mail capabilities, then you may e-mail the letter to NFA and fax it to the other party so that the other party received the letter on the same day as NFA. If the other party does not have either e-mail or fax, you must serve the filing on everyone, including NFA, by regular or overnight mail.

<sup>19</sup> In a case where the respondent is also filing a claim (e.g., a counterclaim, cross-claim, third-party claim) that requires the payment of filing and hearing fees, the respondent will be responsible for either the arbitration service fee or the hearing fee, whichever is higher.

At this point, the pleadings stage is completed. The claimant has filed a claim and the respondent has provided an Answer. Any other claims, Answers and Replies to the claims, and any amended claims have also been filed. In sum, you have told the respondents, in writing, why you think they owe you money, and they have told you why they think they don't.

## Can you resolve your case without a hearing?

The pleadings stage just described sets the arbitration process in motion. If you continue to pursue arbitration, it will lead to an eventual hearing and a final determination of the dispute by an arbitration panel. You'll recognize that it has also served another purpose. It has enabled you to more clearly focus on the strengths of your case and, equally important, obtain a better understanding of the position being taken by the party you are making a claim against. Simply said, the issues have now been defined, battle lines have been drawn, and chances are you know more than you did when you began about what you are likely to be up against during the hearing or summary proceeding.

This could be a good time to pause for a moment and ask yourself a couple of well-timed questions.

First, on the basis of what you now know (which you may not have known when you started, such as the strengths of the other party's arguments), would it make sense to withdraw your claim? This might be your decision if, for example, you now have serious doubts as to whether you'd be able to convince arbitrators that the other party should be ordered to pay compensation to you. Withdrawal could save you time and money if you conclude that your case isn't as strong as you first believed it to be.

Second, if you decide withdrawal is out of the question, you might wish to consider whether there might still be some other way to satisfactorily resolve this dispute. That is, now that you and the other party better understand each other's positions and the merits of each other's arguments, might it be possible to arrive at some mutually acceptable settlement?

### ■ Withdrawal

#### Code Section 10(j)

Although a claim can be withdrawn at any time, the withdrawal may require the written consent of the other party (or parties). Consent is required if the respondent has already filed an Answer to your claim. (If no Answer has been filed, a claim can be withdrawn without the consent of the other party or parties.)

One means of withdrawing a claim is to send NFA a written, signed request to withdraw. The request should state whether the withdrawal is with or without prejudice.<sup>20</sup> Upon receiving a withdrawal request, NFA will send the request to the other party for its signature and consent (if its consent is necessary).

Or, as an alternative, you can contact the other party directly and provide NFA with a withdrawal agreement signed by both parties. If the withdrawal agreement does not say whether the withdrawal is with or without prejudice, NFA will assume it is without prejudice.

If you have made a claim against more than one party, it is possible to withdraw your claim against some but not all of the parties. NFA will consider the claim withdrawn against only those parties indicated in the withdrawal agreement and only if those parties have consented to the withdrawal (i.e., those parties who have signed the withdrawal agreement). NFA will not consider a claim withdrawn against any party who has not signed (consented to) a withdrawal agreement (if its consent is required).

### ■ Settlement

#### Code Sections 10(g), 10(h), 10(i) and 11(b)

In general, one-half of NFA's arbitration cases closed each year are settled prior to a hearing. There are a number of possible advantages to reaching a settlement agreement, and these advantages are most fully realized by settling as early in the arbitration process as possible.

#### Advantages include:

- the savings of time and money (such as legal and travel expenses) if a hearing and preparing for a hearing can be avoided;
- the opportunity to arrive at an agreement that may be more mutually satisfactory than the decision the arbitrators may reach; and
- the possibility of preserving an existing business relationship since settling the claim early may keep the parties on good terms with each other.

Wherever the issues involved in a dispute are open to a potential pre-hearing settlement, NFA encourages the parties to explore the possibility of settlement. The parties can settle at any time—indeed, right up to the moment both parties walk into the hearing room. However, settlements reached early in the arbitration process are to everyone's advantage, including NFA's, since staff time can then be devoted to other cases and arbitrators won't be tied up with cases that won't reach the hearing stage. Furthermore, NFA will refund all or a portion of the hearing fee and service fee to the parties depending on how far in advance of the hearing or summary the case settles. See Code Section 11(b).

Notification to NFA that the parties have agreed to a settlement should be—but doesn't have to be—in writing and signed by both parties. If there is oral rather than written notification of a settlement, or if NFA is notified by only one of the parties, NFA will notify both parties in writing that it has been informed of a settlement. Unless either party informs NFA within 20 days of this notice that a settlement has not been reached, NFA will conclude that a settlement has occurred and will, at that point, terminate the arbitration proceeding and close the case.

The 20 day period gives a party time to tell NFA the information we have is wrong—the case is not settled. If you've agreed to the terms of the settlement but simply haven't signed a release or received a check, the case is settled and NFA will close it.

Further, Members and Associates are required to comply with settlement agreements. If a Member or Associate fails to comply with a

<sup>20</sup> If a request to withdraw is without prejudice, you can re-file your claim later at NFA or some other forum. Withdrawal with prejudice means that you cannot later re-file your claim in any forum.

settlement agreement, NFA may suspend the Member or Associate's membership until the settlement is satisfied.<sup>21</sup>

If a settlement agreement does not include all of the parties, NFA will not terminate the case against the remaining parties. However, if you wish, you can elect to withdraw your claim against the remaining parties.

When settling a claim against some but not all parties, the notice of settlement you provide to NFA should indicate the amount of the settlement or payment. If you don't disclose this information, the arbitration panel may require that you disclose it at the time of the hearing against the remaining parties. (Even if you have settled with all parties, NFA encourages you to indicate the amount of the settlement so this information is available, confidentially, for statistical purposes.)

If you decide settling your dispute is a possibility, you may want to contact NFA to request a settlement form. The use of the form, however, is optional.

The parties may also agree to ask the arbitrators (whose consent is also required) to issue a consent award containing the terms of the settlement agreement. A consent award carries the same validity as an arbitration award. In other words, NFA may suspend a Member or Associate for failing to comply with a consent award and you may go to court to enforce it. (See page 22.)

## ■ Mediation

### Code Sections 14

Because mediation has become an increasingly successful and popular means of attempting to settle disputes, NFA has a mediation program that it will suggest to parties involved in an arbitration proceeding.

In mediation, parties submit their dispute to a neutral party—the mediator—who works with them to reach a mutually agreeable settlement. A mediator listens objectively to the parties and may suggest ways of settling the dispute that they have not considered on their own. But the mediator does not resolve the dispute for the parties. The mediator's role is to get the parties talking, to help them understand what they really want, and to evaluate how likely they are to get it from an arbitration panel. In other words, the mediator helps the parties resolve their own dispute.

You cannot be forced to accept a settlement you don't like. If you are unable to reach a mutually agreeable settlement, you can proceed with arbitration. And, if arbitration follows an unsuccessful attempt to mediate, your discussions during mediation are confidential and can't be used to prejudice the arbitration hearing.

Shortly after the pleadings stage is completed, you will be contacted about mediation. The mediation option can be pursued, however, only if both you and the other party agree. Otherwise, your arbitration case will proceed to a hearing.

If settlement is achieved through mediation, you should provide NFA with the same notification that's required when a settlement is reached by any other method. (See page 11.)

The following section of this guide assumes that you have not chosen to withdraw your claim and that a settlement doesn't appear imminent. The next step in arbitration is the pre-hearing stage.

## What steps are involved in preparing your case?

Now that you have re-examined—and, in your own mind, reaffirmed—that arbitration is the best course for resolving your dispute, you should focus your attention on developing the strongest possible case to present to the arbitration panel.

To allow you time and to assist you in gathering all of the documents and other information needed in preparing your case, the arbitration timetable provides for a pre-hearing discovery stage. The “what” and the “when” of discovery will be discussed in detail in the following paragraphs.

At the same time that you and the other party are engaged in discovery, NFA will begin selecting an arbitration panel (and a hearing site if an oral hearing is required). In addition, the arbitrators may make certain pre-hearing decisions and, in extraordinary circumstances, conduct preliminary hearings during the pre-hearing stage. These topics are also discussed in this section.

## ■ Discovery

### Code Section 8(a)

Preparing for the hearing involves acquiring, studying and organizing all the records, documents and other information that you believe will be necessary and useful in presenting your case. Much of this is likely to be material you already have. Other material, however, may be available only from the party you have filed a claim against, or from non-parties who may have knowledge or records pertaining to the dispute. Simply stated, the purpose of discovery is to enable you to obtain this material from other persons. Or, more specifically, that's one purpose of discovery.

A second and related purpose is to enable you to learn as much as you are entitled to about how the other party plans to defend against your claim or present their claim against you.

Under NFA discovery rules, which are similar to but not quite as broad as those in civil proceedings, you have the right to request and obtain any information that is reasonable for preparing and presenting your case. Additionally, the parties that possess this information are required to provide it—voluntarily, cooperatively, and on a timely basis.

Of course, that works both ways. Respondents' rights to discovery are the same as claimants'. As a claimant, you are required to respond to reasonable and necessary information requests from the party you are making a claim against.

You need to understand five things to make the best use of your discovery rights:

1. What types of information you are entitled to obtain through discovery;
2. How to request the information you need;
3. The timetable for making and responding to requests;
4. What you should do if you feel that you are unable (or shouldn't be required) to provide information the other party has requested; and
5. What recourse is available to you if the other party fails to voluntarily or satisfactorily respond to your requests.

<sup>21</sup> The Code allows NFA to suspend a firm that guaranteed an IB during the relevant time if the firm fails to pay a settlement agreement after being notified that its guaranteed IB has failed to do so.

## ■ What can be requested

Discovery rules apply to “documents and written information,” but this is liberally construed. It can include such things as tape recordings (e.g., that may have been made of your conversations with the respondent) and written interrogatories (a list of questions that you want the respondent to answer). While the parties may mutually agree to depositions, the panel cannot order discovery depositions. However, an arbitrator is permitted to order an evidence deposition. See page 17 for more information regarding depositions.

To avoid common discovery disputes, NFA rules require the parties to automatically exchange routine documents. Using a list of documents approved by NFA’s Board of Directors, NFA will identify the standard documents that are generally relevant to the particular causes of action alleged in the case. For example, in an order execution dispute, NFA may order the claimant to produce all daily confirmation statements for his account for the dates of the disputed transactions and the respondent brokerage firm to produce all floor and office order tickets for the disputed transactions.

NFA will not, however, require you to produce or exchange any documents or information that are not in your possession or control.

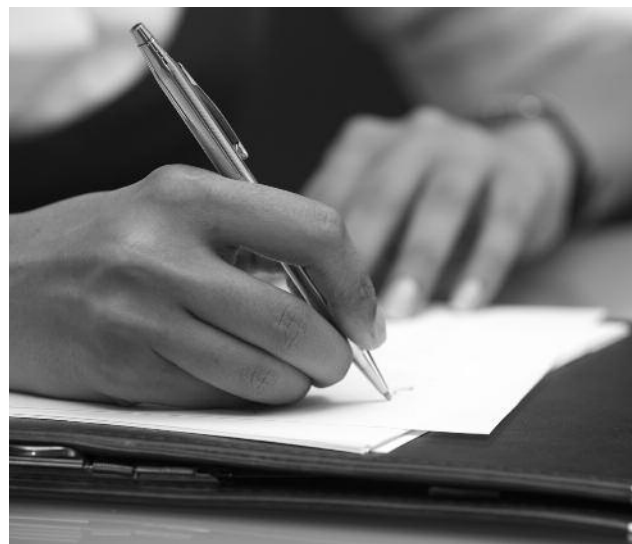
The parties may ask for other documents and information, but there are no hard and fast rules as to what you can ask for through discovery, except that the information is necessary and reasonable. You might, for example, require copies of monthly account statements or pertinent correspondence. In submitting interrogatories, the respondent could ask you to list all previous trading accounts, or you could ask for information about the broker’s employment history.

Discovery might also include what is called a Request for Admissions—a request that the other party admit, in writing, to some particular event or action. For example, “do you admit that I asked you to phone me before placing such-and-such an order on such-and-such a date?” Such an admission, if made, can eliminate having to prove or dwell on the event or action at the time of the hearing.

Neither party should request information that is repetitive or irrelevant to the issue in dispute or that would impose an unreasonable burden on the other party to produce. Nor should requests be in the nature of “fishing expeditions” or serve no purpose other than to delay the arbitration process.

## ■ How to obtain information

At the time NFA accepts the claim and serves it on the respondent, we will identify the standard documents for the parties to exchange. The parties should make all requests and responses for other documents and information to each other directly. There is no need to file your discovery requests with NFA or to provide NFA with copies of material obtained or provided during discovery. (As we’ll discuss on page 18, the parties will need to provide NFA with certain information later in the process.)



## ■ The discovery timetable

There is a specific timetable spelled out in the Code of Arbitration for making and responding to requests for information. This timetable and its applicable deadlines should be taken very seriously. Requests and responses that are not timely can result in the arbitration panel taking sanctions against the late party. Even if the arbitrators don’t impose sanctions, however, they have wide leeway to take into account that one party was timely and cooperative and the other was not. It’s obviously in your best interest to be the party that is timely and cooperative.

Briefly, discovery can begin at any time after the claim is filed. However, the various deadlines for requests and responses are pegged, as this discussion explains, to due dates.

Under the automatic exchange procedure, NFA will notify the parties at the time we accept the claim and serve it on the respondent that they must automatically exchange the standard documents with each other no later than 15 days after the last pleading is due.

**EXAMPLE:** Assume the claimant filed a claim and that the respondent’s Answer was due May 15. The parties have until May 30 (15 days after the due date for the Answer) to exchange the standard documents identified by NFA.

Where the aggregate claim amount does not exceed \$50,000, you may ask for other documents and written information no later than 20 days after the last pleading is due. Where the aggregate claim amount exceeds \$50,000, you may ask for other documents and written information no later than 30 days after the last pleading is due.<sup>22</sup>

**EXAMPLE:** Assume you are a claimant, that you’ve filed a claim for \$30,000 and that the respondent’s Answer was due July 1. Even if the Answer was received by you on, say, June 15, you still have until July 31 (30 days after the due date for the Answer) to make a discovery request.

<sup>22</sup> You may also ask for documents from the list approved by NFA’s Board of Directors that NFA staff has not identified for automatic exchange if you believe those documents are relevant to the claim or defense.

If a counterclaim, cross-claim or third-party claim is filed, the discovery due dates will be extended. NFA will inform you of the new deadlines.

**EXAMPLE:** Assume that rather than being the claimant, you are the respondent. You've received the claimant's claim and you filed an Answer and a counterclaim. The final pleading in this case will be the claimant's Reply to your counterclaim. Your deadline for making a discovery request is 30 days after the due date for receiving the Reply. If the due date for the Reply was October 1, you have until October 31 to make a discovery request even if the Reply was not received by the October 1 due date.

Similar rules apply to responses. If you receive a discovery request, you must respond within 20 days if the aggregate claim amount does not exceed \$50,000 and within 30 days if the aggregate claim amount exceeds \$50,000.<sup>23</sup>

**EXAMPLE:** The other party's deadline for making a request was January 15, but they actually made the request prior to that date. You nevertheless have until February 14 to respond if the aggregate claim amount exceeds \$50,000.

## ■ Objections to a request

Under the rules requiring cooperation between the parties, the best response to a request for information is to provide the information requested, and to do so by the deadline. There may be situations, however, in which the information is unavailable to you or, even if available, you feel you shouldn't be required to provide it. In this case, you have the right to file an objection.

The objection should be made directly to the other party, not to NFA, and it should be in writing and be specific as to the reasons for your objection.

For example, you may believe that furnishing the requested information would violate attorney-client confidentiality, or that the information being requested is irrelevant to the dispute.

**Note:** The deadline for making an objection is the same as for a response. That is, the objection must be served on the other party no later than the date the response was due.

## ■ Your recourse if the other party fails to respond

If the deadline for providing the documents and information passes and you do not receive a response, or you believe the response is incomplete, or if the response was an objection, you can file a written request with NFA asking the arbitrators to compel the other party to provide you with the documents and information. Obviously, a request to compel should not be filed until after the deadline for a response has passed.

<sup>23</sup> Although a party is not required to respond to a late discovery request, he should do so if the documents are relevant and the lateness is not prejudicial. Failure to respond to a late request is not grounds for sanctions but may be the subject of a request (by the other party to the arbitrators) to compel a response. The lateness of the request will, of course, be one of the factors the panel considers.

<sup>24</sup> For cases decided through oral hearing, NFA may schedule a pre-hearing conference with the panel and the parties within 30 days of the motion to compel due date. Issues to be covered at the conference include outstanding discovery disputes and scheduling the hearing.

Your written request should identify the documents and information you requested and clearly state why you consider them relevant and necessary. If the other party has objected to your request, you should include a copy of the objection and explain why you feel the objection is not valid.

You must also include a written certification with any request to compel. The certification must state that you made a good faith effort to resolve the discovery dispute through either a telephone conference or an in-person meeting with the other party or its representative. You should send a copy of the request to compel and the certification to the other party at the same time you send them to NFA.

As with most other aspects of discovery, there is an applicable deadline. You must serve a request to compel on NFA no later than 10 days after the discovery response was due. If you are going to file a request to compel, you must file it by the deadline or you may be waiving your right to do so. NFA will not accept a late request unless you explain in writing why it was late.



**EXAMPLE:** If a response to your request for discovery was due by August 1 and you didn't receive the requested information by that date, your request to compel must be served on NFA no later than August 11.

After receiving a request to compel, the opposing party may file a response with NFA no later than 10 days after the request to compel was *served*.

NFA will send the request to compel, the certification and any response to the request to the arbitrators for consideration. However, NFA will return any request to compel, certification or response that is incomplete. Therefore, it is in your best interest to file a complete submission.

Furthermore, with the consent of the other panel members, one or more of the arbitrators may schedule a discovery conference with the parties, in person or by telephone, to decide any outstanding discovery issues. Discovery conferences, however, are not necessary in every case. The panel will only hold a discovery conference if there is a good reason for doing so. For example, a discovery conference may be appropriate where the parties are not cooperating with each other in exchanging documents and information and both sides have filed voluminous requests to compel.<sup>24</sup>

If the panel orders the production of documents, it will specify the documents and information to be produced, and set a deadline for complying with the order.

## ■ Sanctions

### Code Section 8(d)

Arbitration panels take a dim view of parties who fail to meet their obligation to cooperate voluntarily during discovery. A party who does not cooperate with reasonable discovery requests, comply with a discovery order, exchange documents in a timely manner or cooperate with the other parties in preparing a timely hearing plan (see discussion on page 19) may be subject to sanctions by the panel—up to and including the rendering of an award by default against the non-cooperating party.

While it is entirely up to the arbitrators whether or not to sanction a party for failing to cooperate, if you feel the other party's lack of cooperation during discovery deprives you of information that's essential to present your case effectively, you can ask the panel for sanctions. If the failure to cooperate is highly prejudicial (makes it very hard for you to present your case) or flagrant and in bad faith, you can request a preliminary hearing solely on the issue of sanctions. The panel, however, probably won't hold a preliminary hearing unless the sanction it would impose would terminate the entire proceeding or a major portion of the proceeding. Otherwise, if the panel determines sanctions are appropriate, arbitrators normally impose them during or following the arbitration hearing. (For more about preliminary hearings, see page 16.)

Beyond sanctions, any party to an arbitration who is an NFA Member or Associate and who does not cooperate throughout the proceeding or comply with an order of the panel is subject to disciplinary action by NFA's Business Conduct Committee. These actions can be as severe as loss of membership, which is tantamount to expulsion from the futures industry.

## ■ Requests for information from non-parties

### Code Section 9(d)

The discussion to this point has focused on discovery by and from persons who are parties to the dispute, but that's not always the case. In preparing your case, you may find that you have a need for documents or other written information that can be obtained only from non-parties. If so, your first step should be to contact those persons directly, explain your need, and request that they provide the desired information. Should that fail, your next step will depend on whether the unresponsive party is an NFA Member or Associate.

If the non-party is an NFA Member or Associate, you can contact the person and remind him of his obligations as a Member or Associate to cooperate (NFA Compliance Rule 2-5). If he remains uncooperative, notify NFA in writing of the name of the party, the specific information you have requested, why it's necessary, and the efforts you have made to obtain the information voluntarily. Then ask the panel to order the Member or Associate to produce the requested documents or attend the hearing.

If the non-party is not an NFA Member or Associate or otherwise subject to NFA jurisdiction, you must ask the panel to issue a subpoena requiring the person to produce documents or testify at the hearing. Attorneys are not permitted to issue subpoenas on their own. Once you file your subpoena request with NFA, we will notify the non-party of your request. The non-party has the opportunity to tell the panel, in writing, why they should not issue the subpoena for the documents or testimony (e.g., because the information is irrelevant). Your request and any non-

party responses will be sent to the panel for review. The panel will then determine whether to grant the subpoena request. Granted requests can then be served by you on the non-party. The panel's subpoena can be enforced by the courts, if necessary.

**Note:** Subpoenas for testimony are normally enforceable only within a limited geographical area. If that person's testimony is necessary to your case, you can ask that the hearing be scheduled for a location where the subpoena is enforceable.

## ■ Consolidation

### Code Section 6(m)

A party may ask NFA to consolidate two or more claims involving common questions of fact or arising from the same acts or transactions. NFA may order consolidation in the interests of providing a fair, equitable and expeditious proceeding. In addition to deciding requests for consolidation, NFA also decides whether to condition consolidation on the consent of the other party.

## ■ Selecting a Hearing Site

### Code Section 9(b)

Before selecting arbitrators, NFA must select the hearing site. NFA will only consider a site preference if it is indicated in a timely-filed pleading. This means that even if the parties agree to extend pleading due dates, you must still inform NFA of your site preference by the deadline originally established by NFA. Although this determination is entirely within NFA's discretion, NFA usually schedules the hearing in a city of the customer's choice, or one that's mutually agreeable to the parties. There can, however, be extenuating circumstances. For example, the city preferred by the customer may be one that, for health reasons, a Member is unable to travel to. Or a witness essential to the Member's case may not be subject to subpoena in that city. NFA may also honor a site selection clause in the customer agreement.

## ■ Selecting Arbitrators

### Code Section 4

Next comes selecting the arbitration panel. The size of the panel (one person or three) will depend on the size of your claim, plus any other claim. If the total claim amount is \$100,000 or less, there will be only one arbitrator.<sup>25</sup> If it's more than \$100,000, there will be three.

If you are the customer, the composition of the panel (i.e., Member or non-Member) is entirely up to you. (You'll recall that NFA asked you to make this decision when you filed your claim or Answer.) NFA will appoint a Member panel unless the customer asks for a non-Member panel.

NFA will screen potential arbitrators for possible conflicts of interest. NFA will tell them the names of all parties to the case, the party's representatives and any witnesses that have been disclosed. NFA will not

<sup>25</sup> One arbitrator will decide claims between \$50,000.01 and \$100,000 unless all parties ask NFA to appoint three arbitrators. This request must be made within 30 days after the last pleading is due. The sole arbitrator assigned may also ask NFA to appoint two additional arbitrators.

appoint a potential arbitrator who feels he has a conflict of interest. Moreover, the arbitrator is required to disclose any facts and circumstances that might give even an appearance of partiality. If the appearance of possible partiality is strong, NFA will not ask that person to serve. Otherwise, NFA will appoint the arbitrator and inform the parties of the disclosure.

NFA will notify you when we have selected the panel and will tell you the arbitrators' names, addresses, current business affiliations, and recent employment history. If after reviewing the information you know of any circumstances that might possibly create an appearance of bias or partiality, you are required to disclose the relationship to NFA. For example, if you have an account at the firm where one of the arbitrators is employed, disclose the information to NFA.

NFA's rules also require each party to disclose to NFA any circumstances likely to affect an arbitrator's impartiality. Any party who fails to disclose that information will waive the right to object to the arbitrator based on those circumstances.

There are no preemptory challenges (challenges you don't have to give a reason for) in NFA arbitration proceedings, but each party has the right to challenge any arbitrator for cause. Make your objection to NFA in writing and provide details of the basis for the objection. The fact that you may have had a professional acquaintanceship with the person, and nothing more, is not grounds for a challenge, but a current or recent adversarial relationship may be. NFA decides all objections to arbitrators.

After NFA appoints the arbitrators, you should not contact them about the case. [See Section 4(f) of the Code.] Instead, you should communicate with the NFA staff person assigned to your case.

## ■ Preliminary Hearings

### Code Section 9(a)

Under normal circumstances—which includes the vast majority of cases—the panel does not address or resolve any of the issues in the dispute until the time of the hearing. There are, however, occasional exceptions when the panel grants a request for a preliminary hearing. The party asking for a preliminary hearing will need to present a strong argument as to why the arbitrators need to make some particular determination prior to the regular hearing. Furthermore, NFA will require you to deposit a hearing fee before we will process your request for a preliminary hearing.

One possible basis for a preliminary hearing could be to address whether a claim is a proper subject for NFA arbitration under Section 6(n) of the Code. For example, a respondent may assert that witnesses or documents essential to a fair and final decision are unavailable or that some parties to the dispute are not subject to NFA's jurisdiction. The party making this argument and requesting a preliminary hearing will need to show that:

- the unavailable person is actually necessary;
- NFA does not have jurisdiction to order the unavailable person's appearance; and
- all reasonable efforts—including a change in hearing site and a subpoena, if applicable—have been made to secure the person's appearance at the hearing.

<sup>26</sup> For cases decided through a summary proceeding, the panel will decide all motions as part of the summary review, except for those that relate to discovery and postponement requests.

A preliminary hearing is not appropriate in every case where NFA jurisdiction is challenged. For example, in many cases involving the two-year limitation period, when the claimant knew or should have known is a factual question that can only be decided by presenting the very same evidence that would be presented at a regular hearing. If so, holding a preliminary hearing could waste time rather than save it.

In extremely rare instances, a preliminary hearing might be authorized to consider whether sanctions should be imposed against a party that is uncooperative in the discovery process. The panel is likely to grant a preliminary hearing on sanctions only if the uncooperative conduct is so serious that the panel might terminate the entire proceeding or declare that some major issue in the dispute has been established or rebutted.

A preliminary hearing can be conducted orally, by phone, or by written submissions. A party can ask for a particular method of hearing, but the panel makes the final decision.

## ■ Other Pre-hearing Requests

The arbitrators have the authority to consider and act on other pre-hearing requests to, for example, dismiss a case or issue a default judgment.<sup>26</sup> These requests are generally only appropriate, however, if made in connection with a request for sanctions for non-cooperation. In any other circumstance, a dismissal or default judgment prior to a hearing would deprive the other party of their right to have their case fully and fairly heard. These and other common pre-hearing requests are discussed below.

## ■ Pre-hearing Motion Fee

### Code Section 8(e)

Any party who files a pre-hearing motion after a certain date is required to pay a fee. For cases involving one arbitrator, a party who files a motion more than 80 days after the last pleading is due must include a \$125 motion fee with the motion. For cases involving three arbitrators, a party who files a motion more than 100 days after the last pleading is due must include a \$425 motion fee with the motion. The pre-hearing motion fee is separate from the fee required to file a preliminary hearing request or a postponement request.

## ■ Motions to Dismiss

### Code Section 8(e)

As explained on pages 8 and 9, NFA's rules prohibit motions to dismiss for failing to state a claim. This restriction also applies to any motion that staff determines is really a motion to dismiss for failing to state a claim, even if the party filing it calls it something different.

The parties may file motions to dismiss on other grounds, but the parties must include the motion in a timely Answer or Reply. For example, a respondent may ask the arbitrators to consider whether to dismiss a claim because it was not filed within NFA's two-year time limit or because it is barred by the doctrine of *res judicata*.

## ■ Motions for Summary Judgment

### Code Section 8(e)

The parties may raise motions for summary judgment at any time. In a motion for summary judgment, the opposing parties agree on the facts in the dispute but do not agree how the law applies to those facts. The arbitrators generally decide this type of motion through a preliminary hearing or at the regular hearing on the merits.



## ■ Failure to Prosecute or Defend

### Code Section 9(c)

Another request for the panel to consider, on its own or at the written request of any party, is whether a party has failed to prosecute or defend the proceeding and therefore has waived its right to an oral hearing. This could happen, for example, if a respondent fails to file an Answer or a claimant fails to continue to pursue an action but does not withdraw his claim. Rather than having the “participating” party go to great expense to appear and bring witnesses to the hearing and likely waste the arbitrators’ time on a one-sided and perhaps unnecessary hearing, the panel may find that the non-participating party has waived its right to an oral hearing. The participating party can still request an oral hearing if the party has a right to one. Otherwise, the panel will decide the case based on the parties’ written submissions.

## ■ Amended Claims

### Code Section 6(k)

As previously discussed on page 10, once NFA appoints an arbitration panel, a party can only file a new or different claim (including counterclaims, cross-claims and third-party claims) with the panel’s consent. In considering a request to amend a claim, the panel will look to see if there are sound and compelling reasons for permitting it, along with bona fide reasons from the requesting party for not having included the information in the original claim. The panel may refuse to allow the amendment if the arbitrators feel it would unreasonably delay the hearing or impair the ability of the respondent to effectively prepare a defense.

If the panel accepts the amended claim, the respondents will have 20 or 45 days to file an Answer or 35 days to file a Reply to the amended claim, and a new discovery period (see pages 12-15) starts for documents and written information based on new claims or new respondents.

## ■ Telephonic Testimony

If you or your witnesses would like to testify by telephone—rather than in person—at the time of the hearing, you’ll need to request permission from the panel in advance of the hearing. However, if the witness is someone whose credibility is important to the case, the panel will normally deny the request. Otherwise, the panel will consider such things as the nature of the testimony, the hardship to you if the request isn’t granted, and the hardship to the other parties if the request is granted.

Again, if you have a request to allow telephonic testimony, submit it early—early enough so there’s still time to make other arrangements for testimony if the request is denied.

## ■ Depositions

Parties may voluntarily agree to both discovery and evidence pre-hearing depositions. Arbitrators, however, only have the power to order evidence depositions. An evidence deposition is a substitute for live testimony at the hearing, and an arbitrator will only order an evidence deposition for good cause shown. For example, you might ask an arbitrator to order an evidence deposition if one of your witnesses is too ill to travel or cannot otherwise attend the hearing (e.g., a person who resides in a foreign country).



## ■ Continuances (Postponements)

### Code Sections 9(b), 9(e) and 11(c)

NFA will notify you at least 45 days before the first scheduled hearing of the date, time and place of the hearing (or summary proceeding). And, in the case of oral hearings, NFA will contact the parties by phone or mail before a date is scheduled in an effort to avoid scheduling conflicts and, hopefully, requests for continuances.<sup>27</sup> If you are unavailable on any of the proposed dates, you must tell NFA why you are not available and provide supporting documentation. If you do not tell NFA why you are unavailable or provide supporting documentation, we will consider the dates open and schedule the hearing.

Once the hearing date has been set, either party has the right to ask the panel to grant a continuance, but the panel is under no obligation to approve the request—even if it’s the first continuance requested. If you find it necessary to ask for a continuance, put the request in writing and be specific about the reasons for the request and the length of the continuance you’re seeking. The panel’s decision will be based on the reasonableness of the request.

Just as continuances aren’t automatic, neither are they free. Your request must be accompanied by a \$250 postponement fee. Furthermore, the cost of each additional postponement request by a party goes up—\$500 for the second request and \$1,000 for each request thereafter. The graduated fee schedule is designed to discourage unnecessary requests for continuances and contribute to the orderly resolution of disputes. If the panel does not grant the request, the fee is refunded to the party who paid it.

<sup>27</sup> The scheduling may be done as part of the pre-hearing conference with the parties and the panel if one is scheduled.

You must pay the postponement fee before NFA will pass your request on to the arbitrators. However, you can ask the arbitrators to waive the fee. If the panel decides there is good reason to waive the fee, you'll get a refund. It could be waived if, for example, the events making the continuance necessary couldn't have been reasonably foreseen or avoided and if the request was made promptly after these events became known. Moreover, the panel could decide to assess the fee against the other party instead of you if you can show the continuance was necessary because of the other party's uncooperativeness. The panel can also assess expenses incurred by the parties and their witnesses because of the continuance, including reasonable attorney's fees.

**Bottom Line:** Avoid requests for continuances wherever possible and, if not avoidable, make the request as early as possible.

If the panel agrees to a continuance, it will decide on the new hearing date or the period during which the hearing should be rescheduled. The panel doesn't have to provide a new 45-day notice, and the rescheduled hearing could be as soon as the next day.

## What steps are involved in finalizing your case?

Once the date of the hearing arrives or the summary proceeding begins, you and the other party will naturally want it to proceed smoothly, effectively and without any unnecessary delays. This can best be accomplished if there are no "surprises" at the hearing (or during the summary). An arbitration hearing is not a stage for a TV courtroom drama. The arbitrators will not applaud dramatic new allegations, unexpected witnesses and previously undisclosed evidence. Indeed, they may not allow them.

To prevent such occurrences—and to avoid arguing issues that aren't in dispute—NFA arbitration procedure requires both parties to exchange documents and, for oral hearings, to jointly prepare and concur in a written hearing plan before the hearing. It's important, as a party, that you understand these requirements.

Specifically what's required and when it's required depends, in part, on whether there is to be a summary proceeding or an oral hearing.

A summary proceeding is where the parties present their cases to the panel entirely in writing. The panel will make its determination on the basis of the written submissions. In other words, there is no hearing where the parties appear in person. Summary proceedings are generally held when the total amount of the claims is \$50,000 or less.<sup>28</sup>

Provided credibility is not an issue, a summary proceeding (in lieu of an oral hearing) can also be scheduled if the parties agree to it and if the panel agrees. Whether the panel for the summary proceeding will consist of one arbitrator or three will depend on whether the total amount of the claims is more than \$100,000.

<sup>28</sup> See Footnote 10, page 7. In some situations, the panel may order an oral hearing even if the parties do not have a right to one. This could be the case if the panel feels that one or both parties' credibility is an issue and the panel can't determine credibility from written submissions. Even then, however, the panel will likely require an oral hearing only if it believes the total amount of the claims justify the cost of travel by the parties.

<sup>29</sup> One arbitrator will decide claims between \$50,000.01 and \$100,000 unless all parties ask NFA to appoint three arbitrators. This request must be made within 30 days after the last pleading is due. The sole arbitrator assigned may also ask NFA to appoint two additional arbitrators.

All other arbitration cases are resolved through oral hearings. That is, all of the parties (with their representatives, if any) personally appear at the hearing and present their cases and defenses to the panel (consisting of one arbitrator if the total amount is \$100,000 or less, or three if it's more than \$100,000).<sup>29</sup>

Requirements for pre-hearing exchange of documents and preparing a hearing plan (for oral hearings) are summarized on the following pages.

## Documents to Be Introduced into Evidence Code Section 8(b)

The Code of Arbitration requires each party to provide the other with copies of documents that will be introduced into evidence at the hearing at least 35 days before the scheduled hearing date. You must also provide copies to NFA at that time (two copies of each document if there's to be one arbitrator and four copies if there are to be three arbitrators). You should mark each exhibit with an exhibit number (e.g., Exhibit 1, Exhibit 2), include your exhibits in a binder and index them numerically. You should also coordinate with the other parties to submit joint exhibits together in one binder, and you should include documents that the parties cannot agree to in a separate binder. The arbitrators will receive copies of your exhibits in advance of the hearing.

Arbitrators arrive at a fair and equitable decision based on the information provided by the parties. Some cases involve issues relevant to the dispute about which the arbitrators may not be knowledgeable. Therefore, it is the parties' responsibility to see that the arbitrators are educated on these issues. This information must also be served on the other party and NFA at least 10 days before the hearing.

If there's to be a summary proceeding (rather than an oral hearing), submit all documents that are part of your case, including reasonably foreseeable rebuttal evidence. This information must be served on NFA and the other party at least 15 days before the summary starts.

If there's additional rebuttal evidence, such as evidence you didn't know would be needed until you saw the other party's documents, you can submit this information to NFA and the other party as late as five days prior to the beginning of the summary proceeding. The arbitrator will receive copies of the parties' evidence in advance of the summary proceeding.

If your hearing will be oral (rather than a summary), the only documents you need to provide to the other party (and to NFA) are those that pertain to your direct case. Rebuttal evidence can be disclosed for the first time at the hearing.

**Note:** Direct evidence is evidence that helps prove your case or show that your version of the facts is true. Rebuttal evidence, usually presented after the other party has presented his version of the facts, helps prove that the other party's version of the facts is not true.

## ■ Hearing Plan

### Code Sections 8(c) and 8(d)

If there's to be an oral hearing, both you and the other party are responsible for developing what's called a "hearing plan." No hearing plan is needed for a summary proceeding.

The hearing plan, if required, should include the following information:

- the names of the parties to the dispute;
- a one or two-line statement of the claims and defenses involved;
- a brief summary of the case from each party's point of view;
- a statement of facts the parties have agreed to, which do not need to be argued or proven at the hearing;
- a statement of the disputed issues that will be argued at the hearing;
- a list of the witnesses each party intends to call plus a brief description of their testimony; and
- a list of the exhibits each party intends to introduce.

A sample hearing plan outline is included on page 23.

You should match the numbering of exhibits in the hearing plan with the way the exhibits are indexed and included in the binder (see discussion on page 18). You should also coordinate with the other parties and list joint exhibits on the hearing plan under the section called "Joint Exhibits." For documents the parties cannot agree to, you should list them on the hearing plan separately for each party (e.g., Claimant's Exhibits, Respondent's Exhibits).

Parties are responsible for preparing the hearing plan. If one of the parties is unrepresented or is uncooperative in preparing the plan, the NFA staff person assigned to the case will act as a facilitator.

The parties must send or deliver a typed copy of the agreed-to hearing plan to NFA at least 30 days before the scheduled hearing date.<sup>30</sup> It doesn't have to be signed by the parties or their representatives at that time, but it must be final and have been agreed to. Signing can occur anytime prior to the hearing.

NFA will keep the arbitrators informed of the parties' progress in preparing the hearing plan. If the parties are not meeting their hearing plan requirements, the arbitrators may conduct a conference with the parties to complete or modify the plan.

Failure to cooperate in preparing a hearing plan (or failure to exchange documents in a timely manner) can result in sanctions by the panel (including taking certain facts as established, prohibiting the presentation of certain evidence, or striking designated claims or defenses). Therefore, as in all other aspects of arbitration, voluntary cooperation is in everyone's best interest.

With a final date set for the hearing, with all required documents exchanged, and with a written hearing plan in place (for oral hearings), now comes the hearing itself—the opportunity you've been working toward for the arbitrators to hear your case and render a decision.

## What happens at the hearing?

### ■ Procedure for Summary Proceedings

#### Code Section 9(i)

As previously described, summary proceedings involve a decision by the arbitration panel based solely on the parties' written submissions and are generally conducted in lieu of an oral hearing when the sum of the claims is less than \$50,000. The panel usually consists of one arbitrator.

If you are a party to a summary proceeding and have provided, on a timely basis, the documents you want the arbitrator to consider, nothing further is required of you at this point. The arbitrator has 10 days to review the information the parties have submitted and another 30 days to reach a decision.

This 10-day review period could be extended, however, if the arbitrator determines more information is needed from either party. If so, you will be notified.

Although no further documents are generally accepted from either party once the 10-day review period begins, exceptions are possible. If you have additional documents you want the arbitrator to consider, you should send the documents to NFA and ask the arbitrator, in writing, to include them in the record. You should explain why you feel they're important to your case and why you did not submit them earlier. The other party will have the opportunity to respond to your request. The arbitrator will then decide whether to consider them.

### ■ Procedure for Oral Hearings

#### Code Section 9(d)

In oral hearings, the arbitrators, particularly the chairperson of the panel, have broad discretion to conduct the hearing in whatever manner they determine will give the parties the opportunity to fully and fairly present their cases. You should keep in mind throughout the hearing that the arbitrators—not the parties and not their representatives—are in charge of the hearing. If you are represented, your representative's conduct and cooperation is your responsibility. Your case could ultimately be jeopardized if that person's conduct is deemed "contumacious."<sup>31</sup>

Notwithstanding the arbitrators' broad discretion, hearings usually follow a standard procedure. The following will give you a general idea of what to expect.

At the outset, the chairperson of the panel (or the arbitrator if it's a one-person panel) will introduce himself or herself and the other arbitrators (if it's a three-person panel), state the purpose of the hearing, and explain the planned sequence of the hearing. Following that, the chairperson will swear in all parties and witnesses, and the entire hearing

<sup>30</sup> If some but not all of the parties are represented, NFA will ask a party's representative to prepare his client's portion of the hearing plan. The NFA staff person will then combine it with the unrepresented party's portion of the plan. In this case, a represented party may need to submit his part of the plan to NFA sooner.

<sup>31</sup> Contumacious is defined as "contemptuous of authority or disobedient."

will be conducted under oath. The common hearing procedure is as follows:

1. brief opening statement by the claimant or his representative;<sup>32</sup>
2. brief opening statement by the respondent or his representative;<sup>33</sup>
3. claimant's case, including witnesses, exhibits, and cross-examination by respondent;
4. respondent's defense, including witnesses, exhibits, and cross-examination by claimant;
5. repetition of steps 3 and 4 if necessary to present new evidence (not simply to rehear testimony previously heard), counterclaims, cross-claims, and third-party claims until the parties have presented all relevant evidence;
6. closing statement by respondent;
7. closing statement by claimant; and
8. closing of the hearing by the chairperson.

The chairperson will ask the parties to affirm that they have no further proof to offer or additional witnesses to be heard. However, the panel, not the parties, will decide if the parties have had an adequate opportunity to be heard and can close the hearing even if you don't think you had enough time to present your case.

It's likely that issues will arise and questions will occur to you during the course of the hearing. And, although a hearing is much less formal than you'd experience in a courtroom environment, there are certain procedures that are normally followed. Here is further background that can help you better anticipate and plan for the hearing.

## ■ NFA's Role

Although the panel is fully in charge of the hearing, an experienced NFA staff person is generally present throughout, primarily to provide procedural advice and guidance to the panel as requested. You may also want to make inquiries of the staff person, but those inquiries should deal solely with procedural matters. The staff person cannot offer any opinions—to the parties or to the arbitrators—concerning the merits of either party's arguments (i.e., who should win the case), nor can the staff person be asked to testify as a witness.

## ■ Witnesses

### Code Section 8(d)(4)

Members of the panel may wish to question the witnesses. These questions will usually, but not always, be deferred until the parties have had an opportunity to question the witness.

<sup>32</sup> Since both parties have already summarized their cases in the hearing plan, the statement should be very brief or, at the suggestion of the arbitrators and with the consent of the parties, these statements can be waived unless the parties wish to include additional information.

<sup>33</sup> See Footnote 32.

As mentioned, you should avoid bringing witnesses to the hearing who were not listed in the hearing plan, and the panel has discretion to not allow the witness to testify. There's a strong possibility, too, that the other party may object to allowing surprise witnesses. What, if any, testimony to permit from a surprise witness, and what weight to give to the testimony of this witness, is up to the panel.

## ■ Affidavits

### Code Section 9(d)(6)

An affidavit is a sworn statement offered in writing rather than in person. Arbitrators have the authority to accept affidavits in place of testimony where a person may be unavailable to appear as a witness or if their appearance would be unreasonably burdensome or expensive. However, the other party has the right to argue that the arbitrators should not accept an affidavit into evidence. In making their decision, the arbitrators will take into account that an affidavit doesn't allow the other party an opportunity for cross-examination. For this reason, even if allowed, the arbitrators may give an affidavit less weight than direct testimony.

## ■ Exhibits

### Code Section 8(d)(4)

When you seek to offer a document as evidence, the panel will give the other party the opportunity, if desired, to object to its introduction. The arbitrators could uphold the objection if, for example, you didn't list the document on the hearing plan and you can provide no good reason for not including it, or if they deem the evidence irrelevant or repetitive, or if it provides information the other party requested but was denied prior to the hearing. The panel generally will not allow documents you didn't list on the hearing plan, so you shouldn't offer them as exhibits. If one is offered, however, the panel will give the other party reasonable time to examine it.

In presenting your case, it's not necessary to distribute copies of documents that you previously submitted to NFA. You can simply refer to the document by its pre-assigned exhibit number. Nor, in presenting your case, are you required to use (that is, ask to have included in the hearing record) every document that was previously submitted. Whenever you do want a document to be included in the record, however, you should tell the panel.

## ■ Objections

The panel has wide latitude to consider whatever evidence and hear whatever testimony the panel believes may be useful in arriving at a fair decision. Too many objections slow down the hearing and tell the arbitrators that you are trying to run the hearing rather than letting them run it. In order to avoid too many objections, you should only object to evidence that is privileged, doesn't have much to do with the issues in the case but will hurt your case anyway, is repetitive, was obtained illegally or was not listed in the hearing plan. You should also consider saving your arguments about why an exhibit or testimony shouldn't be believed until you make your closing statement.

## ■ Length of Hearing

### Code Section 11(a)

The arbitrators and the arbitrators alone determine how long a hearing will continue and if additional days are required. Don't expect a hearing to be stopped at 5:00 P.M. for your convenience.

Furthermore, depending on the size of the claim and the complexity of the issues, an NFA arbitration hearing may last one day or several days, sometimes spanning several months. If a case requires more than four hearing days, the hearing fees collected by NFA will double for the fifth day and each day thereafter. However, the panel may decide to keep the fees at the standard amount if the number of hearing days is due to case complexity rather than a party's tactics or a representative's presentation style.

## ■ Briefs

If the panel decides it needs additional information or clarification of legal or technical matters, it can ask the parties to submit briefs (additional written statements) on the issue. The panel will indicate when and in what form the briefs and the information needed should be submitted. The panel could also ask for additional documents.

As a party, you can request that the panel accept post-hearing briefs. However, if the panel believes that the sole purpose of your request is to delay the decision or introduce new evidence that you knew about before the hearing, they will deny your request.

## ■ At the Close of the Hearing

Following the chairperson's statement closing the hearing, all parties will be asked to leave the hearing room together. The hearing is over. The panel will not determine who wins or the amount of any award during the hearing, and you should not seek to engage in any further discussions with the panel.

## What happens after the hearing?

### ■ The Arbitrators' Decision

Members of the panel normally meet immediately after the hearing to discuss the case and the evidence presented. At this meeting, they may or may not make a decision about who wins and how much. That may not be possible if, for example, the issues are particularly complex, if panel members feel they need more time to consider the evidence, or if the parties are to provide additional information, such as briefs or additional documents.

The most important question for you following the hearing is: When will the arbitrators make their decision? The answer is: Within 30 days after "the record is closed." Unless the panel asks the parties to provide post-hearing briefs or additional documents, the record is closed when the hearing is concluded. If the panel has requested briefs or additional documents, the record closes when the additional material is received or when the deadline set for its submission has passed, whichever is earlier.<sup>34</sup>

## ■ The Award

### Code Section 10(a), 10(b) and 12

Once the arbitrators have notified NFA of their decision (in writing, signed by at least a majority of the arbitrators), NFA will promptly notify you (and the other party).

The notification will be essentially a statement of what issues were decided and "who gets what." Arbitration panels do not explain how they arrived at their decisions or provide reasons for their awards. Rather, the award will represent their best effort to do "what's right." In addition to the evidence presented by the parties, the panel will consider such things as the credibility of the witnesses and the cooperativeness of the parties before and during the hearing.

If, on the merits of the case, the arbitrators determine that no monetary award should be made to either party, the notification will usually state "the claim has been dismissed." (In other words, nobody gets anything.)

Unless other arrangements are agreed to by the parties, an award must usually be paid within 30 days.

Under certain circumstances, an award may include an assessment of other costs such as expenses of the parties and their witnesses and attorney's fees. These could be assessed if, for example, one party has incurred expenses due to a postponement requested by the other party, or if the panel determines a party's claim was frivolous or made in bad faith, or if either party engaged in willful acts of bad faith during the arbitration. Attorney's fees can also be assessed if the claim was based on a statute that specifically authorizes an assessment of attorney's fees or if a contract between the parties authorizes them.

## ■ Requests for Modification

### Code Section 10(c)

The ruling of the arbitration panel is final, and neither the decision nor the award itself is open to reconsideration or modification. Under certain circumstances, however, an award can be modified to correct technical or clerical errors. A request for modification must be received by NFA in writing within 20 days after the date NFA served the award.

The decision to (or not to) modify an award is made by the panel. However, before a request is forwarded to the panel, NFA staff will review any modification request filed by the parties to see if it meets the standards under Section 10(c) of the Code. Those standards are listed below:

- There was an *evident* material miscalculation of figures, or an *evident* material mistake in the description of any person, thing or property referred to in the award (e.g., the panel meant to award \$20,000 on a \$30,000 claim but added an extra zero by mistake and awarded \$200,000).

<sup>34</sup> If a case is particularly complicated, or if extra time is needed to obtain additional information, the parties can be asked to agree to an extension of the 30 days.

- The arbitrators awarded on a matter not submitted to them (e.g., the arbitrators awarded punitive damages when they were not asked for).
- The award is imperfect in matter of form not affecting the merits of the controversy (e.g., the wrong case number is on the award form).

NFA will not forward a modification request to the panel unless it is based on one of the grounds listed above.

## ■ Appeal

### Code Sections 10(d) and 10(e)

An arbitration award cannot be appealed either to NFA or to the panel. In a word, it is final!

It is also a well-established principle that courts will not review an arbitration award on its merits. Said another way, the courts will not second guess the decision of the arbitrators on such matters as whether the correct party won or the amount of an award.

The law does provide, however, for court review on limited grounds having to do with the fairness of the arbitration process, with the challenging party having the burden to prove that:

- the award was obtained by corruption, fraud or other undue means; or
- an arbitrator was obviously not impartial or any arbitrator engaged in misconduct which prejudiced (unfairly limited) the rights of any party; or
- the arbitrators were guilty of misconduct in refusing to postpone the hearing when there was good reason to do so, or refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced,<sup>35</sup> or
- the arbitrators decided issues they didn't have any right to decide, did not decide issues they should have decided or issued an award that is unclear.

As mentioned but worth repeating, the burden of proving in court that any of these circumstances existed is on the person challenging the award.

## ■ Enforcement of an Award

### Code Sections 10(f) and 10(g)

NFA Members and Associates are required to pay arbitration awards within 30 days.<sup>36</sup> Failure to comply can result in suspension of membership. If, as a party granted an award, you do not receive payment by the required date, notify NFA (using the form provided by NFA when you were notified of the award) if the award was against an NFA

<sup>35</sup> An award will not be overturned just because a postponement was not granted or evidence was not admitted; the arbitrators' conduct must have been unreasonable.

<sup>36</sup> Unless a request for modification is pending at NFA; or an application to vacate, modify or correct the award is pending in a court of competent jurisdiction and the Member has posted a bond with NFA equal to, in most cases, 150% of the award; or the award itself provides for a different payment schedule.

<sup>37</sup> The code also allows NFA to suspend a firm that guaranteed an IB during the relevant time if the firm fails to pay an award (or settlement agreement) after being notified that its guaranteed IB has failed to do so.

Member or Associate.<sup>37</sup> Although NFA may suspend a Member or Associate for failing to pay an arbitration award, the suspension does not guarantee payment. And NFA cannot force a party to pay.

In this regard, non-payment of an arbitration award is no different than non-payment of an award obtained through a lawsuit. You may have to go to court to enforce payment.

Judgment on any arbitration award can be entered in any court that has jurisdiction. Even if you have to go to court to enforce the award, however, your case—from filing through enforcement—will probably still be a lot quicker and less expensive than if you had filed your case in court in the first place.

## The decision is yours

As you have undoubtedly concluded from this guide, arbitration is not a formula for “instant relief.” Although it generally involves significantly less time from start to finish than its alternatives, particularly litigation, it nevertheless requires time and effort on your part. And although it is less costly than the litigation alternative, it still involves some expense.

It should also be clear that, once you have exercised the right to have your dispute resolved through arbitration, you thereby assume the obligations that arbitration entails. The principal obligation is to participate and cooperate fully and on a timely basis throughout the arbitration process. And, of course, you have a continuing obligation to act in good faith throughout the proceeding.

Now that you have a better understanding of how arbitration works, what would be required of you and its advantages as a means of dispute resolution, the decision whether to proceed with arbitration is yours. If you decide in favor of arbitration, NFA and its arbitration staff will make every appropriate effort to guide and assist you. Meanwhile, if you have questions about arbitration procedures that were not answered in this guide, please contact NFA's Information Center at 800-621-3570 or visit NFA's Web site at [www.nfa.futures.org](http://www.nfa.futures.org). ■



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