

August 27, 1992

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

Re: National Futures Association: Proposed Amendments to
NFA Compliance Rule 2-9, NFA Registration Rule 210, and
Sections 2 and 6 of NFA's Code of Arbitration

Dear Ms. Webb:

Pursuant to Section 17(j) of the Commodity Exchange Act, as amended, National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission ("Commission") proposed amendments to NFA Compliance Rule 2-9, NFA Registration Rule 210, and Sections 2 and 6 of NFA's Code of Arbitration. These amendments were approved by NFA's Board of Directors ("Board") at its meeting on August 20, 1992. NFA respectfully requests Commission review and approval of the amendments.

The proposed text of NFA Compliance Rule 2-9 in this submission supersedes the text of NFA Compliance Rule 2-9 proposed in NFA's submission to the Commission dated June 16, 1992.

PROPOSED AMENDMENTS

- A. Proposed amendments to NFA Compliance Rule 2-9 (additions are underscored and deletions are placed within brackets):

COMPLIANCE RULES

* * *

Part 2 -- RULES GOVERNING THE BUSINESS CONDUCT
OF MEMBERS REGISTERED
WITH THE COMMISSION

* * *



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Rule 2-9. SUPERVISION OF TELEMARKETING ACTIVITY.

- (a) Each Member shall diligently supervise its employees and agents in the conduct of their commodity futures activities for or on behalf of the Member. Each Associate who has supervisory duties shall diligently exercise such duties in the conduct of that Associate's commodity futures business on behalf of the Member.
- (b) NFA's Board of Directors may require Members which meet [certain] specific criteria established by the Board relating to the employment history of its associated persons to adopt supervisory procedures specified by the Board for the supervision of telemarketing. This requirement may, in NFA's discretion, be waived upon a showing by the Member that the Member's current supervisory procedures provide effective supervision over its employees and agents. Any Member seeking such a waiver may submit a written request to a three-member panel consisting of one member from each Regional Business Conduct Committee, said Members to be appointed by the Board from time to time. Within 30 days after a Member submits a waiver request the Compliance Director will submit a written response to the panel. The decision of the panel shall be final and shall be based upon the written submission for the Member and of the Compliance Director.

* * *

B. Proposed Amendments to NFA Registration Rule 210 (additions are underscored):

REGISTRATION RULES

* * *

PART 200. REGISTRATION REQUIREMENTS AND PROCEDURES

* * *

Rule 210. Deficiencies, Inaccuracies, and Changes to Application Information Must be Reported

- (a) Each applicant or registrant as a futures commission merchant, introducing broker, commodity pool operator, com-



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modity trading advisor, or leverage transaction merchant must, in accordance with the instructions thereto, promptly correct any deficiency or inaccuracy in a Form 7-R or Schedules A, B, or C to the Form 7-R which no longer renders accurate and current the information contained therein. Each such correction must be made on a Form 3-R and must be prepared and filed in accordance with the instructions thereto. When a Form 3-R is filed by a registrant for purposes of reporting a change in the form of the organization of the registrant, the Form 3-R must be accompanied by a letter, signed by an appropriate signatory, certifying that the newly formed organization will be liable for all obligations of the pre-existing organization which arose out of the Act or the Regulations thereunder.

- (b) Each applicant or registrant as an associated person and each principal of a registrant must, in accordance with the instructions thereto, promptly correct any deficiency or inaccuracy in the Form 8-R or any supplemental statement thereto which no longer renders accurate and current the information contained in the Form 8-R or supplemental statement. Each such correction must be made on a Form 3-R and must be prepared and filed in accordance with the instructions thereto.
- (c) After the filing of a Form 8-R by or on behalf of any person for the purpose of permitting that person to be an associated person of a sponsor, that sponsor must notify NFA within twenty days after the occurrence of either:
 - (1) the failure of that person to become associated with the sponsor as an associated person or principal and the reasons therefore; or
 - (2) the termination of the association of the associated person or the association as a principal with the sponsor and the reasons therefore.
- (d) Any notice required by paragraph (c) of this Rule must be filed on a Form 8-T or on a Uniform Termination Notice for Securities Industry Registration. The sponsor must currently provide a copy to the person whose association has been terminated. If the notice is filed electronically pursuant to Rule 801, the sponsor may provide the person

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whose association has been terminated with a printout of the information which has been filed electronically.

- C. Proposed Amendments to Sections 2 and 6 of NFA's Code of Arbitration (additions are underscored and deletions are placed within brackets):

CODE OF ARBITRATION

* * *

Section 2. Arbitrable Disputes.

(a) Mandatory Arbitration.

- (1) Claims. Except as provided in Sections 5 and 6 of this Code with respect to timeliness requirements, the following disputes shall be arbitrated under this Code if the dispute involves commodity futures contracts [and does not require for its adjudication the presence of witnesses or other third parties over whom NFA lacks jurisdiction and who are not otherwise available]:

(i) a dispute for which arbitration is sought by a customer against a Member of employee thereof, or Associate, provided that --

(A) the customer is not a futures commission merchant, floor broker, Member or Associate;

(B) the dispute does not solely involve cash market transactions that are not part of or directly connected with a commodity futures transaction; and

(C) if brought against a Member or employee thereof, the Member is a futures commission merchant, an introducing broker, a commodity pool operator, a commodity trading advisor, or a leverage transaction merchant.

* * *

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Section 6. Initiation of Arbitration.

* * *

(k) Dismissal Without Prejudice.

The Panel may, at the written request of a party or on its own motion, dismiss without prejudice any claim or counterclaim which it determines is not a proper subject for NFA arbitration.

* * *

EXPLANATION OF AMENDMENTS

A. Explanation of the proposed amendments to NFA Compliance Rule 2-9:

By letter dated June 16, 1992, NFA submitted to the Commission for its review and approval proposed amendments to NFA Compliance Rule 2-9 and an Interpretive Notice of the rule which would institute requirements for enhanced supervision of tele-marketing activity. After discussions with the Commission, NFA adopted the proposed amendments to NFA Compliance Rule 2-9 in this submission to clarify the intent of the rule.

B. Explanation of the proposed amendments to NFA Registration Rule 210:

NFA Registration Rule 210 requires NFA Members to submit a Form 8-T or U-5 ("termination notice") notifying NFA of the termination of an associated person ("AP") and the reasons for the termination. The rule currently does not require that the AP receive a copy of this termination notice. Therefore, the terminating Member firm may submit information on the termination notice which is inconsistent with the AP's understanding of the circumstances surrounding his departure or may include allegations or negative inferences of which the AP is unaware. The proposed amendments to NFA Registration Rule 210 would require a terminating Member firm to provide the AP with a copy of the

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termination notice.¹ This will give the AP the opportunity to address any inconsistencies with the terminating Member firm.

C. Explanation of the proposed amendments to Sections 2 and 6 of NFA's Code of Arbitration:

Section 2(a)(1) of NFA's Code of Arbitration ("Code") provides for mandatory arbitration of futures-related disputes between NFA Members and their customers at the customers' request. However, Section 2(a)(1) states that arbitration is not mandatory if a dispute will "require for its adjudication the presence of witnesses or other third parties over whom NFA lacks jurisdiction and who are not otherwise available...."² While other SRO arbitration forums also provide this important protection to their members, NFA is the only major arbitration forum which addresses this issue as a jurisdictional one. This quirk in NFA's Code of Arbitration has at times drawn NFA into needless litigation. NFA feels that it is preferable to provide this protection to NFA Members by following the approach of other SROs.

The issue of whether certain witnesses or other third parties are necessary and unavailable is generally raised in an NFA arbitration proceeding by a respondent who is an NFA Member. This has, for example, been an issue in claims filed by foreign customers alleging wrongdoing against U.S. futures commission merchants where the accounts were introduced by foreign introducing brokers who are not NFA Members and are not named as respondents. To successfully challenge NFA's jurisdiction on such grounds, a respondent has the responsibility to show that the

¹ This is similar to an NASD rule which places on the employer the responsibility of providing terminated employees with copies of their termination notices. Under Article IV, § 3(a) of NASD's Bylaws, members are required to provide each terminated employee with a copy of the termination notice sent to the NASD. A copy of the notice must be sent to the employee at the same time it is filed with the NASD.

² This language tracks CFTC Regulation 180.1(a) which defines those disputes that NFA must hear. CFTC Regulation 180.1(a) does not, however, prohibit NFA from hearing other disputes as well. The proposed amendments to Sections 2 and 6 of NFA's Code of Arbitration do not conflict with CFTC Regulations.

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witnesses or other third parties are both necessary and unavailable and that every reasonable effort was made to secure their availability.³ If the arbitrators are satisfied that the witnesses or other third parties are both necessary and unavailable, they will terminate the arbitration proceeding for lack of jurisdiction.

Determinations regarding the necessity and unavailability of witnesses and other third parties require an analysis of the facts of a particular case. Since these issues involve determinations of fact, it is NFA's policy and position that these issues are best left to the arbitrators to decide, subject to ultimate judicial review on a petition to modify, correct or vacate any final arbitration award. NFA amended the Code of Arbitration to allow for a preliminary hearing on this sort of issue. Unfortunately, parties in NFA arbitration cases are raising this issue more frequently and, in certain instances, are formally challenging NFA's policy in court. Though the courts have uniformly found in favor of NFA in the three cases filed thus far, valuable resources have been diverted in defending these actions.

NFA fully agrees that the arbitrators should be able to dismiss a claim where witnesses or other third parties are both necessary and unavailable. However, by characterizing this as a jurisdictional issue rather than a matter for the arbitrators, the Code invites unnecessary and costly litigation. In fact, litigation is even more costly for the Members challenging jurisdiction since their challenges have all been unsuccessful.

NFA avoided this problem in adopting rules for Member to Member arbitration by following the approach of the NASD and NYSE. Section 8 of the Member Arbitration Rules, which is similar to provisions found in the rules of the NASD and the NYSE, allows the arbitrators to dismiss, without prejudice, any claim or counterclaim which is not a proper subject for NFA arbitration. This provision also allows the panel to dismiss cases in which witnesses or documents essential to a fair and

³ Implicit in this argument is that the witnesses or other third parties are not persons whom NFA has the authority to order be available. A witness or third party who is an NFA Member or Associate is required to cooperate in an NFA arbitration proceeding under NFA Compliance Rule 2-5.



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final decision are unavailable, which would result in multiple proceedings because some parties to the dispute are not subject to NFA jurisdiction, or which are otherwise suited to another forum.

In light of NFA's past experience, NFA is concerned about the significant drain placed on NFA's resources when it is faced with arguing this issue in court or administering arbitration cases under the existing provision in the Code. Therefore, to avoid the unnecessary utilization of NFA's resources in the future, NFA proposes that the Code of Arbitration be amended to include a provision similar to the provision in NFA's Member Arbitration Rules making it clear that the arbitrators--not the courts or staff--will determine the necessity and unavailability of witnesses or other third parties. Adopting this provision would also require a slight modification to Section 2(a)(1) deleting the language which would be covered by the new rule.

NFA respectfully requests that the Commission review and approve the proposed amendments to NFA Compliance Rule 2-9, NFA Registration Rule 210 and Sections 2 and 6 of NFA's Code of Arbitration. NFA further requests that the amendments be declared effective upon Commission approval.

Respectfully submitted,

Daniel J. Roth
General Counsel

DJR:cm(sub/sub2)

- cc: Chairman Wendy L. Gramm
- Commissioner Fowler C. West
- Commissioner William P. Albrecht
- Commissioner Sheila C. Bair
- Commissioner Joseph B. Dial
- Andrea M. Corcoran, Esq.
- Dennis P. Klejna, Esq.
- Joanne T. Medero, Esq.
- Alan L. Seifert, Esq.
- Susan C. Ervin, Esq.
- Lawrence B. Patent, Esq.
- David Van Wagner, Esq.

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

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

May 17, 1993



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

Re: Proposed amendments to NFA Code of
Arbitration (§§2(a), 6(k), 10(g) and 17)
and Member Arbitration Rules (§§10(g)
and 16)

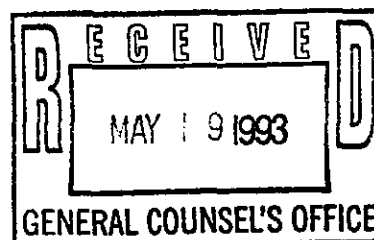
Dear Mr. Roth:

By letters dated August 27 and December 4, 1992, and April 16, 1993, the National Futures Association ("NFA") submitted the captioned rule proposals pursuant to section 17(j) of the Commodity Exchange Act ("Act") for Commission approval. The rule proposals relate to jurisdictional requirements for arbitration, dismissal authority, noncompliance with settlement agreements, and the treatment of conflicts between NFA's arbitration rules and parties' arbitration agreements. Please be advised that the Commission has approved the proposal effective immediately.

Yours truly,

Jean A. Webb

Jean A. Webb
Secretary of the Commission



April 16, 1993

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

Re: National Futures Association; Proposed Amendments to
Sections 2 and 6 of NFA's Code of Arbitration

Dear Linda:

As we discussed over the telephone, NFA intends to update its Arbitrator's Manual to provide specific guidance to arbitrators regarding how they should apply proposed Section 6(k) of the Code of Arbitration (as well as the identical language in Section 8 of the Member Arbitration Rules). In particular, we have developed the following language to be added to the section in the Arbitrator's Manual which discusses pre-hearing decisions.

The arbitrators are authorized to dismiss any claim or counterclaim without prejudice if the arbitrators determine that the claim or counterclaim is not a proper subject for NFA arbitration. However, this authority should only be used in extraordinary circumstances. It is not intended to be used to dismiss a claim or counterclaim merely because the claim or counterclaim is frivolous or unfounded. If one of the parties is a customer, the arbitrators must also be aware of NFA's statutory obligation to provide a forum for customers who have a futures-related dispute with an NFA Member.

Dismissing a claim or counterclaim without prejudice could be appropriate if witnesses or documents essential to a fair and final decision are unavailable in NFA arbitration but may be available elsewhere; hearing the dispute would result in multiple proceedings because some parties to the dispute are not subject to NFA jurisdiction; the dispute appears to require relief which is not available in NFA arbitration (e.g., injunctive relief); or, in the case of Member claims, it is a personal dispute (as opposed to a business dispute) which is unrelated to futures transactions.

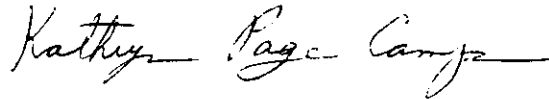
Linda Kurjan, Esq.

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April 16, 1993

For your information, Section 6 of the Code will only be applied to cases filed on or after its effective date. If you have any questions or need any additional information, please let me know.

Very truly yours,

A handwritten signature in cursive script that reads "Kathryn Page Camp". The signature is written in dark ink and is positioned above the typed name.

Kathryn Page Camp
Associate General Counsel

KPC(Letters\Kurjan.3)

March 31, 1993


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

Re: National Futures Association; Proposed Amendments to
Sections 2 and 6 of NFA's Code of Arbitration

Dear Linda:

By letter dated August 27, 1992, National Futures Association ("NFA") submitted proposed amendments to Sections 2 and 6 of NFA's Code of Arbitration to the Commodity Futures Trading Commission for review and approval pursuant to Section 17(j) of the Commodity Exchange Act, as amended. As we discussed over the telephone today, NFA agrees to extend the time for Commission review and approval of the proposed amendments until April 30, 1993.

Very truly yours,



Kathryn Page Camp
Associate General Counsel

KPC(letters\Kurjan.2)

February 19, 1993

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

Re: National Futures Association; Proposed Amendments to
Sections 2 and 6 of NFA's Code of Arbitration

Dear Linda:

By letter dated August 27, 1992, National Futures Association ("NFA") submitted proposed amendments to Sections 2 and 6 of NFA's Code of Arbitration to the Commodity Futures Trading Commission for review and approval pursuant to Section 17(j) of the Commodity Exchange Act, as amended. As we discussed over the telephone today, NFA agrees to extend the time for Commission review and approval of the proposed amendments until March 31, 1993.

Very truly yours,



Kathryn Page Camp
Associate General Counsel

KPC(letters\Kurjan.1)

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION

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

January 22, 1993



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

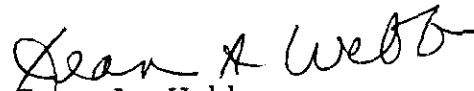
Re: The National Futures Association's Proposed
Amendment to Registration Rule 210

Dear Mr. Roth:

By letter dated August 27, 1992 and received August 31, 1992, the National Futures Association ("NFA") submitted to the Commission, pursuant to Section 17(j) of the Commodity Exchange Act ("Act"), a proposed amendment to its Registration Rule 210.

The Commission understands that NFA intends to implement the proposed amendment upon receipt of notice of Commission approval. Please be advised that on this date the Commission has approved the above-referenced proposed amendment under Section 17(j) of the Act.

Very truly yours,


Jean A. Webb
Secretary of the Commission

