

August 27, 2013

**Via Federal Express**

Ms. Melissa Jurgens  
Office of the Secretariat  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, DC 20581

Re: National Futures Association: Consolidation of Arbitration Claims Involving  
Customer Segregated Funds Losses - Proposed Amendments to NFA's  
Code of Arbitration \*

Dear Ms. Jurgens:

Pursuant to Section 17(j) of the Commodity Exchange Act, as amended, National Futures Association ("NFA") hereby submits to the Commodity Futures Trading Commission ("CFTC" or "Commission") the proposed amendments to NFA's Code of Arbitration regarding the consolidation of arbitration claims involving customer segregated funds losses. NFA's Board of Directors ("Board") approved the proposal on August 15, 2013, and NFA respectfully requests Commission review and approval of the proposal.

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**PROPOSED AMENDMENTS**  
**(additions are underscored and deletions are ~~stricken through~~)**

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**CODE OF ARBITRATION**

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**(n) Special Consolidation Procedures for Claims Involving Customer Segregated Funds and/or Customer Secured Amount Funds Losses.**

In the event of an FCM insolvency that results in customer segregated funds and/or customer secured amount funds losses in excess of \$50 million based on the net liquidating value of customer accounts as of the close of business on the date of the bankruptcy, one or more groups of customers of the FCM may consolidate their claims

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for monetary losses by filing a single arbitration claim under the Code subject to the following additional provisions:

- (1) At the time of filing the consolidated claim, the consolidated group of claimants must indicate the claim is being filed under Section 6(n);
- (2) The consolidated group of claimants must be represented by an attorney(s) acting on behalf of the consolidated group, and individual claimants are not permitted to have their own counsel representing them in the arbitration;
- (3) The consolidated group of claimants may not proceed against any Respondent(s) that has filed a petition for bankruptcy under the U.S. Bankruptcy Code, absent bankruptcy court approval;
- (4) The consolidated group of claimants shall remit a filing fee of \$20,000 and a hearing fee deposit of \$30,000 to NFA at the time the consolidated claim is filed. Where the hearing fee deposit paid by the consolidated group of claimants is not sufficient to cover fees assessed to the consolidated group of claimants for pre-hearing motions, preliminary hearing requests and/or postponement requests (if any) and hearing sessions based on the standard, preset fee NFA pays to the arbitrators, NFA will assess and collect additional hearing fees from the consolidated group of claimants to cover the additional standard, preset fees to be paid to the arbitrators;
- (5) The relief requested by the consolidated group of claimants shall be limited to monetary damages equal to the net liquidating value of each individual claimant's account(s) as of the close of business on the day of the bankruptcy, but may also include a request for interest, costs and fees where appropriate under the Code;

- (6) Respondent(s) must serve the Answer and any other pleadings or documents on the attorney(s) representing the consolidated group of claimants and not the individual claimants;
- (7) Any pre-hearing motions or requests for preliminary hearing are subject to a fee of \$675 assessed against the filing party. Fees assessed against the consolidated group of claimants will be applied against the initial hearing deposit. Fees assessed against the Respondent(s) are due at the time of filing;
- (8) Any postponement fee shall be assessed and remitted in accordance with Section 11(c) of the Code, except that if the consolidated group of claimants file the postponement request, the fee shall be assessed against the initial hearing fee deposit;
- (9) Site selection preferences are limited to Chicago or New York;
- (10) Any hearing fees collected from the consolidated group of claimants that are not paid to the arbitrators will be refunded to the consolidated group; and
- (11) Except as provided above, the consolidated claim shall otherwise be administered in accordance with the existing provisions of the Code.

~~(n)~~ **(o) Dismissal without prejudice.**

~~(o)~~ **(p) Attestation.**

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## **SECTION 7. RIGHT TO COUNSEL**

- (a) Except as provided in Section 6(n), A party may be represented at any time through the arbitration proceeding, including a mediation proceeding, by an attorney-at-law licensed to practice law in the highest court of any state, by a family member or other person who is representing the party without compensation and who does not have any interest in the outcome of the proceeding, or by an officer, partner or employee of the party. The attorney or other representative shall serve timely notice in writing on NFA and the other parties of the name and address of such representative. The Panel may bar from the proceeding any representative for dilatory, disruptive or contumacious conduct.

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## **SECTION 8. PRE-HEARING**

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### **(e) Other Pre-Hearing Motions.**

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- (3) Except as provided in Section 6(n), NFA shall assess a motion fee as follows:

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## **SECTION 9. HEARING**

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- (b) Except as provided in Section 6(n), Section 8(g) or Paragraph (i) of this Section, the place and time of the hearing shall be determined in the sole discretion of the Secretary, who shall endeavor to accommodate, if possible, the preferences of all parties as indicated in a timely-filed pleading. Upon setting the initial hearing date, NFA shall serve notice on each party at least 45 days before the hearing of the date, time and place. NFA shall give reasonable notice of any rescheduled hearing date.

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## **SECTION 10. AWARD, SETTLEMENT AND WITHDRAWAL.**

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### **(b) Relief.**

Except as provided in Section 6(n), The the award may grant or deny any monetary relief requested, and may include an assessment of interest, costs or fees (See Sections 11 and 12). A request for declaratory relief will only be heard by the arbitrators if the Respondent agrees to have the arbitrators hear the claim.

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## **SECTION 11. ARBITRATION FEES**

### **(a) Filing and Hearing Fees.**

- (1) Except as provided in Section 6(n) and Section 18, each party filing a claim under this Code shall pay a filing and hearing fee based on the amount claimed, including punitive and treble damages but exclusive of interest and costs, as follows:

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- (2) Except as provided in Section 6(n), ~~W~~where the hearing fees paid by the parties is not enough to cover the standard preset fees to be paid by NFA to the arbitrators, NFA shall collect additional fees to cover the fees to be paid to the arbitrators. If a case requires more than four days of hearing, the hearing fees will be twice the standard preset fees, unless the arbitrators order the fees to remain at the standard amount.

### **(b) Refunds.**

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- (3) Except as provided in Section 6(n) with respect to the initial hearing fee paid by the consolidated group of claimants, if all claims have been settled or withdrawn and NFA receives written notice of the settlement or withdrawal at least five days in advance of the first scheduled pre-hearing conference date, if one is scheduled, or at least 30 days in advance of the first scheduled preliminary hearing date or oral hearing date, if no pre-hearing conference is scheduled, a full refund of the hearing fees paid under Section 11(a) and the arbitration service fees paid under Section 6(e) shall be made to the party paying the fee.
- (4) Except as provided in Section 6(n) with respect to the initial hearing fee paid by the consolidated group of claimants, if all claims have been settled or withdrawn and NFA receives written notice of the settlement or withdrawal at least 15 days in advance of the summary proceeding start date or first scheduled oral hearing or preliminary hearing date, the hearing fees paid under Section 11(a) and arbitration service fees paid under Section 6(e) shall be refunded to the party paying the fee in accordance with the schedule below.

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### EXPLANATION OF PROPOSED AMENDMENTS

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Currently, Section 6(m) of NFA's Code of Arbitration<sup>1</sup> includes a provision for consolidation of separately filed customer claims. Claims involving common questions of fact or arising from the same transaction may be consolidated for hearing at the request of any party or by NFA in the interest of providing a fair, equitable and expeditious procedure. In practice, consolidation occurs when two or more customers file separate claims involving common questions of fact or arising from the same transaction against a respondent(s) and request consolidation. In those circumstances when a request for consolidation is permitted, each customer pays his/her own filing

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<sup>1</sup> NFA's Code of Arbitration governs disputes involving commodity futures contracts between customers and NFA Member FCMs, RFEDs, IBs, CPOs, CTAs, or employees thereof and Associates.

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and hearing fees, which are based on the size of the customer's claim and are intended to cover administrative and hearing costs (i.e., the honorariums paid to the arbitrators), respectively.

NFA generally subsidizes a material portion of the administrative costs associated with all customer claims (consolidated or not). NFA does not generally subsidize the honorariums paid to arbitrators for their participation in pre-hearing and hearing sessions because NFA assesses additional hearing fees if the amount collected at the time of filing is not sufficient to cover the honorariums paid.

Based on concern that requiring a separate filing and hearing fee from each customer in a claim involving customer segregated funds losses might be cost prohibitive to some customers, NFA's Board has amended the Code to provide a process, in the event of an FCM insolvency in which customer segregated fund losses exceed \$50 million, where customers would be permitted to consolidate their claims and file one group claim with a single fee of \$50,000 that will be allocated to cover a portion of the administrative costs and the hearing fees.<sup>2</sup> In particular, \$20,000 of the initial fee will be allocated towards administrative costs and the remaining \$30,000 towards the honorarium paid to the arbitrators for pre-hearing matters and the hearing sessions. If the initial \$30,000 is not sufficient to cover the pre-set fees paid to arbitrators as outlined in the Code (\$1,275 per day for a 3 arbitrator panel), NFA will assess additional fees to cover the honorariums paid to the arbitrators at the pre-set rate.

In order to keep the process manageable, the amendments to the Code also impose the following conditions on a consolidated claim of this type:

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<sup>2</sup> Since the FCM would be in bankruptcy, the single claim would likely be filed against the FCM's principal(s) or AP(s) because the U.S. Bankruptcy Code prohibits proceeding against a party (i.e., the FCM) that has filed for bankruptcy absent bankruptcy court approval.

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- The customer claimants must file a single arbitration demand against the same respondents, and indicate that the claim is being filed under the consolidation provision;<sup>3</sup>
- The sole type of remedy permitted is monetary damages for the net liquidating value of each customer's account as of the date of the bankruptcy filing;
- The customer claimants must be represented by the same attorney(s); and
- The hearing locations are limited to Chicago or New York because it is unlikely that NFA would be able to assemble an arbitration panel for this type of matter in any other location due to arbitrator experience and cost considerations.<sup>4</sup>

NFA's FCM and CPO/CTA Advisory Committees supported the changes to the Code to permit this process provided NFA adopted a fee schedule allocating a portion of the fees to cover NFA's administrative costs thereby seeking to limit the amount of subsidy that NFA incurred relating to these cases. The IB Advisory Committee did not support the change, believing that this type of case could be handled under the current consolidation provisions.

The amendments to the Code provide that in the event of an FCM insolvency that results in customer segregated fund and/or customer secured amount

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<sup>3</sup> It is possible that NFA could have more than one group of consolidated claims resulting from the same FCM bankruptcy. Additionally, no customer is required to consolidate his/her claim and may file his/her own separate claim against the respondent(s) regardless of whether a consolidated claim(s) has been filed at NFA.

<sup>4</sup> NFA not only has its largest pool of qualified arbitrators in those locations, but it also maintains offices which can be used for the hearing proceedings. Based on prior experience in managing large groups of consolidated hearings which were heard in venues other than New York or Chicago, the costs for renting space for hearings and flying arbitration staff to other locations would quickly mount and become cost-prohibitive to NFA and the parties.



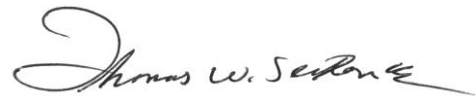
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fund losses exceeding \$50 million, one or more group(s) of customers of the FCM would be permitted to consolidate their claims into a single arbitration claim to be heard under the Code, subject to certain procedural provisions and revised fee schedule. The amendments also include technical changes to other provisions in order to implement the process.

NFA respectfully requests that the Commission review and approve the proposed amendments to NFA's Code of Arbitration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas W. Sexton". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Thomas W. Sexton  
Senior Vice President and  
General Counsel

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\* Went into effect on January 15, 2014.