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## Dispute Resolution in Commodities Futures

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# DISPUTE RESOLUTION IN COMMODITIES FUTURES

## I. Introduction

The commodity futures<sup>1</sup> industry is experiencing rapid growth<sup>2</sup> and a consequential rise in disputes between industry professionals and customers.<sup>3</sup> This Note focuses on the available forums for resolution of such disputes with a particular emphasis on disputes where there is a small to moderate financial interest.<sup>4</sup> In addition, the Note analyzes the need for the recently enacted National Futures Association (NFA) arbitration program<sup>5</sup> and the proposed Commodity Futures Trading Commission arbitration program.<sup>6</sup>

After briefly examining the history of the Commodity Exchange Act (CEA),<sup>7</sup> the types of commodity disputes that arise<sup>8</sup> and the various forums for resolving such disputes,<sup>9</sup> this Note concludes that the NFA

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1. A commodity is any of the agricultural products listed in the Commodity Exchange Act and "all other goods and articles, except onions . . . , and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in . . ." Commodity Exchange Act § 2, 7 U.S.C. § 2 (1982).

The commodities futures industry includes "the organized commodity markets; the brokerage houses and their supervisory and sales personnel; those who offer a service in trading advice; managers of pools or funds contributed by investors for common use in the futures markets; individual members of the exchanges who execute orders for others on the market's trading floor; vendors of commodities "options"; and those offering instruments now known as "leverage contracts." 1 P.M. Johnson, *Commodities Regulation* § 101, at 1 (1982).

2. CFTC Ann. Rep. 3 (1982) (notes the rapid expansion of industry). The National Futures Association estimates that over 100 million commodity futures contracts are traded each year. National Futures Association, *Arbitration Procedures for Resolution of Commodity Related Disputes* (National Futures Association, Chicago, Illinois).

3. See *infra* note 132 for a discussion of the increasing number of claims.

4. The focus is on claims under \$75,000. See *infra* note 64 and accompanying text for a discussion of prohibitive litigation costs.

5. The National Futures Association, the only futures association registered pursuant to 7 U.S.C. § 21 (1982), began conducting arbitrations of commodity-related disputes on March 31, 1983. Letter from David Gelfand, attorney for NFA, to the author (March 31, 1983) (discussing NFA arbitration program).

6. See CFTC Reg. § 12.41, advance notice of which was published in 48 Fed. Reg. 6720 (proposed Feb. 15, 1983).

7. Commodity Exchange Act, ch. 369, § 1, 42 Stat. 998 (1922); ch. 545, § 1, 49 Stat. 1491 (1936) (current version at 7 U.S.C. §§ 1-26 (1982)) as amended by Pub. L. No. 97-444, 96 Stat. 2294 (3 U.S.C.S. 1498 (1983)). History examined *infra* notes 14-39 and accompanying text.

8. See *infra* notes 40-58 and accompanying text for a discussion of the disputes that arise.

9. See *infra* notes 59-98 and accompanying text for a discussion of the available forums.

arbitration program indeed fills a gap in the previously available forums.<sup>10</sup> The Note suggests that (1) the exchanges refer disputes to NFA,<sup>11</sup> (2) pre-dispute arbitration agreements designate NFA as the arbitration forum to enhance NFA's effectiveness<sup>12</sup> and (3) an arbitration program sponsored by the CFTC would be repetitive and unnecessary.<sup>13</sup>

## II. History of the Commodities Exchange Act

Although commodities markets have existed in the United States since the late 1700's,<sup>14</sup> federal regulation was not enacted until 1922<sup>15</sup> under the Grain Futures Act.<sup>16</sup> Based upon the power of Congress to regulate interstate commerce,<sup>17</sup> the Act was promulgated to institute federal designation of the various grain exchanges.<sup>18</sup> The exchanges were required to prevent price manipulation as a condition of such designation.<sup>19</sup> The requirement is still in effect today.<sup>20</sup>

The Grain Futures Act was amended and renamed the Commodity Exchange Act in 1936.<sup>21</sup> The coverage of the Act was extended to regulation of commodities other than grains and to the field of commodity brokerage.<sup>22</sup> Between 1936 and 1968 several minor amend-

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10. See *infra* notes 148-181 and accompanying text for this conclusion.

11. See *infra* note 180 and accompanying text for the exchanges' authority to refer disputes to NFA.

12. See *infra* note 178 and accompanying text for this suggestion.

13. See *infra* notes 196-201 and accompanying text for a discussion of the repetitiveness of the CFTC's proposal.

14. 1 Comm. Fut. L. Rep. (CCH) ¶ 104. In the late 1700's producers and merchants formed central markets to trade in grain, eggs and other produce. Generally the trading was a present market for cash, rather than a futures market.

15. 1 Comm. Fut. L. Rep. (CCH) ¶ 104. A year earlier the Futures Trading Act of 1921 was passed based on the taxing and spending clause of the Constitution (U.S. Const. art. I, § 8, cl.1.) but was held unconstitutional in *Hill v. Wallace*, 259 U.S. 44 (1922).

16. Grain Futures Act, ch. 369 § 1, 42 Stat. 998 (1922).

17. See U.S. Const. art. I, § 8, cl. 3. The Grain Futures Act was upheld on this basis in *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923).

18. 1 Comm. Fut. L. Rep. (CCH) ¶ 104. Futures in grain could no longer be traded informally. The exchange needed to be designated as an official "contract market" to serve as a market for the exclusive trading of that commodity futures contract.

19. Grain Futures Act, ch. 369, § 1, 42 Stat. 998 (1922).

20. Commodity Exchange Act § 5(d), 7 U.S.C. § 7(d) (1982).

21. Commodity Exchange Act, ch. 545, § 1, 49 Stat. 1491 (1936).

22. Commodity Exchange Act, ch. 545, §§ 3 & 4(d), 49 Stat. 1491 (current version at 7 U.S.C. § 2 (1982)).

ments<sup>23</sup> were made to the Act; most extended coverage to additional commodities.<sup>24</sup>

The Commodity Futures Trading Commission Act of 1974<sup>25</sup> revised the CEA<sup>26</sup> and created the Commodity Futures Trading Commission (CFTC)<sup>27</sup> to administer the Act. The coverage of the Act was further extended to include previously unregulated commodities and all present or future dealing in contracts for future delivery.<sup>28</sup>

The 1974 amendment to the Act created two methods by which customer claims against commodities professionals could be resolved. One such method was a reparations system<sup>29</sup> to be developed and implemented by the CFTC.<sup>30</sup> Additionally, the 1974 amendment mandated each contract market to provide a means of fair and equitable voluntary settlement of customer claims.<sup>31</sup>

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23. Commodity Exchange Act, ch. 108, § 1, 52 Stat. 205 (1938); ch. 786 § 1, 54 Stat. 1059 (1940); National Wool Act, Pub. L. No. 690, § 710, 68 Stat. 913 (1954); Pub. L. No. 174, § 1, 69 Stat. 375 (1955); Pub. L. No. 90-258, §§ 1(a)-(c), 82 Stat. 26 (1968); Pub. L. No. 90-418, 82 Stat. 413 (1968).

24. The various commodities to which coverage of the Act was extended were wool tops, fats and oils, cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, wool, onions, livestock and livestock products and frozen concentrated orange juice. See *supra* note 23 for the amendments that added these commodities.

25. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974).

26. The stated purpose of the Act is "to strengthen the regulation of futures trading, to bring all agricultural and other commodities traded on exchanges under regulation . . . ." Pub. L. No. 93-463, 88 Stat. 1389 (1974).

27. Pub. L. No. 93-463, § 101, 88 Stat. 1389 (1974) (codified at 7 U.S.C. § 4a (1982)). Previously, regulation was conducted by the Commodity Exchange Authority in the U.S. Dept. of Agriculture. U.S. CODE CONG. AND AD. NEWS, 93d Cong., 2d Sess. 5844 (1974).

28. 1 Comm. Fut. L. Rep. (CCH) ¶ 104.

29. Pub. L. No. 93-463, § 106, 88 Stat. 1389 (1974) (current version at 7 U.S.C. § 18 (1982)). "Reparation proceedings are essentially lawsuits heard by administrative law judges, whose decisions are reviewable by the CFTC." 2 T. Russo, *Regulation of the Commodities Futures and Options Market* § 14.01, at 14-2 (1983). An individual can complain within two years of violations of the CEA or CFTC regulations thereunder committed by persons registered with the CFTC [Pre-1983, those required to be registered. See *infra* note 90 for a complete discussion of the change.]. The customer petitions the CFTC for redress. 7 U.S.C. § 18(b) (1982). If the CFTC decides a violation may have occurred, with resultant damage, it forwards the petition to respondent. *Id.* The respondent may answer. *Id.* The CFTC can investigate the complaint. *Id.* Until recently the CFTC was required to hold a hearing before an administrative law judge [ALJ] for all claims over \$5,000. See 7 U.S.C. § 18(b) (1976 & Supp. IV 1981).

30. Pub. L. No. 93-463, § 106, 88 Stat. 1389 (1974).

31. Pub. L. No. 93-463, § 209, 88 Stat. 1389 (1974) (currently 7 U.S.C. 7a(11) (1982)). Arrangements for voluntary settlements of claims became a requirement for

The Futures Trading Act of 1978<sup>32</sup> amended the CEA in several ways relating to the registration of commodities professionals.<sup>33</sup> It also allowed an Exchange to satisfy its obligation to provide a forum for fair and equitable settlement of customer disputes<sup>34</sup> by delegating the dispute to an arbitration proceeding conducted by a registered futures association.<sup>35</sup>

The most recent amendments to the CEA were enacted by passage of the Futures Trading Act of 1982.<sup>36</sup> Provisions of the Act<sup>37</sup> removed specific requirements imposed on the CFTC in reparations proceedings<sup>38</sup> and authorized it to promulgate what it "deems necessary or appropriate" rules and regulations for reparations proceedings.<sup>39</sup>

### III. Types of Disputes That Arise

Disputes between commodities professionals and their customers can arise from violations of the anti-fraud provisions of the Act<sup>40</sup> or regulations thereunder.<sup>41</sup> Potential abuses which occur include churning of customer accounts,<sup>42</sup> unauthorized trading of the customer's

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designation as a contract market. Arbitration has been the response of all the existing exchanges. *See GAO Report, infra* note 64, at 869.

32. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (1978).

33. Futures Trading Act of 1978, Pub. L. No. 95-405, §§ 5-9, 92 Stat. 865, 869-70 (1978).

34. *See supra* note 29 and accompanying text.

35. Futures Trading Act of 1978, Pub. L. No. 95-405, § 11, 92 Stat. 865, 870 (1978) (current version at 7 U.S.C. 7a(11) (1982)).

36. Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983).

37. Futures Trading Act of 1982, Pub. L. No. 97-444 § 231, 96 Stat. 2319 (1983).

38. For example, the requirement of a hearing before an ALJ for all claims over \$5,000 has been deleted. *See supra* note 36. For a discussion of reparations proceedings, see *supra* note 29.

39. Futures Trading Act of 1982, Pub. L. No. 97-444, § 231, 96 Stat. 2319 (1983).

40. *See* 7 U.S.C. §§ 6b, 6c, & 6o (1982). These provisions generally make it unlawful for persons or firms in the industry to cheat or defraud, make false reports or statements, or willfully deceive another person in connection with commodities futures contracts.

41. 17 C.F.R. §§ 30.01-30.02, 166.1-166.3 (1983).

42. For examples of churning, *see* Piskur v. International Precious Metals Corporation, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,664, at 26,509-26,512 (CFTC Nov. 4, 1982) (customer objective was conservative—to hedge against inflation by investing in gold and silver; turnover of more than twice per year is presumed to be churning); Bahrke v. Delphi Commodities Inc., 2 Comm. Fut. L. Rep. (CCH) ¶ 21,641, at 26,434 (CFTC Dec. 15, 1982) (excessive trading of customer's account that could not be justified by customer objectives) and Quigley v. Dean Witter Reynolds, Inc., [80-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21, 330, at 25,597 (CFTC Jan. 22,

account,<sup>43</sup> price manipulation,<sup>44</sup> non-competitive execution of customer orders,<sup>45</sup> bucketing,<sup>46</sup> failure to segregate customer funds,<sup>47</sup> and failure to keep the customer aware of all facts affecting his account.<sup>48</sup>

A customer faced with fraud in relation to his account or another violation of the CEA or CFTC regulations has the choice of several forums in which to seek redress.<sup>49</sup> A customer may be able to utilize

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1982) (one trade considered churning because not made for the benefit of the customer). Churning has been defined as “[e]xcessive trading which permits the broker to derive a profit [through commissions] while disregarding the best interests of the customer”. Commodity Futures Trading Commission, Glossary of Some Terms Used in the Futures Trading Industry 5 (1975) [hereinafter cited as *CFTC Glossary*].

43. See, e.g., *Blanding v. First Commodity Corp. of Boston*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,648, at 26,451 (CFTC Nov. 29, 1982) (account liquidated without customer's consent); *Stein v. Cayman Assoc. Ltd.* [80-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,269, at 25,326 (CFTC Oct. 16, 1981) (complainant was not notified before trades were executed in his managed account, in violation of agreement with respondent).

44. See *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971) (Cargill used its controlling interest in the futures market to exact higher prices for wheat in its storehouses), *cert. denied*, 406 U.S. 932 (1972); *G.H. Miller and Co. v. U.S.*, 260 F.2d 286 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959).

45. Non-competitive execution is sometimes accomplished by a cross-trade. See *CFTC Glossary*, *supra* note 42, at 8 (cross-trade is “[o]ffsetting or noncompetitive matching of the buying order of one customer against the selling order of another, a practice that is permissible only when executed as required by the Commodity Exchange Act, CFTC regulations and rules of the contract market”). Generally a cross-trade is only permissible if made at the market price after each order has been offered in open outcry and neither has been accepted. *Cohl v. Floor Broker Associates*, [77-80 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,790, at 23,217 (CFTC Mar. 12, 1979) (no defense that market had already traded at price that was crossed).

46. Bucketing is defined as “[d]irectly or indirectly [putting] the opposite side of a customer's order into the handling broker's own account or into an account in which he has an interest, *without execution on an exchange*. ” See *CFTC Glossary*, *supra* note 42, at 3 (emphasis added); see also, *Siegel Trading Company, Inc.* [77-80 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,452 (CFTC July 26, 1977) (the fact that bucketing occurred *on the trading floor* held not determinative because order was not executed *on the exchange*); *In Re Stovall* [77-80 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941 (CFTC Dec. 6, 1979).

47. See *Hunter v. Madda Trading Company*, [80-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21, 242, at 25,204 (CFTC Sept. 2, 1981) (Futures Commission Merchant (FCM) used customer funds to offset an error in FCM's own account).

48. *Roberts v. Lincolnwood Commodities, Inc., of California*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,699, at 26,738 (CFTC Mar. 4, 1983); *In Re Federal Gold and Silver Inc.* [80-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,278, at 25,372 (CFTC Oct. 28, 1981) (failed to segregate on ten dates).

49. See *infra* notes 50-57 and accompanying text for a listing of the various forums.

(1) federal<sup>50</sup> or state courts;<sup>51</sup> (2) commercial arbitration conducted by the American Arbitration Association,<sup>52</sup> the National Association of Securities Dealers<sup>53</sup> or the New York Stock Exchange,<sup>54</sup> (3) arbitration conducted by the various commodities exchanges;<sup>55</sup> (4) arbitration conducted by the NFA;<sup>56</sup> or (5) reparations conducted by the CFTC.<sup>57</sup> The various forums have their respective advantages and disadvantages.<sup>58</sup>

#### IV. Avenues of Resolution of Disputes between Commodity Professionals and Customers

The issue of a private right of action under the CEA was brought before the United States Supreme Court because of conflicting United States Circuit Court of Appeals decisions<sup>59</sup> and legislative silence on this point. The United States Supreme Court in *Merrill Lynch, Pierce, Fenner and Smith Inc. v. Curran*,<sup>60</sup> recognized a private right of action for violations of the CEA<sup>61</sup> and cleared the way for open access to the federal court system by commodities customers based on federal question jurisdiction.<sup>62</sup> All plaintiff need prove is damage from a violation of the CEA.<sup>63</sup> However, the high cost of litigation in federal court makes this forum impractical for resolution of small to moderate

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50. See *infra* note 60.

51. See *infra* note 67.

52. See *infra* note 83 and accompanying text.

53. *Id.*

54. *Id.*

55. See *infra* notes 72 and 73.

56. See *infra* note 149 and accompanying text.

57. See *infra* note 87 and accompanying text.

58. For a discussion of the relative strengths and weaknesses of the present forums see *infra* text accompanying notes 101-152.

59. See *Curran v. Merrill Lynch, Pierce, Fenner and Smith*, 622 F.2d 216 (6th Cir. 1980), *aff'd*, 456 U.S. 353 (1982); *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom.* 456 U.S. 353 (1982) (the two cases were consolidated on appeal). The Court also considered *Rivers v. Rosenthal and Co.*, 634 F.2d 774 (5th Cir. 1980). For a discussion of the conflict among the circuits see Note, *Fraud in Commodity Futures Trading—An Examination of the Investor's Remedies*, 34 Vand. L. Rev. 1349, 1385-1401 (1981).

60. 456 U.S. 353 (1982). See Davis, *The Commodity Exchange Act: Statutory Silence is not Authorization for Judicial Legislation of an Implied Private Right of Action*, 46 Mo. L. Rev. 316, 321 (1981) for a discussion of the issue published prior to the Supreme Court decision.

61. 456 U.S. 353, 388 (1982).

62. See 28 U.S.C. § 1331 (1980). The action is based on violation of the Commodity Exchange Act. The private right of action has been codified at 7 U.S.C. § 25 (1982).

63. 456 U.S. 353, 374 (1982).

damage claims.<sup>64</sup> Although *Merrill Lynch v. Curran*<sup>65</sup> allows a federal cause of action, it is unlikely that customers will cease to use the reparations program or other dispute resolution forums.<sup>66</sup>

In state court a litigant can bring a complaint against a commodity professional based on a state statute or common law fraud.<sup>67</sup> The cost will vary depending on the state.<sup>68</sup> The degree of permitted discovery is also dependent on state law.<sup>69</sup> Jurisdiction is usually based on residence or business transactions.<sup>70</sup>

Each commodity contract market<sup>71</sup> is required to set up a voluntary dispute resolution forum for settlement of customer grievances against members or employees.<sup>72</sup> The arbitration<sup>73</sup> is required to be prompt<sup>74</sup>

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64. The liberal discovery allowed under the federal rules (Fed. R. Civ. P. 26-37) is the primary cause of the high litigation expense. "From a practical viewpoint, . . . claimants with less than \$50,000, and maybe \$75,000 in damages, probably should not rush into federal court. Federal procedures permit liberal, and costly discovery." Miller, *Commodities Litigation: Choosing a Forum and Defense Considerations*, Commodities Law Letter, July-Aug. 1982 at 2. A report compiled by the General Accounting Office (GAO) noted: "[t]he high cost of court litigation makes it a plausible alternative only for commodity claims involving large amounts [\$100,000] and/or difficult and complex issues." This report is cited in *Commodity Futures Trading Commission Oversight, Hearing before a Subcomm. of the House Comm. on Gov't Operations*, 97th Cong., 2nd Sess. 883 (1982) [hereinafter cited as GAO Report]. The cost of discovery which allows for oral depositions is especially costly in commodity cases because these cases often involve tremendous amounts of financial records and "considerable time may be required in civil court proceedings just to educate the judge and jury regarding the underlying principles of commodity futures trading." *Id.* at 880.

65. 456 U.S. 353 (1982).

66. See GAO Report, *supra* note 64, at 884.

67. See, e.g., Singer v. Clayton Brokerage Co. of St. Louis, Inc., 620 S.W.2d 720, 724 (Tex. Civ. App. 1981) (action for misrepresentation); Bishop v. Commodity Exchange, Inc., 2 Comm. Fut. L. Rep. (CCH) ¶ 21,746 at 27,005 (S.D.N.Y. June 13, 1983) (CEA does not preempt the "Martin Act", a N.Y. statute prohibiting fraudulent commodities trading) (the Martin Act is codified at N.Y. GEN. BUS. LAW § 352 (McKinney 1968)); Thayer v. American Financial Advisers, 322 N.W.2d 599, 600-01 (Sup. Ct. Minn. 1982) (plaintiffs claimed fraudulently induced to enter commodity account agreement).

68. Miller, *Commodities Litigation: Choosing A Forum and Defense Considerations*, Commodities Law Letter, July-Aug. 1982, at 2 (chart)(discusses requirements for litigation in state court).

69. *Id.*

70. *Id.*

71. See *supra* note 18 for a definition of contract market.

72. See 7 U.S.C. § 7a(11) (1982).

73. This is the method of dispute resolution currently utilized by all of the commodity exchanges. GAO Report, *supra* note 64, at 885. National Futures Association arbitration is now operational and is permitted as a substitute to the exchange providing arbitration. See 7 U.S.C. § 7a(11) (1982).

74. 17 C.F.R. § 180.2(c) (1983). Most exchange arbitrations are settled within a few months. GAO Report, *supra* note 64, at 869.

and is voluntary for the customer.<sup>75</sup> Members of the exchange are required to submit to arbitration if the customer desires.<sup>76</sup> Formal rules of evidence need not apply.<sup>77</sup> Claims of any amount are permitted to be arbitrated by the exchanges.<sup>78</sup> Often when signing an agreement to open a trading account a customer will sign an agreement to arbitrate any dispute which might arise.<sup>79</sup> Even where a customer signs a pre-dispute arbitration agreement, however, he cannot waive his right to proceed in reparations.<sup>80</sup> Regulations promulgated by the CFTC allow the customer 45 days after a demand for arbitration is made to choose to proceed in reparations.<sup>81</sup> However, a customer can waive his right to federal court litigation.<sup>82</sup>

Arbitrations are also conducted by the National Association of Securities Dealers (NASD), the American Arbitration Association (AAA) and the New York Stock Exchange (NYSE).<sup>83</sup> Jurisdiction is always based on voluntary agreement,<sup>84</sup> and membership of one of the parties in the particular association or exchange is also necessary when the arbitration is conducted by NASD or NYSE.<sup>85</sup> Arbitrations are con-

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75. 17 C.F.R. § 180.3(a) (1983).

76. 17 C.F.R. § 180 (1983); § 46 Fed. Reg. 57,457 (1981). The Chicago Board of Trade had interpreted 17 C.F.R. 180 to mean that arbitration was also voluntary to members. The CFTC disapproved this interpretation. *Id.*

77. Although exchanges are not required to apply formal evidentiary rules, "the procedures established [by the exchanges] may not be so informal as to deny due process." 17 C.F.R. § 180.2(d)(2) (1983).

78. See *infra* notes 122-125 and accompanying text for a discussion of the 1982 amendments that eliminated a \$15,000 ceiling on arbitrable claims.

79. See Brodsky, *Arbitrating Disputes Involving Commodities*, N.Y.L.J., Nov. 3, 1982 at 1, col. 1.

80. 17 C.F.R. § 180.3(b)(3) (1983).

81. *Id.*

82. 17 C.F.R. § 180.3(1983). See *Rothberg v. Loeb, Rhoades & Co.*, 445 F. Supp. 1336 (S.D.N.Y. 1978); *Ingbar v. Drexel Burnham Lambert, Inc.*, 683 F.2d 603 (1st Cir. 1982). The waiver will be invalid if the pre-dispute agreement does not conform to regulation 180.3. However, if the law relating to commodities follows the development in securities law, a customer will not be able to waive his right to go to federal court before the dispute arises. See *Wilko v. Swan*, 346 U.S. 427 (1953) (securities case); Peloso, *Enforceability of Pacts to Arbitrate Claims in Commodity Futures*, N.Y.L.J. January 26, 1983 at 1, col. 1; Brodsky, *supra* note 79.

83. Gargan, *Guide to Commodity Futures Arbitration Procedures*, Commodities Law Letter, July-Aug. 1982 at 5.

84. See *infra* note 85.

85. National Association of Securities Dealers, *Code of Arbitration Procedure, Part I*, § 1 (3d ed. 1982); New York Stock Exchange, *Arbitration Rules*, art. VIII, § 1.

ducted in accordance with the rules and regulations of the particular association.<sup>86</sup>

The CFTC is given the authority to create a system to award damages to individuals injured by violations of the CEA as amended in Section 14 of the Act.<sup>87</sup> The purpose of congressional establishment of CFTC reparations was to "bring about inexpensive and expeditious adjudication of customer claims."<sup>88</sup> The intent was to create a simple forum, much like a small claims court.<sup>89</sup> In bringing a reparations claim a customer must allege respondent's violation of the CEA<sup>90</sup> (or rules thereunder) and resultant damage in his petition to the Commission.<sup>91</sup> The complaints are then screened by the Commission to determine if a cause of action is properly stated.<sup>92</sup> Next, respondent is notified of the claim,<sup>93</sup> to which he may answer<sup>94</sup> and reply to any counterclaims.<sup>95</sup> After an analysis of these pleadings, the CFTC either dismisses the complaint or conducts an investigation and hearing before an administrative law judge (ALJ) or hearing officer.<sup>96</sup> Decisions and any reparation award made by a hearing officer or ALJ may be reviewed by the Commission upon proposal by the parties or selection by the Commission.<sup>97</sup> The CFTC enforces reparations deci-

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86. See National Association of Securities Dealers, Code of Arbitration Procedure (3d ed. 1982); American Arbitration Association, Commercial Arbitration Rules (1982); New York Stock Exchange Arbitration Rules, rules 600-632.

87. See 7 U.S.C. § 18(a) (1982). This provision reads:

Any person complaining of any violation of any provision of this [Act], or any rule, regulation, or order issued pursuant to this [Act], by any person who is registered under this [Act] may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding actual damages proximately caused by such violation.

*Id.*

88. GAO Report *supra*, note 64, at 861.

89. *Id.*

90. Between 1978 and the enactment of the Futures Trading Act of 1982, the petition could be against anyone "who is registered or required to be registered" under the Act. See 7 U.S.C. § 18(a) (Supp. III 1979) (as amended by Futures Trading Act of 1978, Pub. L. No. 95-405, § 21(1), 92 Stat. 876 (1978)). Now it may only be against anyone who "is registered" under the Act. See 7 U.S.C. § 18(a) (1982).

91. Commodity Exchange Act § 14(a), 7 U.S.C. § 18(a) (1982).

92. 17 C.F.R. § 12.22 (1983).

93. *Id.*

94. 17 C.F.R. § 12.23 (1983).

95. 17 C.F.R. § 12.24 (1983).

96. 17 C.F.R. § 12.31 (1983). When the claim is \$5,000 or less, it may be decided based on the submissions of the parties. Prior to 1978 the amount was \$2,500. *Id.*

97. 17 C.F.R. § 12.101 (1983). A CFTC decision is a final administrative decision when it is reviewed by the Commission or when review is denied. 7 U.S.C. §

sions by suspending the registrant or prohibiting the registrant from trading.<sup>98</sup>

## V. Weaknesses of Present Forums

Although there are several forums for resolving commodities futures disputes,<sup>99</sup> each forum has material drawbacks.<sup>100</sup>

Federal and state court litigation are effective but costly and time consuming remedies.<sup>101</sup> In state court, a litigant loses the opportunity of simply proving a violation of the Act<sup>102</sup> and must prove the elements of his common law cause of action or show a violation of a state statute.<sup>103</sup> However, the courts are available to those who choose to resolve disputes in this fashion and can afford the costs. The focus of this Note is on those investors with a small or moderate claim who do not view court litigation as a viable or desirable alternative. These investors have resort to a host of arbitration forums<sup>104</sup> and CFTC reparations.<sup>105</sup>

Exchange arbitrations<sup>106</sup> are limited by jurisdictional restraints.<sup>107</sup> An exchange can arbitrate a dispute only if it:

arises out of any transaction on or subject to the rules of a contract market executed by or effected through a member of that contract market or employee thereof which dispute does not require for

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18(e) (1982). Thereafter, review can be sought in the U.S. Court of Appeals and next in the United States Supreme Court. 7 U.S.C. § 18(e) (1982).

98. 7 U.S.C. § 18(f) (1982).

99. See *supra* notes 50-57 and accompanying text for a discussion of the various forums.

100. See *infra* notes 101-147 and accompanying text for a discussion of the weaknesses of the various forums.

101. See *supra* note 64 for a discussion of the costliness of court litigation.

102. See *Bishop v. Commodity Exchange, Inc.*, 2 Comm. Fut. Rep., (CCH) 21,746 at 27,005 (S.D.N.Y. June 13, 1983). See *supra* text accompanying notes 90-91 for requisites of a reparations claim.

103. See *supra* note 67 for a discussion of common law fraud cases and violations of state statutes.

104. Examples include the National Association of Securities Dealers, the American Arbitration Association, the New York Stock Exchange and exchange arbitrations. See *supra* notes 83-86 and accompanying text for a discussion of commercial arbitrations.

105. See *supra* notes 87-98 and accompanying text for a discussion of CFTC reparations.

106. Exchange arbitrations are those conducted by each commodity exchange pursuant to 7 U.S.C. § 7a(11) (1982).

107. See *infra* note 108 and accompanying text for an explanation of the limitations.

adjudication the presence of essential witnesses or third parties over whom the contract market does not have jurisdiction . . .<sup>108</sup>

Therefore, neither allegations of general mismanagement of an account nor complaints that involve transactions on several exchanges are cognizable. For example, if a customer has a complaint pertaining to the execution of gold and cotton trades, it cannot be decided in one exchange forum.<sup>109</sup> Neither exchange has jurisdiction over the activities on the other exchange.<sup>110</sup> The requirement that the transaction which is the subject of the dispute be "executed by or effected through"<sup>111</sup> a contract market member limits most exchange arbitration complaints to those involving trading floor execution of an order.<sup>112</sup> For instance, if a customer felt that the floorbroker who sold one lot<sup>113</sup> of gold for the customer's account did so at a price below the prevailing market rate, he could proceed in Comex<sup>114</sup> arbitration. The same customer, however, could not complain that his brokerage firm failed to properly manage his gold futures portfolio.<sup>115</sup> Another limitation of exchange arbitration is that it is only conducted where the exchange is located.<sup>116</sup>

The public perception of exchange arbitrations is poor.<sup>117</sup> In a GAO study comparing CFTC reparations to other available dispute resolution forums, two problems in the area of public perception were discovered:<sup>118</sup> (1) pro-industry bias and (2) lack of customer awareness of arbitration forums. The first exists because the exchange arbitration panels include exchange members and industry officials, thereby cre-

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108. 17 C.F.R. § 180.1 (1983).

109. Cotton and gold are not traded on the same exchanges.

110. *GAO Report*, *supra* note 64, at 886.

111. See *supra* text accompanying note 108.

112. See Gargan, *Guide to Commodity Futures Arbitration Procedures*, Commodities Law Letter, July-Aug. 1982, 5, 7. An example of an isolated transaction is a case where the actual buy or sell order is executed on the trading floor and the price or quantity that is obtained is disputed by the customer.

113. "In futures trading, [lot] refers to the unit of trading . . ." *CFTC Glossary*, *supra* note 42, at 17.

114. This is the Commodity Exchange located in New York where gold is traded. Gold is also traded on the Chicago Board of Trade and various exchanges outside the U.S. 1 Comm. Fut. L. Rep. (CCH) ¶ 131 at 1028.

115. See Gargan, *supra* note 112, at 7; see also *GAO Report*, *supra* note 64, at 886.

116. *GAO Report*, *supra* note 64, at 886.

117. *Id.*

118. This comparison was made by the GAO in a study conducted during 1980-1981. *GAO Report*, *supra* note 64, at 861-93.

ating a public perception of pro-industry bias.<sup>119</sup> Another problem noted by the GAO is the lack of customer awareness of arbitration forums.<sup>120</sup> This problem is particularly troublesome because, "arbitration is potentially the least cumbersome and costly forum available to settle commodity disputes."<sup>121</sup>

Prior to 1983, the CEA limited disputes that exchange arbitrations are required to accept to those claiming \$15,000 or less.<sup>122</sup> There is now no ceiling on the value of the claims that are required to be arbitrated by the exchanges.<sup>123</sup> The elimination of the statutory ceiling was made in an effort to make arbitration an attractive alternative to CFTC reparations.<sup>124</sup> Regulations promulgated by the CFTC in accordance with the CEA were changed to conform with this elimination.<sup>125</sup> The elimination of the ceiling should increase the usefulness of exchange arbitrations.<sup>126</sup>

The commercial arbitration forums which exist<sup>127</sup> are completely voluntary to both parties.<sup>128</sup> These arbitrations are often limited to respondents who are members of the respective exchanges.<sup>129</sup> Commercial arbitration also "include[s] industry officials or exchange

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119. *Id.* at 886.

120. *Id.* Only five of twenty-four reparations complainants interviewed by the GAO knew that they could also have proceeded in arbitration. *Id.*

121. *Id.*

122. See Commodity Exchange Act §§ 5(a)(11), 17(b)(10), 7 U.S.C. §§ 7a(11), 21(b)(10) (1982).

123. See Futures Trading Act of 1982, Pub. L. No. 97-444, § 217, 96 Stat. 2294, 2307 (1983).

124. H.R. Rep. No. 565, Point 1, 97th Cong., 2d Sess. 56 (1982). This was also the rationale of the CFTC when they adjusted C.F.R. § 180 to conform to the new legislation. "The Commission expects that this change [removal of \$15,000 ceiling] may encourage customers with more sizable claims to arbitrate their claims instead of petitioning for reparations hearings." 48 Fed. Reg. 22,136, 22,137 (1983) (to be codified at 17 C.F.R. §§ 170.8, 180.2, 180.4).

125. See 48 Fed. Reg. 22,136 (1983).

126. See GAO Report, *supra* note 64, at 886 (83% of the claims filed in reparations in 1981 could have gone to exchange arbitration if the dollar ceiling had been \$25,000 rather than \$15,000). *Id.*

127. The New York Stock Exchange, the National Association of Securities Dealers, and American Arbitration Association. See *supra* note 83 and accompanying text.

128. See New York Stock Exchange, Arbitration Rules, Art. VIII, § 1; National Association of Securities Dealers, Code of Arbitration Procedure, Part I, § 8 (1982); American Arbitration Association, Commercial Arbitration Rules, rule 1 (1982). A party can be forced to arbitrate only if a pre-dispute arbitration agreement has been properly executed. See 17 C.F.R. § 180.3(a) (1983). For details of an effective pre-dispute arbitration agreement, see *supra* note 82 and accompanying text.

129. See New York Stock Exchange Arbitration Rules, Art. VIII, § 1; National Association of Securities Dealers, Code of Arbitration Procedure, Part I, § 1 (1982).

members" on arbitration panels<sup>130</sup> and therefore "customers often perceive the panels to be less than completely impartial."<sup>131</sup>

The foremost problem with CFTC reparations is the long delay in arriving at a final determination of a claim caused by the great backlog of cases.<sup>132</sup> The burgeoning case load is generated by the increase in complaints,<sup>133</sup> coupled with the limited resources of the CFTC.<sup>134</sup> The backlog may be reduced by a provision of the 1983 amendment that no longer allows a customer to make a complaint against any individual merely *required* to be registered under the Act but rather only against those *actually* registered.<sup>135</sup> Two other problems exist with respect to CFTC reparations: complexity of the procedures makes it difficult and expensive for customers to use,<sup>136</sup> and delay in assigning cases to an ALJ or hearing officer does not provide the opportunity for encouraging settlement because communication between the parties does not begin until the case is assigned.<sup>137</sup> The protracted appeals preparation of the Opinions Section<sup>138</sup> and further review by the Commission, also delays resolution.<sup>139</sup> This protracted

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130. See *GAO Report*, *supra* note 64, at 886.

131. *Id.*

132. Of the complaints actually forwarded to the Hearings Section of the CFTC, the number pending at year end has steadily increased. The Hearings Section received 25 complaints in 1976, 319 in 1977, 303 in 1978, 535 in 1979, 747 in 1980, 818 in 1981 and 514 in 1982. *GAO Report*, *supra* note 64, at 873 and CFTC Ann. Rep. 33-34 (1982). The cumulative complaints pending were 25 in 1976, 274 in 1977, 343 in 1978, 700 in 1979, 1172 in 1980, 1389 in 1981 and 1010 in 1982. *Id.* The "CFTC estimated that the adjudication backlog will remain high in future years . . ." *GAO Report*, *supra* note 64, at 872. "[F]or complaints originally filed with CFTC in fiscal years 1976, 1977 and 1978, an average of 1,729 days (4 years), 1,173 days (3 years) and 1,129 days (3 years) respectively were required for a complaint to proceed through the entire reparations process." *Id.* at 865-66. Included in a typical reparations packet of material sent to the author by the CFTC on or about Feb. 20, 1983 was a Notice that in part reads "[d]ue to the large number of claims now pending in the reparations process, delay in a final adjudication on the merits may be as long as two years." Commodity Futures Trading Commission, Instructions for filing a Complaint (Feb. 1983).

133. See *supra* note 132 for a discussion of the backlog.

134. See *GAO Report*, *supra* note 64, at 861.

135. See *supra* note 90. Some firms and individuals conduct business illegally by operating without being registered. See 1982 U.S. CODE CONG. & AD. NEWS, 97th Cong. 2d Sess. 3905 (1982). They are sometimes referred to as "outlaw" firms. *Id.*

136. See *GAO Report*, *supra* note 64, at 861.

137. *Id.* at 870.

138. The Opinions section of the CFTC prepares background material and makes recommendations on appeals to the Commission. *Id.* at 872-76. This involves enforcement, registration and interlocutory appeals as well as reparations appeals. *Id.*

139. *Id.* at 874.

appellate delay<sup>140</sup> encourages respondents "to appeal unfavorable decisions in order to delay paying a judgment to a complainant."<sup>141</sup> Therefore, "the number of complainants who actually received money when viewed against the total number of complaints . . . accepted for adjudication [is] . . . astonishingly low."<sup>142</sup>

The GAO found that the operation procedures were too complex for many people to understand<sup>143</sup> and that this caused many to consult an attorney.<sup>144</sup> The Futures Trading Act of 1982<sup>145</sup> made reparations procedures to be followed by the CFTC less rigid,<sup>146</sup> which may enable the CFTC to overcome the problems of reparations being difficult and expensive.<sup>147</sup>

## VI. One New Forum—One Proposed New Forum

### A. NFA Arbitration

Recently, the National Futures Association (NFA), the only registered futures association,<sup>148</sup> began conducting nationwide arbitration

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140. "[I]t took an average of 899 days to issue an opinion in fiscal year 1981." *Id.* at 876.

141. *Id.*

142. *GAO Report*, *supra* note 64, at 877. As of Aug. 1981, 53 people received money from reparations awards; as of Sept. 1981, 2,607 complaints had been accepted for adjudication. *Id.*

143. *Id.* at 878. "[Seventy-five] percent of all reparations complainants whose claims are forwarded to the Hearing Section for adjudication hire attorneys to represent them. *Id.* By comparison, only 18 percent of complainants in arbitration employ attorneys." *Id.*

144. *Id.*

145. Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983).

146. See *infra* note 205 and accompanying text for a discussion of the changes. Futures Trading Act of 1982, Pub. L. No. 97-444, § 231(b), 96 Stat. 2319 (1983).

147. "Notwithstanding any other provision of law, such rules, regulations, and orders [of the CFTC] may prescribe, or otherwise condition, without limitation, the form, filing, and service of pleadings or orders, the nature and scope of discovery, counterclaims, motion practice . . . , hearings . . . , rights of appeal, if any, and all other matters governing proceedings before the Commission under this section." *Id.*

148. "Any association of persons may be registered with the Commission . . . pursuant to [7 U.S.C. § 21(b)]." 7 U.S.C. § 21(a) (1982). The NFA was registered on Sept. 22, 1981. It is "a self-regulatory organization developed to maintain the integrity of the futures industry and to protect the public through effective and efficient self-regulation." National Futures Association, Arbitration Procedures for Resolution of Commodity Related Disputes, 1 (printed by National Futures Association, Chicago, Ill.). One requirement for registration as a futures association is that the association provide "a fair, equitable, and expeditious procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof . . ." 7 U.S.C. § 21(b)(10) (1982).

of disputes between customers and commodities professionals.<sup>149</sup> Arbitration panels are composed of NFA members<sup>150</sup> but a complainant can choose to have some non-NFA related arbitrators on the panel.<sup>151</sup> The legislation that eliminated the \$15,000 limit on arbitrable claims in exchange arbitrations also eliminated the ceiling on claims arbitrable by NFA.<sup>152</sup>

Membership in the Association is required of all futures commission merchants.<sup>153</sup> Further, NFA members can only conduct business with commodity pool operators, futures commission merchants, introducing brokers or commodity trading advisors if they are also NFA members.<sup>154</sup> This effectively causes many commodities professionals to become members.<sup>155</sup> However, there is no mandatory membership requirement for other commodity professionals.<sup>156</sup>

The claims that the NFA arbitrates are divided into disputes that are subject to mandatory arbitration and those that are heard on a discretionary basis.<sup>157</sup> Members of the Association must submit to arbitration when a mandatory claim is involved.<sup>158</sup>

NFA arbitration will be a valuable addition to the available forums for resolution of commodity futures disputes, particularly for complainants with small to moderate claims.<sup>159</sup> The major justification for NFA arbitration is its specialized focus on commodity futures disputes.<sup>160</sup> This specialization will alleviate the need for education of the arbitrators in the complex area of commodities futures trading.<sup>161</sup> Exchange arbitrators are also familiar with commodities futures trading, but are often perceived to be biased in favor of respondents.<sup>162</sup>

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149. The arbitrations began on March 31, 1983. Letter from David J. Gefland to the author (March 31, 1983) (discussing NFA arbitration program).

150. National Futures Association, *Code of Arbitration*, § 4(a).

151. *Id.*

152. Futures Trading Act of 1982, Pub. L. No. 97-444 § 217, 96 Stat. 2307 (1983).

153. Commodity Exchange Act, § 17m, 7 U.S.C. § 21(m) (1982).

154. National Futures Association, Bylaw 1101.

155. See National Futures Association, *A Partnership between the Public and the Industry*, 5 and insert. This is so because only commodity exchanges (and the floorbroker members), commodity-related commercial firms and commercial banks are not required to join NFA. *Id.*

156. *Id.*

157. National Futures Association, *Code of Arbitration*, § 2.

158. National Futures Association, *Arbitration Procedures for Resolution of Commodity Related Disputes*, 3.

159. See *supra* note 64 for a discussion of small to moderate claims.

160. National Futures Association, *Arbitration Procedures for Resolution of Commodity Related Disputes* 2.

161. *Id.* at 2-3.

162. See *supra* text accompanying notes 98 & 99.

State and federal courts and the various commercial arbitration bodies are not familiar with commodities futures. The courts have the ability to decide such disputes, but their lack of expertise in this area increases the time necessary for final resolution.<sup>163</sup> The CFTC is familiar with commodities futures, but the long delay in the adjudication process may outweigh the value of its expertise to potential claimants.

A further asset of NFA arbitration is that it will be offered nationwide.<sup>164</sup> State and federal courts are also available nationwide but exchange arbitrations are not.<sup>165</sup> CFTC reparation hearings are held in a city where the respondent engages in business, unless otherwise agreed to by the parties<sup>166</sup> and exchange arbitrations are limited to the city where the exchange is located.<sup>167</sup>

The NFA aims to complete arbitration within several months,<sup>168</sup> rather than the extensive time needed to complete reparations or trials in federal and state courts.<sup>169</sup> Although exchange arbitrations and commercial arbitrations are also completed within a matter of months,<sup>170</sup> these alternatives have other limitations.<sup>171</sup>

Because NFA membership consists of a broad base of industry professionals<sup>172</sup> and because non-NFA members can be requested to serve on arbitration panels,<sup>173</sup> the NFA is less likely than the exchanges to be perceived by the public as biased in favor of the industry member. The NFA is organized specifically as an association representative of the entire futures industry.<sup>174</sup> Unlike exchange arbitrations, NFA's arbitration panels are not composed of floorbrokers involved in a working relationship with other exchange members.<sup>175</sup> The various NFA programs, including the arbitration program, are

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163. GAO Report, *supra* note 64, at 880.

164. National Futures Association, *Arbitration Procedures For Resolution of Commodity Related Disputes* 2 (printed by National Futures Association, Chicago, Ill.). "NFA will conduct arbitration hearings in any city in which qualified Arbitration Panels can be assembled . . . ." *Id.*

165. See *infra* note 167 and accompanying text.

166. 17 C.F.R. § 12.71(d) (1983).

167. GAO Report, *supra* note 64, at 886.

168. National Futures Association, *Arbitration Procedures For Resolution of Commodity Related Disputes* 5-11.

169. See *supra* notes 64 and 132 for a discussion of the duration of court litigation.

170. GAO Report, *supra* note 64, at 869.

171. See *supra* section V., entitled "Weaknesses of Present Forums."

172. See GAO Report, *supra* note 64, at 888.

173. See NFA Code of Arbitration § 4(a).

174. National Futures Association, *A Partnership between the Public and the Industry*, 1.

175. 17 C.F.R. § 180.2(a) (1983). A claimant can request a mixed panel of arbitrators in an exchange arbitration. *Id.*

"designed to oversee the practices of commodity professionals and safeguard the interests of both public and commercial users of United States futures markets."<sup>176</sup> This is a significant comparison to the low priority placed on reparations by the CFTC.<sup>177</sup>

NFA has jurisdiction to arbitrate claims pertaining to any futures contract.<sup>178</sup> This offers a centralized forum for resolution of multi-exchange disputes that cannot be arbitrated at one exchange forum.<sup>179</sup> All exchanges may delegate their required arbitration responsibilities to the NFA arbitration program.<sup>180</sup> If commodities exchanges exercise their delegation authority, NFA will provide a professional, nationwide system of arbitration which is a uniform, viable and attractive alternative to court litigation, other arbitration forums or CFTC reparations.<sup>181</sup>

## B. CFTC Proposed Voluntary Dispute Resolution Program

Congressional review of the CFTC<sup>182</sup> revealed long delays and inefficiencies with the reparations program.<sup>183</sup> The CFTC was mandated to improve the program.<sup>184</sup> As part of this mandate, Congress provided a more flexible framework in which the CFTC is to operate.<sup>185</sup> The CFTC's efforts to improve the reparations program include a proposal to institute a voluntary dispute resolution procedure.<sup>186</sup> The procedure will be much like commercial arbitration.<sup>187</sup> Both parties must agree to arbitrate and the decision will be unappealable.<sup>188</sup> This procedure is expected to be completed in less time than

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176. National Futures Association, *Arbitration Procedure for Resolution of Commodity Related Disputes* 1.

177. GAO Report, *supra* note 64, at 876.

178. National Futures Association, *Arbitration Procedure for Resolution of Commodity Related Disputes* 2. Pre-dispute arbitration agreements can be utilized. 17 C.F.R. § 180.3 (1983).

179. See *supra* text accompanying notes 110-111.

180. 7 U.S.C. § 7a(11) (1982).

181. National Futures Association, *Arbitration Procedures for Resolution of Commodity Related Disputes*, 2-3 (printed by National Futures Association, Chicago, Ill.).

182. See GAO Report, *supra* note 64, at 876.

183. *Id.* at 861.

184. See 1982 U.S. CODE CONG. & AD. NEWS, 97th Cong., 2d Sess. 3904 (1982).

185. See The Futures Trading Act of 1982, Pub. L. No. 97-444, § 231, 96 Stat. 2319 (1983).

186. See Proposed 17 C.F.R. § 12.41 Commodities Futures Trading Commission, *Proposed Rules Relating to Reparation Proceedings*, Subpart B, 22 (1983).

187. Commodity Futures Trading Commission, *Proposed Rules Relating to Reparation Proceedings* (1983).

188. 48 Fed. Reg. 25,281. However, the CFTC in proposed regulation 12.403, would authorize "the Commission to review a final decision in a voluntary proceeding if manifest injustice would otherwise result." *Id.*

ordinary reparations.<sup>189</sup> It is unlikely the CFTC will arbitrate as quickly as do other arbitration bodies, because the Commission's proposed appeal process will lengthen the proceeding.<sup>190</sup>

The voluntary nature of this proposed program is a drawback which will likely cause it to be under-utilized by respondents.<sup>191</sup> Respondents will normally prefer CFTC reparations because of the delays in CFTC arbitration.<sup>192</sup> NFA and exchange arbitrations compel members to arbitrate and are thereby viable.<sup>193</sup>

The CFTC's proposed voluntary dispute resolution procedure is similar to NFA arbitration.<sup>194</sup> The great majority of the comments on the proposed regulation did not support the proposal.<sup>195</sup> The general criticism is that the system will not succeed because it is voluntary and because it duplicates existing systems.<sup>196</sup> For example, Shearson American Express, Inc.<sup>197</sup> felt that reparations have been a "dismal failure"<sup>198</sup> and the proposed voluntary procedure would "simply create new staff positions and would merely be a step backward toward expanding the cost and size of government involvement in duplicating existing private dispute resolution forums without any perceivable benefits accruing to the public."<sup>199</sup> The Futures Industry Association, the national trade association of the futures industry, while commanding the CFTC's efforts, did not support the CFTC's creation of its own voluntary procedure.<sup>200</sup> It noted that a new procedure need not be

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189. See *supra* note 132 and accompanying text.

190. See *supra* notes 138-142 and accompanying text for a discussion of the duration of appeals.

191. See *supra* text accompanying notes 172 & 173.

192. See *supra* text accompanying notes 140 and 141 for a discussion of respondents' preferences.

193. See NFA Code of Arbitration § 2(a)(1)(i) and 7 U.S.C. § 7a(11) (1982).

194. See Commodity Futures Trading Commission, *Proposed Rules Relating to Reparation Proceedings* (1983).

195. CFTC, Informational Memorandum of the Commission from Dennis A. Dutterer, General Counsel, at 3 (April 28, 1983). "All of the comment letters questioned the need for the Commission's establishment of a voluntary decisional procedure that would be akin to commercial arbitration. Concern was expressed in each of the letters that the Commission's voluntary procedure may in large part duplicate and might inhibit the development of the arbitration procedure established by NFA on March 31, 1983." *Id.*

196. See *infra* notes 56-98 and accompanying text for a discussion of existing systems.

197. Comment letter from Michael Hogan, Senior Counsel for Shearson American Express to the CFTC (April 27, 1983).

198. *Id.* at 1.

199. *Id.* at 2.

200. Comment letter from John Damgard, President of Futures Industry Association to the CFTC, at 3 (May 12, 1983).

invented when ample arbitration procedures are already in existence.<sup>201</sup>

As pointed out in one of the comment letters, the congressional mandate to the CFTC focused on improving the trial-type remedies currently available.<sup>202</sup> The CFTC proposal creates a new arbitration system<sup>203</sup> rather than improving reparations procedures. Changes in reparations instituted during 1983<sup>204</sup> are directed at streamlining the existing procedures and may help reduce the existing backlog.<sup>205</sup>

### CONCLUSION

The commodity futures industry offers customers several methods of resolving disputes that arise with commodity professionals.<sup>206</sup> An additional forum, NFA arbitration, was added recently.<sup>207</sup> This forum offers a much needed uniform and nationwide system of arbitration with jurisdiction over multi-exchange disputes. Requiring the exchanges to refer disputes to NFA and to include NFA as the forum for arbitration in pre-dispute arbitration agreements would greatly enhance the effectiveness of this new arbitration forum. These changes would have the effect of creating a uniform code for arbitrating commodity futures disputes. Eliminating confusion in this manner can increase the use of NFA arbitration and in turn reduce the backlog in CFTC reparations. The CFTC's responsibility to improve reparations would be better served by encouraging NFA arbitration while monitoring and analyzing the effectiveness of the many changes aimed at streamlining reparations recently instituted, rather than developing and instituting a new forum duplicative of NFA arbitration.

*Dorothy Matthews Freeburg*

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201. *Id.*

202. Comment letter from Clinton Burr, General Counsel for Rosenthal & Company to the CFTC, at 5 (March 17, 1983).

203. See *supra* text accompanying notes 188-191 for a discussion of the proposed system.

204. Petitions can only be brought against an individual actually registered under the Act. For a discussion of this change see *supra* note 135 and accompanying text. For a discussion of all the 1983 changes to reparations see 1982 U.S. CODE CONG. & AD. NEWS, 97th Cong., 2d Sess. 3904-05 (1982).

205. *Id.*

206. See *supra* text accompanying notes 59-102 for a discussion of the various forums.

207. See *supra* note 5.

