

**THE REPARATIONS PROGRAM OF THE COMMODITY
FUTURES TRADING COMMISSION: REDUCING
FORMALITY IN AGENCY ADJUDICATION**

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INTRODUCTION

The Commodity Exchange Act of 1974 (CEA)¹ contains a provision that is unusual, although not unique,² in the statutory lexicon of the

1. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389-1416 (amending Commodity Exchange Act, ch. 369, § 1, 42 Stat. 998 (1922)).

2. Some commentators have called the process unique. See Markham & Bergin, *Customer Rights Under the Commodity Exchange Act*, 37 VAND. L. REV. 1299, 1345 (1984) (describing CEA provision permitting CFTC to award damages); Graham, *Special Reparations Actions*, 35 BUS. LAW. 773 (1980) (stating CFTC reparations program as unique to federal sector). The unique aspect of the CFTC reparations program is that the CFTC's decision is appealable only to a United States court of appeals, not to a district court for a trial de novo. See Graham, *supra*, at 774 (commenting that the Commission is required to conduct a classic APA adjudication since section 14 does not provide for de novo review); see also Markham, *The Seventh Amendment and CFTC Reparations Proceedings*, 68 IOWA L. REV. 87, 88, 97-98 (1982) (explaining that legislative history clearly indicates Commission's findings would be reviewable only in courts of appeals with no jury trial or factual review available in district court). Be-

federal government. Section 14 of the Commodity Exchange Act provides for a civil complaint resolution system, known as the reparations program.³ In effect, the reparations program is a national civil administrative court for customers of commodities brokers (called futures commission merchants or FCM's), administered centrally from Washington, D.C., by a federal regulatory agency, the Commodity Futures Trading Commission (CFTC). The CFTC reparations program is now receiving increased attention because it is an unusual federal program that is very much in accord with the alternative dispute resolution methods currently the subject of great interest.⁴

The reasons for the adoption of a reparations program for the CFTC and not for other federal agencies are unclear. The Government Accounting Office (GAO) has asserted that, "in establishing a reparations program, the Congress was attempting to create an expeditious, inexpensive, and easy to use dispute resolution process, available to as many commodity customers as possible."⁵ Another explanation for the exist-

cause the reparations process provides for only limited appellate review of the facts, it has been challenged under the seventh amendment to the United States Constitution as denying a jury trial to the respondent. The challenge, as yet, however, has not been successful. See *Myron v. Hauser*, 673 F.2d 994 (8th Cir. 1982) (holding Congress' creation of statutory scheme without providing for jury trials does not violate seventh amendment); *Terson Co. v. Pension Benefit Guaranty Corp.*, 565 F. Supp. 203 (N.D. Ill. 1982) (dismissing proposition that seventh amendment requires jury trial upon demand in reparation proceedings before CFTC).

3. Added in 1974, section 14 established the reparations program. The idea of the new program was to complement the informal arbitration programs to be established by the exchanges (section 5a(11)) and futures associations (section 17(b)(10)). Raisler & Geldermann, *The CFTC's New Reparation Rules: In Search of a Fair, Responsive, and Practical Forum for Resolving Commodity-Related Disputes*, 40 BUS. LAW. 537, 539 (1985).

4. See, e.g., Administrative Conference Recommendation No. 86-3, Agencies' Use of Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-3 (recommending that agencies adopt and also encourage regulated parties to adopt alternative means of resolving disputes); *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L.J. 399 (1987) (describing uses of ADR and addressing problems arising from its use); Friedman, *Alternative Dispute Resolution*, 1 WASH. LAW. 4-5 (1987) (describing an ADR program called "The Multi-Door Dispute Resolution Program" in the District of Columbia); Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L.J. 141 (1987) (comparing major types of ADR techniques). A comprehensive coverage of dispute resolution techniques can also be found in S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985).

5. GAO REPORT, REPARATIONS AND OTHER PRESENTLY AVAILABLE FORUMS FOR THE RESOLUTION OF CUSTOMER CLAIMS, reprinted in *Commodity Futures Trading Commission Oversight: Hearings before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 97th Cong., 2d Sess. 861 app. 5 (1982) [hereinafter *1982 House Operations Committee Hearings*]. The GAO Report stated that in 1974, "[t]he objectives of the new program [established by Congress] were to provide an alternative grievance procedure, midway in

tence of the program rests more in history than in logic. The 1974 Amendments to the CEA, the statute that created the reparations program, also created the Commodity Futures Trading Commission to administer the program.⁶ The CFTC was heir in function to the old Commodity Exchange Authority (Authority), which was part of the United States Department of Agriculture (USDA). The USDA also administered the Packers and Stockyards Act, which has long contained a reparations program.⁷ Congress may not, therefore, have intended deliberately to "experiment"⁸ with new administrative forms of adjudication, but rather may simply have transposed the essence of the old Packers and Stockyards program onto the new futures regulatory program.⁹

As will be discussed below, whatever might have been the intention of Congress in creating the reparations program within the CFTC, the program has struggled for resources and recognition throughout most of its history. Despite this struggle, the concept of the reparations process as an alternative means of dispute resolution has considerable appeal. In theory, at least, the prototype program offers distinct advantages over both civil judicial actions and industry-sponsored arbitration. It offers a dispute resolution system liberated from the formal, rigidly conventional system of civil litigation.¹⁰ In addition, unlike civil court,

complexity and expense between the traditional remedies used in the futures industry of arbitration and court litigation." *Id.* at 861.

6. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (current version at 7 U.S.C. § 18 (1982)).

7. Section 309 of the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 209-10 (1982) contains the reparations provisions. The USDA recently amended its rules of practice for such proceedings to eliminate an oral hearing as of right for claimants in cases of less than \$10,000. 9 C.F.R. § 202.111 (1987). In so doing, the USDA copied a practice already in effect at the CFTC for claims of less than \$10,000. 17 C.F.R. §§ 12.200-210 (1987).

8. In his testimony before Congress in 1982, Philip McB. Johnson, then chairman of the CFTC, called the reparations process "the noble experiment." *CFTC Reauthorization Hearings on H.R. 5447 Before the Subcomm. on Conservation, Credit and Rural Development of the House Comm. on Agriculture*, 97th Cong., 2d Sess. 115 (1982) [hereinafter *1982 House Agriculture Committee Hearings*] (supplemental statement of Philip McB. Johnson, Chairman, CFTC).

9. In his article, Shipe, *Private Litigation before the Commodity Futures Trading Commission*, 33 ADMIN. L. REV. 153, 160-61 (1981), Arthur L. Shipe, an administrative law judge, stated that the "progenitor of [the CFTC reparations program] is traceable, through the Perishable Agricultural Commodities Act, and the Packers and Stockyards Act 1921, to the Interstate Commerce Act, originally enacted in 1887." For another discussion of the origins of the CFTC program, see Markham, *supra* note 2, at 94-98 (pointing out that what may be unique about CFTC reparations process is not existence of a private dispute resolution system, which has long existed at Interstate Commerce Commission and Department of Agriculture, but rather limited appellate review provided in CFTC process as compared to other processes).

10. One major impetus for the use of ADR methods is the widespread view that the rules of civil procedure are unresponsive to the dispute resolution needs of the public.

the reparations process offers a judicial panel that has expertise in commodity futures law and practice, and unlike industry-sponsored arbitrators, the reparations judiciary is staffed by federal employees who are presumed more neutral and less sympathetic to the industry's perspective than would be arbitrators drawn from industry.

This Article will first review briefly the CFTC reparations program in view of the array of alternative dispute resolution procedures currently used in this country. It will then describe the "typical" case brought in reparations. It will then review the history of the CFTC reparations program and describe its current structure. Next, the Article will analyze the current performance of the program at the CFTC. Finally, it will suggest ways in which the prototype reparations process may be utilized as a dispute resolution technique outside the CFTC.

I. THE PLACE OF REPARATIONS IN THE FIELD OF DISPUTE RESOLUTION TECHNIQUES

Ever since our British jurisprudential forebearers eschewed trial by ordeal for more fact-based means of resolving disputes, there has been a quest to discover a fair, effective, and efficient means of dispute resolution. Our present system of civil litigation is premised on a societal judgment that certain protections are worth their costs. These protections include a formalized, even-handed procedure with extensive discovery,¹¹ strict rules of evidence,¹² impartial judges, and an assured process of appeal.¹³ The costs have been in efficiency and the actual monetary cost of underwriting the litigation process. Our system of civil litigation also rests on the notion that lay decisionmakers, be they judge or jury, are capable of understanding the factual underpinnings of disputes upon which they are called to judge. Our legal system has proven to be costly, complex, and slow. The factual issues in dispute are no longer perceived as being necessarily within the grasp of lay judges and juries. For these reasons, the recent years have seen a renewed quest for dispute resolution techniques that represent an "alternative" to civil litigation.

See Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984) (discussing inability of judicial system to adjudicate civil disputes economically and efficiently).

11. See generally FED. R. CIV. P. 26-37 (delineating rules for depositions and discovery).

12. See generally FED. R. EVID. (setting out rules governing proceedings in courts of U.S. and before U.S. magistrates).

13. See generally FED. R. APP. P. (setting out procedures necessary to file appeals).

In his recent article,¹⁴ Philip J. Harter describes nine “major” categories of alternative dispute resolution (ADR). These categories are arbitration, “med-arb,” fact-finding, minitrial, mediation, facilitation, convening, conciliation, and negotiation.¹⁵ These techniques feature, in the listed order, a diminishing degree in which decisionmaking power is vested in a neutral third party. Thus, in arbitration, the third-party decisionmaker is frequently vested with plenary authority to decide the dispute (although the decision may be nonbinding). In negotiation, on the other hand, there may not be a third party involved at all. These techniques also feature, in roughly descending order, varying degrees of formality attendant in the dispute resolution process. Thus, conciliation may involve almost no rules or structure, while a fact-finding neutral may be constrained by rigid rules of evidence. Finally, the listed techniques may involve, in no particular order, varying degrees of expertise in the decisionmaker. Thus, in some kinds of disputes, the arbitrators are drawn from the industry in which the dispute arises. For example, fact-finding processes may involve fact-finding by an expert group of scientists.¹⁶

The reparations program at the CFTC is very much at the formal end of the ADR spectrum. The decisionmaker, either an administrative law judge (ALJ) appointed pursuant to the Administrative Procedure Act,¹⁷ or a “judgment officer” created by the CFTC¹⁸ for the purposes of administering the reparations program, is vested with decisional power akin to a trial judge. The process of fact-finding is quite formal, even for the “voluntary” procedure which is the most informal of the decisional procedures available under the program. The decisionmaker is expected to be expert in the facts and law at issue, and the decisionmaker’s jurisdiction is limited almost exclusively to matters arising under the Commodity Exchange Act.¹⁹

14. See Harter, *supra* note 4 (discussing alternatives to APA methods for resolving disputes).

15. *Id.* at 145.

16. See Edwards, *Alternative Dispute Resolution Panacea or Anathema?*, 99 HARV. L. REV. 668, 680-82 (1986) (arguing presence of a knowledgeable and skilled neutral makes arbitration superior to litigation in areas ranging from labor cases to mediating disputes between parents and schools over special education programs); Edelman & Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, 42 ARB. J. 7, 14 (1987) (citing benefits of using experienced neutrals in government contract disputes).

17. See 5 U.S.C. § 3105 (1982) (describing appointment of administrative law judges).

18. See Rules Relating to Reparations, 17 C.F.R. §§ 12.101, 12.201 (1987) (setting forth functions and responsibilities of judgment officer).

19. The fact finder may also hear common law counterclaims not arising under the CEA, but which involve the same facts and circumstances that gave rise to the repara-

If the CFTC's reparations program is to have value as an ADR technique, it should provide savings in time and cost, and an ease of process, over civil litigation. Moreover, the expert "judiciary" should provide more swift and accurate resolution of disputes than the "inexpert" decisionmakers of the civil litigation system. The decision should also be less subject to industry pressure and bias than the industry-based arbitration system. As will be discussed below, the reparations program at the CFTC is reasonably well structured to achieve these objectives. The process, however, has only recently shown indications that it can achieve its potential.

II. A "TYPICAL" REPARATIONS CASE

The typical kind of case brought by retail customers of commodity futures, commodity options, and securities usually involves some form of alleged wrongdoing by a brokerage firm and its sales staff in connection with the purchase and sale of the relevant instrument. In these sales practice complaints, the customer usually will allege that the salesperson: (1) misrepresented the risk of the transaction ("You'll make money," etc.; the misrepresentation is often labeled "fraud"); (2) made trades not authorized by the customer; (3) "churned" the customer's account (the allegation of "churning" is that an excessive number of trades allegedly were made for the customer's account for the purpose of generating commissions for the broker); or (4) departed from the customer's express investment purpose.²⁰

The resolution of complaints based on fraud and unauthorized trades normally requires a determination of credibility. The decisionmaker must decide who is telling the truth. For this determination, the decisionmaker may have the opportunity to hear testimony or, in the case of voluntary and summary proceedings, may be required to resolve the dispute on the basis of written information, either through interrogatories or requests for admissions.²¹ The resolution of a churning charge

tions complaint. *Mallen v. Merrill Lynch Futures, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,003 (N.D. Ga. 1985).

20. Commission rules provide that a charge that the trades were "unsuitable" is not actionable under the Commodity Exchange Act. See *Phacelli v. ContiCommodity Services, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,250, at 32,674 (Sept. 5, 1986) (holding that customer who makes knowing and meaningful election to undertake risks of trading cannot recover losses by claiming he should have been warned he was unsuitable for such a risk).

21. See 17 C.F.R. § 12.100(b) (1987) (providing that parties who elect voluntary decisional procedure waive opportunity for oral hearings, to receive written statement of factual findings, to prejudgment interest with reparation award, and to appeal final decisions). Only those claimants who chose the formal decisional procedure are entitled

requires an analysis of all transactions in an account to determine whether the frequency of trades could or could not be justified by market conditions. In both instances, the development of a record from which to decide the case can be quite time consuming,²² especially in a formal process where the decision must be based on the record because of the opportunity for appeal.

A recently decided case brought by husband and wife complainants *pro se* against a company and an individual account executive provides an example of a typical case.²³ The case commenced in April 1986, with the filing by the complainants of a 32-page, seven count complaint against defendants. The complaint alleged that defendant and its employee had: (1) violated CFTC and commodities exchange margin requirements (i.e., had not required the plaintiffs to maintain the required ratio of funds in their account to properly cover potential losses); (2) misrepresented material facts; (3) made unauthorized trades in the complainants' account; and (4) churned their account.²⁴ As part of the complaint, the complainants included selected account statements.²⁵

In early May, when the complaint was completed, the CFTC's Office of Proceedings notified defendants of the complaint and required an answer by June 20. On June 20, defendants responded with a 17-page answer and counterclaim. Appended to the answer were more than 100 pages of account statements and confirmation slips (the paper record of the transactions made in the customers' account), plus pages of customer agreements and disclaimers. On or about July 18, the complainants filed an answer to defendants' counterclaim, and on August 20 the pleadings were forwarded to the hearing section of the Office of Proceedings for assignment to an administrative law judge.

The next stage of the proceeding was occupied with discovery. The rules for reparations proceedings do not permit oral discovery, such as depositions, but do permit interrogatories, requests for admissions, and

to an oral hearing. 17 C.F.R. § 12.312 (1987).

22. For a general discussion of the delay problem associated with the CFTC reparations program, see Note, *Dispute Resolution in Commodities Futures*, 12 *FORDHAM URB. L. J.* 175, 187 n.132 (1983-84) (citing GAO Report which found that complainants who originally filed with CFTC in fiscal years 1976, 1977, and 1978 had to wait an average of 1,729 days (4 years), 1,173 days (3 years), and 1,129 days (3 years), respectively, for completion of the reparations process).

23. *Weddell v. A.G. Edwards & Sons, Inc.*, [1986-1987 Transfer Binder] *Comm. Fut. L. Rep.* (CCH) ¶ 23,447 (Jan. 21, 1987).

24. *Id.* at 33,197.

25. *See id.* at 33,198 (including complainants' original and "credit" balance, total deposits, and FCM commissions charged to securities account).

requests for production of documents.²⁶ Both parties availed themselves of these latter opportunities by requesting extensive information from each other. The discovery process had its own skirmishing, which required the ALJ to rule on at least one motion.

The hearing in the case was held on November 20, 1986. The hearing itself was relatively short, lasting two hours and forty-five minutes, and producing 114 pages of testimony. The exhibits to the testimony were more extensive, occupying more than 300 pages. Many of the exhibits duplicated materials produced in discovery. At year-end the parties filed post-hearing briefs. Complainants' brief, including exhibits, was several hundred pages long. Less than one month later, on January 21, 1987, the administrative law judge issued his opinion, ruling that complainants had admitted authorizing all trades, found for respondents on all counts, and dismissed the complaint.²⁷

III. A BRIEF HISTORY OF THE CFTC REPARATIONS PROGRAM

A. *The Original Process*²⁸

In the 1974 amendments to the Commodity Exchange Act, two kinds of adjudicatory procedures were provided: an informal procedure to adjudicate cases in which alleged damages were not greater than \$2,500, and a formal procedure for all other cases.²⁹ The informal procedure was not a formal adjudication within the meaning of the Administrative Procedure Act.³⁰ It did, however, provide an opportunity for oral hearing and had a presiding officer, rather than an ALJ, as the decisionmaker. The formal procedure allowed an oral hearing before an ALJ if one were requested by the defendant.³¹ In addition, the formal procedure's rules permitted discovery, counterclaims, summary disposition, issuance of administrative subpoenas, and interlocutory appeals, i.e., the essentials of a formal hearing as mandated by section 554 of the Administrative Procedure Act.³²

26. 17 C.F.R. § 12.30(a) (1987).

27. [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 33,199.

28. The rules governing the original process were promulgated by the CFTC on January 22, 1976. Rules Relating to Reparation Proceedings, 17 C.F.R. 180 (1977).

29. See Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 104(b), 88 Stat. 1383, 1393 (current version at 7 U.S.C. § 18 (1982)) (providing where amount claimed as damages does not exceed \$2,500, hearing is not required; instead parties may conduct depositions or submit verified factual statements to support their contentions).

30. 5 U.S.C. § 554 (1982).

31. 7 U.S.C. § 18(b) (1976).

32. 5 U.S.C. § 554 (1982).

B. *The Problems Encountered in the Administration of the
Reparations Program from 1974 to 1978*

Several problems beset the CFTC's reparations program almost from the outset. One set of problems arose from the uncertain relationship of the reparations process to the arbitration programs administered by the various futures exchanges. Many FCM's included in their agreements with customers a requirement that the customer submit all disputes to arbitration.³³ Although the CFTC did not recognize such so called "pre-dispute arbitration agreements" as effecting a waiver of a customer's right to initiate a reparations proceeding, the Commission would not permit parallel proceedings. Thus, if a complainant had already submitted to arbitration, the reparations process would be stayed pending the outcome of the arbitration process.³⁴

A more serious problem was the surge in reparations complaints provoked by the most serious sales-practice issue to surface in the early years of the reparations program, the so-called London commodity options problem.³⁵ The problem with these instruments first erupted in 1976 when 73 complaints were filed, thereafter increasing to 543 and 680 in the next two years respectively.³⁶

The sheer volume of complaints stemming from the London commodity options crisis alone would have created problems for the fledgling reparations program, but the problems were made worse because these instruments were sold mainly by unregistered persons.³⁷ By March 1978, 62% of the reparations complaints involved claims against options firms, many of which were not registered with the CFTC.³⁸ Firms and persons who avoid the agency's registration process are often difficult to locate, difficult to serve, and often impossible to collect from. Apart from these practical problems, the Commission was

33. Today, if the FCM agreement includes a mandatory arbitration provision, the agreement must satisfy the six conditions set forth in 17 C.F.R. §§ 180.3(b) (1987). See also *Ingbar v. Drexel Burnham Lambert Inc.*, 683 F.2d 603 (1st Cir. 1983) (holding predispute broker-customer arbitration agreements enforceable under Commodity Exchange Act, as long as in compliance with regulations).

34. *Raisler & Geldermann*, *supra* note 3, at 541.

35. See *id.* at 542 n.16 (noting U.S. antifraud statutes were insufficient to regulate the sale of London commodity options in U.S.).

36. *Id.* at 545 n.28; see also COMPTROLLER GENERAL, REPORT TO THE CONGRESS OF THE UNITED STATES, REGULATION OF THE COMMODITY FUTURES MARKETS - WHAT NEEDS TO BE DONE 135 (May 17, 1978) [hereinafter COMPTROLLER'S REPORT] (warning that unless steps to counteract trend are taken, within two years a four-and-one-half year backlog of reparations cases could be expected), noted in *Raisler & Geldermann*, *supra* note 3, at 545.

37. *Raisler & Geldermann*, *supra* note 3, at 542.

38. *Id.* at 542.

faced with a difficult and important jurisdictional question: did the program have jurisdiction over unregistered salespersons? The statute permitted actions against persons *registered* under the Exchange Act, but was silent about the extension of jurisdiction to those persons whose activities *required* registration, but who failed to register.

In 1978, in *Stucki v. American Options Corp.*, the CFTC ruled that those persons who *should be* registered by virtue of their activities, as well as those who actually are registered, are covered by the Exchange Act.³⁹ The effect of this decision, which subsequently was ratified by Congress in the 1978 amendments to the Exchange Act,⁴⁰ was to increase greatly the number of cases covered by a reparations program already beginning to stagger under its heavy workload. Without the Commission insisting on a corresponding increase in the resources available to the reparations program, the Commission's decision to interpret its jurisdiction expansively did little to enhance the program's effectiveness. Indeed, according to some commentators, the increased workload only succeeded in "impeding" the CFTC's "effort to administer reparations efficiently and expeditiously."⁴¹

39. *Stucki v. American Options Corp.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,559 (Feb. 13, 1978); see also Raisler & Geldermann, *supra* note 3, at 542-43 (explaining *Stucki* opinion and its later effect on reparations process).

40. The 1978 amendments changed section 14(a) to read, in pertinent part:

Any person complaining of any violation of any provision of this Chapter or any rule, regulation, or order issued pursuant to this chapter by any person who is registered or required to be registered under this chapter may, at any time within two years after the cause of action accrues, [file a complaint with the Commission].

Futures Trading Act of 1978, § 21 (codified as amended at 7 U.S.C. § 18 (1982) (emphasis added). The CEA was again amended in 1982, removing CFTC reparations jurisdiction over unregistered persons. Raisler & Gelderman, *supra* note 3, at 551. The current section 14(a) reads, in pertinent part:

Any person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter, by any person who is registered under this chapter 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.

7 U.S.C. § 18(a) (1982) (emphasis added).

41. Raisler & Geldermann, *supra* note 3, at 543 n.20. Any fraudulent conduct committed or any swindle by a con-artist became potentially actionable under the reparations provision. *Id.* at 543 n.20; see also testimony of Philip McB. Johnson, Chairman of the CFTC, in the 1982 House Operations Committee Hearings:

[T]he Commission proposes that the program be limited to claims against persons who are actual registrants under the act. At present, the program is required to entertain claims against non-registrants if they should have been registered with the Commission. These individuals or firms are typically unknown to the Commission, and many are in bankruptcy or receivership by the time when reparations claims are filed. And, because these persons have not registered, the Commission is unable to monitor their business practices for the purpose of trying to reduce the level of customer complaints against them.

Accomplishing service of process against unregistered persons created another problem for the Commission. The Commission frequently did not have a proper address for an unregistered person for the purpose of serving process. In 1978, after grappling with the problem for a few years, the CFTC decided in *Troll v. Lloyd Carr & Co.* that "constructive" service of process would be sufficient to serve missing respondents.⁴² While this decision solved the problem of effecting service, it greatly exacerbated the CFTC's ability to collect awards. After the *Troll* decision, a complainant could easily obtain a default judgment against an absent unregistered person, but the victory was hollow, since in many instances collecting the award was impossible.⁴³

The final important difficulty to beset the early years of the reparations program was inflicted by a decision of the Commission itself. In *Antoniolli v. Clayton Brokerage Co.*,⁴⁴ the Commission ruled that once a complaint and answer were technically complete and had been referred to an ALJ, the ALJ was obligated to try the case.⁴⁵ The ALJ could not dismiss the complaint on the pleadings, even if the complaint was patently defective.⁴⁶ This decision increased the workload of a program already staggering from the impact of the London commodity options crisis.⁴⁷

In the CFTC's 1978 reauthorization hearings, congressional committee members heard much about the slowness and ineffectiveness of the reparations process.⁴⁸ Congress nonetheless enacted into law the Com-

It is virtually impossible to intelligently manage the program as long as it is vulnerable to sudden surges of claims against previously unknown respondents, and, even when these cases are decided, the awards are frequently totally uncollectable. The entire reparations program suffers from these unexpected shock waves, to the detriment of claimants generally.

1982 House Operations Committee Hearings, *supra* note 5, at 12.

42. *Troll v. Lloyd Carr & Co.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,676 (Sept. 22, 1978); *see also* Raisler & Geldermann, *supra* note 3, at 544 (explaining lack of actual receipt of complaint not a bar to jurisdiction over respondent).

43. *See* O'Brien v. Williston Corp., [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,180 (Mar. 24, 1981); Nobel v. Williston Corp. [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,227 (July 24, 1981).

44. [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,546 (Jan. 18, 1978).

45. *Id.* at 22,249.

46. *Id.* at 22,250.

47. Raisler & Geldermann, *supra* note 3, at 544-45.

48. *See Reauthorization of the Commodity Futures Trading Commission: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition and Forestry*, 95th Cong., 2d Sess. 449 (1978) [hereinafter *1978 Senate Agricultural Committee Hearings*] (discussing inefficiencies in reparations process).

mission's opinion in *Stucki* that unregistered persons were within the Commission's jurisdiction for the purpose of reparations proceedings.⁴⁹ The only real measure to respond to the backlog of complaints was the raising of the jurisdictional amount from \$2,500 to \$5,000 for invoking the formal process.⁵⁰ Without an increase in resources available to the reparations program, however, these actions were hardly sufficient to overcome the problems created by *Stucki*, *Troll*, *Antoniolli*, and the flood of cases prompted by the London options crisis. Indeed, the problems worsened.

C. *The Program from 1978 to 1982*

From 1978 to 1982 the Commission struggled to manage a growing problem in the administration of the reparations program. The demand for the services of the program far outpaced the Commission's ability to respond. During fiscal year 1973, 903 complaints were filed. This number rose dramatically again in 1980 to 1,401, and to 1,412 in 1981.⁵¹

Along with the increased demand came an increase in the backlog of cases. During 1979, there were 68 cases decided, although there were 343 docketed.⁵² In 1980, these numbers climbed to 89 cases decided out of the 700 cases pending. In 1981 there were 201 cases decided out of the 1,172 pending. Finally, in 1982 there were 230 cases decided out of 1389 docketed. Of the 230 cases decided, 127 were rendered by one presiding officer, while the remaining 103 decisions were issued by the CFTC's four ALJ's.⁵³

Adding to the causes of the backlog was the 1980 crisis in the silver markets, which created another ground swell of unhappy commodity futures retail customers. The reparations unit itself was beset with internal problems, which were chiefly budgetary but also managerial. For example, the Chief ALJ created a bottleneck in the assignment of cases, often holding them for a year.⁵⁴ As for budgetary problems, the

49. Futures Trading Act of 1978, Pub. L. No. 95-405, §§ 21(2)-(3), 92 Stat. 865 (1978).

50. *Id.*

51. Raisler & Geldermann, *supra* note 3, at 547 (citing COMPTROLLER'S REPORT, *supra* note 36, at 135).

52. *Id.* at 547 n.46.

53. *Id.* at 547 n.46.

54. 1982 House Operations Committee Hearings, *supra* note 5, at 870. In discussing this problem, the GAO noted the Chief ALJ's hesitation in assigning complaints. The Chief ALJ was concerned that assignment to the other ALJ's would result in them being overburdened with questions and telephone calls from the parties. *Id.* at 870. The GAO suggested that (1) the Chief ALJ develop standards to encourage presiding of-

years from 1978 to 1982 were not bullish ones for federal regulatory agencies. With deregulation the prevailing philosophy, it was particularly difficult for a fledgling agency like the CFTC to garner sufficient resources for its programs. One consequence of the budget crunch was to restrict travel to locations distant from Washington, requiring the ALJ's to "save up" cases to distant sites.⁵⁵ The saving of travel money, however, was costly in terms of efficiency. Also, because of the difficulties involved in locating unregistered persons, even when the Commission saved up cases, the unregistered respondent often did not appear at the hearing.⁵⁶

In addition, other possible forums for hearing claims were either not available or were of uncertain quality. There were uncertainties over access to federal civil courts for complaints arising under the Exchange Act. In addition, the lower federal courts had given a mixed reaction to the existence of a private right of action, and the Supreme Court had yet to resolve the issue.⁵⁷ But the uncertainty ended in May of 1982, when the Supreme Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, held that a private right of action under the Exchange Act had been retained when the Act was amended in 1974.⁵⁸ Shortly thereafter, Congress amended the Act to specifically include, *inter alia*, a statutory private right of action.⁵⁹

During this period, the use of self-regulatory organization arbitration programs was not popular. Section 5a(11) of the Act⁶⁰ required contract markets to offer arbitration facilities. The Commission had hoped that use of contract market arbitration would reduce demand on the

ficers to maintain productivity, *id.* at 861; and (2) the Chief ALJ should assign cases immediately, and to avoid overburdening the ALJ's, a qualified staff person should be designated to answer the parties' questions concerning the reparations process. *Id.* at 870.

55. Memorandum from Judge Hunt to Judges Duncan, Painter, and Shipe (July 31, 1981) (discussing hearing itineraries and budget constraints). The letter noted the agency's "budgetary strictures" required "economies in all areas," and noted that travel for hearings was "one of the areas in which cost effectiveness may be achieved."

56. Raisler & Geldermann, *supra* note 3, at 548.

57. *Compare* *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980) (recognizing a private right of action), *aff'd sub nom.* *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) *with* *Rivers v. Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980) (not recognizing a private right of action), *vacated and remanded*, 456 U.S. 968 (1982).

58. 456 U.S. 353 (1982). By a five to four vote, the Court ruled that the private right had not been extinguished by the 1974 amendments to the Exchange Act. For an informative discussion of the case, see Miller, *Supreme Court Grants Private Right of Action*, COMM. L. LET., May 1982, at 1.

59. Futures Trading Act of 1982, Pub L. No. 97-444, § 22, 96 Stat. 2294 (codified at 7 U.S.C. § 25 (1982)).

60. 7 U.S.C. § 7a(11) (1982).

reparations program, but the procedure was found to be "grossly under utilized."⁶¹ Two problems existed regarding exchange arbitration. The first concern was about the fairness of these forums, and this concern militated against their use.⁶² Second, and perhaps more important, there had not yet been established a nationwide self-regulatory organization to administer an arbitration program that would be reasonably accessible to commodity futures complainants. The creation of the National Futures Association and the development of a vigorous arbitration program were still in the future.⁶³

D. The Congressional Hearings of 1982

In February 1982, in connection with congressional reauthorization hearings for the CFTC, Congress again reviewed the problems with the Commission's reparations program.⁶⁴ While the reparations program was by no means the exclusive, or even the most important of the issues addressed by Congress,⁶⁵ it did receive attention due to its slowness and complexity and the attention focused upon the issue in a newspaper article.⁶⁶

61. Raisler & Geldermann, *supra* note 3, at 550; see also 46 Fed. Reg. 60,834, 60,836 (1981) (describing Commission's experience with arbitration rules and announcing adoption of new rules).

62. See Shearson/American Express Inc. v. McMahon, 107 S. Ct. 2332 (1987) (discussing history of mistrust of arbitration); Note, *supra* note 22, at 185-86 (suggesting general belief of pro-industry bias).

63. See *infra* text accompanying notes 152-63 (discussing initiation of NFA arbitration program).

64. Three separate congressional committees conducted hearings: the House Committee on Agriculture, the Senate Committee on Agriculture, Nutrition and Forestry, and the House Committee on Government Operations. 1982 House Agriculture Committee Hearings, *supra* note 8; CFTC Reauthorization: Hearings on S. 2109 Before the Subcomm. on Agriculture Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry, 97th Cong., 2d Sess. (1982) [hereinafter 1982 Senate Agriculture Committee Hearings]; 1982 House Operations Committee Hearings, *supra* note 5.

65. Much attention was directed to CFTC oversight of exchanges and to the Commission's response to novel market instruments. There was also considerable attention paid to the fledgling National Futures Association.

66. For a somewhat spirited exchange between Philip McB. Johnson, Chairman of the CFTC, and Congressman Glenn English of Oklahoma, see 1982 House Agriculture Committee Hearings, *supra* note 8, at 33-34. Congressman English was discussing an article that appeared in the *Washington Post* the morning of the hearing, which purported to describe a draft report critical of the CFTC reparations program from the General Accounting Office. Chairman Johnson said that he had not read the article, and the Congressman responded:

Mr. English: Let me give you a little bit of the gist of the thing. It says . . . the reparations program which is supposedly to simplify and give people a place to go and complain is taking up to 3 years to work these claims through and costing up to \$10,000.

The CFTC offered two proposals for dealing with the program's problems. First, it asked that the Exchange Act be amended to remove the CFTC's jurisdiction over unregistered persons. Second, it asked to be given *carte blanche* to restructure the procedures for pursuing a reparations claim.⁶⁷ In one respect, the Commission was seeking congressional relief from a situation of its own making. The Chairman of the CFTC stated that one of the main difficulties experienced by the CFTC in administering the program was the effect of the *Antoniolli* decision, which prevented ALJ's from dismissing defective claims.⁶⁸ The Commission, however, did not request substantial additional resources for the program.⁶⁹

The General Accounting Office (GAO) criticized the reparations program,⁷⁰ ascribing fault not only to cumbersome procedures, but also to the Commission's inadequate management of the program.⁷¹ The GAO recommended that the CFTC impose performance standards on

Mr. Johnson: As far as the reparations program is concerned, it has been slow. I will admit that it has been slow. We have proposals here to improve it. We intend to improve it.

Id. at 33-34.

67. *Id.* at 12 (statement of Chairman Johnson). Disappointment with the reparations program prompted the Commission to propose two changes. First, the CFTC sought authorization to redesign the program through rulemaking in order to eliminate delays in cumbersome procedures. *Id.* The new procedures would be designed to maintain fairness, but improve efficiency. Second, the CFTC requested that the program be limited to claims against persons actually registered under the Act. *Id.*

68. In response to a question in the 1982 House Agriculture Committee Hearings about the reasons for the reparations backlog, Chairman Johnson answered as follows:

We would hope that through a streamlined procedure we could set up a dismissal procedure so that the administrative law judges could dismiss cases that are clearly unworthy and would not have to take them to trial.

Id. at 26.

69. Chairman Johnson stated that the Commission did not seek additional powers or to increase regulatory burdens. *Id.* at 105.

70. Charles A. Bowsler, Comptroller General of the United States, stated:

The Commission's reparations program . . . is not meeting its objectives. The Commission needs to simplify its rules and procedures. The Commission should also take steps to make arbitration a more attractive and effective alternative to reparations.

1982 House Operations Committee Hearings, *supra* note 8, at 45.

We have concluded, however, that the reparations program is not meeting Congressional and CFTC objectives that the program be fast, easy to use, and inexpensive. The reparations program is lengthy, relative to the available alternatives of court litigation and arbitration; difficult for complainants to understand; and expensive because most complainants who reach the adjudication stage feel it is necessary to hire attorneys.

1982 House Operations Committee Hearings, *supra* note 5, at 48.

71. See 1982 House Operations Committee Hearings, *supra* note 5, at 48 (stating that because of time and resource constraints and insufficient planning, CFTC has gathered very little management information which would enable effective monitoring and evaluation of the program).

the ALJ's,⁷² institute automated management methods,⁷³ hire a person to answer parties' telephone calls, and rewrite the reparations rules to make them easier to understand.⁷⁴ In addition, the GAO promoted the use of self-regulatory organization arbitration programs as an alternative to reparations.⁷⁵

Testimony from the private bar was also critical. Richard A. Miller,⁷⁶ who testified as a member of the Committee on Commodities Regulation of the Association of the Bar of the City of New York, called the reparations program a "financial white elephant that [had] siphoned much needed funds and personnel away from the primary duties of the CFTC."⁷⁷ Still, Mr. Miller recommended retention of the program because of its "due process advantages, including the opportunity for CFTC and judicial review of reparations decisions."⁷⁸ Mr. Miller also rejected the view that arbitration and civil litigation could be a substitute for reparations. He had conducted a cost/benefit comparison between reparations and arbitration, and had concluded that civil litigation was not an alternative because of the "jurisdictional and procedural complexities of civil litigation."⁷⁹ Arbitration, he found, was not yet sufficiently "mature" to supersede reparations. He did, however, foresee a day when arbitration would replace reparations, "particularly for smaller cases."⁸⁰

Mr. Miller recommended a two-tiered approach to reparations. For claims of \$10,000 or less, he recommended an informal, arbitration-like

72. See 1982 *House Operations Committee Hearings*, *supra* note 5, at 871 (noting that performance standards would assist in determining productivity problems). Some ALJ's have taken up to two years after completion of a hearing to write an initial decision. *Id.* at 871.

73. *Id.* at 880-81. Instituting automated information on the program, it was argued, would allow for more adequate and efficient monitoring and evaluation. *Id.* at 880.

74. *Id.* at 878. It was believed that rewriting the rules in a simplified manner would result in fewer attorneys being required.

75. The Comptroller General stated:

A considerable burden can be shifted from the reparations program by removing certain limitations to increased use of arbitration. To increase the potential for use of arbitration, the Congress should raise from \$15,000 to \$25,000 the dollar limit for claims that customers can compel exchange members or the National Futures Association to arbitrate. To resolve the issue of the availability of Federal court litigation, the Congress needs to clarify its intent regarding whether customers have a private right of action to adjudicate commodity-related claims in Federal court.

1982 *House Agriculture Committee Hearings*, *supra* note 8, at 45.

76. Mr. Miller is also Editor of the *Commodities Law Letter*.

77. 1982 *Senate Agriculture Committee Hearings*, *supra* note 64, at 228.

78. *Id.* at 228.

79. *Id.* at 229.

80. *Id.* at 229.

forum, with no oral hearing and no discovery.⁸¹ This format would then be phased out as the arbitration program of the then-infant National Futures Association matured. For claims greater than \$10,000, Mr. Miller recommended the same formal process as then existed, with some technical amendments.⁸²

Mr. Miller criticized the CFTC's request for *carte blanche* to rewrite the reparations rules because of the vast discretion that would be given the agency. He was particularly concerned that the reparations process not be divorced from its statutory due process underpinnings.⁸³ He also criticized the CFTC proposal not to regulate unregistered persons.⁸⁴

E. The Exchange Act Amendments of 1982 and the New Reparations Rules

The Commodity Exchange Act was amended on January 11, 1983,⁸⁵ and in most of the essential provisions, Congress responded to the CFTC's recommendations. Section 14(a) was revised to do away with the *Stucki*⁸⁶ amendment of 1978. The 1982 amendments provided that only persons registered at the time of the alleged infraction (or by Commission rules those who *willfully* aided or abetted a registered person) could be pursued under the reparations process.⁸⁷ The CFTC did, however, retain jurisdiction over unregistered respondents in cases pending on the effective date of "certain amendments" to section 14.⁸⁸

Section 14(b) was amended to give the Commission broad latitude to fashion workable rules, which was the *carte blanche* the agency had requested.⁸⁹ In addition, section 17(b)(10) was amended to eliminate

81. *Id.* at 229.

82. *Id.* Those technical amendments included: (1) excluding respondents from the reparations program who are in bankruptcy or receivership; (2) amending the statute of limitations period; and (3) imposing specific statutory deadlines on the CFTC to screen complaints. *Id.* at 229.

83. *Id.* at 229.

84. *Id.* at 231-232. Thomas A. Russo, the Chair of the Committee on Commodities Regulation of the Association of the Bar of the City of New York agreed that the CFTC should not be given *carte blanche*. *Id.*

85. Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (codified as amended at 7 U.S.C. §§ 1-26 (Supp. III 1985)).

86. For a discussion of the *Stucki* amendment, see *supra* notes 48-49 and accompanying text.

87. See Raiser & Geldermann, *supra* note 3, at 551 (describing new amendments).

88. See *Nelson v. Chilcott Commodities Corp.*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,934 (Dec. 12, 1983) (refusing to apply amendments to section 14(a) retroactively).

89. 7 U.S.C. § 18(b) (Supp. III 1985). It was pursuant to this amendment that the CFTC undertook the extensive revision of its reparations rules that culminated in the publication of final rules on February 22, 1984. 17 C.F.R. § 12.1-408 (1987).

the \$15,000 ceiling for cases that could be arbitrated by self-regulatory organizations.⁹⁰ Section 22 was added to explicitly provide for a private right of action under the statute.⁹¹

Within only a few months, the CFTC promulgated regulations implementing the 1982 amendments.⁹² These regulations provided for three types of reparations procedures: the voluntary procedure, the summary procedure, and the formal procedure.

1. *The Voluntary Procedure: By the Consent of Both Parties*⁹³

This new procedure marked a radical departure from the Administrative Procedure Act's formal adjudicatory process model.⁹⁴ The exchange of procedural formalities for greater flexibility and speed put it very much in line with the alternative dispute resolution methods currently in vogue.⁹⁵ The process is presided over by a judgment officer, who is an employee of the CFTC Office of Proceedings.⁹⁶ The judgment officer may or may not be a lawyer, but in any event, the holders of the position are supposed to be thoroughly familiar with futures in-

90. Futures Trading Act of 1982, Pub. L. No. 97-444, § 17(b)(10), 96 Stat. 2294, 2322-24 (codified as amended at 7 U.S.C. § 21(b)(10) (Supp. III 1985)).

91. Futures Trading Act of 1982, Pub. L. No. 97-444, § 22, 96 Stat. 2294, 2322-34 (codified as amended at 7 U.S.C. § 25 (Supp. III 1985)).

92. Final Rule Relating to Reparations, 49 Fed. Reg. 6,602 (1984) (codified at 17 C.F.R. § 12). In most important circumstances, the regulations applied only to complaints filed after that date. See 17 C.F.R. § 12.1(c) (1987) (explaining applicability of part 12 rules). Certain sections of the new rules applied to all cases, including those cases pending on April 23, 1982. These included 17 C.F.R. sections 12.14, 12.21, 12.22, 12.23, 12.24 and 12.408. Section 12.14 concerned the timing of withdrawals of complaints without prejudice; section 12.21 concerned dismissal with prejudice; section 12.22 and 12.23 concerned default proceedings; section 12.24 concerned parallel proceedings; and section 12.408 concerned delegation of authority regarding certain procedural appellate motions to the Chief of the Opinions Section of the CFTC.

The new subpart F, concerning the Commission's review of decisions, applied to matters in which initial decisions or "similar dispositive orders," were served on or after April 23. Parties with cases pending on April 23 were allowed to opt by mutual agreement to use the voluntary procedure set forth in subpart C of the new rules.

93. See 17 C.F.R. §§ 12.100-106 (1987) (describing rules applicable to voluntary proceedings).

94. 5 U.S.C. § 556 (1982).

95. One article described the voluntary procedure as a "trend setter in administrative adjudications." Koblenz & Rowland, *CFTC Innovation Under Revised Reparations Rules - The Three Decisional Procedures*, COMM. L. LET., July-Aug. 1984, at 2. The authors suggest that one motivating factor for developing the voluntary procedure was the competition for cases from the courts and the self-regulatory organizations: "The CFTC is competing hard for the business of rendering justice, attempting to beat both forums with faster and cheaper alternatives." *Id.* at 2.

96. 17 C.F.R. § 12.101 (1987). Judgment officers presided over the voluntary and summary procedures, but not the formal procedures. 17 C.F.R. § 12.101, 12.201 (1987).

dustry practice and law.

Several features of the procedure are designed to enhance speed. Oral hearings are not permitted.⁹⁷ In addition, the final decision dispenses with findings of fact, and is simply a conclusory statement of result.⁹⁸ The judgment officer's decision is final, with no appeals available to either the Commission or the courts.⁹⁹ Perhaps because of the absence of virtually all of the procedures considered critical to due process (e.g., an independent decisionmaker, oral hearing, cross-examination, submission of findings, written decision, and right of appeal), a finding of liability against a commodities professional rendered under this procedure has no collateral effect.¹⁰⁰

Some features of the voluntary procedure, however, work against speed and efficiency. The formalities of filing a complaint and all supplemental pleadings are the same as those for more formal procedures.¹⁰¹ Moreover, the voluntary procedure is subject to the same rules of discovery as with more formal proceedings.¹⁰² Thus, depending upon the length of time taken for pleadings and discovery, the voluntary proceeding may or may not save time. Even if the complainant selects the voluntary processes, however, the rules permit the respondent the option of the more formal procedural processes upon respondent's payment of the fee differential between the two.¹⁰³ This elective process is novel both for permitting an election of procedure, and for placing the cost of the formal procedure on the requesting party.¹⁰⁴ The filing fees vary depending upon the type of decisional process chosen.¹⁰⁵

When the new rules were promulgated, the CFTC hoped that deci-

97. 17 C.F.R. § 12.105 (1987).

98. *Id.* § 12.106(b) (1987).

99. *Id.* § 12.106(d) (1987). The Commission will review a decision on its own motion where such review is "necessary to prevent manifest injustice." *Id.* § 12.403(b) (1987). See generally Koblenz & Rowland, *supra* note 95, at 8 (describing pros and cons of voluntary proceedings).

100. 17 C.F.R. § 12.106(b)(3) (1987).

101. See *id.* §§ 12.103, 12.104 (1987) (providing procedures for filing documents and amending pleadings, and prohibiting most motions).

102. *Id.* § 12.100(a) (1987). Discovery is limited to requests for admissions, the production of documents, and written interrogatories. None of the processes permit oral depositions as part of discovery. *Id.* § 12.30(a).

103. *Id.* § 12.25(b)(2) (1987). The formal procedural process applies only if the amount sought exceeds \$10,000. *Id.* § 12.26(c).

104. Procedures for resolving most disputes before other agencies are either formal or informal, leaving the citizen with no other choice. For an example of an informal procedural process, see the Federal Trade Commission's (FTC) dispute resolution process concerning problems with product warranties. 16 C.F.R. §§ 703.1-8 (1987). By contrast, see the formal processes involved in bringing an unfair labor practice suit before the National Labor Relations Board (NLRB). 29 C.F.R. § 102 (1987).

105. 17 C.F.R. § 12.25 (1987).

sions under the voluntary process could be rendered in six months. But the backlog of cases existing when the new rules were promulgated made any early realization of this goal, and of the goals for the other decisional processes, infeasible.¹⁰⁶

2. *The Summary Procedure: Claims of Less than \$10,000*¹⁰⁷

The summary proceeding is essentially identical to the summary procedure that existed before the 1982 amendments. Like the voluntary procedure, it is conducted by a judgment officer, but in contrast an appeal may be had from the judgment officer's decision.¹⁰⁸ Its procedural and decisional formalities are greater than the voluntary proceeding, but not as extensive as the formal proceeding. For example, the judgment officer's opinion includes findings of fact, but the procedure does not permit parties to file briefs proposing findings of fact and conclusions of law.¹⁰⁹

Its novel feature provides for a telephonic hearing in some circumstances, when deemed "necessary or appropriate."¹¹⁰ In ordinary circumstances, however, the hearing is a paper hearing. An in-person oral hearing may be held in Washington, D.C., when resolution of factual disputes justifies it, and the parties consent to the required travel.¹¹¹ The original target for rendering decisions is nine months from the filing of the complaint.¹¹²

3. *The Formal Procedure: Claims Greater than \$10,000*¹¹³

The formal procedure is in most respects the traditional formal hearing procedure contemplated by section 554 of the Administrative Procedure Act.¹¹⁴ For example, the hearing is conducted by an ALJ. There

106. When the new rules were promulgated, the case backlog was severe. The four ALJ's had a combined backlog of more than 500 cases, and the two judgment officers' backlog came to 142 cases. Letter from R. Britt Lenz, Director, Office of Proceedings, CFTC (Apr. 10, 1987).

107. 17 C.F.R. § 12.200-210 (1987).

108. See *id.* §§ 12.207(e), 12.210(d) (providing right of appeal from judgment officer's order granting summary deposition as well as initial decision).

109. See *id.* § 12.210 (1987) (outlining judgement officer's duty to make initial decision).

110. *Id.* § 912.209(b). The judgment officer has sole discretion to allow oral testimony. *Id.* § 12.208(b). If allowed, the testimony may take place by telephone if the party elects. *Id.* § 12.209(b).

111. See *id.* § 12.209(a) (explaining steps required to access oral testimony).

112. The filing fee is \$100. *Id.* § 12.25(a)(2).

113. See *id.* §§ 12.300-315 (1987) (outlining rules applicable to formal proceedings).

114. 5 U.S.C. § 554 (1982).

are, however, three distinct and somewhat controversial features of this proceeding. First, the rules provide that the proceedings officer will rule on all discovery matters, with an appeal to the ALJ available.¹¹⁵ Second, the rules provide that in most ordinary circumstances, formal hearings conducted outside of Washington, D.C., may be held only in a selected list of 20 cities.¹¹⁶ Finally, the rules permit the ALJ to dispense with an oral hearing altogether when the written submissions are sufficient to resolve disputed factual issues.¹¹⁷ The original hope was that decisions would be rendered in one year from the filing of the complaint.¹¹⁸

4. *The Appellate Process*¹¹⁹

The main change in the appellate process is that an appeal to the Commission is no longer by certiorari but rather now is of right.¹²⁰ The Commission need not render an opinion, but instead may summarily affirm. This does not, however, mean that the Commission has adopted the rationale of the lower decision; nor will the lower decision then have precedential effect.¹²¹ To ensure procedural and technical correctness, the Chief of the Opinions Section of the CFTC Office of General Counsel is given significant control over the appeals process.¹²²

115. 17 C.F.R. § 12.301 (1987). The three controversial features of the formal proceeding are: (1) the "proceedings officer" provision, which involves functions similar to a magistrate and the giving of assistance to the ALJ's; (2) the limitation of hearing sites to twenty selected cities; and (3) discretion of the ALJ whether to grant an oral hearing.

116. *Id.* § 12.312(b). The statutory choice of cities is eclectic. For example, Houston, Texas is on the list, but not Dallas. St. Petersburg, Florida is on the list, but not Miami. Kansas City, Missouri, is on the list, but St. Louis, Missouri, is not. *Id.*

117. *Id.* § 12.406(b).

118. The filing fee is \$200. *Id.* § 12.25 (a)(2).

119. *See id.* §§ 12.400-.408 (rules for Commission review).

120. *Id.* § 12.401. The Commission explained that replacing the certiorari procedure with the appeal as of right would eliminate the two step procedure, by which the Commission first reviewed appellant's detailed application for review to determine whether to grant review, and then if the application was successful, it reviewed appellant's full brief:

[The new procedure] will spare the Commission from having to consider the merits of an initial decision and an application for review separately before determining whether to review the issues on appeal and render its own decision in the case. The new appeal procedure would also relieve a burden imposed on parties by the Commission's former reparation rules that required parties to file a detailed and time-consuming application for review which often resembled a brief, followed by, if review was granted, a brief in support of the issues raised in the application for review.

49 Fed. Reg. 6602, 6620 (1984).

121. 17 C.F.R. § 12.406(b) (1987).

122. *See id.* § 12.408 (explaining list of functions belonging solely to chief of

5. *Other Features of the Reparations Program*

In order to enhance efficiency, certain other generic changes or decisions were made in connection with the new rules. The Commission decided not to permit third party claims, reasoning that a third party practice would unduly complicate the reparations program.¹²³ The Commission also vested in the Director of the Office of Proceedings plenary authority to decide whether a complaint should be sent on to an ALJ or judgment officer for hearing and decision.¹²⁴ The vesting of such authority in a nonjudicial officer is quite significant because the decision regarding the disposition of the complaint is not reviewable,¹²⁵ and there are no formal standards to guide the Director's discretion.¹²⁶ For this reason, and out of a sense of fairness, the present Director errs on the side of inclusion in deciding on the adequacy of the complaint.¹²⁷ If there is any question as to the validity of the complaints it is forwarded to an ALJ or judgment officer.¹²⁸

The regulations also incorporated an organizational change. The Commission consolidated those offices involved in the nonappellate aspects of the reparations process into one office, the Office of Proceedings.¹²⁹ The CFTC initiated this change in the hope of creating a more effective and efficient administrative structure.¹³⁰

opinions).

123. 49 Fed. Reg. 6602, 6605 (1984).

124. *Id.*

125. The Commission's determination to keep such authority in the Director was coupled with an unwillingness to permit respondents to file motions to dismiss in lieu of answers. Under the rules, the respondent must answer a complaint that has been forwarded, but may accompany that answer with a "motion for reconsideration of the determination to forward the complaint." 17 C.F.R. § 12.18(b) (1987).

126. The Commission rejected comments proposing the establishment of such standards. 49 Fed. Reg. 6602, 6610 (1984).

127. Interview with R. Britt Lenz, Director, Office of Proceedings, CFTC (Mar. 27, 1987).

128. *Id.*

129. 17 C.F.R. § 12.2(h) (1987).

130. See Raisler & Geldermann, *supra* note 3, at 555 (discussing CFTC organizational changes affecting regulations).

CFTC REPARATIONS PROGRAM¹³¹

	<i>Voluntary</i>	<i>Summary</i>	<i>Formal</i>
Damage amount claimed	any amount	\$10,000 or less	more than \$10,000
Deciding employee	judgment off.	judgment off.	ALJ
Discovery	yes/limited ¹³²	yes	yes
Hearing rights	no	phone/D.C.	20 major cities
Written decision	no fact findings	brief fact & law concl.	full fact & law concl.
Appeal rights	no	full	full
Fee	\$25.00	\$100.00	\$200.00

In sum, the new rules sought to address the problems of the old rules in several ways. To remedy the problem of a lack of speed, the arbitration-like voluntary procedure was created. To address the case load bottleneck created by the Chief ALJ, authority to assign cases was vested in a CFTC employee. To remedy the general ALJ caseload bottleneck, the CFTC increased the number of cases that can be disposed of by a person who is not an ALJ, and created a proceedings officer to perform like a magistrate. With respect to the problems of travel, the new rules let nontraveling employees dispose of more cases, increased the number of cases that could be decided on the basis of documentary proof, and limited travel to 20 cities. To remedy the delays caused by the discovery process, the CFTC limited available discovery time. Finally, to remedy the backlog of cases before the Commission, the CFTC eliminated the certiorari process.

6. *Reaction to the Reparations Program*

When the rules were first proposed, the reaction was not altogether favorable. From within the CFTC, one ALJ described the rules as "un-

131. An excellent and comprehensive chart summarizing the three procedures may be found in Koblenz & Rowland, *supra* note 95, at 3.

132. In voluntary proceedings, discovery can be requested only by the parties. 17 C.F.R. § 12.34 (1987). The summary and formal proceedings permit the decisionmaker to conduct discovery on his own motion. *Id.* § 12.34. Oral discovery is not permitted in any of the proceedings. *Id.* § 12.30(a).

necessarily complex and prolix” and advised that for unsophisticated parties the extensive rules would be too complicated to master.¹³³ He was also critical of both the summary and voluntary procedures. He argued that parties were being “induced, through an array of burdens incident to the exercise of their due process rights, and promised benefits incident to the forfeiture thereof,” to opt for the voluntary procedure, a procedure he regarded as being particularly unsuited to the resolution of serious disputes.¹³⁴ And, he noted, for those consigned to the summary procedure, the routing was not even voluntary.¹³⁵ Another ALJ was displeased with the proceedings officer: “I object to anyone else making preliminary determinations — especially on discovery — regarding my assignments.”¹³⁶

The private bar was also skeptical. The vice president and senior counsel in Shearson/American Express’ commodities division believed that the rules should have encouraged private arbitration through the National Futures Association.¹³⁷ A member of the plaintiffs’ bar believed that the rules were too complex and would discourage litigation.¹³⁸ Plaintiffs’ lawyers also believed that an appeal as of right with only a 50-dollar filing fee would encourage delay. In response, a CFTC attorney pointed out that the judicially sanctioned favoring of prejudgment interest in damage awards would reduce the incentive to delay, especially for defendants.

All sides disliked the idea of telephonic hearings. The representative from Shearson/American Express characterized it as “horrible,”¹³⁹ and a member of the New York bar noted the paradox of testing the credibility of commodities salesmen over the telephone.¹⁴⁰ The argument is that it is difficult to imagine how an ALJ could assess the credibility of a man by telephone when the charges against him are that he is a con man who operates by telephone. Indeed, part of the skill of a salesman is to be persuasive on the telephone.¹⁴¹

133. Arieff, *CFTC Reparations Rewrite Wins Little Support*, *Legal Times*, Aug. 29, 1983, at 2 (quoting memorandum from Arthur L. Shipe to CFTC).

134. Letter from Arthur L. Shipe to the CFTC (July 19, 1983) (commenting on proposed new reparation rules).

135. *Id.*

136. Arieff, *supra* note 133, at 2 (quoting ALJ William Sprull).

137. *Id.* at 2 (mentioning views of Michael H. Hogan).

138. *Id.* at 2 (mentioning views of M. Van Smith).

139. *Id.* at 2 (arguing that live cross-examination is more effective).

140. *Id.* at 2 (Mr. Nathan arguing that you cannot judge credibility of an experienced salesman over the phone).

141. *Id.* One of the incumbent judgment officers thinks the telephonic hearing works against those who are glib, and so he differs with Mr. Nathan’s judgment. Interview with Judgment Officer Joost (Mar. 4, 1987).

Other critics focused less on the particular details of the new rules than on the overall compromise of procedural safeguards manifest in the summary and voluntary procedures.¹⁴² One group of authors praised the CFTC's attempt to provide a menu of procedural choices as showing "inventiveness and flexibility,"¹⁴³ but thought that too much had been compromised away. The group also objected to denying the small claimant the opportunity to opt for the formal procedure.¹⁴⁴

There were also a host of comments relating to particular details of the process, such as the length of time for responding to a complaint, extensions of time to file pleadings, and interlocutory relief.¹⁴⁵ Other comments focused on the number of copies of pleadings required for filing, and whether pleadings should be considered filed when received or when posted.¹⁴⁶ Still others addressed the filing fee amounts required,¹⁴⁷ but these comments obviously did not reach the more interesting and important issues raised by the new rules.

IV. THE REPARATIONS PROGRAM SINCE THE CFTC AMENDMENTS OF 1983

Because the new reparations rules have now been in effect for several years, there is a reasonable opportunity to assess their performance. Moreover, two other events which affect the program occurred almost simultaneously to the amendments of the Exchange Act, and have made it easier to assess the program's performance. First, the National Futures Association (NFA) initiated in March 1983 a comprehensive arbitration system.¹⁴⁸ This program has provided a forum for the informal resolution of disputes arising under the commodity futures laws.¹⁴⁹ Second, the Supreme Court's 1982 decision in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*,¹⁵⁰ which upheld a private right of action under the Exchange Act, was subsequently codified in the Exchange Act amendments of 1982.¹⁵¹ The recognition of such a right has provided an alternative forum for the formal resolution of major commodi-

142. See Koblenz & Rowland, *supra* note 95, at 9 (providing general outline of three procedures).

143. *Id.* at 9.

144. *Id.* at 10.

145. 49 Fed. Reg. 6602, 6605 (1984).

146. *Id.* at 6605-06.

147. *Id.* at 6609.

148. Note, *supra* note 22, at 189 n.149.

149. *Id.* at 188-91.

150. 456 U.S. 353 (1982).

151. Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (codified at 7 U.S.C. § 25 (Supp. III 1985)).

ties law claims.

A. Arbitration

The purpose of the CFTC's reparations program is to provide a simplistic, inexpensive, and expedient forum for dispute resolution.¹⁵² Both the CFTC and the GAO believe that self-regulatory organization arbitration programs can provide many of the same benefits as the reparations program. But until recently, arbitration did not fulfill its potential as an ADR technique. This has now changed in three important respects. First, Congress amended the CEA to eliminate the upper limit on arbitrable claims.¹⁵³ Second, through rule changes the CFTC expanded those subject to arbitration to include commodity pool operators and commodity trading advisors,¹⁵⁴ and required the self-regulatory organizations to provide a "mixed panel" comprised of a majority of non-exchange-affiliated persons, upon request of the complainant.¹⁵⁵ Third, and most important, the National Futures Association arbitration program was established,¹⁵⁶ and its program began just three months after the Exchange Act was amended.¹⁵⁷ Since its inception, there has been a steady growth in interest and use of the NFA arbitration program.¹⁵⁸

The growing use of NFA arbitration may be attributed to the nationwide scope of the program. In 1986 it expanded its roster of qualified arbitrators to 1,410, up from 725 arbitrators in the previous

152. 1982 House Operations Committee Hearings, *supra* note 5, at 861.

153. Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (amending 7 U.S.C. § 21(b)(10) (1982)). See Miller, *CLL Report on Commodities Litigation: New Statute, Arbitration & Reparations Rules Affect Plaintiff's Choice of Forum*, COMM. L. LET., July-Aug. 1983, at 8, 9 (stating upper limit on arbitration claims and counterclaims was eliminated). In so doing, Congress was acceding to a request from the CFTC. 1982 House Agriculture Committee Hearings, *supra* note 8, at 128. In general the CFTC advocated statutory and regulatory changes designed to make arbitration a more attractive alternative to reparations than it had been earlier.

154. 17 C.F.R. § 180.3(b) (1987); see also 48 Fed. Reg 22,138 (1983) (discussing impact of additions).

155. 17 C.F.R. § 180.3(b) (1987).

156. See generally, Rosen, *Arbitration Before the National Futures Association*, COMM. L. LET., Jan.-Feb. 1987, at 3; Note, *supra* note 22, at 188-91 (praising NFA arbitration and concluding CFTC's obligation to improve reparations program could be accomplished by encouraging NFA arbitration).

157. 1985 NAT'L FUTURES ASS'N ANN. REV. 13.

158. In 1984, 270 information requests were filed, but there were only 82 demands for arbitration and 23 hearings conducted. In 1985, the figures more than doubled as 652 parties requested information and 60 hearings were conducted. *Id.* at 13. Finally, in 1986 there were 884 information requests, 272 demands for arbitration, and 92 hearings. 1986 NAT'L FUTURES ASS'N ANN. REV. 9.

year.¹⁵⁹ The encouragement and support of the CFTC also contributed to the growth of NFA arbitration. The CFTC Office of Proceedings, which supervises the reparations program, includes literature on self-regulatory organization arbitration in the materials it sends to individuals seeking information about reparations.¹⁶⁰ By publicizing the availability of NFA arbitration, the CFTC is expressing its own belief in the potential of self-regulatory organization arbitration and acting in accord with the GAO's endorsement of such a program.¹⁶¹ Furthermore, the CFTC may also be diverting cases from its own reparations program. In years corresponding to the growth of NFA arbitration, the number of complaints filed with the CFTC has diminished.¹⁶² Signifi-

159. *Id.* at 9.

160. *Id.* at 20.

161. *1982 House Operations Committee Hearings, supra* note 5; GAO Report, *Reparations and Other Presently Available Forums for the Resolution of Customer Claims are Inadequate*, at 861-97. The GAO expressed great hope in NFA because it lacks the structural defects of exchange arbitration, but added that:

. . . if NFA arbitration is to reach its full potential, it will require substantial cooperation between the industry and CFTC. To ensure that commodity customers are aware of the NFA's arbitration program, the industry and CFTC must educate and inform the public regarding the existence of the program and how it works. CFTC must also monitor the program to make certain that the NFA is adhering to CFTC approved rules and procedures.

Id. at 889; see also *1982 House Agriculture Committee Hearings, supra* note 8, at 177 (statement of Henry Eschwege, Director, Community and Economic Development Division, GAO) (arguing Commission should attempt to make arbitration more attractive alternative to reparations).

Another reason for the increase in the use of arbitration to resolve customer disputes relating to commodity futures is that courts generally have not extended the doctrine of *Wilko v. Swan*, 346 U.S. 427 (1953) to commodity customers. See *Olsen v. Paine, Webber, Jackson & Curtis, Inc.*, Comm. Fut. L. Rep. (CCH) ¶ 23,072 (N.D. Ind. 1986) (ruling that legislative history of Commodity Exchange Act indicates agreements to arbitrate enforceable). In *Wilko* the court ruled that a predispute arbitration agreement was unenforceable against a securities customer. For a good discussion of why the courts have distinguished commodity futures customers from securities customers, see *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 720 F.2d 1446, 1449 (5th Cir. 1983) (Commodity Exchange Act emphasizes extra-judicial resolution of disputes, whereas securities acts do not). But as the Fifth Circuit noted in *Smoky Greenhaw Cotton Co.*, the CFTC has created its own *Wilko* doctrine by promulgating a regulation that advises commodity customers that signing an arbitration agreement does not effect a waiver of the right to proceed by reparations. See 17 C.F.R. § 180.3(b)(4) (1987) (requiring all arbitration agreements to feature in block letters notice to customers that "your consent to such an agreement be voluntary" and that customer need not sign agreement in order to open account).

The *Wilko* holding, even as it applies to the securities laws, has been limited severely by the Supreme Court's recent decision in *Shearson/American Express v. McMahon*, 107 S. Ct. 2332 (1987). The Court held that pre-dispute arbitration agreements were valid for claims arising under section 10(b) of the Securities Exchange Act of 1934. *Id.* at 2341.

162. Several ALJ's agree that the NFA's program has diverted cases from the CFTC. Interviews with Judges Spruill, Painter & Shipe (Oct. 24, 1986). Furthermore,

cantly, the NFA is now a competitor with the CFTC for ADR business.¹⁶³

B. Private Right of Action

Commodity futures litigants have gained greater access to civil federal courts since the Exchange Act was amended in 1983.¹⁶⁴ However, even before the Exchange Act was amended, the *Curran* case recognized an implied private right of action in commodities futures cases.¹⁶⁵ Congress amended the Exchange Act to expressly provide a private right of action to persons injured under the Exchange Act.¹⁶⁶ Under the provisions of the revised statute, a complainant is subject to a two-year statute of limitations and may receive actual damages, but not punitive or consequential damages.¹⁶⁷

Rights under the statute may be broader than cases covered by *Curran* because the judicial interpretations of *Curran* by the lower courts were not expansive. In general, lower courts have denied private actions for claims that would not have been available to private litigants when the Commodity Exchange Act was amended in 1974.¹⁶⁸ Consequently, courts denied a pre-1982 private action right for a number of important claims, including actions based on aiding and abetting,¹⁶⁹ failure to supervise,¹⁷⁰ and suitability issues.¹⁷¹ However, the current Act's two-year statute of limitations and the constraints on the types of damages avail-

when the Commission promulgated the new reparations rules, it conceded that it would reevaluate whether the Commission's voluntary procedure remains necessary after the NFA establishment of the NFA. 49 Fed. Reg. 6602, 6612 (1984). Complaint filings were up, however, 57% in the first two quarters of fiscal year 1987 compared to the same period a year ago. Telephone interview with R. Britt Lenz, Director, Office of Proceedings, CFTC (Apr. 21, 1987).

163. Competition between any type of program is valuable. For instance, competition for business between the English common law courts and the Court of Chancery is credited with stimulating important advances in English jurisprudence. For an amusing look at the subject of competition between courts, see Orth, *A Reverie on Medieval Judges, Milton Friedman and the Supreme Court*, 1983 A.B.A. J. 1454-61.

164. Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (codified at 7 U.S.C. §§ 1-26 (1982)).

165. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

166. 7 U.S.C. § 25 (Supp. III 1985). See generally Miller, *supra* note 153.

167. 7 U.S.C. § 25(a)(1), 25(c) (Supp. III 1985).

168. *Evanston Bank v. ContiCommodity Services, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,979 (N.D. Ill. 1985).

169. *Id.* at 31,874 (citing *Johnson v. Chilcott*, 590 F. Supp. 204 (D. Colo. 1984)).

170. *Id.* at 31,874 (citing *Bennett v. E.F. Hutton Co.*, 597 F. Supp. 1547 (N.D. Ohio 1984)).

171. *Id.* at 31,874 (citing *J.E. Hoetger & Co. v. Asencio*, 558 F. Supp. 1361 (E.D. Mich. 1983)).

able may not apply to *Curran* cases.¹⁷²

For those claims which fall under *Curran* or within the new statutory provisions, private actions brought in civil court may offer a significant advantage over reparations. Specifically, such an action allows several federal claims to be heard by a single court. For example, in *Evanston Bank v. ContiCommodity Services, Inc.*¹⁷³ the bank alleged violations of the Commodity Exchange Act, the Racketeer Influenced and Corrupt Organization Act (RICO)¹⁷⁴ and pendant state statutory and common law claims.¹⁷⁵

The federal courts are in agreement that the 1974 amendments to the Commodity Exchange Act did not preempt state common law fraud claims stemming from commodity futures transactions.¹⁷⁶ While there is less authority regarding the impact of the 1982 amendments to the Act, at least one court has held that state claims were not preempted by the 1982 amendments.¹⁷⁷

Aggrieved commodity futures customers now have more places to go with their complaints than they did in 1982, with the result that the reparations program is no longer suffering from a glut of complaints. The question now is whether, given these other forums, particularly the NFA arbitration program, the CFTC reparations program still serves a necessary ADR function.

V. THE PERFORMANCE OF THE REPARATIONS PROGRAM UNDER THE NEW RULES

The following is an assessment of the new reparations rules since they went into effect in April 1984. The assessment below is derived from a number of sources: (1) annual reports of the CFTC; (2) CFTC Office of Proceedings statistical performance summaries;¹⁷⁸ (3) CFTC Executive Office reports to the Commission on the reparations program;¹⁷⁹ (4) an analysis of all reparations decisions rendered under the

172. Miller, *supra* note 138, at 9.

173. [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,979 (N.D. Ill. 1985).

174. 18 U.S.C. §§ 1961-1968 (1982).

175. See *Griswold v. E.F. Hutton*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,980 (N.D. Ill. 1985) (cause of actions similar to *ContiCommodity*).

176. *Patry v. Rosenthal & Co.*, 534 F. Supp. 545, 551 (D. Kan. 1982).

177. *Mallen v. Merrill Lynch Futures, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,003 (N.D. Ga. 1985).

178. Since at least the first quarter of fiscal year 1983, the CFTC's Office of Proceedings has been keeping records and compiling statistics on caseload receipt and disposition. In addition, performance statistics compiled by the GAO in connection with the congressional hearings of 1982 contain valuable statistical information.

179. Since the reparations rules were revised, three reports providing statistical

new rules and reported in the Washington Service Bureau's *CFTC Administrative Reporter*,¹⁸⁰ (5) a review of a sample of reparation case files at the CFTC,¹⁸¹ (6) memoranda and correspondence obtained from the CFTC; (7) interviews with key CFTC personnel; and (8) contacts with complainants and respondents in recently completed reparations cases.¹⁸²

A. *The Impact of the New Rules on Efficiency of Case Disposition*

An important reason for the passage of the new rules was to increase

data on the progress of the reparations program have been made. The first is dated January 25, 1985, and covers approximately the first seven months of the reparations program (from April 23, 1984 to November 30, 1984) [hereinafter *CFTC Report No. 1*]. The second is dated June 11, 1985, and covers approximately the first year of the reparations program (from April 23, 1984 to April 30, 1985) [hereinafter *CFTC Report No. 2*]. The third is dated July 25, 1986, and covers the first two years of the reparations program (from April 23, 1984 to April 30, 1986) [hereinafter *CFTC Report No. 3*]. It should be noted that *CFTC Report No. 3*, like the earlier reports, does not provide a breakdown of the time required for the various steps in the three processes.

180. One hundred thirty-two cases were reviewed. [hereinafter *1985-1987 Analysis of Reparations Decisions*]. They constituted all reparations cases reported in the Washington Service Bureau *CFTC Administrative Reporter* from December 1985 through mid-February 1987 that were decided under the new rules. Several cases, however, were not analyzed because they failed to disclose a filing date. Others could not be subject to full analysis because the reporting occasionally left out a necessary factor. For example, a case might not disclose the award sought.

In addition, the lines were not always clear between cases decided under the old rules and those decided under the new rules because some complaints filed before April 24, 1984 were processed pursuant to the new procedures. For example, in *Sunvold v. Clayton Brokerage Co.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,053 (Apr. 30, 1986), the complaint was filed on March 19, 1984, but decided pursuant to the new rules. Similarly, in *Simpson v. Chartered Systems Corp.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,107 (June 10, 1986), a complaint that would have originally been processed under the old rules, and thus would have been heard pursuant to a formal proceeding because the amount claimed was \$5,051, was heard in 1985 as a summary proceeding.

Cases under the new rules with reported counterclaims are sparse because throughout most of the period in which the new rules have been in effect the Commission has stayed proceedings with common law counterclaims or for which appeal might be had to the Court of Appeals for the District of Columbia Circuit. The Commission did so because of the August 13, 1985 decision in *Schor v. Commodity Futures Trading Commission*, where the D.C. Circuit held that the CFTC lacked jurisdiction to hear such counterclaims. 740 F.2d 1262 (D.C. Cir. 1985). On July 7, 1986, the Supreme Court reversed the D.C. Circuit opinion in *Schor*, 106 S. Ct. 3245 (1986), and on August 5, 1986, the Commission lifted its stay. See *In the Matter of Various Reparation Proceedings in Which Counterclaims have been Filed and Judicial Review is or May be Available in the United States Court of Appeals of the District of Columbia Circuit*; *Crump v. A.G. Edwards & Sons, Inc.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,186 (Aug. 5, 1986).

181. See *infra* notes 220-26 and accompanying text (section VI(b)).

182. See *infra* notes 208-20 and accompanying text (section VI(a)).

the efficiency with which the reparations process was conducted.¹⁸³ But it is difficult to draw conclusions about the success of the rules in achieving this efficiency because even before the new reparations rules became effective there was a diminution in the number of reparations complaints docketed with the hearings section of the CFTC. For example, in 1981 there was a large increase in the number of cases disposed of by the hearings section. There were 818 complaints docketed in 1981,¹⁸⁴ the year after the silver crisis erupted, but only 610 complaints docketed the following year.¹⁸⁵ The number docketed in fiscal 1984, 286, seems inordinately low, and is the result of two phenomena relating to the institution of the new rules in the middle of that year.¹⁸⁶

These numbers suggest that the tapering off of crisis-generated complaints, rather than new procedures offered by the rules, may account for at least some of the increased efficiencies at the CFTC. At least three of the four CFTC ALJ's ascribe the diminution in backlog to factors other than the efficiencies of the new rules. One ALJ asserted that the absence of market crises, coupled with the infusion of personnel and computer equipment into the Office of Proceedings, was largely responsible for the improved efficiency in the program.¹⁸⁷ Early in the new program, another ALJ objected to crediting the new procedures with the reduction in case backlog, stating that the reduction in complaints was attributable to a "quiet market" as much as the new rules.¹⁸⁸ The third ALJ believed that the 1982 Exchange Act amendments, which limited jurisdiction to complaints against registered persons, cut down on the number of cases. The first ALJ similarly pointed to a slower market and the jurisdictional limitation as the primary causes for the reduced caseload.¹⁸⁹

183. 1985 CFTC ANN. REP. 97.

184. 1981 CFTC ANN. REP. 40.

185. 1982 CFTC ANN. REP. 33.

186. First, the new rules permitted the dismissal of complaints that were the subject of parallel proceedings, and thus 51 cases which might otherwise have been docketed were dismissed instead. Second, while the new rules were being put into place, there was a slowdown in cases forwarded from the Complaints Section of the Office of Proceedings. See *CFTC Report No. 1*, *supra* note 179, at 5.

187. See Memorandum from Judge Painter to Chairman Phillips (Feb. 1, 1985) (regarding Report on the New Reparations Rules). He attributed the diminution in backlog, among other things, to reduced case filings, the acquisition of word processors, the appointment of an efficient judgment officer, fewer enforcement cases, part-time summer help, and student interns.

188. Memorandum from Judge Spruill to R. Britt Lenz, Director, Office of Proceedings, CFTC (Jan. 24, 1985).

189. Interview with Judge Shipe (Oct. 24, 1986).

B. The Impact of the New Rules on the Speed of Disposition

In recent years, the CFTC has compiled statistics on processing time for all reparations complaints filed with the Commission.¹⁹⁰ The CFTC data include not only cases that are adjudicated and decided, but also those that are settled or are otherwise disposed of without decision. The average number of days for completion of a voluntary procedure is 145.¹⁹¹ For a summary procedure the average is 186, and 265 days is the average for a formal procedure.¹⁹²

Results of an analysis by this author of the 132 reparations decisions made by the Hearings Section between the end of December 1985 and the beginning of February 1987¹⁹³ vary somewhat from the CFTC's results. The average number of days from the receipt of a complaint by the CFTC to an initial decision was smallest for the least formal procedure (voluntary) and next smallest for the most formal procedure (formal). Interestingly, the elapsed time from complaint to initial decision for the summary procedure was appreciably greater than for either of the other two procedures, including the formal procedure. The average number of days for the voluntary procedure was 488 days. For the summary procedure, the average number of days was 618, and for the formal, the average number was 546.¹⁹⁴

Although the results of this analysis are revealing, a full-scale time study of the reparation unit's records would be desirable before a proper judgment could be made about the relative efficiencies of the three procedures.¹⁹⁵ It may be, for example, that summary procedures going to decision take longer to process than formal procedures because the CFTC has four ALJ's to judge formal complaints and only two judgment officers to judge both voluntary and summary complaints. Indeed, in the time covered by the sample, the two judgment officers de-

190. The Office should within the next several years have an efficient means of tracking and analyzing case dispositions.

191. *CFTC Report No. 3*, *supra* note 179, at 4, 6.

192. *Id.* at 4, 6.

193. *See* sources cited *supra* note 179.

194. These results represent only those cases which had been adjudicated and for which an initial decision had been rendered. Unlike the CFTC's data, they do not include cases settled before decision, or those dismissed for cause.

The data do not change significantly if only a smaller sample (58) of more recent cases is used to compute the results. The average number of days for voluntary, summary and formal procedure are 529, 676, and 473, respectively, for 31, 18 and 8, respectively.

195. A time study of a very small sample of reparations cases suggests that summary cases take longer to process at most stages in the process, and not simply the final decisional stage.

cided 90 cases, and the ALJ's decided only 34.¹⁹⁶ The addition of another judgment officer might well reduce the overall processing time for summary and voluntary proceedings. Thus, although further monitoring is needed, the present information leads to the conclusion that for those summary proceedings that go to decision the hoped for time savings have not yet been realized.

It is difficult to make comparisons between the NFA and CFTC programs on the basis of speed since the parameters from which the data bases are derived may not be identical. The NFA's methods for identifying date of receipt, for example, may differ from the CFTC's, as may their way of recognizing a "disposition." Nonetheless, the numbers for time from receipt to disposition for the NFA and CFTC are remarkably close. Figures supplied by the NFA show that on an annualized basis, the average time from receipt to award was as follows:¹⁹⁷

TIME FROM RECEIPT TO AWARD IN NFA ARBITRATION

<i>Year</i>	<i>Average Time</i>	<i>Number of Cases</i>
1983	7.4 months	45
1984	6.7 months	124
1985	8.5 months	196
1986	4.8 months	88 ¹⁹⁸

When the figures for 1985 and 1986 are combined, the average time from receipt to award is roughly 7.1 months (or 220 days). This figure may be compared to the CFTC's figures for a roughly similar time.¹⁹⁸ The CFTC reported that the average time from receipt to disposition for its cases was 145, 186, and 265 days respectively for its voluntary, summary, and formal proceedings. The 220-day average for recent NFA proceedings is, at least on an unweighted basis, roughly in between the averages for the CFTC's formal and summary proceedings.

196. A third person, no longer with the Commission, decided some summary and voluntary cases. He accounts for eight cases in the 132-case sample.

197. Letter from the National Futures Association, Marianne K. Smythe (Mar. 26, 1987).

198. See *supra* notes 191-92 and accompanying text (providing CFTC figures).

C. *The Differences in the Types of Procedures as Reflected in Outcome*

An analysis¹⁹⁹ of the initial decisions of the 132 cases that went to decision reveals a slightly greater percentage of decisions favorable to complainants in the formal and summary proceedings than in the voluntary proceedings. In summary proceedings, 66% of the complainants "won" their case (a complainant was regarded as having "won" if he or she received any portion of the damages claimed). In formal proceedings, 62% won their case. In contrast, only 56% of complainants in voluntary proceedings prevailed on their claims.

The reason for this mild disparity is likely that both parties may have a preference for the formal processes when the case is close or the stakes are high. As noted earlier, the rules permit the respondent to opt for the more formal procedural processes, even if the complainant selects the voluntary process, upon respondents payment of the difference in fee. It can be concluded that respondents only risk voluntary (and therefore nonappealable) proceedings for those cases which they believe the complainant has a weak case, and elect the more formal procedures for those cases in which respondents believe the issues are closer.²⁰⁰ If that is the case, the choice of procedure may assist in explaining the disparate results.

The data²⁰¹ suggest that when the stakes are high, complainants likewise show a preference for the more formal procedures. Since the inception of the new program, complainants have consistently, by a margin of approximately 60% to 40%, shown a preference for voluntary procedures over summary procedures for claims of less than \$10,000. For claims of greater than \$10,000, however, the opposite is true. For these claims, complainants choose the formal procedure over the voluntary procedure by a margin of 74% to 26%.²⁰²

The disparities attributable to the type of procedure involved are far less dramatic than the disparities of outcome among and between the different types of judicial officers. The two CFTC judgment officers who decided most of the voluntary and summary cases differed markedly in their decisions. The first officer decided 46 cases, 74% of which were decided in favor of the complainant. The other officer decided 44

199. *1985-1987 Analysis of Reparations Decisions*, *supra* note 180.

200. Comments of two attorneys who represent respondents in these proceedings are consistent with this rationale, as are the views of Judgment Officer Phillips.

201. *1985-1987 Analysis of Reparations Decisions*, *supra* note 180.

202. See *CFTC Report No. 1*, *supra* note 179, at 5.

cases, 48% of which were decided for the complainant.²⁰³ On a proportionate basis, however, both officers were more "pro-complainant" in summary than in voluntary proceedings, again suggesting that voluntary cases provide lower risk for the respondents.²⁰⁴ Overall, the complainants in the 1985-1987 CFTC Study won in 61% of the initial decisions.²⁰⁵

In comparing the CFTC won/lost percentages to those generated over a roughly comparable period of time at the NFA, the potential pro-industry bias of the NFA arbitrators can be found to result in a forum slightly more sympathetic to respondents than is provided by the CFTC reparations program. Figures provided by the NFA show for the period from October 1985 to March 1987 that the claimant won in 74 cases, the respondent won in 5 cases, and no monetary award was provided in 48 cases.²⁰⁶ Thus, for the 127 judgments in the NFA sample, the claimant won 58% of the time. This is roughly the same winning percentage as complainants coming before one of the CFTC judgment officers in summary proceedings. The winning percentage for complainants in NFA arbitrations is slightly higher (2%) than the winning percentage for complainants in the CFTC voluntary proceedings discussed earlier. The NFA results are 3% lower than the 61% winning percentage for all complainants in the CFTC sample.²⁰⁷

VI. CONTACTS WITH RECENT USERS OF THE REPARATIONS PROCESS AND REVIEW OF CASE FILES OF RECENTLY COMPLETED REPARATIONS CASES

To better understand how the summary and voluntary procedures of the reparations process were perceived by those who actually used the process, complainants, respondents, and respondent firms of recently

203. The difference between the ALJ's is equally striking. Judge Shipe ruled in favor of complainants, 83% of the time and Judge Spruill ruled in favor of complainants 82% of the time, but Judge Painter favored complainants only 41% of the time.

204. Judgment Officer Phillips ruled for complainants 57% of the time in summary proceedings, but only 44% of the time in voluntary proceedings. Judgment officer Joust ruled for complainants 77% of the time in summary proceedings, and 74% of the time in voluntary proceedings. *1985-1987 Analysis of Reparations Decision*, *supra* note 180.

205. *Id.*

206. Letter from the National Futures Association to Marianne K. Smythe (Mar. 26, 1987).

207. *Id.* The data from which these figures are derived, however, may not necessarily be comparable, since the NFA figures may reflect all outcomes, while the CFTC figures reflect only the outcome of cases going to initial decision. In addition, the concept of "wins" and "losses" is overly simplistic in the dispute resolution context. A claimant winning 5% of the amount claimed, for example, might technically be classified as a "winner," but may in reality not have won at all.

completed reparations cases were contacted. In addition, a review of case files of reparations cases recently completed was conducted. The following is a discussion of the results of those reviews.

A. *Contacts with Recent Users*

A letter and brief questionnaire were sent to the complainants, respondents, and respondent firms of a few recently completed reparations cases.²⁰⁸ The parties were asked, in essence, for their reactions to the reparations process.

Although only a few responses were received, the answers to the questions varied considerably. For example, the response given by complainants as to whether they would consider using the reparations process again ranged from: "In a similar situation, I would use the process again"; to, "probably"; to, "Never. It is just furnishing some shysters an office plus a place of employment." Significantly, those plaintiffs who won their claims were satisfied with the process, and the one dissatisfied complainant had not won. Four of the five complainants found the process too slow. Three found the process easy to understand, although two of those complainants were represented by counsel.

One particularly thoughtful response came from a complainant who found the process overwhelming to the lay person. Her comments encapsulate some of the common elements in the reparations process. She, like most complainants, was *pro se*. The respondent, on the other hand, was represented by counsel. The complainant found the process slow and confusing. Yet she had some perception that her suit served the purpose of informing the regulators about a problem in the industry, as well as providing her with an avenue for potential vindication of her complaint.²⁰⁹ Despite her misgivings about the process and about

208. Because the reparations program provides only a contract damages remedy, with no opportunity for punitive damages or injunctive relief, it would be difficult to determine from only the record of proceedings what is being sought by a complainant besides monetary compensation. For example, it is possible that a complainant might also want vindication or revenge, or might want to perform some perceived public service by pursuing the respondent. In a study by a consumer fraud bureau in Illinois, 50% of the complainants in the sample group were found to be seeking something other than restitution. Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107, 1138-39 (1975). The study also showed that more than one quarter of the complainants at the high end of the income spectrum (over \$17,000 per annum in the mid 1970's) sought a public-oriented remedy. *Id.* at 1140-41. Since one would suspect that commodity futures customers belong in the higher income groups, their satisfaction with the program might not only rest with a monetary reward but might also require some sense that the public good had been vindicated.

209. The discussion of the responses is derived either from notes of telephone calls,

her competence to pursue her claim, she persevered and prevailed.²¹⁰

Of the 12 individual respondents contacted, only three answered.²¹¹ Six (or 50%) of the letters were returned undelivered.²¹² The three remaining individual respondents simply did not answer. This response rate may well illustrate the difficulty the CFTC and complainants experience in locating individual respondents, not to mention making them accountable for a judgment. Of the three individual respondents who did answer, none seemed happy with the process. All had lost their cases, and all felt that the process had a pro-complainant bias and was not fair.²¹³

Of the 11 respondent firms contacted, only three answered. One letter was returned undelivered, and seven firms simply failed to respond. The most comprehensive and helpful response came in a telephone call from an attorney who has represented a firm in a number of reparations cases, although never in a case using the voluntary procedure. He regarded the voluntary procedure as "strange," because of the absence of a written opinion or the right of appeal.²¹⁴ While he regarded the

or from the written answers on the questionnaire.

210. The text of the letter is as follows:

You can't imagine how difficult this was for me to do (I mean choosing to sue). First of all most people cannot write & explain themselves well. Then you don't know if you should be brief or lengthy. One almost wants to quit before beginning. You don't know how many times I wrote and tore up and mentally considered defeat before I started. What kept me going, was knowing in my heart that there were mistruths (sic) and especially when I received lies in writing from the lawyers. I sat down and simply wrote what happened to me and said let the reparation committee decide. I thought at least they will be aware in Washington that [the respondent firm] was not acting in the best interests of their clients but only in their best interests. I wonder how many other people they [the firm] have abused and gotten away with it because most people don't want to be bothered with a lot of aggravation. Again, smaller clients figure you can't win against a big company so don't complain.

I would love to go to the newspapers with this and have a headline something like "Small Man Can Win Against the Big Conglomerate."

211. There were actually four responses, although the fourth was a response from an individual on behalf of his firm.

212. These six individuals were respondents whose cases had been decided recently.

213. See Sackheim, *Administrative Enforcement of the Federal Commodities Laws By the Commodities Futures Trading Commission*, 12 SETON HALL 445, 469 (1982) (emphasizing structural drawbacks regarding the CFTC as judicial body as well as prosecutorial body). One former chairman was quoted as saying: "The agency has heard your case at least three and perhaps more times before you have a hearing. The minds of men are simply not supple enough to judge a defendant's culpability fairly when vindication and reputation are also at stake in an adversarial proceeding." *Id.*

214. See Van Smith, *Breaking the Chains That Bind: Arbitration Agreements Versus Forum Rights Under the Commodities Futures Trading Commission Act of 1974*, 16 SAN DIEGO L. REV. 749 (1979) (pointing out strangeness of voluntary arbitration procedure). In order for a customer's pre-dispute agreement to be voluntary, 17 C.F.R.

summary and formal procedures as fair in the abstract, he believed that the ALJ's did not have an understanding of the practical side of the commodities futures business and that this lack of understanding gave the ALJ's a pro-complainant bias. He felt that the NFA's process, by contrast, yielded more balanced and predictable results because the arbitrators had a better understanding of the industry.²¹⁵ His perception also was that arbitration was "a lot quicker" than reparations. Significantly, he regarded the absence of an oral hearing in summary cases to work to the advantage of respondents, since they, unlike most respondents, would be represented by counsel and thus better equipped for writing briefs.²¹⁶

From these few contacts with recent users, a number of impressions about the workings of the reparations process emerge. First, approximately 75% of the complainants in this process are *pro se*, that is, unrepresented by counsel.²¹⁷ These complainants are not particularly sophisticated, and this is somewhat disturbing, given the sometimes complex nature of the transactions which are the subject of dispute.²¹⁸ Second, the difficulty in locating individual respondents seems to be characteristic of these proceedings. Several of the complainants noted that they had won their case but had received no monetary compensation, presuming that the respondent could not be located or was insolvent. Indeed, one major regulatory consequence of the reparations pro-

section 180.3 states that a bold-face-type clause must be inserted to advise customers that they do not have to agree or submit to arbitration and that if they should agree, they may be waiving the right to a court proceeding. However, as the author points out, few customers will read and understand the agreement when they open an account. At best they will glance over the documents and then sign. *Id.* at 762. This tendency thereby eliminates the advantageous effect of the section 180.3 clause of preventing fraud and mistake. *Id.*

215. See Note, *supra* note 22, at 188-91 (discussing attributes NFA arbitration has regarding qualifications of arbitrators).

216. Telephone interview with Jerry Tartar, General Counsel for a commodities brokerage house (Mar. 7, 1987). Counsel for another respondent's firm believed the reparations process to be biased in favor of complainants. The firm's counsel stated that "[p]rocedural (e.g., discovery, filing deadlines etc.) and substantive (e.g., statute of limitations) rules are frequently waived for complainants but rigidly enforced against respondents."

217. Data from the CFTC Office of Proceedings show that for the period beginning March 1985 and ending March 1987, of the 716 reparations complaints filed, 529 (or 74%) were from complainants acting *pro se*.

218. See 1984 CFTC ANN. REP. 103-05. The 1984 CFTC Annual Report highlighted some of the decisions which concerned intricate arguments over whether (1) an amendment to the Commodity Exchange Act retroactively barred the Commission from jurisdiction over unregistered respondents in reparations proceedings begun before the effective date of amendment; (2) privilege against self-incrimination attached to a response to complainant's allegations; and (3) whether tape recordings of conversations should have been barred under California law. *Id.* at 103-05.

gram is that respondents who lose, and who then default on the judgment, are barred from registration in the industry until they satisfy the judgment. To enforce this regulation, the Office of Proceedings keeps a hefty sanctions list of such individuals, and provides the NFA (which is responsible for the industry registration process) with constantly updated lists.²¹⁹ Finally, the few respondents, both individual and institutional, who did respond seemed to believe that the reparations process was biased against them.

B. Review of Case Files

The review of the files of reparations cases in the CFTC's Office of Proceedings confirmed and reinforced the impressions gained from the survey discussed above.²²⁰ The parties to these cases, like the parties covered in the survey, tended to conform to a repeating profile. The complainants were unsophisticated, unrepresented individuals, respondents were itinerant and hard to find, and respondent firms were frequently represented by experienced counsel.

Docket No. 86-R56 serves as our prototypical case. The complainant was *pro se*, and almost all his correspondence was by hand, and quite unsophisticated. The respondent was represented by counsel and all pleadings and motions had the form and language of documents filed in court. The complainant elected the voluntary procedure, while the respondent elected the summary procedure. After discovery had been completed, and a pretrial order issued, the complaint was settled for \$650.²²¹

In another case, however, an eighty-nine year old leukemia victim, barely able to communicate, won a summary decision against a major wire house. In this case, as in several others where the amount in controversy was less than \$10,000, the agency clearly did not demand of the complainant the kind of rigid adherence to form and expression typically expected in civil court. On the other hand, when the complainant was seemingly sophisticated, he or she was given no special assistance.²²²

219. The most recent annual compilation of defaulting respondents is entitled *1984, 1985 and 1986 Reparations Sanctions in Effect List* (Dec. 31, 1986). It lists 472 individuals or firms whose failure to satisfy a judgment or settlement has caused their registrations to be suspended by the CFTC.

220. Approximately sixteen complete case files were reviewed. Eleven had been selected by the Director of the Office of Proceedings to represent cases that had been processed slowly, moderately, or quickly, and the others were chosen by the Director to represent the three forms of procedure.

221. There was nothing in the file to indicate how that figure was derived.

222. In one case, in which the allegation was unauthorized trading, the issue was

Formal proceedings can be very complex and protracted if they go to decision. One particular case involved an individual suing against a major wire house. The amount claimed was \$120,000, the case was accompanied by extensive briefs and interrogatories, and produced a transcript of more than 450 pages. The complainant eventually lost — essentially on the issue of credibility.

A brief time study²²³ of the sample slow, medium, and fast cases both confirms the impression that the reparations process has been too slow and also gives some clues as to where the time delays occur. The most alarming set of figures from these 11 cases²²⁴ was the category representing the number of days from receipt of the complaint by the Hearings Section to the disposition of the case — 388 days. More than a year, on average, elapsed between the completion of pleadings and the decision in what are supposed to be cases disposed of “summarily.” As noted above, the problem may be a simple one of staffing, remediable by adding another judgment officer to the staff of the Office of Proceedings.

AVERAGE NUMBER OF DAYS FOR COMPLETION OF DIFFERENT STAGES OF THE CFTC REPARATIONS PROGRAM

<i>Type of Procedure</i>	<i>Receipt by Complaints Section to Completion of Pleadings</i>	<i>Completion of Pleadings to Forwarding to Hearings Section</i>	<i>Receipt by Hearings Section to Disposition</i>	<i>Receipt by Complaints Section to Disposition</i>
Formal	86	96	334	516
Summary	133	45	388	565
Voluntary	81	66	109	256
All	106	67	317	491

essentially one of credibility between the complainant and respondent, and the respondent won.

223. The agency keeps manual records of the progress of the case through the process, although the Office of Proceedings is now in the process of computerizing its record. Based on these records, an average number of days was tabulated for the time it took to process these eleven cases. This time period was broken down into the time elapsed during the different stages of the process.

224. The average number of days was determined for four categories: (1) receipt by Complaints Section to completion of pleadings; (2) completion of pleadings to forwarding to Hearing Section; (3) receipt by Hearing Section to disposition; and (4) receipt by Complaints Section to disposition. These figures were based on the type of adjudication chosen - formal, summary, or voluntary.

The other set of troubling figures is the time it takes from completion of the pleadings to forwarding the case to the Hearings Section.²²⁵ Even allowing for a review period to assure the pleadings are in order, the interval between completion of pleadings and forwarding to the Hearings Section is too long. The Director of the Office of Proceedings assures, however, that the delay in forwarding complaints to the Hearings Section has ended and that complaints are now forwarded almost as soon as the pleadings are complete.²²⁶

C. Informational Materials Furnished to Parties

The agency tries to be both informative and clear in the written materials it provides to individuals requesting information about the reparations process. Upon request, an informational booklet containing a complaint form is sent to a prospective complainant. Although the informational materials are helpful, the complaint form can be intimidating to the average lay complainant.²²⁷ The Office of Proceedings, only recently digging out from the avalanche of claims of the late 1970's and early 1980's, can be forgiven for attempting to guard against the tyranny of the telephone.²²⁸ Nonetheless, if the purpose of the program is to provide a dispute resolution process geared to relatively unsophisticated nonlawyers, the Commission needs to increase its

225. The time elapsed in this category was 96 days for a formal action, 45 days for a summary action, and 66 days for a voluntary action.

226. A brief review of the case-progress records for cases docketed since July of 1986, indicates that he is correct. The Office of Proceedings now assigns cases to an ALJ or judgment officer within one or two days of completion of the pleadings. Letter from R. Britt Lenz, Director, Office of Proceedings, CFTC, to Marianne K. Smythe (Apr. 23, 1987) (discussing ALJ assignment under new procedure).

227. A concise, seventeen page booklet is provided upon request entitled *Questions & Answers About How You Can Resolve A Commodity Market-Related Dispute*. This booklet also contains a double-sided, single sheet complaint form. Included with the packet is a "complaint checklist" and another booklet entitled *Alternatives to CFTC Reparations: Other Ways to Resolve Futures-Related Disputes*.

Although the complaint form is short, it may still be confusing to the lay reader in two respects. First, it asks the complainant whether the individual respondent or the firm was registered at the time of the alleged violation, but the form does not explain why this is important. The importance of determining registration is outlined in the booklet, but not on the form. Second, the form asks for a detailed explanation of "the facts which will show how the Act was violated and the way in which the complainant was injured by that violation." The requirement for detail and specific facts could be intimidating to the average lay complainant.

228. The form states as follows:

Because of the large volume of reparation claims pending in this office, we ask that you refrain from telephoning except at our request. If you must contact us, please refer to the docket number above. We are in the process of reviewing your claim. You will be contacted as soon as any further action is taken on your claim.

efforts to make the process intelligible to such people. It should be emphasized that the personnel in the Office of Proceedings seem committed to making the process work for the unsophisticated complainant. There is a fine line between helping a complainant and prosecuting the case on his or her behalf, but the personnel in the Office of Proceedings seem committed to actively assist those in need of help.

VII. THE APPELLATE PROCESS

As noted above, the new CFTC reparations rules modify the appellate process in one significant respect. They terminate the certiorari procedure and the double briefing, and instead institute an appeal as of right.²²⁹ The new rules also delegate significant authority to the Chief of the Opinions Section to remand cases to the Office of Proceedings for a variety of reasons, including procedural mistakes, lack of clarity in the decision, or a record insufficient to support the decision. A centralization of management in the Opinions Section, with a greater insistence on adherence to required filing deadlines, has relieved the backlog of cases at the appellate level.²³⁰ The goal, which is presently being realized, is to have all cases current to the fiscal year.²³¹

CONCLUSION

A. *The CFTC Reparations Program*

The reparations program at the CFTC has struggled for nearly 13 years to become a useful forum for dispute resolution. The placement of such an experimental program in a new agency, with many other problems to resolve, contributed to the uncertain fortunes of the program. Since the program's restructuring in 1982, a number of factors have led to a more efficient treatment and disposition of reparations cases within the agency. These include the fortuity of a quiet market, and the recent availability of other forums to which commodity customers may bring complaints. Additionally, the CFTC has paid more attention to the management of the program and has provided it with

229. 17 C.F.R. § 12.401 (1987).

230. The CFTC Annual Report for 1986 shows that the number of cases pending at year-end in the CFTC appellate docket for reparation cases has steadily declined in the last four fiscal years. There has been a uniform decline of pending cases of at least thirty per year: from a high of 177 in fiscal year 1983, to the current low of 71 pending cases in fiscal year 1987. During these years the CFTC has dramatically increased the number of orders and opinions issued.

231. Interview with Jerome Nelson, Chief, Office of Opinions and Review, CFTC (Mar. 26, 1987).

additional resources.

The extent to which the creation of new procedures has contributed to the improved efficiency of the reparations program is a complex question. The reduction of procedures, as evidenced in the highly experimental voluntary process, has shortened the time necessary for the decisionmaker to render a decision once the pleadings are complete. The less experimental summary process should in theory also have shortened case processing time, but these economies have been compromised by the resource constraints on the Office of Proceedings.

Increased decisional authority delegated to judgment officers, rather than to ALJ's, has the potential for improving efficiency through exerting supervisory control over such employees. No amount of control, however, can substitute for a sufficient number of decisionmakers. The analysis of decided cases suggests that the two judgment officers at the CFTC are overburdened. The relatively slow processing time for complaints heard under the voluntary and summary procedures may also be caused by a lengthy discovery process, which is the same for the formal procedure. Substantial time savings could result if a streamlined discovery process is developed to comport with the streamlined decisional processes.

The one notable personnel *addition* contained in the new rules, having a proceedings officer function as a magistrate, did not turn out to be a successful innovation. The incumbent proceedings officer left the agency in September 1986 and had not been replaced as of April 1987. It is unclear whether the idea of such a functionary is flawed, or whether the problems were less those of structure than of personality. Two ALJ's refused from the outset to permit the proceedings officer to preside over their cases, and another, who did permit such access, subsequently decided that the proceedings officer had created a bottleneck. The two ALJ's who resisted using the officer had theoretical objections to the role. They believe that a judge's involvement in discovery and pretrial skirmishing is a necessary part of understanding a case.

Another innovation of the new rules for the formal procedure is the limitation on hearing sites to 20 cities. This has not been strictly enforced, however, because better program management has made such restrictions unnecessary.²³²

The telephonic hearing concept is the most noteworthy invention of the new summary procedure. It is regarded by one judgment officer as

232. Interview with R. Britt Lenz, Director, Office of Proceedings, CFTC (Mar. 27, 1987).

a useful innovation,²³³ yet another finds it questionable. Part of the problem with its use is the cost: upwards of \$200 may be charged for one telephonic hearing. Neither judgment officer currently at the Commission, however, expressed being fully comfortable with a process that depends heavily on a paper hearing for fact-finding. Both regard the opportunity actually to hear the contestants as an important fact-finding tool.²³⁴

B. The CFTC Reparations Program as a Model for Other Programs

Beyond the performance of the reparations program at the CFTC, the broader utility of such an ADR program for other federal agencies will depend essentially on one question: whether value is ascribed to expert government employees serving as judges of private disputes arising under a federal regulatory program. The benefits to aggrieved consumers seem obvious. An expert and impartial judiciary is provided, along with some opportunity to choose a process with procedural protections commensurate with their perceived needs. Although the process at the CFTC has had a troubled history, the prototype process provides a potentially useful model for other agencies with a consumer protection mission, such as the Securities and Exchange Commission or the Consumer Products Safety Commission.²³⁵

The benefits of a reparations process to a regulated industry are less obvious. There is a perception that the CFTC's reparations process has a pro-complainant bias, suggesting that the presumed benefit of an *impartial* judiciary is not necessarily evident to everyone. The cases decided by CFTC reparations judges were not, however, notably more pro-complainant than those decided by the NFA arbitrators. Therefore, the perception of pro-complainant partiality may not be valid.

The benefit to a regulatory agency of having a reparations program

233. Interview with Judgment Officer Joost, CFTC (Mar. 4, 1987).

234. Interviews with Judgment Officers Joost and Phillips, CFTC (Mar. 4, 1987).

235. Agencies other than the CFTC have reparations programs. Other than the Department of Agriculture's program, the progenitor of the CFTC program, many of the programs center around disputes involving common carriers. For example, the Federal Maritime Commission has a reparations program to mediate certain disputes between ocean common carriers, 19 U.S.C. § 1641(i) (1982), and against "common carrier[s] by water in interstate commerce," 46 U.S.C. § 821 (1982), and for alleged rate overcharges, 46 U.S.C. § 845a (1982). See also 46 U.S.C. § 1704 (d) (1982) (concerning reparations with assessment agreements); 46 U.S.C. § 1710(g) (1982) (concerning reparations amongst common carriers, ocean freight forwarders, and marine terminal operators). The Interstate Commerce Commission's reparations authority relating to common carriers is now 100 years old. 49 U.S.C. §§ 908, 916 (1982).

should also be obvious. First, a reparations program provides a valuable source of information to the agency about the problems in the regulated industry. Much of the important sales-practice law in the commodity futures industry has been articulated by the CFTC in cases heard on appeal from an initial reparations decision. Secondly, a *government-sponsored* ADR forum serves as a useful alternative to industry-run arbitration programs. If the commodity futures industry perceives bias in the CFTC reparations program, an equal and opposite perception probably exists among consumers with respect to industry-sponsored arbitration fora. Because of this, somewhat duplicative agency and private dispute resolution fora serve as useful checks on perceived pro-complainant or pro-industry bias.

For a federal agency reparations program to be successful as an ADR forum, it needs adequate resources. No amount of procedural innovation will substitute for the number of personnel minimally necessary to hear cases, and the equipment to automate and speed the paper trail of the adversarial process. If one lesson can be drawn from the CFTC experience, it is that inadequate resources will make for a struggling program.

A reparations program probably will always have to fight for the resources and attention that more traditional agency programs, such as rulemaking and enforcement, enjoy. The slow, somewhat unglamorous business of presiding over individual claims will be regarded by many as low in prestige and, therefore, a low-priority undertaking. Moreover, the government's providing to the lay citizen an opportunity for redress against an industry monolith may not please the industry monolith. Pressures from industry on the agency and on key legislators likely will not be in the direction of increasing resources for such programs. As the satisfaction evident in the victorious claimant suggests, however, the availability of such programs is an important service provided by the government to its citizens, and one not to be disparaged.