Commodity Futures Trading Commission
CEA CASES

NAME: GEORGE REX ANDREWS

CITATION: 32 Agric. Dec. 553

DOCKET NUMBER: 195

DATE: MARCH 8, 1973

DOCUMENT TYPE: DECISION AND ORDER

(No. 15,073)

In re GEORGE REX ANDREWS. CEA Docket No. 195. Decided March 8, 1973.

Unauthorized transfer of funds -- Unauthorized trades resulting in loss of funds -- Deceiving customer as to true status of the customer's accounts -- Denial of trading privileges

Where respondent, without the knowledge or authorization of the customer, John F. Selle, transferred funds from the customer's stock account to the customers' regulated and nonregulated commodity accounts, made trades in such accounts, resulting in loss of the funds so transferred and deceived said customer as to the true status of his account, respondent is denied trading privileges as stated in the order herein for a period of five years.

Darrold A. Dandy, for complaint.

Respondent *pro se.*

John A. Campbell, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is an administrative proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1, 1946 ed., as amended, Supp.

IV, 1969), hereafter referred to as the "Act", instituted by a complaint filed August 28, 1972, by the Assistant Secretary of Agriculture. The complaint alleges that the respondent violated §§ 4b, 4d, and 9 of the Act (7 U.S.C. 6b, 6d and 13), and § 1.20 of the Regulations (17 CFR 1.20) by reason of the activities set forth therein.

The complaint alleges that the respondent, a salesman for a brokerage firm registered as a futures commission merchant under the Act, acting without the knowledge or authorization of a customer, transferred $ 14,000 from the customer's stock account to the customer's commodity accounts, and made commodity trades with the $ 14,000 "which were closed out at prices which resulted in the loss of the entire $ 14,000." The complaint further alleges that to further such course of conduct, the respondent, at various times, deceived the customer as to the true status of his accounts.

Copies of the complaint and the rules of practice were served on respondent by certified mail on August 31, 1972. Respondent was notified in writing that, in accordance with the applicable rules, an answer should be filed within 20 days following receipt of the complaint, and that failure to file an answer denying the specific allegations in the complaint and requesting an oral hearing

would constitute admission of such allegations and waiver of an oral hearing. Notwithstanding such notice, respondent did not file an answer.

Complainant filed suggested findings of fact, conclusions and order on October 4, 1972, which were served on respondent. The order suggested by the complainant would have suspended the respondent's trading privileges on contract markets for five years. Complainant recommended that the Referee proceed in accordance with § 0.9(c) of the rules of practice (17 CFR 0.9(c)), which provides:

(c) *Procedure upon admission of facts.* The admission, in the answer or by failure to file an answer, of all the material allegations of fact contained in the complaint shall constitute a waiver of hearing. Upon such admission of facts, the referee, without further investigation or hearing, shall prepare his report, in which he shall adopt as his proposed findings of fact the material facts alleged in the complaint.

The Administrative Law Judge to whom the case was assigned, John A. Campbell, filed a Recommended Decision on November 1,

1972, adopting as proposed findings of fact the material allegations set forth in the complaint. Except for a change in the denial of trading privileges from five to three years, he adopted the proposed conclusions and order submitted by the complainant. No exceptions to the Recommended Decision were filed.

FINDINGS OF FACT

1. The respondent, George Rex Andrews, an individual whose address is 159 Ponce de Leon Drive, Osmond Beach, Florida, was at all times material herein a salesman of duPont Glore Forgan Incorporated, a brokerage firm dealing in securities and commodities. At all such times the said firm was a registered futures commission merchant under the Commodity Exchange Act and entitled to membership privileges on various contract markets.

2. At all times material herein, John F. Selle, an individual, maintained stock and commodity futures trading accounts at duPont Glore Forgan Incorporated.

3. During the period from June 25 through August 14, 1970, the respondent, acting without the knowledge or authorization of John F. Selle: (1) transferred approximately $ 14,000 from John F. Selle's stock account to the regulated commodity account of John F. Selle and thereafter transferred a portion of the said amount to the nonregulated commodity account of John F. Selle; and (2) made trades in the regulated and nonregulated commodity accounts of John F. Selle.

To further such course of conduct, the respondent, at various times during such period deceived John F. Selle as to the true status of his accounts. The trades so made subsequently were closed out at prices which resulted in the loss of the entire $ 14,000.

4. The transactions in commodity futures previously referred to were capable of being used for hedging transactions in interstate commerce in such commodities or the products or byproducts thereof, or for determining the price basis of transactions in interstate commerce in such commodities sold, shipped or received in interstate commerce for the fulfillment of such futures contracts.

CONCLUSIONS

I

Under § 4b of the Commodity Exchange Act (7 U.S.C. 6b), it is unlawful:

for any member of a contract market, or for any correspondent, agent or employee of any member, in or in connection with any order to make, or the making of, * * * any contract of sale of any commodity for future delivery, made, or to be made, * * * for or on behalf of any other person * * * (A) to cheat or defraud or attempt to cheat or defraud such other persons; (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof; (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person * * *.

Section 4d of the Commodity Exchange Act (7 U.S.C. 6d) provides that:

It shall be unlawful for any person to engage as futures commission merchant in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery * * * unless -- * * * (2) such person shall * * * treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer.

Section 9 of the Commodity Exchange Act provides that it "shall be a felony punishable by a fine or not more than $ 10,000 or imprisonment for not more than five years, or both, * * * for any futures commission merchant, or any employee or agent thereof, to embezzle, steal, purloin, or with criminal intent convert to his own use or the use of another, any money, securities, or property having a value in excess of $ 100, which was received by such commission merchant to margin, guarantee, or secure the trades or contracts of any customer of such commission merchant or accruing to such customer as the result of such trades or contracts" (7 U.S.C. 13(a)).

The respondent did not answer the complaint. Under the rules of practice, his failure to do so constitutes an admission of all the material allegations therein (17 CFR 0.9(b) and (c)), and such

allegations have been adopted as the Findings of Fact herein. Hence it is admitted that the respondent, without the knowledge or authorization of John F. Selle, (1) transferred $ 14,000 from Mr. Selle's stock account to his regulated commodity account; (2) thereafter transferred a portion of the said funds to Mr. Selle's nonregulated commodity account; (3) made trades in both the regulated and nonregulated accounts, losing the entire $ 14,000; and (4) at various times deceived Mr. Selle as to the true status of his accounts.

Certainly, this conduct on the part of the respondent is a serious and substantial violation of the Act. The violations of the respondent were of a wilful, deliberate and flagrant nature. Accordingly, the respondent should be prohibited from trading on all contract markets for a period of five years and all contract markets should be directed to refuse all trading privileges to the respondent for this period, and the respondent should be ordered to cease and desist from violating the Act in the manner set forth above.

In reducing the complainant's recommended denial of trading privileges from five years to three years, the Administrative Law Judge said:

Complainant recommended among other things that respondent be prohibited from trading on or subject to the rules of any contract market for a period of *five* years. While we recognize the agency expertise in matters involving the severity of sanctions needed to serve as a deterrent to violations, we nevertheless believe that the recommended five year sanction is more severe than was imposed for similar past violations. In our limited research of past decisions (based upon default, consent and hearing) we find that denials of trading privileges range from 60 days to three years. For example, see: *In re Rodger Harris,* 29 AD 1330 (Dec. 1970), Default -- 60 days; *In re Khalil Haddad,*

22 AD 137 (Feb. 1963), Default -- 6 months; *In re Edward Weitman,* 30 AD 600 (May 1971), Consent -- 90 days; *In re William R. Thompson, Jr.,* 27 AD 335 (March 1968), Consent -- 2 years; *In re Jack C. Flora,* 29 AD 1015 (Sept. 1970), Consent -- 2 years; *In re Marvin Sperling,* 31 AD 377 (March 1972), Hearing -- 3 years; *In re Douglas Steen,* 21 AD 1076 (Oct. 1962), Hearing -- 3 years.

This being a default proceeding, we believe it prudent here to hug the shore of past precedent, and impose a three year

sanction instead of the five years as recommended by complainant. Also because the offense by respondent was deliberate, serious, and flagrant, no less than three years should be imposed.

Since the sole issue at this stage of the proceeding relates to the length of the denial of trading privileges, it seems appropriate in this case to set forth my views at length as to administrative sanctions under the Act, including views previously stated in other cases. n1

n1 Final administrative authority to decide cases under the Commodity Exchange Act has been delegated to the Judicial Officer. 36 F.R. 3210; 37 F.R. 28463, 28475.

The office of Judical Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550). The Department's first Judicial Officer held the office from 1942 to 1972. The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

II

In determining the sanction to be imposed under the Commodity Exchange Act for a violation of the Act, it is necessary to recognize that futures trading is a vital part of the agricultural marketing system in the United States -- of great importance to growers, handlers, processors and consumers of agricultural commodities. n2 The value of the futures contracts regulated under the Act in fiscal 1972 was $ 148 billion. n3

n2 See Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 *George Washington Law Review* (1958), 215, 218-219.

n3. U.S.D.A. Press Release No. 2315-72 dated July 14, 1972.

The Congress recognized, in a declaration of policy set forth in the Act (7 U.S.C. 5), that futures trading is a vital part of the agricultural marketing system. The Congress declared that --

Transactions in commodit[ies] involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodit[ies] and the products and byproducts thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer

and the consumer of commodit[ies] and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling

commodit[ies] and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of commodit[ies] on such boards of trade are susceptible to speculation, manipulation; and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodit[ies] and the products and byproducts thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodit[ies] and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

Futures trading serves a vital function in pricing agricultural commodities and, also, in enabling processors, warehousemen, and other handlers of agricultural commodities to hedge against disastrous price changes.

Prices on the futures market record accurately the current balance of market opinion. Properly understood, they help the bargaining position of producers, small merchants, and small processors even more than would an open and competitive merchandising market that recorded only prices on spot transactions.

* * *

* * * Today, the fact that futures trading provides central market prices established in open competitive bargaining may deserve to be regarded as the chief merit of futures markets from the public standpoint. n4

The vital relationship between futures prices and farm prices, between futures trading and farm marketing, was recognized by the Congress more than 30 years ago. n5

Futures market quotations are widely disseminated as is all market information pertaining to growing conditions, crop size, storage stocks, rates of use, etc. The existence of futures markets increases the knowledge of producers about market conditions and thus puts them in a more equal bargaining position with purchasers. n6

The trade in futures contracts is of sufficient magnitude to exercise at all times a directing influence upon spot prices in central as well as local markets. This price-directing function of futures trading is regarded by many as the principal function of organized commodity exchanges. n7

Because of the importance of proper price levels to growers, dealers, processors, and consumers, this function is placed first in spite of the popular notion that hedging is the main reason for the existence of futures markets. n8

n4. Working, "Economic Functions of Futures Markets," in *Futures Trading in Livestock* (1970), p. 47. See, also, Working, "Price Effects of Futures Trading," in *Food Research Institute Studies* (1960), pp. 5-6; Black, "Historical Evaluation, Theory and Legal Status," in *Futures Trading Seminar* (1960), Vol. I, p. 47; Teweles, Harlow, and Stone, *The Commodity Futures Trading Guide* (1969), pp. 4, 168; Larson, "Price Predictions on the Egg Futures Market," in *Food Research Institutes Studies* (Supp. to Vol. VII (1967)), pp. 50-51.

n5. Mehl, "The Futures Markets," in *Marketing, The Yearbook of Agriculture,* 1954, p. 324.

n6. Hieronymus, "Effects of Futures Trading on Prices," in *Futures Trading Seminar* (1960), Vol. I, p. 132.

n7. United States Department of Agriculture, *Trading in Commodity Futures,* Commodity Exchange Admin. Bulletin No. 14, Washington, D. C. (1938), p. 2.

n8. Irwin, "Legal Status of Trading in Futures," *Ill. Law Rev.*, Vol. XXXII, No. 2 (1937), p. 157.

The House Report on the 1968 amendments to the Commodity Exchange Act states:

The speculative activity provides a means of reducing price risks by persons handling the actual commodity and thus makes possible higher prices to producers and lower prices to consumers. The markets also provide a place for the focusing of the worldwide factors of supply and demand with the result that, in the absence of artificial or manipulative forces, proper competitive prices are established. n9

n9. H. Rep. No. 743, 90th Cong., 1st Sess., p. 2.

It is the purpose of the Commodity Exchange Act to prevent manipulations of prices and other unfair practices which, if not prevented, could completely destroy the usefulness of futures trading. See *In re David G. Henner,* 30 Agriculture Decisions 1151, 1241-1249, 1263 (1971). Futures trading is valueless as a price indicator if the futures price is a manipulated price.

No matter how efficient the mechanism is itself in finding prices and discovering prices, the price signal is of vaule in decision making only if prices are based on all possible information, and only if no technical condition or friction develops that would distort the signal. n10

It is equally important that a futures market should be free of manipulation or arbitrary influences if it is to serve as a barometer or indicator of the prevailing world prices of a commodity. n11

n10. Ehrich, "The Role of Market Prices," in *Futures Trading in Livestock* (1970), pp. 83-84.

n11. United States Department of Agriculture, *Trading in Commodity Futures,* Commodity Exchange Admin. Bulletin No. 14, Washington, D.C. (1938), p. 29.

Similarly, futures trading is valueless as a hedging medium if the futures price is a manipulated price. n12

Futures prices are widely disseminated and utilized in the marketing and distribution of agricultural commodities. It is essential that futures prices be based on fair and competitive trading, undisturbed by arbitrary or manipulative practices on the part of any person or group in the market. A manipulated futures market operates to the disadvantage of all legitimate market users. Distorted price relationships make effective hedging impossible. Erratic price movements, downward or upward, usually work against the interests of both producers and consumers. n13

If hedgers find that they are frequently forced to buy back their short contracts at a price far above true supply and demand as dictated by a sufficiently powerful holder of long contracts, the market will lose its usefulness as a hedging medium. n14

n12. See Kauffman, *Recent Developments in Futures Trading Under the Commodity Exchange Act,* U.S.D.A. Agriculture Information Bulletin No. 155 (1956), p. 7; *Report* [*to the Secretary*] *of the Chief of the Commodity Exchange Administration* (1938), p. 14; Testimony of Artheur R. Marsh, former President of the New York Cotton Exchange, in *Cotton Prices, Hearings before a Subcommittee of the committee on Agriculture and Forestry* (1928), *United States Senate, 70th Cong., 1st Sess., pursuant to S. Res.* 142, pp. 208-211; Smith *Organised Produce Markets* (1922), p. 114, fn. 2.

n13. Kauffman,*Recent Developments in Futures Trading Under the Commodity Exchange Act,* U.S.D.A. Agriculture Information Bulletin No. 155 (1956), p. 7.

n14. *Investigation of the October* 1949 *Egg Futures Contracts on the Chicago Mercantile, Exchange,* U. S. Department of Agriculture, Commodity Exchange Authority (May 1950), p. 27.

The "[m]anipulations of * * * futures for speculative profit * * * exert a vicious influence and produce abnormal and disturbing

temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only * * * justifiable hedging but distrub the normal flow of actual consignments." *Chicage Board of Trade* v. *Olsen,* 262 U.S. 1, 39. The major purpose of the Commodity Exchange Act is "to remove burdens on interstate commerce caused by manipulation and market control." *Board of Trade of Kansas City* v. *Milligan,* 90 F.2d 855, 857 (C.A. 8), certiorari denied, 302 U.S. 710. The House Report on the bill enacted as the Commodity Exchange Act states that the purpose of the Act "is to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." H. Rep. No. 421, 74th Cong., 1st Sess., p. 1. See, also, 62 Cong. Rec. 9414; 79 Cong. Rec. 8589-8590; 80 Cong. Rec. 6164, 8017. Senator Pope, who was in charge of the bill which became the Commodity Exchange Act, stated (80 Cong. Rec. 6164):

There is a widespread public interest attached to the business of future trading. The very nature of the business is such as to make it fraught with temptation for those who are disposed to take unfair advantage. In no other business is there found the same combination of circumstances and profit possibilities to tempt the unscrupulous.

It is the purpose of this bill to reduce to a minimum the possibility of unscrupulous trading and to permit the benefits of such trading to be obtained by those entitled to them.

There can be no defense for such fraudulent practices as have been pointed out in transactions in these grain exchanges. The present law does not reach them. These markets are extremely sensitive. A false or misleading statement or fictitious trading may in a few minutes turn thousands of dollars into the pocket of some unscrupulous trader, as illustrated by the example I gave a few moments ago. At the same time it may cause millions of dollars in loss to farmers and others affected by a fictitious price movement. Large speculators may temporarily upset the whole price structure.

* * *

At best, with all the safeguards possible to be thrown around transactions in futures, these market exchanges possess possibilities of manipulation to the advantage of the shrewd and

unscrupulous trader with corresponding loss to the thousands of producers who are innocent victims.

If it be true that there are advantages in commodity exchanges, that the price to the farmer is stabilized by bona fide hedging transactions, and other proper forms of trading, it certainly cannot be contended that fraudulent, fictitious, and cheating practices are justified from any standpoint. The farmer has enough difficulties, enough discriminations against him, enough suffering as the result of natural obstacles to his industry, without subjecting him to manipulations of his commodity markets by unscrupulous and cheating operators on the grain exchanges in this country.

In short, the Congress recognized that futures trading is so essential to the agricultural marketing system that price manipulation and other unfair and dishonest practices on the commodity markets must be stopped.

III

The administrative proceeding in this case does not partake of the essential qualities of a criminal proceeding. In permitting the respondent to trade on the commodity markets, the Government has, in effect, granted him a privilege. Suspension of the privilege for failure to comply with the statutory standard "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act." *Nichols & Co.* v. *Secretary of Agriculture,* 131 F.2d 651, 659 (C.A. 1). Accord: *Helvering* v. *Mitchell,* 303 U.S. 391, 399; *Kent* v. *Hardin,* 425 F.2d 1346, 1349 (C.A. 5); *Blaise D'Antoni & Associates, Inc.* v. *Securities & Exchange Com'n.,* 289 F.2d 276, 277 (C.A. 5), certiorari denied, 368 U.S. 899; *Eastern Produce Co.* v. *Benson,* 278 F.2d 606, 610 (C.A. 3); *Cella* v. *United States,* 208 F.2d 783, 789 (C.A. 7), certiorari denied, 347 U.S. 1016; *Irving Weis & Co.* v. *Brannan,* 171 F.2d 232, 235 (C.A. 2); *Nelson* v. *Secretary of Agriculture,* 133 F.2d 453, 456 (C.A. 7); *Board of Trade of City of Chicago* v. *Wallace,* 67 F.2d 402, 407 (C.A. 7), certiorari denied, 291 U.S. 680; and *Farmer's Live Stock Commission Co.* v. *United States,* 54 F.2d 375, 378 (E.D. Ill.). See, also, *Ex Parte Wall,* 107 U.S. 265, 287-290; *Hawker* v. *New York,* 170 U.S. 189, 190-200; *Steuart & Bro.* v. *Bowles,* 322 U.S. 398, 406-407; *Brown* v. *Wilemon,* 139 F.2d 730, 731-732 (C.A. 5); Chamberlain, Dowling, and Hays, *The Judicial Function in Federal Administrative Agencies* (1942), pp. 93-95.

The function of an administrative sanction is "deterrence rather than retribution" (Schwenk, "The Administrative Crime, Its Creation and Punishment by Administrative Agencies," 42 *Mich. L. Rev.* (1943) 51, 85).

Under the foregoing authorities, the sanction should, *inter alia,* be adequate to deter the respondent from future violations.

In *Beck* v. *Securities and Exchange Commission,* 430 F.2d 673, 675 (C.A. 6), the Court questioned, without deciding, whether a suspension order may also be used to deter others in the regulated industry from committing similar violations. As far as I know, this is the only case in which the use of an administrative sanction to deter others has been questioned. Previously, the use of an administrative sanction to deter others had been assumed to be proper. See, *e.g., American Air Transport and Flight School, Inc., Enforcement Proceeding,* 2 Pike & Fisher Ad. L. 2d 213, 215 (C.A.B.). See, also, the dissenting opinion in *Beck* v. *Securities and Exchange Commission,* 413 F.2d 832, 834 (C.A. 6).

In cases arising under the Civil Aeronautics Act, it has been expressly held that the Civil Aeronautics Board has the power to "impose a suspension as a 'sanction' against specific conduct or because of its 'deterrence' value -- either to the subject offender or to others similarly situated." *Pangburn* v. *C.A.B.,* 311 F.2d 349, 354 (C.A. 1). Accord: *Hard* v. *Civil Aeronautics Board,* 248 F.2d 761, 763-765 (C.A. 7), certiorari denied, 355 U.S. 960; *Wilson* v. *Civil Aeronautics Board,* 244 F.2d 773, 773-774 (C.A.D.C.), certiorari denied, 355 U.S. 870.

The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of sanctions only on the respondents and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings. All futures commission merchants are on the complainant's mailing list to receive copies of all Decisions and Orders issued under the Act. The actions of potential violators could be significantly affected by the sanctions imposed against other persons. Eight years' experience in the administration of a regulatory program has convinced me that it is necessary to consider, as a major factor, the effect of a sanction in

a particular case not only on the violator, but on other potential violators, as well.

In the field of criminal law, it is settled beyond question that one of the primary purposes of the penalty imposed on a particular violator is to deter other potential violators.

* * * punishment * * * is used not to prevent future violations on the part of the criminal alone, but in order to instill lawful behavior in others. n15

sanctions are * * * also * * * intended to deter others from the performance of similar acts * * *. n16

* * * deterrence * * * is aimed at the protection of society. By making a certain action a punishable offense, we expect that people will refrain from committing the offense through fear of punishment.

The purpose of punishment as a deterrent * * * is also to demonstrate to the potential offender the consequences if he violates the law. n17

* * * the deterrent value of a correctional system is not restricted to those who come into direct contact with it but applies to the whole population. n18

* * * it is a primarily preventive consideration -- having an eye to what is necessary to keep the people reasonably law-abiding -- which today's legislators have in mind * * * when they define crimes and stipulate punishments. n19

* * * regulations which are such commonplaces in modern times: traffic ordinances, building codes * * * regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general -- preventive function. Here nearly all of us are potential criminals. n20

The purpose of punishment be it a criminal sentence, a civil penalty, or punitive damages, is not to inflict suffering or to

impose a loss on the offender. Its object is to act as a deterrent: * * * to discourage the offender himself from repeating his transgression; and * * * to deter others from doing likewise. n21

Sentencing is * * * an exacting task in which the Court undertakes to * * * impose a sentence which will best protect society, deter others * * *. n22

More controversial but certainly no less important [than deterrence of the individual violator] is the need for *deterrence,* "general prevention," of potential criminals who may be dissuaded from crime by the threat and the administration of penalties. n23

* * *

Penalties are not provided as a punishment for the individual who has gone wrong. Their imposition is alone justified for the effect the punishment may have upon the convict in preventing him from a continuance in crime, and in teaching him that "the way of the transgressor is hard." But a still greater object to be attained is the deterrent effect the sentence may have upon those who may be inclined to follow the criminal course upon which the convict has embarked. n24

* * * deterrence looks primarily at the potential criminal outside the dock [of the courtroom] * * *. n25

Punishment can protect society by deterring potential offenders * * *. n26

One of these goals [of law] is deterrence by means of punishment. We punish in order to deter people from engaging in the undesirable conduct which we call crime.

* * * deterrence * * * addresses itself * * * both to the individual himself * * * and to the entire community. n27

n15. Andenaes, "The General Preventive Effect of Punishment." 114 *University of Pennsylvania Law Review* (1966), 949, 982.

n16. Schwartz & Skolnick, "Two Studies of Legal Stigma," 10 Soc. *Problems* (1962), 133, 138.

n17. Gardiner, "The Purposes of Punishment," 21 *Mod. L. Rev.* (1958), 117, 121.

n18. Gould and Namenwirth, "Contrary Objectives: Crime Control and the Rehabilitation of Criminals," in *Crime and Justice in American Society* (1971), 245, 246.

n19. Andenaes, "General Prevention -- Illusion or Reality?," 43 *Journal of Criminal Law, Criminology and Police Science* (1952) 176, 177.

n20. Andenaes, "General Prevention -- Illusion or Reality?," 43 *Journal of Criminal Law, Criminology and Police Science* (1952), 176, 182.

n21. *Collins v. Brown,* 268 F. Supp. 198, 201 (D.C.D.C.).

n22. *U. S. v. Mandracchia,* 247 F. Supp. 1, 4 (D.N.H.).

n23. Tappan, *Crime, Justice and Correction* (1960), p. 243.

n24. Id., at p. 243, fn. 5, quoting from *Peaple v. Gowasky,* 219 App. Div. 19, 219 N.Y.S. 378, 380, affirmed, 244 N.Y. 451, 155 N.E. 737.

n25. Williams, *Salmond on Jurisprudence* (12th ed., 1966), § 15, p. 94.

n26. *Id.,* § 15, p. 94.

n27. Puttkammer, *Administration of Criminal Law* (1953), 8.

Perhaps the most salient authority for the proposition that the primary end of punishment is to serve as a deterrent to the general

public is Chief Justice William Howard Taft's statement written in 1928:

* * * the chief purpose of the prosecution of crime is to * * * deter others tmpted to do the same thing from doing it because of the penal consequences. n28

n28. Menninger, *The Crime of Punishment* (1968), 190, 194. The original statement of Chief Justice Taft's position appeared in his article, "Toward a Reform of the Criminal Law," in *The Drift of Civilization* (1929).

Johannes Andenaes, a leading authority from the University of Oslo, makes the same point, as follows: "From the point of view of sheer logic one must say that general prevention -- i.e., assurance that a minimum number of crimes will be committed -- must have priority over special prevention -- i.e., impeding a particular person from future offenses." n29

n29. Andenaes, "The General Preventive Effects of Punishment," 144 *University of Pennsylvania Law Review* (1966), 949, 952.

Whether punishment achieves the objective of deterring others from violating the law is questioned by some authorities, but affirmed by others.

As an argument for the abolition of the deterrent doctrine, it is often maintained that neither the threat nor application of penalties does prevent crime. This position reflects the simplistic notion, too commonly prevailing in matters of social action, that nothing has been achieved merely because not everything is accomplished that we should like. It is sometimes said that high crime rates prove that sanctions do not deter or that penalties actually invite the crimes of men who seek punishment to dissolve their feelings of guilt. With tiresome frequency the illustration is cited of the pickpockets who actively

plied their trade in the shadow of the gallows from which their fellow knaves were strung. These assertions have a superficial relevance but they do not dispose of the issue by any means.

Persons with a will to believe in the efficacy of an exclusively individualistic and positivistic correctional system often quote the words of Warden Kirchwey. His patent oversimplifications of man's behavioral motivations should be noted, for this sort of loose thinking and naive criminological idealism pervert the ends of correction. n30

n30. Tappan, *Crime, Justice and Correction* (1960), p. 245.

[Next paragraph continues from same source.]

* * *

It is true, certainly, that the Classical doctrine of deterrence appears crudely oversimple in the light of modern conceptions of human behavior. In terms of reasonable goals for today it proposed to accomplish both too much and too little. This doctrine of deterrence was substantially more sound, however, than the position taken by those who deny any preventive effect to criminal sanctions. It is maintained here that the penal law and its application do in fact deter; indeed, with the declining efficacy of other forms of social control, it must be relied upon increasingly to maintain standards of behavior that are essential to the survival and security of the community. A complete failure of legal prevention cannot be inferred from the serious crimes committed by a small per cent of the population any more than can its success by the law obedience of the great preponderance of men. The matter is not so simple. n31

* * * [as to studies indicating the death penalty is ineffective as a deterrent to murder], their very broad interpretation has rendered a disservice to the more general issue of punishment as a deterrent to all kinds of criminal behavior. Such an expansive conclusion is obviously not justified since murder is * * * a unique kind of offense often involving very strong emotions. n32

* * *

It is naive to suppose that punishment exists in a vacuum and is unrelated to the specific kinds of acts and the meaning which the punishment has for the actor. n33

n31. Tappan, *Crime, Justice and Correction* (1960), p. 246.

n32. Chambliss, "The Deterrent Influence of Punishment," 12 *Crime & Delinquency* (1966), 70 71.

n33. *Id.*, at p. 75.

That sanctions do, in fact, serve as a deterrent to "white-collar" violations is evidenced by a number of studies.

As Sutherland's analysis of white-collar crime has shown, violators of the Sherman Antitrust law are relatively free from criminal prosecution, though the imposition of punishment would be *maximally effective* with this type of offense. n34

An intensive study of parking violators indicates that * * * an increase in the severity and certainty of punishment does act as a deterrent to further violation. These findings suggest the necessity for a reappraisal of current thinking. Studies demonstrating the ineffectuality of punishment as a deterrent to certain types of offenses should not be interpreted to mean the punishment is ineffective in deterring all types of offenses. n35

n34. Chambliss, "Types of Deviance and hte Effectivess of Legal Sanctions," 1967 *Wisconsin Law Review* 703, 716 (emphasis supplied).

n35. Chambliss, "The Deterrent Influence of Punishment," 12 *Crime & Delinquency* (1966), 70.

Since one of the main purposes of a criminal law sentence is to deter other potential violations from committing similar violations, it follows, *a fortiori,* that one of the main purposes of an administrative law sanction is to deter other potential violators. In criminal law, "[r]etribution or social retaliation, though persistently criticized by modern advocates of a progressive penology, continues to be a major ingredient of our penal law and of our correctional system." n36 "The principle of retribution was formulated in the *lex talionis,* the Mosaic doctrine expressed in *Deuteronomy,* 19:21: 'Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.'" n37 But retribution or social retaliation is not one of the objectives of administrative sanctions -- they are to "assure a proper adherence to the provisions of the Act" (*supra,* p. 16). Hence deterrence -- both as to the individual violator, and as to other potential violators -- is the primary, if not the only, objective of an administrative sanction.

n36. Tappan, *Crime, Justice and Correction* (1960), p. 241.

n37. *Id.*, at p. 241, fn. 3.

To serve as an effective deterrent to potential violators of a regulatory statute, I believe that administrative sanctions should be severe; sanctions which are too lenient, rather than being a deterrent, will serve as a catalyst for violations by others. Not all criminologists, sociologists, or jurists share this view; but many noted authorities do.

* * * one natural strategy for increasing the deterrent efficacy of threats is to increase the severity of threatened consequences. The theory of increased penalties as a marginal deterrent is simple and straightforward: all other things being equal, an increase in the severity of consequences threatened should reduce the number of people willing to run the risk of committing a particular * * * act * * *. n38

* * * when penalties for criminal activity that many people find attractive are quite low, thereby making * * * crime a reasonable alternative to legitimate means of obtaining gratification for many persons, even a high probability of apprehension may leave a high rate of the threatened behavior, and increases in the severity of threatened consequences can be expected to have a more substantial marginal deterrent effect than if the level of consequences threatened is already quite high in relation to the benefits obtainable through * * * [illegal] means. n39

* * * the risk of a high penalty provides more incentive to avoid crime than the risk of a low penalty. n40

* * * it is likely that increases in the severity of threatened consequences are more or less significant, depending on the relationship between size of penalty increase and size of base penalty. n41

If we are hopeful of the curative effects of a threat, we have to make the threat unpleasant, which is another way of saying that we have to be severe. n42

Generally speaking * * * deviance decreases as the sanctions become stronger. n43

* * * perhaps the main justification for imposing severe penalties on those who violate the law is that such punishments serve as a specific deterrent to future violations by the offender and as a general deterrent to violations by others who might be tempted to follow his lead. n44

As long as every one believes in their deterrent effects, severe sanctions represent a powerful tool for authorities in meeting their responsibilities, and a sign to the broader community that they are taking those responsibilities seriously. n45

n38. Zimring, *Perspectives on Deterrence,* National Institute of Mental Health -- Center for Studies of Crime and Delinquency, Washington, D. C. (1971), 83-84.

n39. *Id.,* at p. 84.

n40. *Id.,* at p. 85.

n41. Zimring, *Prespectives on Deterrence,* National Institute of Mental Health -- Center for Studies of Crime and Delinquency, Washington, D. C. (1971), at p. 89.

n42. Puttkammer, *Administration of Criminal Law* (1953), 16-17.

n43. Salem and Bowers, "Severity of Formal Sanctions as a Deterrent to Deviant Behavior," 5 *Law and Society Review* (1970), 21, 25.

n44. *Id.,* at p. 21.

n45. *Id.,* at 21, 37.

Dr. Zimring, a noted authority, capsulizes this concept in his statement that "since the goal of all legal threats is to keep the population law abiding, the potential effectiveness of variations in severity of threatening consequences should be used to create the widest possible distinction between criminal and non-criminal behavior by threatening all types of serious crime with penalties which are as severe as possible." n46

n46. Zimring, *Perspectives on Deterrence,* National Institute of Mental Health -- Center for Studies of Crime and Delinquency, Washington, D.C. 1971), 90.

Johannes Andenaes, of the University of Oslo, regarded by many as one of the most distinguished of the modern scholars writing about deterrence, is adamant in his contention that the "simplest way to make people more law-abiding, therefore, is to increase the punishment." n47 Mr. Andenaes is a firm believer in Feuerbach's formula of psychological coercion: "the risk for the lawbreaker must be made so great, the punishment so severe, that he knows he has more to lose than he has to gain from his crime." n48 "(E)conomic crimes," to utilize his epithet, are clearly within the purview of the foregoing severity doctrine, such crimes being violations of "governmental regulation of the economy: price violations, rationing violations * * * disregard of quality standards, and so on." n49

n47. Andenaes, "General Prevention -- Illusion or Reality?," 43 *Journal of Criminal Law, Criminology and Police Science* (1952), 176, 191.

n48. *Id.,* at pp. 178-179.

n49. *Id.,* at p. 84.

The applicability of severe sanctions to economic violation is succinctly treated by Andenaes:

A large number of the people who are affected by economic regulations * * * feel no strong moral inhibition against infraction. They often find excuses for their behavior in political theorizing: they oppose the current government's regulative policies * * * yet the matter of obedience or disobedience can often have important economic consequences * * *. In this area, at any rate, Feuerbach's law of general prevention has a certain validity; it is necessary

that consideration as to the risk involved in breaking the law should outweigh consideration of the advantages to breaking the law. n50

n50. Andenaes, "General Prevention -- Illusion or Reality?," 43 *Journal of Criminal Law, Criminology and Police Science* (1952), at p. 185.

"If we think first of the purely deterrent value of * * * punishment * * * it is clear that deterrence depends not simply on the

risk of being punished, but also on the nature and magnitude of punishment." n51 Andenaes is careful to note that severity of punishment has a more salient effect on crimes, like economic violations, "committed after careful consideration * * * than for crimes which grow out of emotions or drives which overpower the individual." n52

n51. *Id.*, at p. 191.

n52. *Id.*, at p. 192.

My views with respect to the necessity for severe sanctions for serious violations, in order to achieve the Congressional purpose, were set forth in *In re Sy B. Gaiber & Co.*, in a Ruling on Petition for Reconsideration, as follows (31 Agriculture Decisions 843, 851-852 (1972)): n53

Congress enacted the remedial regulatory programs administered by the Department because of a need for economic law and order in the marketplace. The administrative sanctions imposed against violators of such regulatory programs should tend to achieve that purpose.

Persons who engage in a regulated business have been granted a privilege. Suspension or revocation of the privilege for failure to comply with the statutory standards is a necessary power granted to the Secretary to assure a proper adherence to the regulatory program (see the cases cited in the Decision and Order herein, p. 47). Just as a lawyer may lose his privilege to practice law if he embezzles a client's funds or engages in other serious violations, a futures commission merchant, broker, or trader who manipulates a futures market or engages in other serious violations may lose his privilege to engage in futures trading.

The House Report on the 1968 amendments to the Commodity Exchange Act states that it is the view of the committee that serious violations "should be subject to severe penalties" (H. Rep. No. 743, 90th Cong., 1st Sess., p. 5). The administrative sanctions should be severe enough to serve as a deterrent to future similar violations by the respondents and by other persons.

n53. See, also, *In re Arthur N. Economou,* 32 Agriculture Decisions (1973), CEA Docket 167, appeal pending.

It is the general administrative practice under the Department's regulatory programs to institute formal actions only as to violations regarded as serious or repeated. Many minor violations are disposed of with a warning letter or an informal stipulation. Hence

it is to be expected that the relatively few formal cases which are instituted will generally warrant relatively severe sanctions.

Moreover, Congress expressly recognized the need for severe sanctions to effectuate the remedial purposes of the Act. The House Report on the 1968 amendments to the Act states that it "is the view of the committee that serious violations, such as manipulation, dissemination of false information,

embezzlement, and the like should be subject to severe penalties" (H. Rep. No. 743, 90th Cong., 1st Sess., p. 5).

IV

In determining what sanction is appropriate to achieve the purposes of the Act by serving as an effective deterrent to the respondent and to other potential violators, it is important to recognize that the impact of an order suspending a person's trading privileges on futures markets for a specified period depends upon his circumstances.

An order suspending a large commission firm's trading privileges for ten days might be much more severe to the firm than an order suspending the trading privileges of another firm, which merely used futures trading for an occasional speculation, for ten years.

Many persons and firms derive their sole income from futures trading, such as, floor brokers, futures commission merchants, and professional speculators. Other firms engaged in handling or processing agricultural commodities could not remain in business for an extended period of time without hedging on the futures markets.

Many persons speculate in futures contracts merely as a form of "gambling," hoping to augment their income earned in some other manner. A very lengthy suspension of trading privileges imposed on such a person is little more than a "slap on the wrist" inasmuch as (1) the futures markets are merely used by him for "gambling" and are not necessary to his income; (2) mathematically, an order denying a speculator the right to gamble on an exchange will save him from losing money just as often as it will prevent him from earning money; and (3) there are many alternative speculative activities available to the person. This is sufficiently important to warrant elaboration as to each point.

First, the intention of a futures trading speculator is no different from the intention of a gambler -- to make a profit by betting

correctly as to a future event. There is, of course, a difference between speculating in futures and gambling in that speculators on futures exchanges perform a useful function and are essential to provide sufficient trading volume to assume the hedging risks. n54 For example, a grain merchant who owns grain and does not plan to sell it for some time might wish to hedge himself against a price decline by selling grain on the futures market. A grain processor who has entered into a fixed price contract to sell grain products at a future date and who does not have the grain on hand might wish to hedge himself against the risk of an increase in the price of grain by purchasing grain on the futures market. Since the buying hedges do not coincide exactly with the selling hedges as to timing and quantity, speculators perform a necessary function in providing sufficient trading volume to assume the hedging risks. "Speculation supplies needed risk capital, increases the volume of trade to allow easy market entry and regress, and keeps the various markets in alignment through inter-market trading operations." *Cargill* v. *Hardin,* 452 F.2d 1154, 1158 (C.A. 8), certiorari denied, 406 U.S. 932.

> n54. See Campbell, "Trading in Futures Under the Commodity Exchange Act." 26 *George Washington Law Review* (1958), pp. 219-220; Baer and Saxon, *Commodity Exchanges and Futures Trading* (1949), pp. 53-54, 73; Clark and Clark, *Principles of Marketing* (3d ed. 1942), pp. 533-534; VII *Report of the Federal Trade Commission on the Grain Trade* (1926), pp. 13-15; *Hearings Before the Subcommittee on Domestic Marketing of the Committee on Agriculture, House of Representatives,* 85th Cong., 1st Sess., on H.R. 376, H.R. 1933, H.R. 1935, H.R. 3418, H.R. 5236, and H.R. 5732 (1957), p. 10; H. Rep. No. 743, 90th Cong., 1st Sess., p. 2.

In considering whether speculation on futures markets should be considered as illegal gambling, it is appropriate to recognize that a "gamble involves the

deliberate creation of a risk in the hope of correctly forecasting the outcome of a game or other event to win a wager with an opponent" whereas a "speculation, on the contrary, is the assumption of a risk existing in the nature of an enterprise" and the "only way to reduce the hazards of such a risk is to pass it on to someone else who may specialize in such risk-taking -- or speculation." n55 But the distinction between speculation and gambling "doesn't depend on the *intention* of the participant

so much as it does on the *classification of risk* involved in each" (emphasis in original, Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 1). The intention of the futures speculator is the same as the intention of the gambler -- to make a quick, large profit from a relatively small investment.

> n55. *Commodity Trading Manual, Board of Trade of the City of Chicago* (1966), p. 41. See, also, Baer and Saxon, *Commodity Exchange and Futures Trading* (1949), pp. 58-63; Hubbard, *Cotton and the Cotton Market* (1928), pp. 431-432; Baer and Woodruff, *Commodity Exchanges* (1929), pp. 124-127; Hoffman, *Future Trading Upon Organized Commodity Markets in the United States* (1932), pp. 115-117. Speculation on futures markets is frequently distinguished from gambling on the ground that futures speculators intend to make or take delivery of the commodity involved, but that distinction is not sound. See *In re David G. Henner,* 30 Agriculture Decisions 1151, 1270-1280. The "most Common characteristic of these [futures] contracts is that not one in a hundred is ever consummated by receipt or delivery of the actual physical product" (113 Cong. Rec. 34405).

The initial margin required for futures trading is about 5 to 10 percent of the value of the contract. "There are few other financial situations in which a dollar can enjoy such leverage." Belveal, *Commodity Speculation with Profits in Mind* (1967), p. 49. The "objective of professional speculation is that of seeking profit. There is -- there can be -- no other economic justification for voluntary speculation." *Id.* at p. 7. See, also, Hoffman, *Future Trading Upon Organized Commodity Markets in the United States* (1932), pp. 115-116.

Notwithstanding the benefits of speculation, it would be sophistry to attribute to speculators altruistic motives. In considering the sanction to be imposed against a speculator who has another occupation and who is just trading in futures for additional profit, the length of the sanction can be placed in better perspective if we ask the question: "How long should he be prohibited from gambling on the exchanges because of his violation?"

The second factor to be considered is that, mathematically, there is as much chance of losing on a speculative trade as there is of winning. There is an important distinction between a commodity market and a stock market. In the case of a stock market, when prices are rising all persons involved can make money (except for the few short sellers). But in the case of a commodity market, since "markets do not manufacture money, but merely *transfer* money (or values) from the pockets of the losers to the pockets of the winners, it should be abundantly clear that for every market *profit,* there must be a market *loss"* (Belveal, *Charting Commodity Market Price Behavior* (1969), p. 37). Therefore, when commissions are considered, mathematically, there is less than a 50 percent chance of winning on any speculation.

Most traders believe that their chances are better than 50 percent because they feel that they have peculiar knowledge as to future supply and demand conditions with respect to the commodities in which they are trading. Needless to say, however, there are undoubtedly just as many experts with peculiar knowledge

who are on the other side of the market from them. n56 As stated in one futures trading text --

If speculators could buy and sell futures contracts in the exclusive frame of reference of changing supply/demand balances, the fundamentalists who understand price elasticity theory and projective techniques would "own the market" in short order. But it doesn't work this way. The market may not be human, but its users are -- and they render human judgments. Knowledge, ignorance, fear, sagacity, charity and greed are all part of the complex equation that is spelled out in the form of "market price." n57

n56. Belveal, *Charting Commodity Market Price Behavior* (1969), pp. 125-201.

n57. *Id.,* at p. 234. See, also, Hoffman, *Future Trading Upon Organized Commodity Markets in the United States* (1932), p. 259; Converse and Huegy, *Elements of Marketing* (3d rev. ed. 1946), p. 250.

Hence from a mathematical viewpoint, there is as much chance of saving a speculator money by suspending his trading privileges as there is of costing him money. A recent futures trading text begins by saying that "Little space has been devoted in these pages to the huge winnings and equally monumental losses of the 'big time operators.'" Belveal, *Commodity Speculation with Profits in Mind* (1967), pp. ix-x.

The third factor to be considered is that there are many alternatives for speculation available to a respondent whose trading privileges have been suspended. For example, he can speculate in nonregulated commodities on the futures exchanges; he can speculate on the stock market; or he can speculate in numerous other ways.

Considering the very limited impact of an order denying trading privileges to a speculator who is merely "gambling" on the futures markets, if such a person violates the Act in a manner serious enough to warrant a formal action (see *supra,* p. 29), seldom if ever should the suspension of trading privileges be measured in months rather than in years. There is no substantial deterrent effect to such persons (and to other potential violators similarly situated) from a suspension order that is not measured in years.

If a person who uses the futures markets solely for "gambling" deliberately manipulates the market price or participates in a manipulative conspiracy, his trading privileges should ordinarily be suspended for a sufficient number of years to insure that he will never again be able to trade on the regulated exchanges. n58

The futures markets are too valuable to the agricultural marketing system to be subjected to manipulation by gamblers whose unlawful action could be disastrous to producers, handlers, processors and consumers of agricultural commodities.

n58. *Cf. Wright c. Securities and Exchange Commission,* 112 F.2d 89, 95 (C.A. 2).

The view that a longer suspension order should be imposed for the same violation against a speculator who merely uses the futures markets for gambling than on a similar violator who uses the futures markets in his business cannot be construed by those who understand futures trading as indicating a bias against speculators. I recognize the necessary function performed by speculators who are merely gambling on the exchanges (see *supra,* pp. 31-32). As I stated 15 years ago (Campbell, "Trading in Futures Under the Commodity Exchange Act," 26 *George Washington Law Review* (1958) 215, 219-220):

Speculation in commodity futures has, at times, been invectively attacked, but without speculators there would not be sufficient traders to assume the hedging risks. Mr. Rodger R. Kauffman, Administrator, Commodity Exchange Authority, testified at a recent congressional hearing that "speculation, as you, of course, well know, is essential to the operation of a futures market. A

commodity futures market without speculation would be a thing of death; it would not amount to anything. It would serve no economic utility. So there must be speculation, of course." (footnotes omitted).

Although the futures markets need speculators, they do not need the few who refuse to comply with the law. There is no shortage of speculators willing to assume the hedging risks. For example, 108 futures commission merchants reported to the Commodity Exchange Administration that in February 1972 they had 58,194 active customers and 48,322 inactive customers. n59 This was just a partial sample (about 25 firms failed to report) at one contract market. Hence there are ample law abiding speculators to perform the necessary speculative function on the exchanges.

n59. *A Report on the Rules and Practices of the Chicago Board of Trade Concerning Minimum Rates of Commission and Brokerage Fees Prepared for The United States District Court, Northern District of Illinois, Eastern Division, by Administrator, Commodity Exchange Authority, U.S.D.A., Washington, D. C., July 1972,* Table IV-2, p. 110.

In short, considering all of the circumstances, a lengthy suspension order should ordinarily be imposed on violators who use the futures markets solely for "gambling," in order to serve as an

effective deterrent to violations by such speculators and by other potential violators similarly situated.

Similarly, severe sanctions should be imposed on manipulators or other serious violators who are engaged full time in futures trading or who need futures trading for hedging in their business activities. If such persons engage in serious violations which could be extremely disruptive, or disastrous, to the futures markets, seriously injuring or theatening injury to producers, handlers, processors and consumers of agricultural commodities, they cannot legitimately complain about a sanction that could be extremely disruptive, or disastrous, to their own business activities.

However, it must be recognized that the severity of the sanction must be measured by its impact on the particular, respondent rather than by the number of months or years of the suspension order. A suspension order should be sufficiently long to serve as an effective deterrent to the respondent and to other potential violators, considering the impact of the suspension order on the particular respondent.

V

Another principle in determining the sanction to be imposed in a particular case is that, in general, there should be a reasonable relationship between the sanction and the unlawful practices found to exist. n60 In other words, the more serious the violation, the more severe should be the sanction. Even though punishment for the sake of punishment is not a relevant consideration in the field of administrative law, the principle of having a reasonable relationship between the violation and the sanction still has validity in a case of this nature. This is because in order to achieve the major Congressional purposes of the regulatory program, it is more important to deter serious violations than minor violations. Hence a severe sanction for a serious violation will have a greater

deterrent effect than a milder sanction for a lesser violation, and thus will tend to effectuate the major objectives of the regulatory program.

n60. *Kent* v. *Hardin,* 425 F. 2d 1346, 1349-1350 (C.A. 5); *G. H. Miller & Co.* v. *United States,* 260 F. 2d 286, 295-297 (C.A. 7, *en banc),* certiorari

denied, 359 U.S. 907; *Daniels* v. *United States,* 242 F. 2d 39, 42 (C.A. 7), certiorari denied, 354 U.S. 939; *Irving Weis & Co.* v. *Brannan,* 171 F. 2d 232, 235 (C.A. 2); In re *American Fruit Purveyor's Inc.,* 30 Agriculture Decisions 1542, 1596 (1971); *In re Louis Romoff,* 31 Agriculture Decisions 158, 177 (1972); *In re Arthur N. Economou,* 32 Agriculture Decisions -- (1973), CEA Docket 167, appeal pending. See, also, *American Power Co.* v. *Securities and Exchange Commission,* 329 U.S. 90, 112-118; *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 194; *Great Western Food Distributors* v. *Brannan,* 201 F. 2d 476, 484 (C.A. 7), certiorari denied, 345 U.S. 997; *In re Electric Power & Light Corp.,* 176 F. 2d 687, 692 (C.A. 2); *Wright* v. *Securities and Exchange Commission,* 112 F.2d 89, 95 (C.A. 2).

In addition, in determining sanctions to be imposed under the Act, great weight should be given to the recommendation of the officials charged with the responsibility for administering the regulatory program. See *In re Sy B. Gaiber & Co.,* Ruling on Reconsideration, 31 Agriculture Decisions 843, 845-846 (1972); *In re Arthur N. Economou,* 32 Agriculture Decisions -- (1973), CEA Docket 167, appeal pending. Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Administrative Law Judges or the Judicial Officer, who come in contact with only a small part of the regulatory program.

However, in order to aid the Administrative Law Judges and the Judicial Officer in determining whether to follow the administrative recommendation as to the sanction, the administrative officials should, in addition to proving that a violation occurred, develop a hearing record that supports their recommendation as to the sanction. See *In re Sy B. Gaiber & Co.,* Ruling on Reconsideration, 31 Agriculture Decisions 843, 847-850 (1972). After such a record is developed in one case and a determination made as to the appropriate sanction for such a violation, similar evidence relating to the sanction need not be developed in subsequent cases, except to show changed circumstances. n61

n61. The complainant or the respondent may, of course, introduce evidence in any case bearing on the appropriate sanction to be issued.

The recommendation of the administrative officials as to the sanction is not, of course, controlling. For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, *e.g., In re American Fruit Purveyor's, Inc.,* 30 Agriculture Decisions 1542 (1971). But if the alleged violations are proven, and it appears that the administrative officials have fully considered the respondent's contentions, the recommendation of the administrative officials as to the sanction needed to serve as an effective deterrent to the respondent and to other potential violators should be given great weight. Recognizing the greater opportunity for such administrative officials to develop expertise in this area, it will be the policy of the Judicial Officer *never* to *increase* the sanction recommended by the administrative officials.

Insofar as practicable, the sanctions imposed under a regulatory Act against comparable violators for comparable violations should be reasonably uniform. n62 From the beginning, the Judicial Officer has recognized that "[d]isciplinary action taken under * * * [a regulatory] act should follow some general pattern, * * * so that one order will not be entirely out of line with another involving similar violations." *In re Watkins Commission Company, Inc.,* 4 Agriculture Decisions 395, 400 (1945). See, also, *In re Arnold Fairbank,* 27 Agriculture Decisions 1371, 1384 (1968); *In re Nolan E. Poovey, Jr.,* 27 Agriculture Decisions 1512, 1520-1522 (1968); *In re Boone Livestock Company, Inc.,* 27 Agriculture Decisions 475, 503 (1968); *In re Milton Silver, d/b/a Chambersburg Livestock Sales,* 21 Agriculture Decisions 1438, 1452 (1962); *In re American Fruit Purveyor's, Inc.,* 30 Agriculture Decisions 1542, 1595-1596 (1971); *In re*

Louis Romoff, 31 Agriculture Decisions 158, 177 (1972); *In re Arthur N. Economou,* 32 Agriculture Decisions -- (1973), CEA Docket 167, appeal pending. n63

n62. Comparability depends upon many circumstances, such as the nature of the violation, the nature of the respondent's business, the respondent's prior record as to violations, prior warning given to the respondent, the deliberateness of the violation, etc.

n63. Accordingly, counsel should, in all cases, in their briefs and arguments, refer to *relevant* prior cases under the Act which should be considered by the Judical Officer in determining the appropriate sanction to be imposed in the particular case. Failure to explain why a different order was imposed in a case than had previously been imposed in a somewhat similar case was held to be reversible error in *Beacon Journal Publishing CO.* v. *N.L.R.B.,* 401 F.2d 366, 367-368 (C.A. 6); same case, 417 F.2d 1060, 1061-1062 (C.A. 6).

This uniformity necessarily applies only to contested cases. Consent orders issued without a hearing should be given no weight whatsoever in determining the sanction to be imposed in a litigated case. In a case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less severe than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Administrative Law Judge or the Judicial Officer. Conversely, it may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

In order to achieve this desired uniformity and also follow the views as to sanctions set forth herein, it will be necessary to take a new look at the sanction situation under the Commodity Exchange Act. In other words, sanctions previously imposed under

the Act may not have been determined in accordance with these views and, therefore, *sanctions previously imposed under the Commodity Exchange Act will no longer be regarded as relevant* in determining the sanction to be imposed in any case decided hereafter. n64

n64. In fact, the five-year suspension order in this case will not be regarded as relevant in future cases since, as explained below. I do not believe that this sancton is sufficiently severe.

This change in policy, under which sanctions are to be determined under the criteria set forth herein without regard to sanctions previously imposed, will be applied to pending cases as well as to cases instituted hereafter. Since I believe that the policies set forth in this Decision will achieve the purposes of the Act by serving as an effective deterrent to future violations, it is not administratively desirable to delay this change in policy.

An agency is free to reconsider sanctions previously imposed without prior notice. *Communications Comm'n.* v. *WOKO,* 329 U.S. 223, 228; *Continental Broadcasting* v. *Federal Comm. Comm'n.,* 439 F.2d 580, 582-584 (C.A.D.C.); *N.L.R.B.* v. *Majestic Weaving Co.,* 355 F.2d 854, 860 (C.A. 2); quoted with approval in Davis, *Administrative Law Treatise* (1970 Supp.), § 17.08, p. 604.

In *Communications Comm'n.* v. *WOKO,* 329 U.S. 223, 228, the Court held: "Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."

Although the sanctions to be imposed for similar violations by comparable violators in future cases should be as uniform as practicable *with each other (i.e.,* without regard to any sanctions issued prior to this decision), changed circumstances or new insight gained empirically from the day-to-day administration of the regulatory program may demonstrate the need for further changes in the level of sanctions to be imposed. In that event, the record should adequately explain the reasons for the desirability of a change in the sanction level. Any change determined to be desirable will be applied in that case rather than merely announcing

that in future cases there will be a change in policy. As I stated in *In re Arthur N. Economou,* 32 Agriculture Decisions -- , fn. 120 (1973), CEA Docket 167, appeal pending:

Although it is my intention to impose sanctions as uniform as possible for similar violations unless there are adequate reasons for a change of policy (see *In re American Fruit Purveyor's Inc.,* 30 Agriculture Decisions 1542, 1595-1596), a respondent has no inherent right to a sanction no more severe than that applied to others. See *Hiller* v. *Securities and Exchange Commission,* 429 F.2d 856, 858-859 (C.A. 2); *G. H. Miller & Co.* v. *United States,* 260 F.2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907. Specifically, in "any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff,* 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them." *In re Sy B. Gaiber & Co.,* Ruling on Reconsideration, 31 Agriculture Decisions 843, 850 (1972).

The decision to change the sanction policy under the Commodity Exchange Act and to completely disregard all prior sanctions imposed under the Act in no way reflects adversely on the judgment of the prior Judicial Officer. In judicial or quasi-judicial decisions involving criminal punishment or administrative sanctions, the interests of the public must be balanced against the interests of the particular individual involved in the case. A strong argument can be made in support of any philosophy of punishment or sanctions, ranging from extremely light to very severe. There are many excellent judges, criminologists, and sociologists at either end of the poles of this issue; many others take a position between the poles.

For the reasons set forth above, where the violation is intentional, I believe in severity rather than lenity to deter future violations by the respondent and others.

VI

In the present case, the respondent committed very serious violations of the Act. Without the knowledge or authorization of a customer, he took $ 14,000 from the customer's stock account, transferred the money to the customer's commodity accounts, and lost the money in commodity futures trades. To further his course of conduct, he deceived the customer as to the true status of his account.

Futures commission merchants handle billions of dollars each year belonging to customers. It is essential to the continued existence of futures trading

that this money be handled in trust in accordance with the customers' directions.

The respondent is not a registrant under the Act and, therefore, the notice provisions of the Administrative Procedure Act (5 U.S.C. 558 (c)) are not applicable to an order suspending his trading privileges. *In re Arthur N. Economou,* 32 Agriculture Decisions -- (1973), CEA Docket 167, appeal pending. In any event, the violations were wilful and, therefore, even if the respondent were licensed, his license could be suspended or revoked without prior notice (5 U.S.C. 558(c)).

Considering the serious nature of the respondent's violations, I believe that a suspension of trading privileges for more than five years is warranted. But since the administrative officials have recommended a five year suspension of trading privileges, the suspension order will not be in excess of that amount (see *supra,* p. 41).

In addition to preventing the respondent from trading on regulated exchanges during the period of the suspension order, the regulations provide (17 CFR 1.49(a)):

(a) Denial of trading privileges: During the effective period of any order of the Secretary of Agriculture denying trading privileges on contract markets to any person for a violation of the Commodity Exchange Act or the regulations thereunder involving cheating or fraud or manipulation or attempted manipulation of the price of any commodity in interstate

commerce or for future delivery on or subject to the rules of a contract market, no futures commission merchant or member of a contract market shall knowingly employ such person in any capacity which involves the solicitation, acceptance, or execution of orders for the purchase or sale of any commodity for future delivery on or subject to the rules of a contract market, the execution of which would be prohibited by such order of the Secretary of Agriculture if made for the account of such person.

Under this regulation, the respondent would not be subject to employment by a futures commission merchant or member of a contract market during the suspension period "in any capacity which involves the solicitation, acceptance, or execution of orders" involving commodity transactions on or subject to the rules of a contract market.

Although the sanction imposed in this case is more severe than that recommended by the Administrative Law Judge, an agency may impose a sanction substantially more severe than that recommended by the Administrative Law Judge if it determines that the recommended sanction is inadequate to protect the public interest. *Gross* v. *Securities and Exchange Commission,* 418 F.2d 103, 107 (C.A. 2); *Fink* v. *Securities and Exchange Commission,* 417 F.2d 1058, 1059 (C.A. 2).

This decision in no way reflects adversely on the judgment of the Administrative Law Judge. He is required to follow the policy set forth by the Judicial Officer. Based upon the existing policy, his decision cannot be criticized.

Similarly, this decision in no way reflects adversely on the judgment of the administrative officials in this case. Their recommendation for a five year suspension order was reduced to three years by the Administrative Law Judge, who cited numerous precedents for his decision.

Finally, as stated above, this decision in no way reflects adversely on the judgment of the prior Judicial Officer.

In addition to a suspension order, the respondent should, of course, be ordered to cease and desist from violating the Act in a similar manner in the future.

ORDER

(a) The respondent, George Rex Andrews, shall cease and desist

from: (1) placing or causing to be placed, in any customer's account, any commodity futures transaction without the prior knowledge and consent of such customer; (2) transferring funds from any customer's regulated commodity account to any other account without the knowledge or authorization of said customer; and (3) deceiving or attempting to deceive by any means, or wilfully making or causing to be made any false report or statement, or wilfully entering or causing to be entered any false record in connection with any order to make, or the making of any contract of sale of any commodity for future delivery in interstate commerce, made or to be made, on or subject to the rules of any contract market, for or on behalf of any other person.

(b) The respondent, George Rex Andrews, is prohibited from trading on or subject to the rules of any contract market for a period of five years, and all contract markets shall refuse all trading privileges to him during this period, such prohibition and refusal to apply to all trading done and all positions held by him, directly or indirectly.

The cease and desist provisions of this order, set forth in paragraph (a) above, shall become effective upon the date of service of this order upon the respondent. The period of the denial of trading privileges to the respondent, specified in paragraph (b) above, shall become effective on the thirtieth day after the date of entry of this order.

A copy of this Decision and Order shall be served on each of the parties and on each contract market.

LOAD-DATE: June 9, 2008