UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of

SHAHROKH NIKKHAH

CFTC Docket No. 95-13

ORDER

Since 2000, the Division of Enforcement ("Division") and respondent Shahrokh Nikkhah ("Nikkhah") have been litigating the issue of whether Nikkhah had sufficient funds to pay a $200,000 civil monetary penalty. Nikkhah has now tendered a check in that amount. No further inquiry respecting Nikkhah's financial condition is necessary and this matter is ready for final disposition.

* * *

The Commission initiated this case in June 1995 by issuing a complaint charging Nikkhah with fraudulently misallocating trades in his customers' accounts. An Administrative Law Judge ("ALJ") issued an initial decision in 1998 finding Nikkhah liable for most of the violations charged. He imposed a ten-year trading prohibition and a cease and desist order, but, finding that "Nikkhah has a negative net worth," declined to impose a civil monetary penalty. *In re Nikkhah,* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,460 at 47,203 (ALJ Nov. 5, 1998).

Both parties appealed and in May 2000, we affirmed the ALJ's liability findings and the trading prohibition and cease and desist order that he imposed. We found that the gravity of Nikkhah's sanctions warranted a $200,000 civil monetary penalty as well. Because the record on Nikkhah's net worth was poorly developed, Nikkhah was given 30 days to show "why it would be inappropriate to impose a civil money penalty of $200,000" in light of his net worth.[1] *In re Nikkhah,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,879 (CFTC May 12, 2000) ("*Nikkhah I*"). The effective date of the other sanctions was postponed until the issue of the civil monetary penalty was resolved. *Id.* at 49,894.

Four months later, after examining Nikkhah's response to the show cause order, we found his showing inadequate to allow a "reliable determination" of his net worth, and remanded the case to the ALJ for further development of the record. *In re Nikkhah,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,275 at 50,674 (CFTC Sept. 26, 2000). Based on new federal precedent, we also held that the Division bore the burden of production as well as the burden of proof in establishing Nikkhah's net worth.[2] We stated that Nikkhah was required to respond to discovery requests, and that a failure to do so might result in the imposition of adverse inferences.

The ALJ held a two-day hearing in May 2001, at which both parties appeared and presented evidence. The ALJ declined to impose a civil monetary penalty. *In re Nikkhah,* [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,647 at 52,525 (ALJ Sept. 18, 2001). The Division appealed and asked us to draw adverse inferences regarding Nikkhah's net worth because he failed to respond to discovery.

We found that the Division was not given a fair opportunity to develop the record, vacated the ALJ's decision, and remanded the case again. *In re Nikkhah,* [2003-2004 Transfer

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[1] Prior to the October 28, 1992 adoption of the Futures Trading Practices Act of 1992 ("FTPA"), Pub. L. No. 102-546, § 209, 106 Stat. 3606, former Section 6(d) of the Commodity Exchange Act ("Act") required consideration of the appropriateness of a civil monetary penalty to either a respondent's ability to stay in business or net worth. In adopting Section 209 of the FTPA, Congress removed this requirement from the Act and authorized the Commission to impose penalties without regard to a respondent's financial circumstances. Because the misconduct at issue in this case occurred prior to FTPA's enactment, the net worth provisions of former Section 6(d) apply.

[2] The Commission shifted the burden of production as a result of *Slusser v. CFTC,* 210 F.3d 783, 788 (7th Cir. 2000). *Slusser,* decided three weeks before the Commission issued *Nikkhah I*, held that the Commission has the burden of production as well as the burden of proof of net worth.

Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,462 (CFTC Apr. 11, 2003). The ALJ issued another initial decision in November 2003, again refusing to impose a civil monetary penalty. *In re Nikkhah,* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,637 (ALJ Nov. 20, 2003). The Division appealed.

We again found that the ALJ lacked a reliable basis for his finding that Nikkhah had a negative net worth, and again vacated his decision. *In re Nikkhah,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,044 (CFTC Mar. 25, 2005). We also found that the ALJ repeatedly had abused his discretion in overseeing discovery and declined to remand this case to him another time. After giving the parties notice of our intent, we reopened the record to receive evidence directly. The Division commenced discovery.

On August 19, 2005, Nikkhah tendered a $200,000 check drawn on his lawyer's account to the Division. The accompanying letter, signed by Nikkhah's counsel, stated that the check was "in full satisfaction of all claims of the CFTC." The Division subsequently filed a motion asking the Commission to accept it and terminate this proceeding.

* * *

When addressing misconduct that occurred prior to October 29, 1992, we assess the level of a proposed civil money penalty in light of evidence of either a respondent's net worth or the size of a respondent's business and ability to continue in business. *Nikkhah I,* ¶ 28,129 at 49,892 and n.41. Respondents may forego their right to a net worth assessment either through express waiver or by refusing to cooperate in the development of the record on the relevant factors. *Id., citing In re Grossfeld,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,465-66 (CFTC Dec. 10, 1996), *aff'd sub nom. Grossfeld v. CFTC,* 137 F.3d 1300 (11th Cir. 1998). Since Nikkhah's violations occurred in 1990, we considered his net worth.

Nikkhah and the Division have litigated this issue since the penalty was tentatively imposed in 2000. Nikkhah's submission of a check in the amount of the proposed penalty forecloses the need for further inquiry. Accordingly, Nikkhah is ordered to pay a civil monetary penalty of $200,000. The liability findings and the imposition of the cease and desist order and the ten-year trading prohibition set forth in *Nikkhah I* are final.

IT IS SO ORDERED.[3]

By the Commission (Chairman JEFFERY and Commissioners LUKKEN, BROWN-HRUSKA, HATFIELD, and DUNN).

Jean A. Webb

Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: October 25, 2005

[3] Sanctions shall become effective 30 days after the date this order is served. A motion to stay any portion of this order pending reconsideration by the Commission or judicial review shall be filed and served within 15 days of the date this order is served. *See* Commission Rule 10.106, 17 C.F.R. § 10.106. The Division may accept and deposit the check.