**UNITED STATES OF AMERICA**
*before the*
**COMMODITY FUTURES TRADING COMMISSION**

**In the Matter of:**

**Scott C. Anixter,**

**Registrant.**

**SD 04-03**

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Before: George H. Painter, Administrative Law Judge

Appearances:

William P. Janulis, Esq.
Senior Trial Attorney, Division of Enforcement

Marshall E. Hanbury, Esq.
Attorney for Registrant Scott C. Anixter

**INITIAL DECISION**

## PRELIMINARY STATEMENT

On June 30, 2004 the Commodity Futures Trading Commission ("Commission") issued its Notice of Intent to Suspend or Modify the registration of Scott C. Anixter ("Registrant"). The complaint alleges that on October 23, 2003 the U.S. Attorney for the Northern District of Illinois filed a superseding indictment in *United States vs. Welchko and Anixter* in which Registrant was charged with three counts of securities fraud, five counts of bank fraud, five counts of making false statements to financial institutions, and seven counts of making false statements to the Securities and Exchange Commission.[1] The Commission directed that public proceedings be conducted in accordance with the provisions of § 8a(11) of the Commodity Exchange Act ("Act" or "CEA") and Commission Regulation 3.56 to determine whether Registrant's registration should be modified or suspended.

On August 6, 2004 Registrant moved for dismissal of the Complaint on grounds that regulation 3.56(a)(ii)-(iii) provides that the registration of a registrant "shall be suspended or modified" if an Administrative Law Judge finds that the Registrant's continued registration *may* pose a threat to the public interest or *may* threaten to impair public confidence in the markets regulated by the Commission, as distinguished from § 8a(11)(B) which provides that the Commission has the burden of showing that the Registrant *does, or is likely to,* pose such a threat or threats.[2] In sum, the Registrant maintains that this proceeding should be dismissed as the burden of proof under regulation 3.56 is less than the burden of proof set forth in § 8a(11)(B).

By Order issued August 31, 2004 it was ruled that the Division of Enforcement ("Division") had to meet the evidentiary standard set forth in § 8a(11) of the Act. Registrant's Motion to Dismiss was denied.

On or about April 14, 2005 the parties waived the right to call witnesses and requested that argument be presented in writing rather than in oral form. Accordingly, the oral hearing scheduled for April 18, 2005 was cancelled. Exhibits offered by the parties have been identified and admitted. The parties were informed of their right to file initial and reply briefs. The post-hearing briefs include proposed findings of fact and conclusions of law. This matter is ready for decision.

## FINDINGS OF FACT

1. Scott Anixter resides in Glencoe, Illinois.[3]

2. Registrant was registered as a floor broker on January 1, 1982. His registration was suspended from June 17, 1990 to December 19, 1990. His registration has been uninterrupted since December 19, 1990.[4]

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[1] Division Exhibit 1.
[2] 17 C.F.R. § 3.56(a)(ii)-(iii); CEA 8a(11)(B), 7 U.S.C. § 12a(11)(B).
[3] Registrant's Response ¶1.

3. On October 23, 2003 the U. S. Attorney for the Northern District of Illinois filed a superseding indictment in *United States of America vs. Welchko and Anixter*, charging Registrant with three counts of securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2; five counts of bank fraud in violation of 18 U.S.C. §§ 1334 and 2; five counts of making false statements to financial institutions in violation of 18 U.S.C. §§ 1014 and 2; and seven counts of making false statements to the Securities and Exchange Commission in violation of 18 U.S.C. §§ 1001 and 2.[5]

4. The indictment charges Registrant with the commission of, or participation in, crimes that reflect on his honesty or fitness.[6]

5. The indictment charges Registrant with crimes which are punishable by imprisonment for more than one year.[7]

6. The indictment alleges that in connection with his duties for the now-defunct Anicom, Inc. ("Anicom") during the period of early 1998 though at least March 2000, Anixter, along with his co-defendant Welchko and various other co-schemers, committed the following acts, including:

a. engaging in fraudulent practices that materially inflated Anicom's reported revenues, materially understated Anicom's reported expenses, and materially overstated Anicom's net income and earnings by millions of dollars.[8]

b. fraudulently recognizing over ten million dollars in sales to a fictitious customer called SCL Integration in order to inflate sales, as well as to minimize the effect on income of writing off earlier improper and otherwise uncollectible accounts receivable.[9]

c. making and causing to be made various fraudulent entries in Anicom's general ledger in order to overstate Anicom's actual revenues and understate Anicom's actual expenses by millions of dollars, thereby overstating Anicom's net income and earnings for particular reporting periods, and to otherwise misrepresent Anicom's true financial condition for particular quarters and years.[10]

d. providing and causing to be provided to various Anicom lenders, materially false and misleading financial information and financial statements, including copies of Anicom's quarterly and annual reports filed with the SEC and represented to the lenders that the financial statements, financial data and financial computations were true, correct and complete, whereas

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[4] Registrant's Response ¶2
[5] Division Exhibit 1.
[6] *Id.*
[7] Registrant did not dispute the fact that he is charged with crimes punishable by imprisonment for a period of greater than one year.
[8] Division Exhibit 1 at p. 9.
[9] Division Exhibit 1 at p. 11-12.
[10] Division Exhibit 1 at p. 16-18.

Anixter and his co-schemers knew that this information was false and misleading in material respects.[11]

e. retaining and causing to be retained various investment banking firms to explore, among other things, the sale of Anicom to third parties by acquisition of Anicom's shares. Anixter and the co-schemers provided and caused to be provided to these investment banks false and misleading financial information regarding Anicom, including quarterly and annual reports containing financial statements filed with the SEC, knowing that the investment banks would provide the false and misleading financial information to potential acquirers of Anicom's shares.[12]

f. making and causing to be made materially false statements and omissions of material facts in filings required by the SEC concerning Anicom's sales, expenses, earnings, and financial performance.[13]

7. The plea agreement of Carl Putnam alleges that as President and Director of Anicom, Anixter caused to be recognized on Anicom's financial statements millions of dollars of improper billings and sales in an effort to fraudulently inflate publicly reported sales and earnings.[14]

8. In September 1990, Anixter pled guilty to aiding and abetting four misdemeanor violations of then Section 4c(a)(3)(A) of the Act in federal court. He was subsequently sentenced to two years probation and fined $40,000.[15]

9. Anixter's registration as a floor broker was later suspended for six months by the Commission in a Consent Order of Settlement for similar violations of Section 4c(a)(A) of the Act and Regulation 1.38(a).[16]

10. In November 1991, Anixter consented to sanctioning by the Chicago Board of Trade ("CBOT") for violating six different CBOT rules and regulations, all of which derived from the same conduct for which he was criminally convicted. Anixter's membership privileges were suspended for ten days and he was fined $3,500.[17]

11. The Plea Agreement of Carl Putnam in *United States v. Putnam*, 03 CR 268-1 (N.D. Ill.) alleges in part that as President and Director of Anicom, Putnam recognized and caused to be recognized on Anicom's financial statements millions of dollars of improper billings and sales in an effort to fraudulently inflate publicly reported sales figures and earnings. Putnam alleges he did so with the knowledge and approval of "Executive A." By order issued February 3, 2005 it was deemed that Executive A was Anixter. Putnam further alleges that he and Executive A also

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[11] Division Exhibit 1 at p. 26-27.
[12] Division Exhibit 1 at p. 21.
[13] Division Exhibit 1 at p. 43-44.
[14] Division Exhibit 5 at p. 10-12.
[15] Division Exhibits 2, 3.
[16] See *In re Anixter*, Dkt. No. 91-2, 1990 WL 294202 (CFTC Dec. 19, 1990).
[17] Division Exhibit 4.

improperly manipulated Anicom's expenses in an effort to report financial results in line with expectations of analysts and the market.[18]

12. The Plea Agreements of: Ronald Bandyk in *U.S. v. Ronald Bandyk*, No. 03 CR 268-5 (N.D. Ill.); Daryl Spinell in *U.S. v. Daryl Spinell*, No. 03 CR 268-4 (N.D. Ill.); John Figurelli in *U.S. v. John Figurelli*, No. 03 CR 268-3 (N.D. Ill.); and Renee Levault in *U.S. v. Renee Levault*, No. 03 CR 268 (N.D. Ill.) all allege illegal activities that took place while Registrant was an executive at Anicom. None of these plea agreements specifically allege that Registrant committed or directed others to commit the fraudulent acts in question.[19]

**CONTROLLING LAW**

Subparagraph (A) of § 8a(11) authorizes the Commission to suspend or modify the registration of Commission registrants who are involved in a specific class of criminal proceedings which involve either a violation of the Act or a violation of a federal or state law that would (1) reflect [negatively] on the honesty or the fitness of the person to act as a fiduciary, and (2) is punishable by imprisonment for a term exceeding one year.[20]

**DISCUSSION**

**REGISTRANT'S HONESTY AND FITNESS TO ACT AS A FIDUCIARY**

The first question for this court is whether Registrant's acts, alleged, proven or admitted, reflect on his honesty or fitness to act as a fiduciary.[21] The Act specifically provides for suspension when the underlying violations involve transactions in securities, as well as "embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling."[22]

Although the Commodity Futures Trading Commission is not charged with regulating either the securities exchanges or banking markets, it may, in determining whether a registrant

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[18] Division Exhibit 5, p. 10-12.
[19] Division Exhibit 6, p. 4-5; Division Exhibit 7, p. 4-5; Division Exhibit 8, p. 4-5; Division Exhibit 9, p. 4-6.
[20] CEA § 8a(11)(A), 7 USC § 12a(11)(A).
[21] CEA § 8a(11)(A), 7 USC § 12a(11)(A).
[22] CEA § 8a(2)(D)(iii), 7 USC § 12a(2)(D)(iii).

poses a threat to the public interest, or to the public's confidence in the commody markets, take into account crimes and alleged crimes that occurred on these markets.

> "The language of Section 8a(11) indicates that Congress' focus was not limited to criminal conduct that violated the [Commodity Exchange] Act, but extended to criminal conduct that would reflect on the honesty or the fitness of a person to act as a fiduciary…Congress clearly recognized that wrongful conduct that did not involve receipt of funds from futures customers, actual trades on markets regulated by the Commission, or conduct with any direct affect on a futures transaction could be material to a person's fitness to act in a registered capacity."[23]

In the matter at hand, this court finds that Registrant has been indicted on three counts of securities fraud, five counts of bank fraud, five counts of making false statements to financial institutions, and seven counts of making false statements to the Securities and Exchange Commission ("SEC").[24] Registrant's alleged crimes involve transactions in securities, fraud and false pretenses, and if proven, would reflect adversely on Registrant's honesty and fitness to serve as a fiduciary.[25]

In support of its contention that Registrant "does or is likely to pose a threat to the public interest or threaten to impair public confidence in any market regulated by the Commission," the Division has submitted (1) Anixter's October 24, 2003 indictment; (2) the plea agreements of Carl Putnam, Ronald Bandyk, Daryl Spinell, John Figurelli, and Renee Levault; and (3) Anixter's own plea agreement from September 13, 1990.[26]

The indictment alleges a host of crimes that took place on securities and banking markets. Anixter's alleged role was as a co-schemer who made fraudulent representations to shareholders, lenders, and the SEC.

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[23] *In the Matter of Laken*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶28,458 at 51,495 (CFTC Feb. 8, 2001).
[24] Division Exhibit 1.
[25] For purposes of this proceeding, the Commission may rely upon Registrant's indictment. A conviction is not necessary. The Act allows for the suspension of a registrant's registration if he is indicted by a United States attorney or an appropriate State official, and other suspension prerequisites in the Act are met. See CEA 8a(11)(A), 7 USC § 12a(11)(A).
[26] See Division's Post-Trial Memorandum.

The plea agreements of Putnam, Bandyk, Spinell, Figurelli and Levault allege illegal activities that took place while Registrant was President and Director of Anicom.

On September 13 of 1990, Registrant entered into a plea agreement with the United States Attorney. He pled guilty to four misdemeanor trading violations that occurred while he was trading in the soybean pit at the Chicago Board of Trade.[27]

The Division has provided ample evidence that Registrant has violated his fiduciary duties in order to reap personal gain. The Division has shown by a preponderance of the evidence that Registrant's continued registration as a floor broker poses a threat to the public interest and to the public's confidence in those markets on which he is permitted to trade.

The Division proposes that Registrant's floor broker registration be temporarily suspended until his indictment is disposed of, or until the Commission takes further action.[28] Registrant proposes that this court modify his registration as a floor broker to require that he only fill customer orders under supervision or to trade only for himself under the supervision of a sponsor.[29] The Registrant's past conduct, which is described in the findings of fact, warrants suspension of his registration. Section 6(c)(2) of the Act fixes the maximum length of a suspension the Commission may impose upon a registered person at six months.[30] Given the serious nature of Registrant's alleged crimes, a six month suspension of Registrant's registration is warranted.

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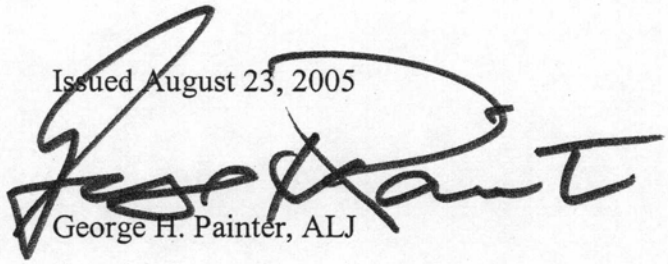
[27] Division Exhibits 2, 3.
[28] Division's Post-Trial Brief at p. 10.
[29] Registrant's Reply to the Division's Post-Trial Brief at pgs. 5-6.
[30] CEA § 6(c)(2), 7 USC § 9(c)(2).

**ORDER**

Pursuant to § 8a(11)(A) of the Act, Registrant's floor broker registration is SUSPENDED for six months, commencing the date this order becomes final.

Issued August 23, 2005



George H. Painter, ALJ

Law Clerk, Steven J. Mickelsen