



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

In the Matter of

ANDREW DAVID RHEE

and

REFLEX ASSET MANAGEMENT
CORPORATION,

Registrants.

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CFTC Docket No. SD 99-8

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CONSENT ORDER REVOKING REGISTRATIONS

On September 20, 1999, the Commodity Futures Trading Commission ("Commission") issued a notice of intent to suspend, restrict or revoke the registrations of Andrew David Rhee ("Rhee") and Reflex Asset Management Corporation ("Reflex").¹ In the Notice, the Division of Enforcement ("Division") alleges

¹ Notice of Intent to Suspend, Restrict or Revoke Registrations, dated September 20, 1999 ("Notice"). According to the Notice, Rhee has been registered with the Commission as an associated person of Reflex, since "at least" March 1997, but is currently incarcerated. Notice, ¶¶3, 4. See 7 U.S.C. §6k. The Notice also avers that Rhee is the sole owner of Reflex, and that Reflex has been registered both as a commodity pool operator and commodity trading advisor since "at least" October 1995. Notice, ¶¶2, 5. See 7 U.S.C. §§1a(4)-(5), 6m and 6n.

that, as the result of a criminal judgment entered against Rhee² and a civil injunctive order entered against Rhee and Reflex,³ Rhee is subject to statutory disqualification from registration under Section 8a(2)(C) and (D) of the Commodity Exchange Act ("Act") and Reflex is subject to disqualification from registration under Section 8a(2)(C) and (H) of the Act.⁴ The

² Notice, ¶¶6-8. The Division alleges that, on December 17, 1998, Rhee was convicted, in the United States District Court in the Southern District of New York, of the felony charge of conspiring to commit wire fraud in connection with the misappropriation of proprietary information, which Rhee used to his benefit in commodities trading. Id.

³ Notice, ¶¶9-10. The Division alleges that, on November 3, 1998, a consent order of permanent injunction was entered in the United States District Court in the Southern District of New York, permanently prohibiting Rhee and Reflex from, among other things, engaging in "fraud and activity involving transactions in or advice concerning contracts of sale of a commodity for future delivery." Id., ¶10. According to the Division, this civil action arose out of the same facts as the criminal action against Rhee. Id., ¶9. See supra note 2.

⁴ 7 U.S.C. §12(a)(2)(C), (D) and (H). See Notice, ¶¶11-14.

The 1982 Amendments to the Act created the existing structure for statutory disqualification. Futures Trading Act of 1982, Pub. L. 97-444, 96 Stat. 2294 (1983). See In re Clark, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,032 at 44,928 (CFTC Apr. 22, 1997) (citing In re Walter, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,215 at 35,010 (CFTC Apr. 14, 1988)) ("The legislative history of the 1982 Act demonstrates that one of Congress's purposes in revising the Act's registration provisions was to streamline and simplify the registration procedures so that those who were fit could be registered expeditiously and those who were unfit could be removed from the industry promptly."). Once the Division

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Notice provided Rhee and Reflex with the opportunity to file a response to the Division's allegations within 20 days after service.⁵ Rhee and Reflex declined to do so.

Forty-five days after service of the Notice, the Division filed an unopposed motion seeking a default judgment revoking the registrations of Rhee and Reflex.⁶ The Court grants the Division's request for sanctions on the ground that Rhee and Reflex consent to it.⁷

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demonstrates grounds for disqualification under Section 8a of the Act, a prima facie case of unfitness is established, and the burden then shifts to the registrant to overcome the presumption of unfitness by producing evidence demonstrating that, despite his disqualifying conduct, his registration would pose no substantial risk to the public. Walter, ¶24,215 at 35,010.

⁵ Notice, at 5. See 17 C.F.R. §3.55(b); Certified Letter from Tempest S. Thomas, Proceedings Clerk, to the Parties, dated September 20, 1999 ("Thomas Letter").

⁶ Motion for Default Orders Against Registrants, dated November 3, 1999 ("Motion"), with Exhibits A-F. The Notice was served on both parties by certified mail on the day it was issued, September 20, 1999. See Thomas Letter; Motion, at 2; Exhibits A-E.

⁷ This consent was obtained in a letter from the registrants' attorney to the Division's counsel, prior to the filing of the Notice. See Letter from David A. Battat, Esq., to Mark Bretscher, Esq., dated September 14, 1999 (Exhibit F). The letter reads in relevant part,

"I have informed Andrew [Rhee] that the CFTC will file an administrative action seeking to

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revoke his registration, as well as that of Reflex Asset Management. I also passed on your assurances that the action is being undertaken because the United States District Court lacks the jurisdiction to revoke CFTC registrations, and that no financial penalties will be imposed in this action. As a result Andrew [Rhee] has asked me to inform you that he consents to the revocation of his and Reflex's registrations."

Id. See also Motion, ¶6 ("Counsel for the Division and counsel for Rhee and Reflex have discussed the nature and basis of this action. Pursuant to those discussions, counsel for the Division understands that Registrants do not oppose, and do not intend to file a response to the Commission's Notice.").

Given the registrants' consent to the revocation of their registrations and their manifest intent not to participate in this proceeding, the Court need not address what implications might otherwise flow from the conflicting directives found in the Commission's Notice, on the one hand, and its properly promulgated Registration Regulations, 17 C.F.R. Pt. 3, on the other.

The muddled Part 3 rules alone are hard enough to decipher and are a continual source of confusion. See, e.g., In re Yeh, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,335 at 42,622-23 (CFTC Mar. 10, 1995); In re Baren, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,303 at 42,495 n.8 (CFTC Feb. 10, 1995); see also In re Zuccarelli, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,651 at 48,102-04 (CFTC May 24, 1999). Careless draftsmanship of the Commission's notice of intent - as apparently occurred here -- only contributes to this problem and can deprive a registrant of effective notice of his rights.

Here, without waiving any of the Commission's procedural rules, the Notice directs that a default order may be entered, if the registrants fail to file a proper response to the Notice pursuant to 17 C.F.R. §3.55(b). Notice, at 6. See Motion, at 5 ("Pursuant to Regulation 3.60(a)(4), Rhee [and Reflex are] in
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default in that [they] failed to file a timely response to the Commission's Notice." See also 17 C.F.R. §§3.60(k) and 10.3(b) (waiver of rules requires "reasonable notice . . . to all parties"); In re Trillion Japan Co., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,082 at 41,590 (CFTC May 23, 1994) (waiver authority is only "to be used sparingly to assure fairness and expedition in unusual circumstances"). In so doing, the Notice flatly contradicts the Part 3 procedural rules governing this type of proceeding. Indeed, under the Regulation 3.55 procedures evoked by the Notice, default under Regulation 3.60(a)(4) is not available. 17 C.F.R. §3.55(f). See Notice, at 5.

As this Court has explained before, the procedures of Regulation 3.55(b) expressly trigger a two-stage registration action. Yeh, ¶26,335 at 42,622-23; cf. Baren, ¶26,303 at 42,495 n.8. In the first stage, the Court merely determines whether a statutory disqualification exists, and, if it does, suspends the registrant's registration. See generally 17 C.F.R. §3.55. A registrant's silence at this point cannot result in default. 17 C.F.R. §3.55(b) and (d). Only if the Court determines that a statutory disqualification exists, and thus suspends the registrant's registration, do the proceedings move into their second stage. 17 C.F.R. §3.55(e). It is only in this second stage that a registrant is susceptible to default -- and the revocation of his registration -- for failing to serve a response within 20 days after the Court's order of suspension, stating his intention to show that his "full, conditioned or restricted registration would not pose a substantial risk to the public despite the existence of the disqualification set forth in the notice." 17 C.F.R. §§3.55(e)(1) and (f), 3.60(b)(2)(i) and (g), and 10.93-94.

The Commission, of course, could have chosen to forego this two-stage process, by merely issuing the Notice under Regulation 3.60(a), 17 C.F.R. §3.60(a), rather than under Regulation 3.55. Indeed, the Court suspects that is what the Commission intended to do. (After all, since the imprisoned Rhee had previously consented to the revocation of his and Reflex's registrations, seeking interim suspension only places an unnecessary procedural burden on the Division and the Court.) However, it looks like
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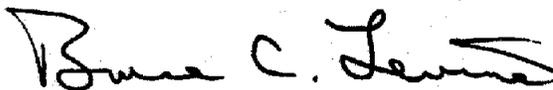
Accordingly, the Court **ORDERS** that:

1. The registration of Andrew David Rhee as an associated person of Reflex Asset Management Corporation is hereby **REVOKED**; and

2. The registrations of Reflex Asset Management Corporation as a commodity pool operator and commodity trading advisor are hereby **REVOKED**.

IT IS SO ORDERED.

On this 15th day of November, 1999



Bruce C. Levine
Administrative Law Judge

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the Commission's lawyers simply failed in the drafting task, creating, in the process, a procedural contradiction.