Commodity Futures Trading Commission
CEA CASES

NAME: LOUIS ROMOFF

CITATION: 31 Agric. Dec. 158

DOCKET NUMBER: 166

DATE: FEBRUARY 11, 1972

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(No. 14,380)

In re LOUIS ROMOFF. CEA Docket No. 166. Decided February 11, 1972.

Violation of reporting requirements -- Determination of sanction -- Denial of trading privileges for 3 years -- Sanctions applicable (except as to hedging transactions) to corporations of which respondent is a part owner

Respondent's failures to file required reports are found to be violations of the act, for which violations respondent is prohibited from trading on all the contract markets for a period of three years, such sanction to apply (except as to hedging transactions) to *corporations* of which respondent is a part owner.

Earl L. Saunders and Harold J. Reuben for Commodity Exchange Authority.

Neale E. Creamer, of Webster & Creamer, Beverly Hills, Cal., for respondent.

Herbert L. Perlman, Hearing Examiner.

Decision by Donald A. Campbell, Judicial Officer

PRELIMINARY STATEMENT

The issues in this case relate to the sanction to be imposed as a result of the respondent's failure to file required reports on 22 occasions even though he had been requested to file reports again -- and again -- and again -- and again -- and again -- and again -- and again -- and again -- and again -- and again - and again -- in writing, and twice by telephone.

The issue is also presented as to whether corporations, jointly owned and controlled by the respondent and Sam Perricone, can speculate in futures contracts during the period of an order suspending "all" trading privileges to the respondent "directly or indirectly."

Complaint. This is a proceeding under the Commodity Exchange Act (7 U.S.C. Chapter 1, 1970 ed.) instituted by a complaint filed February 18, 1970, by Richard E. Lyng, Assistant Secretary of Agriculture. The respondent is charged with failing and refusing to file required reports with the Commodity Exchange Authority concerning his trading in live beef cattle futures and in frozen pork belly futures in wilful violation of the Act (7 U.S.C. 6i) and the regulations issued thereunder (17 CFR 15.01, 15.02, 15.03, 18.00, 18.01, 18.03).

The complaint alleges that between September 1 and October 8, 1969, the respondent held open contract positions in live beef cattle futures on the Chicago Mercantile Exchange of 25 or more contracts in a single future; that between September 24 and October 30, 1969, and November 7 and November 11, 1969, the respondent held open contract positions in frozen pork belly futures on the Chicago Mercantile Exchange of 25 or more contracts in a single future; that since these positions amounted to 25 or more contracts in a single future, the respondent was in reporting status under the regultaions and required to submit reports to the Commodity Exchange Authority with respect to all trades made and positions held by him in such futures during such status, but that he failed and refused to do so; that since June 25, 1968, the Commodity Exchange Authority communicated with the respondent on numerous occasions because of his failure to transmit reports; and that the respondent was aware of his obligations under the Act and the regulations with respect to reporting requirements.

Consent Order. The respondent failed to file an answer to the complaint within the period specified in the rules of practice (17 CFR 0.9). By reason of the respondent's default in the filing of an answer, the Hearing Examiner issued an order on April 1, 1970, cancelling the hearing specified in the complaint. On April 9, 1970, the respondent filed a letter dated April 6, 1970, in which he acknowledged receipt of the order of the Hearing Examiner cancelling the hearing, and stated that "To our knowledge we have never received prior notice on this and we would like to hear

from you regarding the nature of CEA Docket No. 166." On April 16, 1970, the Hearing Examiner, without objection from the complainant, entered an order vacating the respondent's default in the filing of an answer and directing that the complaint be reserved on the respondent. The complaint was re-served on the respondent on April 20, 1970. Thereafter, following negotiations between the parties, the respondent, on June 8, 1970, submitted a stipulation under the rules of practice (17 CFR 0.4(b)) in which he consented to the entry of a specified order. On June 12, 1970, the Judicial Officer entered the order to which the respondent consented. The order in part required that the contract markets under the Commodity Exchange Act refuse the respondent all trading privileges for a period of 30 days, such refusal to apply to all trading done and all positions held by the respondent "directly or indirectly."

Reconsideration of Consent Order. On July 6, 1970, the respondent filed a petition to reconsider the order of June 12, 1970. The respondent's petition recited that he owned 50 percent of the capital stock of Golden Bear Produce Distributors, Inc., and Luer Packing Company, and is an officer in each corporation, and that Sam Perricone owned the other 50 percent of the stock of each of the two corporations and is also an officer therein. The petition further stated that "On occasion either Golden Bear or Luer or both have acquired contracts for frozen pork belly futures;" that Luer Packing Company entered into long term commitments to supply bacon to customers; that "Golden Bear has customarily entered into hedging transactions [in commodity futures] for the benefit of its affiliate Luer;" and that "All decisions of Luer and Golden Bear relating to contracts for commodity futures are made jointly by ROMOFF [the respondent] and SAM PERRICONE." The respondent then alleged that, after the entry of the order of June 12, 1970, he was informed by representatives of the complainant that the order reached any futures contracts in regulated commodities entered into by Golden Bear Produce Distributors, Inc., and Luer Packing Company by virtue of the word "indirectly" contained in such order. The respondent contended in his petition that the order was not susceptible of such an interpretation, and that when he signed the stipulation consenting to the order, he was of the belief that the order would not apply to the two corporations. The order of June 12, 1970, was stayed and complainant filed an answer to the petition for reconsideration. On July 30, 1970, the Judicial Officer entered an order vacating

the order of June 12, 1970, "In view of respondent's belief that the stipulated order would not reach the futures trading of the two corporations."

Answer. The respondent filed an answer to the complaint on August 24, 1970, in which he admits the jurisdictional allegations of the complaint, the trades and positions described therein and the failure to file reports, but denies any wilful violation of the Act. In this connection, the respondent asserts that he "thought he had been complying with the regulations since he had instructed one or more of the licensed brokers handling transactions for him to file the required reports," and "It was not until after the dates specified in paragraphs IV and V of the complaint that respondent became aware of the fact that reports were not being filed for him by his brokers." The respondent also claims in his answer that his failure to file reports was "merely an innocent or technical violation" because it was not conjoined with any other violation such as excessive speculation or price manipulation and was not intended to and did not conceal any such violations.

Prehearing Conference. A prehearing conference was held before Hearing Examiner Herbert L. Perlman on September 23, 1970, in Los Angeles, California. At this conference, the parties stated what they considered to be the issues and their positions with respect thereto and reached agreement on certain evidentiary and procedural matters. The parties were in agreement that one of the issues involved in the proceeding is whether any order entered herein prohibiting the respondent from directly or indirectly trading or exercising trading privileges would apply to the trades made and the positions held in the accounts of Luer Packing Company, Golden Bear Produce Distributors, Inc., United Packing of Iowa, Inc., and Pauma Ranches, Inc.

Oral Hearing. The oral hearing was also held in Los Angeles, California, on September 23, 1970. The respondent was represented at the hearing by Neale E. Creamer, Attorney at Law, Webster & Creamer, Beverly Hills, California. Earl L. Saunders and Harold J. Reuben, Office of the General Counsel, United States Department of Agriculture, appeared as counsel for complainant. Three witnesses testified and 28 exhibits were introduced for the complainant and respondent and his counsel also testified.

The Commodity Exchange Act. The Commodity Exchange Act is the amended name of the Grain Futures Act (Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by the Act of June 15, 1936, c. 545, 49 Stat. 1491, as amended, 7 U.S.C. 1970 ed.). With respect to futures trading in designated agricultural commodities the Congress found that transactions and prices on boards of trade "are susceptible to specultaion, 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 products and byproducts thereof in interstate commerce, and 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." 7 U.S.C. 5.

The Act provides for the designation of boards of trade as contract markets, and all trading in futures in the commodities referred to in the Act -- must be conducted on the designated markets. 7 U.S.C. 2, 6 and 7. The Secretary of Agriculture may regulate boards of trade, futures commission merchants, floor brokers, and persons trading on regulated markets. 7 U.S.C. 6 *et seq.*

Section 4i of the Act provides that "It shall be unlawful for any person to make any contract for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market unless such person shall report or cause to be reported to the properly designated officer in accordance with the rules and regulations of the Secretary of Agriculture * * * whenever such person shall directly or indirectly have or obtain a long or short position in any commodity or in any future of such commodity, equal to or in excess of such amount as shall be fixed from time to time by the Secretary of Agriculture. * * * For the purposes of this section, the futures * * * transactions and positions of any person shall include such transactions and positions of any persons directly or indirectly controlled by such person" (7 U.S.C. 6i).

"If the Secretary of Agriculture has reason to believe that any person (other than a contract market) * * * is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of

Agriculture," he may file a complaint against such person. 7 U.S.C. 9. Any person who is named as a respondent in a complaint, by the administrative agency, is entitled to a hearing, and if the evidence reveals a violation

of the Act the Secretary may require all contract markets to refuse to such person "all trading privileges" thereon for such period as may be specified in the order (7 U.S.C. 9). In addition, the Secretary may enter an order directing that such person shall cease and desist from the violation involved in the case. 7 U.S.C. 13b.

The Act provides that any such order issued by the administrative agency, pursuant to the Act, may be reviewed by the United States Court of Appeals for the circuit in which the person is doing business and empowers the reviewing court to affirm, set aside, or modify the order of the agency. 7 U.S.C. 9.

Final authority to decide cases under the Commodity Exchange Act has been delegated to the Judicial Officer. 36 F.R. 3210.

The Regulations. With respect to frozen pork belly futures and live beef cattle futures, the regulations promulgated by the Secretary of Agriculture provide that a trader who "holds or has a financial interest in or controls" one or more accounts "whether carried with the same or with different futures commission merchants" (7 CFR 18.01 (a)), in which there are in the aggregate open contracts in any one future on any one contract market which equal or exceed 25 contracts has a reportable position and must, while in such status, file reports with the Commodity Exchange Authority with respect to all transactions made and open contract positions held in all futures of the particular commodity in all such accounts (17 CFR 15.00(b), 15.01, 15.03, 18.00, 18.01, 18.03). "A report shall be filed for the first day on which such trader acquires a reportable position, for each day thereafter on which he has transactions in any future of such commodity on any contract market * * *, and for the first day on which he no longer holds or controls a reportable position" (17 CFR 18.00). A trader mailing reports from Los Angeles, California, must have them "postmarked not later than midnight of the day covered by the report" (17 CFR 18.03).

With respect to frozen pork belly futures and live beef cattle futures, the regulations also provide that each futures commission merchant shall report to the Commodity Exchange Authority with respect to any customer's account on his books which shows a position of 25 contracts or more in a single future (17 CFR 15.00(b) and (c), 17.00).

Hearing Examiner's Report. The Hearing Examiner filed a Recommended Decision and Proposed Order on June 18, 1971. He

found and concluded that the respondent wilfully failed to file the required reports. He did not believe the respondent's testimony that he did not recall receiving the complainant's letters, stating (Report, pp. 12-13):

Respondent testified, in part, at the hearing that he could not recall receiving the many letters from the Commodity Exchange Authority, that his secretary had retired some time during the period in which the letters were sent, and that his office was located on the premises of Luer Packing Company and employees of that corporation signed for some of the letters and may have, in effect, misdirected such mail. Respondent's explanations in this regard are incredible and not worthy of belief. Respondent clearly received the first 2 letters sent to him by the Commodity Exchange Authority as he supplied some of the information requested therein (See complainant's Exhibits 3, 4 and 5). It is significant in this connection that the first letter was signed for by an individual who signed Post Office return receipt cards for subsequent letters. Also, respondent personally signed one of the Post Office return receipt cards and while it is not clear that this duplicate card was accompanied by a letter, it seems to us that such card, addressed for return to the Administrator of the Commodity Exchange Authority, would call respondent's attention to a prior communication from the Administrator. More importantly, respondent testified at the hearing that in his conversations with his brokers he asked them if they were reporting as *'I am getting letters'* Further, it was not usual for respondent to receive letters accompanied by Post Office return receipt cards and it is thought that the receipt of such mail would be noted. While respondent's office procedure for the receipt of mail might have been somewhat loose, it appears that he received the letters sent to him by the Commodity Exchange Authority.

The Examiner also did not believe the respondent's testimony that he thought his brokers were filing the reports for him, stating (Report, p. 13):

Respondent next contends that he instructed brokers through whom he traded in live beef cattle and frozen pork belly futures to file the required reports for him and that he thought that they had done so. While such explanation could initially have some probative value, it seems to us that the

many letters to respondent from the Commodity Exchange Authority, his telephone conversations with employees of the Commodity Exchange Authority, his receipt of the letter from the Administrator and his failure even to file reports with respect to trades made after service of the complaint herein upon him completely destroys any credence in respondent's alleged belief that his brokers were filing the required reports. After eleven letters over a fifteen month period and two telephone conversations respondent could not still believe that such was the case. In addition, where he traded through several brokers, they would not necessarily know that reports were due.

It is patent, it appears to us, that respondent's failures to file reports as set forth in the complaint and found in the Findings of Fact herein constitute willful violations of section 4i of the act * * *.

The Hearing Examiner issued a proposed order requiring the respondent to cease and desist from failing to file required reports and denying "all trading privileges" in futures contracts to the respondent for 45 days, such order "to apply to all trading done and all positions held directly by the respondent, either for his own account or as the agent or representative of any other person or firm, or indirectly by respondent" (Report, pp. 21-22). He held that futures transactions during the suspension period by the corporations owned and controlled jointly by the respondent and Sam Perricone would not violate the order (Report, pp. 14-20).

Complainant's Exceptions to Examiner's Report, Petition to Reopen Hearing, and Oral Argument. The complainant filed exceptions to the Examiner's findings, conclusions, and order. No exceptions were filed by the respondent.

The complainant also petitioned to reopen the hearing to introduce new evidence which occurred after the close of the hearing consisting "of testimony of officials of the Commodity Exchange Authority, and official records filed with the Commodity Exchange Authority, which will show that the respondent was in reporting status in pork bellies from March 22, 1971, to June 25, 1971; that he traded in pork bellies on numerous occasions during that time period; and that he failed to report such trades as required by the Commodity Exchange Act and regulations issued thereunder."

The petition was denied by the Judicial Officer on the ground that it would delay the proceeding unnecessarily since the "additional

facts, if proven, would merely confirm what the Hearing Examiner has already found to be true."

Oral argument before the Judicial Officer was held in Los Angeles, California, on September 16, 1971.

Tentative Decision and Order. A tentative decision and order was filed on January 10, 1972, by the Judicial Officer. Comments were filed by the parties. The final decision and order is substantially the same as the tentative decision and order.

FINDINGS OF FACT

1. The respondent, Louis Romoff, is an individual whose business address is 3026 East Vernon, Vernon, California. The respondent and Sam Perricone are and have been engaged as associates or partners in various business enterprises, including, among others, the real estate and meat packing businesses.

2. Luer Packing Company and Golden Bear Produce Distributors, Inc., are California corporations with their office and place of business at 3026 East Vernon, Vernon, California. United Packing of Iowa, Inc., was during the period involved herein an Iowa corporation with its office and place of business at 1200 Cunningham Drive, Sioux City, Iowa. Pauma Ranches, Inc., is a California corporation with its office at 818 Linden Street, Los Angeles, California. Luer Packing Company and United Packing of Iowa, Inc., are and have been during the period involved herein engaged in manufacturing and preparing meats and meat food products for sale and marketing these commodities. The respondent testified that "Golden Bear [Produce Distributors, Inc.] being the purchasing and transportation part of our Luer Packing Company, buys most of the meat from the Luer Packing Company and transports it" (Tr. 105; see also, Tr. 138-139). Pauma Ranches, Inc., is and has been engaged in owning and operating orange groves and marketing the yield therefrom.

3. The respondent and Sam Perricone were, during the period involved herein, the only shareholders of the firms referred to in Finding of Fact 2, each owning 50 percent of the stock of each firm, and they completely dominated and controlled such firms and their assets. The respondent and Sam Perricone own as tenants in common the land and the buildings housing the office and place of business of Luer Packing Company and Golden Bear Produce Distributors, Inc., and certain other real estate such as orange groves and avocado groves, which they operate in partnership.

Neither the respondent nor Sam Perricone receives any salary from Golden Bear Produce Distributors, Inc.

4. The Chicago Mercantile Exchange is now, and was at all times mentioned herein, a duly designated contract market under the Commodity Exchange Act. At all such times, a live beef cattle futures contract on such exchange was a contract calling for the future delivery by the seller and the receipt by the buyer of 40,000 pounds of live beef cattle. At all such times, a frozen pork belly futures contract on the Chicago Mercantile Exchange was a contract calling for the future delivery by the seller and the receipt by the buyer of 30,000 pounds of frozen pork bellies. All of the live beef cattle futures trades and positions and all of the frozen pork bellies futures trades and positions, described in the Findings of Fact, were made and carried on the Chicago Mercantile Exchange.

5. For the past several years, Golden Bear Produce Distributors, Inc., and Luer Packing Company have traded substantially in various commodity futures, primarily live beef cattle futures and frozen pork belly futures, through several futures commission merchants. Respondent gave to the futures commission merchants the orders calling for the trades made for each of these accounts, and exercised control over the accounts, after discussing the futures transactions with Sam Perricone. Each day before trading in these accounts, the respondent and Sam Perricone would meet in the morning to discuss the business that might be available or that had been transacted the previous day by Luer Packing Company or Golden Bear Produce Distributors, Inc. Respondent and Sam Perrcione

would decide what futures positions the corporations might take that day and respondent would then inform Sam Perricone periodically as to "what the market was doing" (Tr. 106). Thereafter, the respondent gave trading orders to the futures commission merchants.

The respondent and Sam Perricone "are very successful in winning bids on U. S. Government bacon contracts," and they "use the Golden Bear account to hedge their meat commitments" (Tr. 59). Trading in the Golden Bear account consisted "primarily of hedges" but there were "some speculative trades placed into the account" (Tr. 59).

For approximately the past five years, the respondent also traded substantially in live beef cattle futures and in frozen pork belly futures through several futures commission merchants in

accounts carried in the respondent's own name. The respondent originated and was responsible for the trading orders in these accounts and exercised control over the accounts. Occasionally, in accordance with the respondent's instructions and with the permission of Sam Perricone, funds were transferred between the trading accounts carried in the respondent's name and those carried in the names of Luer Packing Company and Golden Bear Produce Distributors, Inc. This was done to effect a quick transfer of funds and adjustments were soon made between the respondent and the corporations to retransfer funds to the party to whom they belonged.

6. On each day during the period from September 1, 1969, to October 8, 1969, both inclusive, the respondent had a reportable position in live beef cattle futures because of the fact that the open contract positions held by the respondent in such futures on the Chicago Mercantile Exchange in a trading account carried by the respondent in his own name ranged between 50 and 75 contracts in a single future. On September 3 and 10, 1969, while the respondent was in reporting status, and on October 9, 1969, when the positions held by the respondent in live beef cattle futures were reduced below the reporting level, transactions in such futures were made on the Chicago Mercantile Exchange for said account, but the respondent submitted no reports to the Commodity Exchange Authority with respect to such transactions and the resulting positions.

7. On each day during the periods from September 24, 1969, to October 30, 1969, both inclusive, and from November 7, 1969, to November 11, 1969, both inclusive, the respondent had a reportable position in frozen pork belly futures because of the fact that the open contract positions held by the respondent in such futures on the Chicago Mercantile Exchange in trading accounts with two firms carried by the respondent in his own name ranged in the aggregate between 25 and 85 contracts in a single future. On September 24, 25, 26 and 30, 1969, October 1, 2, 3, 13, 20, 21, 22, 24, 27, 28, 29 and 30, 1969, and November 7 and 11, 1969, while the respondent was in reporting status, and on October 31, 1969, when the positions held by the respondent in frozen pork belly futures were reduced below the reporting level, transactions in such futures were made on the Chicago Mercantile Exchange for one or both of the said accounts, but the respondent submitted no reports to the Commodity Exchange Authority with respect to such transactions and the resulting positions.

8. Between June 25, 1968, and September 24, 1969, the Commodity Exchange Authority communicated with the respondent in writing 11 times because of his failure to file reports required to show reportable transactions and positions in live beef cattle futures and frozen pork belly futures, but received only some reports up to a report for September 13, 1968. The respondent failed to comply with almost all of the requests to file reports made in the 11 letters (Tr. 20-41). On August 30, 1968, and again on August 13, 1969, representatives of the Commodity Exchnage Authority spoke with the respondent over the telephone with respect to his delinquencies in submitting reports (Tr. 32-33, 37-38). In the conversation on August 30, 1968, the respondent stated that "up to that time

he misunderstood that he was supposted to file reports" and that he "thought that each broker would file a report for him" (Tr. 32-33). In the conversation on August 13, 1969, the respondent promised that the necessary reports would be filed (Tr. 38), but no reports were received. On September 24, 1969, the Administrator of the Commodity Exchange Authority sent a letter by certified mail to the respondent calling attention to his delinquencies in submitting reports, and advising the respondent that he should file all required reports on or before October 10, 1969, and warning him that continued failure to file such reports could result in the institution of administrative proceedings directed toward the denial of trading privileges on all contract markets (Comp. Exs. 15, 28; Tr. 154-156). Notwithstanding this eleventh letter dated September 24, 1969, no reports were filed (Answer, paragraphs II through V, Tr. 20-21), and the respondent failed to file required reports thereafter in September and on 15 occasions in October and November 1969.

All of the violations involved in this case occurred after 10 of the 11 written notices were sent to the respondent concerning the reporting requirements. Both telephone conversations relating to the reporting requirements, between the respondent and personnel of the Commodity Exchange Authority, occurred prior to all of the violations involved in this case. The violations on the 22 occasions involved in this case were deliberate, flagrant, and wilful.

The respondent's failure to report was not for the purpose of concealing any other violations of the Act, such as exceeding trading limits or manipulation ofprices.

CONCLUSIONS

I

The issues before the Judicial Officer relate to the sanction to be imposed against the respondent for failing to file required reports on 22 occasions from September to November, 1969. The respondent admits that the required reports were not filed (Answer to Complaint, paragraphs I-II).

During the 15-month period from June 25, 1968, to September 24, 1969, the complainant sent 11 letters to the respondent because of his reporting violations (Comp. Exs. 3, 6-15). Six of the letters were by certified mail, with a return receipt obtained (Comp. Exs. 3, 8, 10, 11, 14, 15). Seven of the letters referred to seven different periods of reporting violations by the respondent occurring from June 1968 to June 1969 (Tr. 23-40; Comp. Exs. 3, 6, 9, 10, 11, 12, 13), *i.e.,* shortly prior to the period of reporting violations from September to November, 1969, involved in this case. Three of the letters called the respondent's attention to violations which were previously referred to in other letters (Tr. 23-40; Comp. Exs. 7, 8, 14), and the last letter referred to some of the violations involved in the present case (Comp. Ex. 15). The respondent failed to comply with almost all of the requests to file reports made in the 11 letters (Tr. 20-41).

The first two letters to the respondent (Comp. Exs. 3, 4) enclosed a form which was completed and signed by the respondent on July 29, 1968 (Comp. Ex. 5). It stated at the top in prominent type "NOTICE: Failure to file a report required by the Commodity Exchange Act and the regulations thereunder, or the filing of a false or fraudulent report may be a basis for administrative action under 7 U.S.C. Sec. 9 * * * ."

The certified letter to the respondent dated February 10, 1969, stated that "Failure to file such reports will be seriously regarded by this agency" (Comp. Ex. 11).

The last letter to the respondent, dated September 24, 1969, and sent by certified mail, stated that if the respondent failed to file the required reports, "we shall have to consider taking formal action which could result in denying you trading privileges on all contract markets. To avoid such action you should file all required reports on or before *October 10, 1969,* with our Chicago office as indicated, and take the necessary precautions to insure

that all future reports are filed in accordance with reporting requirements" (Comp. Ex. 15). The respondent did not file the reports referred to in that letter and most of the violations in this case occurred after that letter was received by the respondent.

Twice the respondent was asked to file required reports in telephone conversations. Robert P. Shiner, Chief of the Trading Branch in the Chicago Office of the Commodity Exchange Authority (Tr. 19), testified that after the respondent had ignored several written requests to file reports, he asked one of the respondent's brokers to try to get him to file the reports (Tr. 27-33). The broker talked to the respondent, and the respondent then telephoned Mr. Shiner on August 30, 1968 (Tr. 31-32). Mr. Shiner testified that the respondent "pointed out that up to that time he misunderstood that he was supposed to file reports. He thought that each broker would file a report for him" (Tr. 32-33). Mr. Shiner testified: "I understood that he would file reports and that he understood such reports were required on Form 1403 for frozen pork bellies" (Tr. 33).

About a year later, and after 9 of the 11 letters had been sent to the respondent, another employee of the Commodity Exchange Authority telephoned the respondent on August 13, 1969, and told him that the required reports were not being received. The respondent said that he would file all required reports (Tr. 37-38; Comp. Ex. 14), but he did not file them (Tr. 39).

All of the 22 violations alleged in this case occurred after the two telephone conversations and after 10 of the 11 letters were sent to the respondent notifying him of the reporting requirements. The last letter advising the respondent that "we shall have to consider taking formal action" if he did not file all required reports (Comp. Ex. 15) was dated September 24, 1969, and reports were not received thereafter in September, October, and November, 1969.

The respondent failed to file reports even after the complaint in this case was filed (Tr. 11-18; Comp. Exs. 16A, 16B, 16C).

It is not surprising that the Hearing Examiner, who saw and heard the respondent testify, concluded that the respondent's testimony that he could not recall receiving the letters from the Commodity Exchange Authority and that he believed brokers were filing the reports for him was incredible or not worthy of

belief (Report, pp. 12-13). I would reach the same conclusion from the record even aside from the weight that should be given to the Hearing Examiner's determination as to the credibility of an orally testifying witness (see *National Labor Relations Board* v. *Swinerton,* 202 F.2d 511, 514 (C. A. 9), certiorari denied, 346 U.S. 814; *National Labor Relations Board* v. *Dinion Coil Co.,* 201 F.2d 484, 490 (C. A. 2); *Cella* v. *United States,* 208 F.2d 783, 788, certiorari denied, 347 U.S. 1016).

Record keeping and reporting requirements are customary features of Federal regulatory programs. See, *e.g., United States* v. *Ruzicka,* 329 U.S. 287, 288-289, 293; *United States* v. *Darby,* 312 U.S. 100, 125; *Electric Bond Co.* v. *Comm'n.,* 303 U.S. 419, 439; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U.S. 194, 204-216; *Baltimore & Ohio RR.* v. *Interstate Commerce Com.,* 221 U.S. 612, 620-623; *Hyatt* v. *United States,* 276 F.2d 308, 312 (C. A. 10); *Panno* v. *United States,* 203 F.2d 504, 510 (C. A. 9); *United States* v. *Turner Dairy Co.,* 166 F.2d 1 (C. A. 7), certiorari denied, 335 U.S. 813; *United States* v. *Turner Dairy Co.,* 162 F.2d 425, 425-428 (C. A. 7), certiorari denied, 332

U.S. 836; *Bartlett Frazier Co.* v. *Hyde,* 65 F.2d 350 (C. A. 7), certiorari denied, 290 U.S. 654.

A former Administrator of the Commodity Exchange Authority explained the importance of receiving futures trading reports as follows: n1

The first requisite for effective regulation is to know the facts. The basic means for obtaining regularly the current facts on futures trading operations continues to be the reporting system under which daily reports are obtained from exchange clearing members, commodity brokers, and large traders. These reports, required by regulations under the Commodity Exchange Act, are also the basis for the release of summary data on futures trading to the public.

n1 Mehl, *Futures Trading Under The Commodity Exchange Act, 1946-1954* (U.S.D.A. 1954), p. 28.

"The daily reports from large traders provide essential information on speculative and hedging transactions in the upper levels of market activity." n2 "The reporting and record keeping provisions of section 4i are needed to assist in determining whether limits on speculative trading or positions fixed by the Commission as provided by section 4a of the act have been violated" (Sen. Rep. No. 947, 90th Cong., 2d Sess., p. 8). The reports aid the Commodity Exchange Authority in preventing and suppressing price manipulations and unwarranted price fluctuations caused by large traders by providing a basis for establishing limits on trading and maximum positions. They enable the Commodity Exchange Authority to appraise the hedging and speculative composition of the market and to assess the qualifications of the exchanges as continuing to meet the requirements of a contract market (Oral Arg. p. 17). n3

n2 Mehl, "The Futures Markets," in *Marketing, The Yearbook of Agriculture, 1954,* (U.S.D.A.), p. 329.

n3 The reports also enable the Commodity Exchange Authority to comply with Congressional requests for the names of large futures traders pursuant to the Act. 7 U.S.C. 12-1. For example, on December 17, 1971, the Department responded to a request from the Committee on Agriculture, House of Representatives, for the names of all traders holding reportable positions in wheat, grain sorghums, and corn from November 23, 1971, to December 13, 1971 (see USDA press release 4188-71).

Only large traders are required to file reports. A trader must have 25 contracts of live beef cattle futures or 25 contracts of pork belly futures before he must file reports (17 CFR 15.03). Each live beef catle future is for 40,000 pounds (Tr. 10), so a trader must be trading in 1,000,000 pounds of live beef cattle before he must file reports, or $ 285,000, at 28 1/2 cents per pound. n4 Each pork belly future is for 30,000 pounds (Tr. 10), so a reporting trader must be trading in 750,000 pounds of pork bellies, or $ 311,250, at 41 1/2 cents per pound. n5

n4 The price of 28 1/2 cents per pound is from the *Chicago Mercantile Exchange Yearbook, 1969-1970,* p. 219.

n5 The price of 41 1/2 cents per pound is from the *Chicago Mercantile Exchange Yearbook, 1969-1970,* p. 123.

The respondent's maximum positions reached 75 contracts in cattle futures (Comp. Ex. 1), or 3,000,000 pounds ($ 855,000, at 28 1/2 cents per pound), and 85 contracts in pork belly futures, or 2,550,000 pounds ($ 1,058,250, at 41 1/2 cents per pound).

Although the Commodity Exchange Authority receives reports from futures commission merchants as to certain transactions of their customers who are in a reportable position, traders can easily avoid such reporting by dealing with several brokers. Also, the futures commission merchants report only transactions in those futures which are in a reportable position (*e.g.,* 25 or more contracts of February pork bellies) whereas a trader who has a reportable position in one future (*e.g.,* 25 or more contracts of February pork bellies) must also report transactions in every future of that commodity (*e.g.,* March and July pork bellies) even

though the trader's position in the other futures is less than 25 contracts (Tr. 45; 17 CFR 15.00(b) and (c); 17.00; 18.00). The Commodity Exchange Authority can properly perform its regulatory functions only if it receives reports from traders as well as from futures commission merchants. n6

n6 When the Commodity Exchange Authority receives a report from a futures commission merchant showing that a trader is in a reporting status, it sends the trader a notice to file reports, together with reporting forms (see, *e.g.,* Comp. Exs. 3, 6, 12, 13). The trader who receives such a notice has already violated the Act (7 U.S.C. 61) and the regulations (17 CFR 18.00) because he is required to file the reports on his own initiative without waiting for any notice. However, as a matter of administrative practice, notices are given to the traders to file reports and no formal action is instituted unless such notices are disregarded or unless unusual circumstances exist.

Many of the respondent's transactions in pork belly futures involved in the reporting violations at issue in this case would not have been reported by the futures commission merchants because he was trading through two different futures commission merchants or because the futures commission merchants are required to report only the particular future which is in a reporting status rather than all futures of such commodity. Reports as to the respondent's pork belly transactions were due to be filed by the respondent and would not have been filed by the futures commission merchants (17 CFR 15.00(b) and (c), 15.03, 17.00), on the following dates in 1969 (Comp. Ex. 2):

February Future	March Future	July Future
September 24 (Stone)	September 30 (Stone)	September 24 (Stone)
September 30 (Stone)		September 26 (Andco)
	October 20 (Stone)	
October 20 (Stone)	October 21 (Stone)	October 21 (Stone)
October 22 (Stone)		October 22 (Andco
October 24 (Andco)	November 11 (Stone)	and Stone)
October 27 (Andco)		October 27 (Andco)
October 31 (Andco)		October 31 (Andco)
November 7 (Andco)		

Similarly, during May 1970, several months subsequent to the complaint (which was filed in this case on February 18, 1970), the respondent was in a reporting position in pork belly futures, but he failed to file reports, and reports would not have been filed by the four futures commision merchants through which he was trading on the following dates (Tr. 11-18; Comp. Exs. 16A, 16B, 16C):

May Future (Comp. Ex. 16A)	July Future (Comp. Ex. 16B)	August Future (Comp. Ex. 16C)
May 4 (Siegel)	May 4 (Siegel)	May 7 (Siegel)
May 5 (Andco)	May 12 (Stone)	May 11 (Hutton)
May 6 (Andco & Hutton)	May 14 (Siegel)	May 12 (Hutton)
May 11 (Siegel)	May 21 (Hutton)	May 14 (Siegel)
May 14 (Siegel)	May 26 (Siegel)	May 18 (Hutton)
May 15 (Siegel)		May 21 (Andco)
May 21 (Andco)		May 25 (Stone)

May Future (Comp. Ex. 16A)	July Future (Comp. Ex. 16B)	August Future (Comp. Ex. 16C) May 26 (Siegel)

Although there is no reason to believe that the respondent was intentionally trading in a manner to keep his positions at any one brokerage firm below the reporting limit, this demonstrates that the Commodity Exchange Authority cannot rely solely on the broker's reports.

There are about 1,200 traders who file reports each day with the Commodity Exchange Authority. If this small agency, with a staff of about 160 persons supervising trading in over $ 110 billion worth of futures contracts annually on 20 exchanges, had to bring many formal actions against large traders to compel them to file reports, it would completely disrupt the regulatory program of the agency. No doubt that is why the agency sent 11 letters to the respondent and talked to him twice on the telephone before bringing a formal action in this case.

In determining the appropriate sanction to be issued in this case, it is helpful to consider, first, some general principles as to administrative sanctions.

The administrative proceeding in this case does not partake of the esential 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: *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);

Helvering Mitchell, 303 U.S. 391, 399; *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 *Farmers' 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; *Stewart & 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. However, anyone intimately acquainted with the administration of a regulatory program knows that it is necessary to at least consider, as one of many relevant circumstances, the effect of the sanction in a particular case on others in the regulated industry. 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).

The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of a sanction only on the respondent and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings, and the actions of potential violators could be significantly affected by the sanctions imposed against other persons.

If administrative sanctions are too lenient, rather than being a deterrent, they will be a stimulant to violations by others. Since, as stated above, the purpose of a suspension order is to "assure a proper adherence to the provisions of the Act," the deterrent effect on the respondent and on other persons subject to the regulatory program must be onsidered.

Another principle is that, in general, there should be a reasonable relation between the sanction and the unlawful practices found to exist. n7 In other words, the more serious the violation, the more severe should be the sanction.

n7 *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; *Kent* V. *Hardin,* 425 F. 2d 1346, 1349-1350 (C. A. 5); *Great Western Food Distributors* v. *Brannan,* 201 F. 2d 476, 484, (C. A. 7), certiorari denied, 345 U.S. 997; *Daniels* v. *United States,* 242 F. 2d 39, 42 (C. A. 7), certiorari denied, 354 U.S. 939; *G. H. Miller & Co.* v. *United States,* 260 F. 2d 286 (C. A. 7), certiorari denied, 359 U.S. 907; *In re Electric Power & Light Corp.,* 176 F. 2d 687, 692 (C. A. 2); *Irving Weis & Co.* v. *Brannan,* 171 F. 2d 232, 235 C. A. 2); *Wright* v. *Securities and Exchange Commission,* 112 F. 2d 89, 95 (C. A. 2).

In addition, insofar as practicable, the sanctions imposed under a regulatory Act against different violators for similar violations should be reasonably uniform. 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 Agric. Dec. 395, 400 (4Agriculture Decisions 395, 400). See, also, In re Arnold Fairbank, 27 Agric. Dec. 1371, 1384 (27Agriculture Decisions 1371, 1384); In re Nolan E. Poovey, Jr., 27 Agric. Dec. 1512, 1520-1522 (27 AgricultureDecisions 1512, 1520-1522); In re Boone Livestock Company, Inc., 27 Agric. Dec. 475, 503 (27 AgricultureDecisions 475, 503); In re Milton Silver, d/b/a Chambersburg Livestock Sales, 21 Agric. Dec. 1438, 1452 (21 Agriculture Decisions 1438, 1452).

In applying these general principles to the facts in this case, we will consider, first, the sanction that should be imposed against the respondent without regard to the effect that a suspension of his trading privileges might have on the corporations jointly owned by the respondent and his partner, Sam Perricone.

Insofar as the respondent's personal futures trading is concerned, it is helpful in determining the sanction to recognize that his trading is in the nature of gambling. He buys or sells futures contracts on the Chicago Mercantile Exchange with the intent of making a profit when he offsets his futures transactions on the Exchange at a later date. Such trading is euphemistically, and more accurately for some purposes, referred to in futures trading parlance as speculating -- rather than gambling. But the intention of a futures trader speculator is no different than the intention of a gambler.

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. n8 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,* -- F.2d -- (C. A. 8), opinion dated December 7, 1971.

n8 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." n9 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. n10

n9 *Comomdity Trading Manual, Board of Trade of the City of Chicago* (1966), p. 41. See, also, Baer and Saxon, *Commodity Exchanges 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; *Commodity Trading Manual, Board of Trade of the City of Chicago* (1966), p. 41; 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).

n10 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." Beleveal, *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?" n11

n11 Although the futures markets need speculators, they do not need the few who refuse to comply with the law.

Another factor to be considered is that, mathematically, there is as much chance of losing on a speculative trade as there is on 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. n12 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." n13

n12 Belveal, *Charting Commodity Market Price Behavior* (1969), pp. 125-201.

n13 *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. n14

n14 A recent futures trading text begins by saying that "Little space has been devoted in these pages to the hugh winnings and equally monumental losses of the 'big time operators.'" Belveal, *Commodity Speculation with Profits in Mind* (1967), pp. ix-x.

Moreover, 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 or he can speculate on the stock market.

There are many professional speculators whose sole source of income is the money derived from their futures trading speculations. An order depriving such a professional speculator from trading in futures deprives him of his full source of income during the period of the suspension. The respondent, on the other hand, is involved in managing, with his partner, Sam Perricone, four corporations. Any money that he derives from futures trading merely supplements his income. Hence a lengthy suspension would not have the same effect on the respondent as the same sanction would have on a professional speculator whose only source of income is derived from futures trading.

Considering the facts that the respondent's violations were deliberate, flagrant and repeated, most occurring after 11 written and two oral notifications as to the reporting requirements; that the 22 violations in this case occurred shortly after seven other periods of reporting violations -- each of which was called to the respondent's attention; and that the respondent continued to violate the reporting requirements after the complaint was filed in this case, I believe that an order denying his personal trading

privileges for three years is appropriate. n15 Such an order has no more impact on the respondent than would a similar order denying trading privileges for three years to a doctor, a lawyer, or a housewife who liked to speculate in futures contracts and who repeatedly refused to file required reports. A cease and desist order should also be issued to help deter the respondent from violating the Act in the future.

n15 Lengthy suspensions under the Act of three or more years are not without precedent (see *In re Douglas Steen,* 21 Agricultural Decisions 1076, 1095; *In re Charles Vojtek,* 14 Agricultural Decisions 347; *Secretary of Agriculture* v. *Stuart,* 1 Agriculture Decisions 359, 362), although a lengthy suspension for a reporting violation is without precedent.

The respondent contends in his brief, pp. 25-26, that prior sanctions imposed under the Act were not as severe as the six-month suspension requested by the complainant in this case. Under the complainant's construction of its requested six-month suspension, the four corporations referred to in the Findings of Fact could not engage in any trading, speculative or hedging, during the suspension period. The inability of the firms to hedge their meat commitments during the period of the respondent's suspension would be particularly damaging to their business activities (Tr. 105, 139-147; see, also, Respondent's Petition to Reconsider Order, pp. 2-3). Accordingly, as discussed later in this decision, the suspension order should be modified to permit the corporations to engage in hedging transactions during the period of the respondent's suspension.

In *In re Webster E. Collins,* 28 Agriculture Decisions 106, 115, the respondent's trading privileges were suspended for 60 days because he failed to file required reports. In that case, the respondent limited his contracts at any one broker to 24 contracts, which indicated that he was concealing his large futures position. In that respect, the reporting violation was flagrant. However, there was no showing that the respondent exceeded the speculative limits or attempted to manipulate prices. The significant circumstance which distinguishes the *Collins* case from the present case is that the action was brought against Collins for his first violation of the Act. No letter was sent to the respondent in the *Collins* case warning him of his violations and affording him an opportunity to correct his conduct prior to the institution of an administrative proceeding.

In the present case, on the other hand, the respondent violated the reporting requirement during seven periods prior to the institution

of this action. Most of the periods involved multiple violations occurring on several dates, and he was asked to file the reports in 11 letters and two telephone conversations. The present case, then, relates to the respondent's eighth period of violation, which consists of violations on 22 separate dates. If, instead of sending the respondent 11 letters and talking to him twice on the telephone, the complainant had instituted an action based upon the respondent's first reporting violation, the *Collins* case would be an appropriate precedent and it could logically be argued that the respondent's penalty should be less than that imposed in the *Collins* case. But since the complainant tried 11 times in writing and twice by telephone to get the respondent to file the reports, the sanction in this case should be much more severe than the sanction imposed for the first offense in the *Collins* case.

For the same reasons, the sanction imposed in the present case should be much more severe than the sanction imposed in the case of *In re Benedict K. Goodman,* 18 Agriculture Decisions 1121, 1129, affirmed, *Goodman* v. *Benson,* 286 F.2d 896 (C.A. 7). In the *Goodman* case, the respondent's trading privileges were suspended for 20 days based upon his first violation of the reporting requirements and his second violation of the speculative limits. The respondent Goodman knew that he was required to file the reports but contended that he "assumed" that his secretary was doing so (18 Agriculture Decisions, at p. 1127). Also, Goodman was erroneously advised by his broker as to the speculative limit and his broker stated that he had checked the matter with the Commodity Exchange Authority (18 Agriculture Decisions, at p. 1126).

Although there were circumstances in the *Goodman* case indicating that the respondent's defense was not valid, the Judicial Officer stated that his "findings herein have been based upon respondent's negligence in complying with the requirements of the act" (18 Agriculture Decisions, at p. 1128), rather than on any deliberate violation. Here, again, the respondent's reliance on the *Goodman* case would have been more persuasive if the complainant had instituted an action based on the present respondent's first or second violation instead of writing the respondent 11 letters and communicating with him twice by telephone prior to the institution of the formal proceeding.

In the case of *In re Rodney Kaminga,* 29 Agriculture Decisions 1126, 1129, the respondent's trading privileges were suspended

for 30 days because he failed to report live beef cattle futures contracts on nine days from March 24 to April 9, 1970. The findings recite that on "numerous occasions" officials of the Commodity Exchange Authority informed the respondent of the reporting requirements under the Act. The respondent did not file an answer and the Hearing Examiner adopted the sanction recommended by the complainant. The Judicial Officer adopted the recommended decision as his own.

Since there was no hearing in the *Kaminga* case, the reasons why the complainant recommended only a 30-day suspension of Mr. Kaminga's trading privileges, along with a cease and desist order, are not apparent. Whether the letters to Mr. Kaminga were sent certified mail, return receipt requested (indicating their importance), and whether they notified Mr. Kaminga that failure to file the required reports could lead to a formal action resulting in suspension of his trading privileges, is not known.

Mr. Kaminga resided in Three Forks, Montana, and he was trading in live beef cattle futures. It is likely, therefore, that Mr. Kaminga was a cattle farmer who hedged his live cattle operations by trading on the futures market. If so, a 30-day suspension of trading privileges would be more severe to him than a comparable suspension of trading privileges imposed against a person who was merely speculating on the futures market and did not utilize futures trading in connection with his business.

In any event, in view of the present respondent's refusal to file reports on many occasions after receiving 11 letters and after two telephone conversations, and his continued violations even after the complaint was issued in this case, n16 I do not believe that a 30-day suspension, together with a cease and desist order, would be an adequate deterrent to future violations by the respondent. Nor do I believe that such an order would deter others in the industry from future similar violations.

n16 I am not referring to the alleged additional violations occurring after the hearing was closed, which are referred to in the complainant's Petition to Reopen Hearing. I am referring only to the violations that are set forth in the record (Tr. 1321; Comp.. Exs. 16A, 16B, 16C). The evidence as to these violations was appropriately admitted for the purpose of showing the respondent's wilfulness (Tr. 13-15). See, *Trade Comm'n.* v. *Cement Institute,* 333 U.S. 683, 704-705.

In *In re Milrose Food Company,* 14 Agriculture Decisions 1037, 1045, the respondent's trading privileges were suspended for 30 days because it filed false reports covering four days, which concealed the fact that the firm exceeded the speculative trading limits. Although I believe the 30-day suspension recommended by the complainant and adopted in that case was too lenient to serve as an effective deterrent, this was the firm's first offense, and since the firm used the futures market to hedge its egg merchandising business, a denial of trading privileges would affect the firm much more than a denial of trading privileges to one who is merely speculating on the futures market. There is nothing in the *Milrose* case to indicate, as there is in the present case, that only the most severe sanction will convince the respondent that he must comply with the Act.

In *In re General Commerce Corp.,* 16 Agriculture Decisions 495, 498, not cited in the briefs, the respondent's trading privileges were suspended for 60 days for seven reporting violations. The complainant wrote the respondent nine times because of its failure to file reports. No hearing was held in the case and the decision does not show how many of the seven violations occurred after the nine communications. It does not show the nature of the communications. The firm did not continue to violate after the complaint was issued. It is probable, but not definitely shown, that the firm used futures trading in its business, and the 60-day suspension may have severely hampered the firm's business activities. In any event, I do not believe that the sanction in that case is at all appropriate in the present case.

The complainant contends that the respondent's disregard of reporting requirements is the "most flagrant it has encountered in its history" (Exceptions to Referee's Report, p. 12). Irrespective of whether other violations of the reporting requirements have been equally flagrant, I believe that a three-year suspension of the respondent's "gambling" privileges on the futures markets is appropriate in the circumstances of this case.

The respondent contends in his Exceptions to the Tentative Decision and Order, pp. 4-5, that the "three-year sanction is six times more severe than the six months' sanction urged by the Complainant in its Exceptions to Referee's Report." This is not true. The six month's sanction proposed by the complainant would have prevented the corporations from hedging during the six-month period. This would have been highly injurious to their business activities. The present order, on the other hand, applies only to the respondent's "gambling" activities.

The respondent refers in his Exceptions to the Tentative Decision and Order, p. 5, to *In re Arthur Gerber,* 27 Agriculture Decisions 1362, 1367, where a three-year suspension recommended by the Commodity Exchange Authority and accepted by the Hearing Examiner was reduced to six months. But the violations in that case were committed by the respondents in their capacity as a futures commission merchant, and the Judicial Officer also revoked their registration as a futures commission merchant.

The case of *In re J. H. Kent,* 28 Agriculture Decisions 656, affirmed, *Kent* v. *Hardin,* 425 F.2d 1346 (C. A. 5), relied on by the respondent in his Exceptions to the Tentative Decision and Order, p. 4, is distinguishable because it involved the respondents' first offense, with no prior warnings from the complainant, and the respondents used futures trading substantially in their businesses.

The respondent contends that the Administrator of the Commodity Exchange Authority, in recent testimony before a Congressional Committee, "indicated that a ninety-day denial of trading privileges on all contract markets was an adequate sanction against a group of speculative traders who conspired to exceed limits on speculative trading * * * ." The Administrator's actual statement in this respect was as follows: n17

The Department of Justice has on occasion brought criminal action against traders for violation of the Commodity Exchange Act. In one recent action a Federal court fined a Miami trader $ 140,000 for violation of speculative limits in potatoes. This criminal action followed earlier administrative action by the Department of Agriculture as a result of which the trader and several associates were denied trading privileges on all contract markets for a period of 90 days.

n17 Testimony of Alex C. Caldwell, Administrator, Commodity Exchange Authority, Before House Agriculture Subcommittee on Domestic Marketing and Consumer Relations, January 20, 1972, p. 9.

The respondent contends in his Exceptions to the Tentative Decision and Order, p. 4, that the Hearing Examiner's sanction should be followed because he "'lived with the case' and he could personally determine the amount of sanction needed to deter Respondent from future violations of the Act." But the Hearing Examiner found that the "respondent's failures to file required reports were willful and constituted a flagrant and cavalier disregard of legal requirements after an intensive and patient effort of the Commodity Exchange Authority to achieve compliance from respondent, * * *" (Recommended Decision, p. 15). He found that the "respondent did not even file reports in connection with trades made after the complaint in this proceeding was served upon him" (Recommended Decision, p. 12). He found the respondent's sworn testimony "incredible and not worthy of belief" (Recommended Decision, pp. 12-13). These findings by the Hearing Examiner who "lived with the case" reinforced my conclusions based on a reading of the "cold record."

The prior decisions in which much lesser sanctions have been imposed are distinguishable. But in any event, this is the sanction that I would impose in any future case of comparable flagrancy for the reasons set forth at length above. 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.). 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."

The respondent argues in his Exceptions to the Tentative Decision and Order, pp. 6-8A, that a change of administrative policy should not be retroactive. But the authorities cited relate to a change in policy as to what constitutes a violation of law, which "raises judicial hackles considerably more than a determination that * * * imposes a more severe remedy for conduct already prohibited" (*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).

An agency may, if it chooses, give advance notice that more severe sanctions may be imposed for future violations of a particular nature (see *Kroblin Refrigerated Xpress, Inc.* v. *United States,* 197 F. Supp. 39, 47-48 (3-judge court, N.D.Iowa)), but there is no requirement that this be done. The respondent's violations in this case were so exceptionally flagrant -- after repeated notices and even after the formal complaint was issued -- that

this case seems to me to be appropriate for imposing a lengthy suspension, particularly since the sanction merely affects the respondent's "gambling" activities.

II

We turn now to the question as to whether an order issued against the respondent in this case would affect futures trading by corporations owned and controlled by the respondent and Sam Perricone.

For the reasons stated below, the Act is broad enough to prohibit the respondent from trading indirectly through the corporations during the period of his suspension, but the corporations should be permitted to use the futures markets for hedging their business risks during the suspension period.

It is clear that the respondent and Sam Perricone operate the business enterprises as a partnership, notwithstanding the fact that they have incorporated for the purpose of obtaining the customary corporate benefits, such as limited individual liability. The respondent and Sam Perricone are the only shareholders of the four firms referred to in the Findings of Fact, each owning half of the stock of the firms (Tr. 57-61, 158-161, 173-175). n18 They completely dominate and control the firms and their assets. Sam Perricone is President of the four firms and the respondent is Vice-President and Secretary of two firms and Secretary-Treasurer of the other two firms (Tr. 57-58). Neither the respondent nor Sam Perricone receives any salary from Golden Bear Produce Distributors, Inc.

n18 The facts as to the corporation are based on the hearing record in this case. The respondent's contentions as to a subsequent chaneg of circumstances involving United Packing of Iowa, Inc., is discussed below.

The activities of Golden Bear Produce Distributors, Inc., and Luer Packing Company are closely coordinated by the respondent and Sam Perricone (Tr. 137-147). "Golden Bear's principal single customer is Luer" (Respondent's Petition to Reconsider Order, p. 12). Both companies are at the same location (Tr. 90, 135-136). The fact that the enterprises are treated in actual operation as if the separate corporate entities did not exist is shown by the respondent's testimony that "Golden Bear [Produce Distributors, Inc.] being the purchasing and transportation part of our Luer Packing Company, buys most of the meat for the Luer Packing Company and transports it" (Tr. 105; see, also,

Tr. 138-139). The respondent told a Government investigator that "he places all commodity orders with the Golden Bear account" (Tr. 59). This includes using the Golden Bear account to hedge meat commitments of its affiliate Luer Packing Company (Tr. 59, 105, 137-147; see, also, Respondent's Petition to Reconsider Order, pp. 2-3.).

The respondent is the one who makes all the futures transactions for the firms, after consulting with Sam Perricone. The respondent testified (Tr. 106):

Mr. Perricone and I meet in the morning to discuss what business might be available that day or the next day or the next day, or what business he might have done the afternoon previous, and we decide or we try to decide, being the market might go one way or the other, or what we will do about the market, and being that he is busy in sales and the phone is ringing every two or three minutes with him, we would decide what position we might take that day, and I inform him maybe every 30 minutes or every hour what the market was doing and then he would let me, or I would execute the orders, because I did have the telephone to where I could go in direct, I knew the numbers, they gave them to me, where I could call directly to Chicago, but with Mr. Perricone's knowledge.

Occasionally, the respondent, with the permission of Sam Perricone, transferred funds between the trading accounts carried in the respondent's name and those carried in the name of Luer Packing Company and Golden Bear Produce Distributors, Inc., in order to effect a quick transfer of funds. Adjustments were then promptly made to retransfer the funds to the party to whom they belonged (Tr. 126-130).

The respondent and Sam Perricone own as tenants in common the land and the buildings housing the office and place of business of Luer Packing Company and Golden Bear Produce Distributors, Inc., and also certain other real estate, such as orange groves and avocado groves, which they operate in partnership (Tr. 170-171).

The respondent was not sure who the directors are of the various corporations (Tr. 131-136). He did not know whether any dividends had ben declared by the corporations during the past five years (Tr. 137).

In short, it is quite clear that the respondent and Sam Perricone are partners and run their businesses as a partnership, except that, for the purpose of obtaining the benefits of corporations, they have incorporated the various enterprises.

If the respondent and Sam Perricone operated meat packing or other businesses as a partnership without any corporate structures involved, futures transactions could not be executed for the partnership during the period of the respondent's suspension under the familiar doctrine that the act of one partner for the partnership is the act also of the other partner.

"It is one of the fundamental principles in the law of partnership, that, within the scope of the partnership business, each partner is the agent of all the other partners for the transaction of the partnership affairs, and his acts are the acts of all." *Hanson* v. *Birmingham,* 92 F. Supp. 33, 43 (N.D.Iowa), appeal dismissed, 190 F.2d 206 (C. A. 8), quoting from 1 Mechem, *Agency* (2d Ed. 1914), Sec. 185.

"Each partner acts as the agent of the other party while acting within the scope of the partnership business, and the activities of one are imputed to all." *Myers* v. *Freedom Newspapers, Inc.,* 274 F. Supp. 93, 95 (N.D.Ohio). See, also, *Bushman Construction Co.* v. *Air Force Academy Housing, Inc.,* 327 F.2d 481, 484 (C. A. 10); *B. F. Goodrich Co.* v. *Naples,* 121 F. Supp. 345, 353 (S.D.Cal.); *Long* v. *United States,* 96 F. Supp. 445, 447 (W.D.Okl.); *Morton* v. *Yeoham,* 419 S. W. 2d 937, 950-951.

If a denial of trading privileges did not prohibit a respondent, during the period of his suspension, from continuing to trade through a corporation which he jointly owns and controls with another person, the remedial purposes of the Act would be completely frustrated. Any person would be free to engage in the most serious violations of the Act, such as cornering the market or otherwise manipulating prices, resulting in losses to farmers and other innocent persons of millions of dollars, and such a person could continue to speculate in futures contracts during the period of his suspension if he had the foresight to become associated, in advance, with another person who was also interested in futures trading, and if they jointly owned and controlled a corporation.

If the Act were that ineffective, futures traders who were inclined to corner the market or otherwise manipulate prices would be quick to insulate themselves in advance from any effective suspension order by forming a corporation with another futures trader. The effectiveness of the regulatory statute would be completely nullified under that interpretation. I cannot construe the Act in such a spirit of mutilating narrowness.

The Commodity Exchange Act is remedial legislation, and remedial statutes should be liberally construed to achieve the congressional purpose. *McDonald* v. *Thompson,* 305 U.S. 263, 266; *Piedmont & Northern Ry.* v. *Comm'n.,* 286 U.S. 299, 311-312; *Bruhn's Freezer Meats* v. *U.S. Department of Agriculture,* 438 F.2d 1332, 1336 (C. A. 8); *Fulford* v. *Forman,* 245 F.2d 145, 153 (C. A. 5); *Adler* v. *Northern Hotel Co.,* 175 F.2d 619, 620-621 (C. A. 7). See, also, *Black* v. *Magnolia Liquor Co.,* 355 U.S. 24, 36.

Here, as in *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 392, unless the Act is construed to prevent a suspended registrant from speculating through a jointly owned corporation, the "essential sanction of the Act would * * * disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question." "Remedial statutes should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.,* 326 F.2d 575, 580 (C. A. 9), quoting from *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F.2d 253, 258 (C. A. 4), certiorari denied, 339 U.S. 919.

The Act provides for an order requiring all contract markets to refuse to a person found to have violated the Act or regulations *"all* trading privileges" for such period as may be specified in the order (emphasis supplied, 7 U.S.C. 9). "All" means "as much as possible;" "every * * * individual component;" "every;" "any whatever" (*Webster's Third New International Dictionary, Unabridged* (1964), p. 54). See, also, *Black's Law Dictionary* (Rev. 4th ed., 1968), p. 98.

"The word 'all' signifies 'the whole of'; * * * A more comprehensive word cannot be found in the English language." *Vandermode* v. *Appert,* 5 A.2d 868, 871, 125 N.J. Eq. 366. See, also, *Addison* v. *Holly Hill Co.,* 322 U.S. 607, 610-611; *Stewart Title Company* v. *Herbert,* 85 Cal. Rptr. 654, 657, 5 Cal. App. 3d 903, 908; *Baker* v. *Brown's Estate,* 294 S.W. 2d 22, 25-26, 365 Mo. 1159; *City of Ukiah* v. *Board of Trustees of Mun. Library,* 15 Cal. Rptr. 811, 812-813, 195 C. A. 2d 344; *Ivey* v. *Wiggins,* 159 So. 2d 618, 620, 276 Ala. 106.

"A more comprehensive and all-inclusive word than 'all' can hardly be found in the English language. There is a totality about it that few words possess." *In re Central of Georgia Ry. Co.,* 58 F. Supp. 807, 813 (S.D.Ga.), reversed on other grounds, 150 F.2d 453, 455-456 (C. A. 5).

The Congress recognized in section 4a of the Act that futures trading may be done directly or indirectly. Section 4a(1) provides for the fixing of speculative limits and provides (7 U.S.C. 6a(1)):

In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an express or implied agreement or understanding, the same as if the positions were held by, or the trading were done by, a single person.

Section 4a(2) of the Act prohibits trading in excess of the speculative limits "directly or indirectly" (7 U.S.C. 6a (2)).

Similarly, it is recognized in section 4i of the Act, which the respondent violated, that futures trading may be accomplished by directly or indirectly controlling another person or firm. Section 4i provides that for "the purposes of this section, the futures and cash or spot transactions and positions of any person shall include such transactions and positions of any persons directly or indirectly controlled by such person" (7 U.S.C. 6i).

Section 8b of the Act, which was added in 1968, provides (7 U.S.C. 12b):

It shall be unlawful for any person, against whom there is outstanding any order of the Secretary of Agriculture prohibiting him from trading on or subject to the rules of any contract market, to make or cause to be made in contravention of such order, any contract for future delivery of any commodity, on or subject to the rules of any contract market.

In the House Report on the bill which was enacted as section 8b, it is explained that the "bill would make it a violation of the act for anyone against whom an order denying trading privileges has been issued to in any manner exercise such privileges during the effective period of such order" (H. Rep. No. 743, 90th Cong., 1st Sess., pp. 4-5). This emphasizes the congressional purpose to authorize effective suspension orders which cannot be evaded in any manner.

Since Congress recognized that trading may be done directly or indirectly (7 U.S.C. 6a(1), 6a(2), 6i; see, also the legislative history in the preceding paragraph), the authorization to suspend *"all* trading privileges" (emphasis supplied; 7 U.S.C. 9) must be construed to prohibit all trading during a suspension period by the respondent, whether done directly by him or indirectly through a partnership in which the respondent is a partner or through corporations jointly owned and controlled by the respondent and another person.

The administrative suspension orders under the Act have always applied not only to direct trading by the respondent but also to indirect trading done through persons or firms owned or controlled by the respondent. For example, the order in *In re Vincent W. Rooney,* 16 Agriculture Decisions 191, 194, directed all contract markets to refuse all trading privileges to the respondent for a specified period, "such refusal to apply to all trading done, and positions held directly by the said Vincent W. Rooney, and also to all trading done and positions held indirectly by persons or firms owned or controlled by him, or otherwise." Identical orders have frequently been issued. See, *e.g., In re Vincent W. Kosuga, et al.,* 19 Agriculture Decisions 603, 626; *In re Fox DeLuxe Foods, Inc, et al.,* 18 Agriculture Decisions 582, 616; *In re Milrose Foods Co.,* 14 Agriculture Decisions 1037, 1045; *In re Joseph Klein and Company, et al.,* 14 Agriculture Decisions 648, 651; *In re Winn & Lovett Grocery Co., et al.,* 14 Agriculture Decisions 561, 565; *In re Ludwig,* 14 Agriculture Decisions 348, 350; *In re Myers and Company, et al.,* 14 Agriculture Decisions 93, 96; *In re Byer, et al.,* 13 Agriculture Decisions 1051, 1056; *In re Peers and Company, et al.,* 13 Agriculture Decisions 875, 879.

Occasionally, the language in the order is shortened to direct all contract markets to refuse all trading privileges to the respondent for a specified period, "such refusal to apply to all trading done and positions held by respondent directly or indirectly" (*In re Benedict K. Goodman,* 18 Agriculture Decisions 1121, 1129, affirmed, *Goodman* v. *Benson,* 286 F.2d 896 (C. A. 7)).

It has been the long standing and settled administrative construction of the Act that a denial of trading privileges to an individual applies not only to his individual trading but to trading by a partnership in which he is associated or to trading by a corporation in which the respondent has a substantial interest and control such as in the present case. The long standing and settled administrative construction of a statute is entitled to great weight. *Red Lion*

Broadcasting Co. v. *F.C.C.,* 395 U.S. 367, 381; *Boutell* v. *Walling,* 327 U.S. 463, 470-471; *United States* v. *American Trucking Ass'ns.,* 310 U.S. 534, 549; *Edwards* v. *Darby,* 12 Wheat. 206, 210; *Hunt Foods and Industries, Inc.* v. *F.T.C.,* 286 F.2d 803, 809 (C. A. 9), certiorari denied, 365 U.S. 877; *Department & Specialty Store Emp. Union* v. *Brown,* 284 F.2d 619, 627 (C. A. 9), certiorari denied, 366 U.S. 934.

Under the circumstances of this case, the primary -- if not the only -- reason for speculative futures transactions by the four corporations during the respondent's suspension period would be to permit the respondent to evade the suspension order. Sam Perricone is free to speculate in his own account during the suspension period, and if he speculated, instead, in one of the corporate accounts, it would result in sharing the speculative profits or losses with the respondent. Hence, in order to have an effective order against the respondent, his suspension order must be construed to prohibit speculative trading by the corporations during the suspension period.

This requires that we disregard the separate corporate entities, or "pierce the corporate veil." But there is abundant precedent for such action. The existence of a separate corporate entity is based on a "legal fiction" created under State law (*Mason* v. *Mitchell,* 135 F.2d 599, 600-601 (C. A. 9)). It is "well settled that the 'corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a [Federal] statute.'" *Bruhn's Freezer Meats* v. *United States Dept. of Agr.,* 438 F.2d 1332, 1343 (C. A. 8). n19

n19 Accord: *Anderson* v. *Abbott,* 321 U.S. 349, 356, 362-363; *Electric Bond Co., v. Comm'n.,* 303 U.S. 419, 440; *Trade Comm'n.* v. *Education Society,* 302 U.S. 112, 119-120; *Northern Securities Co.* v. *United States,* 193 U.S. 197, 342-347; *Sebastopol Meat Company* v. *Secretary of Agriculture,* 440 F. 2d 983, 983-986 (C. A. 9); *H. P. Lambert Co.* v. *Secretary of Treasury,* 354 F. 2d 819, 822 (C. A. 1); *Kavanaugh* v. *Ford Motor Company,* 353 F. 2d 710, 717 (C. A. 7); *Joseph A. Kaplan & Sons, Inc.* v. *F.T.C.,* 347 F. 2d 785, 787, n. 4 (C.A.D.C.); *Sell* v. *United States,* 336 F. 2d 467, 472 (C. A. 10); *Reynolds Pallet & Box Co.* v. *N.L.R.B.,* 324 F. 2d 833, 834-835 (C. A. 6); *Bowater Steamship Company* v. *Patterson,* 303 F. 2d 369, 372-373 (C. A. 2), certiorari denied, 371 U.S. 860; *Mayo* v. *Pioneer Bank & Trust Company,* 274 F. 2d 320, 321 (C. A. 5); *Corn Products Refining Company* v. *Benson,* 232 F. 2d 554, 565 (C. A. 2); *Dickey* v. *National Labor Relations Board,* 217 F. 2d 652, 653 (C. A. 6); *Standard Distributors* v. *Federal Trade Commission,* 211 F. 2d 7, 13-15 (C. A. 2); *United States* v. *Aycock-Lindsey Corp.,* 187 F. 2d 117, 118-119 (C. A. 5); *Mansfield Journal Co.* v. *Federal Commun. Comm'n.,* 180 F. 2d 28, 36-37 (C.A.D.C.); *Atlantic Meat Co.* v. *Reconstruction Finance Corp.,* 155 F. 2d 533, 533-535 (Emerg. C. A.), certiorari denied, 329 U.S. 737; *Ohio Tank Car Co.* v. *Keith Ry. Equipment Co.,* 148 F. 2d 4, 6 (C. A. 7), certiorari denied, 326 U.S. 730; *Great Northern Coop. Assn.* v. *Bowles,* 146 F. 2d 269, 270-272 (Emerg. C. A.); *Alabama Power Co.* v. *McNinch,* 94 F. 2d 601, 618 (C.A.D.C.); *Metropolitan Holding Co.* v. *Snyder,* 79 F. 2d 263, 265-268 (C. A. 8); *Munson S. S. Line* v. *Commissioner of Internal Revenue,* 77 F. 2d 849, 851 (C. A. 2). See, also, *Cherry Cotton Mills* v. *United States,* 327 U.S. 536, 539; *South Carolina Generating Co.* v. *Federal Power Com'n.,* 261 F. 2d 915, 920-921 (C. A. 4); *Goodman* v. *Federal Trade Commission,* 244 F. 2d 584, 590-593 (C. A. 9); *Tractor Training Service* v. *Federal Trade Commission,* 227 F. 2d 420, 425 (C. A. 9).

In *Sebastopol Meat Company* v. *Secretary of Agriculture,* 440 F.2d 983, 983-986 (C. A. 9), the court upheld a cease and desist order issued under the Packers and Stockyards Act against the respondent Singleton, as well as against the corporation, Sebastopol Meat Company, based on violations involving failure to pay, when due and in full, for livestock. The respondent Singleton was president of the corporation, which was authorized to issue stock only to

Singleton and his wife. Singleton directed and controlled the policies of the corporation. The Secretary issued the order against Singleton under the *alter ego* doctrine.

Singleton argued that the doctrine of *alter ego* was improperly applied because, under California law, "fraud or an inequitable result is required as a predicate for application of the concept of *alter ego*" (440 F.2d at 984). However, the court held that we "do not think that state law limitations on the *alter ego* theory or doctrine are necessarily controlling in determining the permitted scope of remedial orders under federal regulatory statutes" (440 F.2d at 985). The court explained (*ibid.*):

The doctrine of *alter ego* is usually invoked in state courts in private litigation, for the purpose of defeating the normal rule of state law that the corporation shields its owners from liability for its obligations. Since the shield was deliberately created by the state to encourage the formation and use of capital, it is not surprising that state courts impose rather stringent limitations upon a doctrine that is designed to remove the shield.

It does not follow that state limitations on the doctrine must be accepted in the application of federal regulatory statutes.

In the case before us, the purpose of the cease and desist order is to insure that the regulation will not be thwarted by continued unlawful conduct.

The court in the *Sebastopol* case cited "many cases that stand for the general principle that the mere form of a business organization is insufficient to shield the practices sought to be prohibited from the reach of a federal regulatory agency" and recognized that "it would be possible to distinguish each one of them, on its facts, from the facts of this case" (440 F.2d at 985-986). But the court held (440 F.2d at 986):

Nevertheless, we think that the principle that they announce is applicable here. It is obvious to us that a cease and desist order directed to both Sebastopol and Singleton is far more likely to assure future compliance with the Act than one directed to Sebastopol alone.

Similarly, in the present case, it would be possible to distinguish the facts in each of the cases cited above from the facts in this case. Nevertheless, the principle that they announce is applicable here.

"It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement." *Anderson* v. *Abbott,* 321 U.S. 349, 362-363. The corporate entity may be disregarded even though the corporation "was organized in good faith and was not a sham" and even though it "was not organized for a fraudulent purpose" (321 U.S. at 356).

"The existence of a separate corporate entity should not be permitted to frustrate the purpose of a federal regulatory statute -- 'corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute.'" *Corn Products Refining Company* v. *Benson,* 232 F.2d 554, 565 (C. A. 2).

In *H. P. Lambert Co.* v. *Secretary of Treasury,* 354 F.2d 819, 822 (C. A. 1), the court upheld the order of the Secretary of Treasury revoking the Louisiana license of a Massachusetts company because of misconduct by a Louisiana company owned and controlled by the same individuals who owned and controlled the Massachusetts company. The court held (354 F.2d at 822):

In such circumstances, the respondent reasonably concluded that the public would be assured little protection if the Massachusetts company could simply take over the Louisiana company's operation after the latter's license was revoked. However important it may be in other respects, the fiction of the corporate entity cannot stand athwart sound regulatory procedure.

In *Ohio Tank Car Co.* v. *Keith Ry. Equipment Co.,* 148 F.2d 4, 6 (C. A. 7), certiorari denied, 326 U.S. 730, the court held:

Generally speaking, corporations do not lose their identity merely because they are owned by the same stockholders, and have the same officers and occupy the same office rooms as other corporations. * * * However, they may merge their identities, under certain conditions, either partly or wholly, or they may retain them for certain purposes, and, at the same time, merge them for other purposes, when to retain them would circumvent the plain and unambiguous intent of a prohibitory Congressional enactment.

Of course, if recognition of a separate corporate entity does not defeat the objectives of the Federal regulatory program involved, the corporate entity will not be disregarded. See, *e.g., Schenley Corp.* v. *United States,* 326 U.S. 432, 436-437; *Stark* v. *Fleming,* 283 F.2d 410 (C. A. 9).

In *Nichols & Co.* v. *Secretary of Agriculture,* 131 F.2d 651 (C. A. 1), the court held that the Secretary erroneously attributed corporate wrongs to a partnership. In the *Nichols* case, the same three individuals owned and controlled the corporation and the partnership, except that two other individuals had some interest in the partnership. The funds required for the organization of the partnership were loaned to it by the corporation. The office of the partnership was in a room in one corner of the office building floor occupied by the corporation and the passageway between it and the corporation was kept open. The partnership handled the corporation's futures trading business and was referred to as the "Futures Room."

There is a distinction between the *Nichols* case and the present case in that, in the *Nichols* case, the Secretary attributed the wrongdoing of the corporation to the partnership and punished the partnership for the corporation's wrong. In the present case, on the other hand, the respondent's wrongdoing is not attributed to the corporations which he jointly owns and controls with Sam Perricone. Only the respondent has engaged in any wrongdoing --

and his wrongdoing is not attributed to the corporations. n20 But under the principles set forth above, in order to issue an effective order against the respondent, the corporations which the respondent jointly owns and controls cannot be permitted to engage in speculative futures transactions during the period of the respondent's suspension order.

n20 In any event, however, the *Nichols* holding would seem to be much more narrow than the more recent cases cited above.

That distinction between the *Nichols* case and the present case is significant. If, in the present case, the wrongdoing of the respondent could be imputed to the corporations, there would be no reason to permit the corporations to engage in any futures transactions during the period of the respondent's suspension -- hedging or speculative. But since the respondent's wrongdoing in this case is not attributed to the corporations, the corporations' trading privileges should be affected only to the extent required to issue an effective sanction against the respondent. Accordingly, the order should be modified to permit the corporations to engage in necessary hedging transactions during the respondent's suspension period. n21

n21 The authority to deny "all trading privileges" has been interpreted to include the power to deny less than all trading privileges. For example, in *In re Cargill, Inc., et al.,* 13 Agriculture Decisions 483, 486-487, the Judicial Officer suspended the respondent's trading privileges in oats futures only. In *In re Berkshire Foods, Inc., et al.,* 19 Agriculture Decisions 3, 6, the suspension order excluded "trading in cash butter." See, also, *In re Irving Weis & Co.,* 8 Agriculture Decisions 151, 152; *In re Alvis R. Davis,* 8 Agriculture Decisions 669, 673. Similarly, in this case, even though the corporate veil has been disregarded, so that trading by the corporations is regarded as indirect trading by the respondent, the order will deny less than "all trading privileges" to the corporations.

The meat packing business in Los Angeles is highly competitive, and the respondent argues that the corporations must be able to engage in certain hedging operations in order to compete successfully (Respondent's Petition to Reconsider Order, pp. 2-3). The respondent contends, for example, that if it places a bid to supply bacon on a Government contract, it must be able to hedge that bid by purchasing pork bellies on the futures market.

In order to prevent the suspension order from being unnecessarily burdensome to the corporations, they should be permitted to engage in the type of hedging referred to in *Corn Products Refining Company* v. *Benson,* 232 F.2d 554, 563 (C. A. 2), *viz.:*

Hedging in futures trading parlance refers to either a sale of futures contracts to offset a risk resulting from the ownership

of, or contract to purchase at a fixed price, an equal quantity of the cash commodity, or a purchase of futures contracts to offset a risk resulting from a previous or simultaneous contract to sell an equal quantity of the cash commodity at a fixed price.

In the present case, a sale of futures contracts to offset a risk resulting from the ownership of the cash commodity should be considered a proper hedge only if the cash commodity is stored (put in inventory) to be processed or sold at a later date. Such a sale of futures contracts should not be considered a proper hedge if the cash commodity is not stored for later processing or sale but is merely on hand for a short time awaiting processing or sale.

In addition, if one of the corporations makes a bid on a contract (*e.g.,* to supply bacon to the Government) it should be permitted to hedge that risk (by buying pork belly futures). n22 Where the cash commodity involved in the transaction is not traded on the futures market (such as bacon), the futures transaction can be in the commodity (such as pork bellies) that is normally used as a hedge for that cash commodity. Similarly, the order should be construed to permit the sale of futures contracts of live hogs to hedge hams being held in storage.

n22 There is no need to interfere with the practice of Golden Bear hedging commitments of Luer Packing Company.

It goes without saying that the futures position must be liquidated on or before the date that the risk in the cash market terminates. Otherwise, the transaction would become speculative.

The respondent has shown no business need to engage in any other type of hedging transactions (Tr. 105, 139-147), and any broader hedging authorization (see, *e.g.,* 7 U.S.C. 6a(3)(C)) would permit such extensive futures trading by the corporations that it could be readily used to evade any effective suspension order against the respondent.

In order to aid the complainant in determining whether the respondent is attempting to circumvent the order issued in this case, the respondent should be required to file reports as to any transactions entered into by the corporations under this hedging exception (when the hedge is entered into and again when it is terminated), together with supporting explanations demonstrating that the transaction is hedging, as defined in this order. Such reports must be postmarked not later than midnight of the day following the day on which the futures transaction is entered into (*cf.* 17 CFR 18.00).

Since the respondent has shown such a complete unwillingness to file required reports, the filing of the reports referred to in this order should be an essential condition of complying with this order, *i.e.,* if a report is not timely filed, such transaction should not be regarded as coming within the terms of the exception, and the respondent would be in violation of the order.

Also, the respondent or the corporations should keep books and records showing all details of such transactions and make them available for inspection by the complainant, or furnish information with respect to such transactions to the complainant, upon request (*cf.* 17 CFR 18.05). This, too, should be an essential condition of complying with the order.

The respondent states in his brief, pp. 5-6 (see, also, Oral Argument, pp. 76-82), that subsequent to the hearing in this case, United Packing Company merged into Floyd Valley Packing Company, in which the respondent and Sam Perricone each own 45 percent of the Class B common stock. The Class B common stock represents about 80 percent of the voting shares of Floyd Valley. The respondent is president of Floyd Valley and Sam Perricone is the chief executive officer (Chairman of the Board). Notwithstanding such a change of circumstances, for the reasons set forth above, the respondent should not be permitted to speculate indirectly through Floyd Valley Packing Company during the period of his suspension of trading privileges. This alleged change of circumstances is not sufficiently great to warrant reopening the hearing in view of the admitted facts as to the respondent's and Sam Perricone's preponderant interest in Floyd Valley. The respondent's attorney admitted that Floyd Valley Packing Company has never engaged in any futures transactions (Oral Argument, p. 80), and, therefore, any speculative futures transactions by the firm during the period of the respondent's suspension would undoubtedly be for the purpose of assisting the respondent in evading the suspension order.

Ordinarily, contract markets and futures commission merchants are required to "police" suspension orders by not executing orders for a person who has been denied trading privileges

(7 U.S.C. 7b; 12a(3)). n23 However, the contract markets and futures commission merchants should not be expected to attempt to determine whether futures transactions by the corporations constitute hedging transactions within the meaning of this order. Unless they knowingly accept an order by the corporations which does not come within the terms of the order, they should not be held to their usual responsibility in this respect.

n23 In the case of futures commission merchants, the Act applies only to "knowingly" accepting an order from a person whose trading privileges have been suspended (7 U.S.C. 12(a)(3)).

This case does not involve the suspension of a license within the meaning of 5 U.S.C. 558(c), but in any event, the violations were wilful.

All contentions presented in the record have been considered and, whether or not specifically mentioned herein, any contentions inconsistent with this decision are found to be without merit.

ORDER

(a) Respondent, Louis Romoff, shall cease and desist from failing to file, in accordance with the Comodity Exchange Act and the regulations thereunder, such reports as he is required to file under such Act and regulations.

(b) Respondent, Louis Romoff, is prohibited from trading on or subject to the rules of any contract market for a period of three years and all contract markets shall refuse all trading privileges to the respondent during this period. Such prohibition and refusal shall apply to all trading done and positions held directly by the respondent, either for his own account or as the agent or representative of any other person or firm, and also to all trading done and positions held indirectly through persons or firms owned wholly or in substantial amount by the respondent or in any way subject to his direction or control, wholly or substantially, including but not limited to, Luer Packing Company, Golden Bear Produce Distributors, Inc., Pauma Ranches, Inc., United Packing of Iowa, Inc., and Floyd Valley Packing Company: *Provided,* however, that trading may be done and positions held indirectly through such persons or firms owned wholly or substantially by the respondent or in any way subject to his direction or control, wholly or substantially, if each one of the following conditions is met:

(1) The trading or positions involve a sale of futures contracts

to offset a risk resulting from the ownership of, or contract to purchase at a fixed price from some person or firm other than one of the persons or firms referred to above, an equal or greater quantity of the cash commodity (or the offsetting liquidation of such a position); or a purchase of futures contracts to offset a risk resulting from a previous or simultaneous contract to sell (or offer to sell) to some person or firm, other than one of the persons or firms referred to above, an equal or greater quantity of the cash commodity at a fixed price (or the offsetting liquidation of such a position);

(2) The futures positions referred to in (1) above are liquidated on or before the date that the risk in the cash market terminates;

(3) Reports are filed by the respondent addressed to the Administrator, Commodity Exchange Authority, U. S. Department of Agriculture, Washington, D. C. 20250, or to such other address as the Administrator shall direct in writing, as to the transactions or positions referred to in (1) and (2) above, including supporting explanations demonstrating that the transactions or positions meet the requirements of paragraphs (1) and (2) above, postmarked not later than midnight of the day followig the day on which the futures transactions are entered into or liquidated; and

(4) The respondent keeps, or is responsible for the corporations keeping, books and records showing all details concerning all such positions and transactions, including all details as to the cash commodity involved in the "hedging" transactions, and makes such books and records available to the Commodity Exchange Authority for examination at all reasonable times and furnishes to the Adminstrator of the Commodity Exchange Authority, or his employees, any additional pertinent information requested by him.

The cease and desist provisions of this order, set forth in sub-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 sub-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