

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:

Harvey T. Gilkerson,
d/b/a BFW Enterprises and
Maverick Paradox Enterprises,

Respondent.

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) **CFTC Docket No: 01-12**
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) **ORDER INSTITUTING PROCEEDINGS**
) **PURSUANT TO SECTIONS 6(c) and 6(d)**
) **OF THE COMMODITY EXCHANGE**
) **ACT, AS AMENDED, MAKING**
) **FINDINGS AND IMPOSING REMEDIAL**
) **SANCTIONS**
)
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I.

The Commodity Futures Trading Commission (the “Commission”) has reason to believe that Harvey T. Gilkerson (“Gilkerson”) has violated Sections 4c(b) and 4o(1) of the Commodity Exchange Act, as amended (the “Act”), 7 U.S.C. §§ 6c(b) and 6o(1) (1994), and Sections 4.13(b)(1), 4.41(b) and 33.10 of the Commission’s Regulations (“Regulations”), 17 C.F.R. §§ 4.13(b)(1), 4.41(b) & 33.10 (2001). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and they hereby are, instituted to determine whether the Respondent engaged in the violations set forth herein, and to determine whether any order should be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, Gilkerson has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Without admitting or denying the findings of fact in this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, As Amended, Making Findings and Imposing Remedial Sanctions (“Order”), the Respondent acknowledges service of this Order. Gilkerson consents to the use of the findings in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party.¹

¹ Gilkerson does not consent to the use of the Offer or this Order, or the findings to which he has consented in the Offer, as the sole basis for any other proceeding brought by the Commission other than a proceeding brought to enforce the terms of this Order. He does not consent to the use of the Offer or this Order, or the

III.

The Commission finds the following:

A. SUMMARY

Beginning in 1998 and continuing through 1999, Gilkerson, doing business as BFW Enterprises and, later, Maverick Paradox Enterprises, fraudulently solicited and pooled funds to be used for commodity options trading. In total, he raised \$18,220 from 13 investors for his pools. Gilkerson promoted investments in commodity pools managed by BFW Enterprises and Maverick Paradox Enterprises, and a trading system that these businesses allegedly used to trade commodity options for investors through on-line business “clubs.”

Gilkerson sent several potential investors who were identified through the on-line clubs a 35-page essay entitled “Blueprint for Financial Wealth” (the “BFW”), which claims it can make investors “WEALTHY BEYOND [THEIR] WILDEST DREAMS!” (Emphases in Original.) In support of such claims, the BFW falsely or misleadingly asserted that Gilkerson’s system produced no losing “completed trades,” each “completed trade” was certain to yield a profit of at least 160%, and that in eleven months of trading the system had generated in one account more than a \$300,000 profit. It nowhere discloses the fact that these claims of guaranteed profits were based solely on hypothetical trading. Gilkerson had never made any trades based on his system and, indeed, had never traded commodity options. Moreover, the purportedly profitable “completed trades” are defined elsewhere in the BFW to include only profitable trades, an explanation inadequate to cure the misrepresentation.

In addition, Gilkerson misappropriated the funds that he received from investors and falsely reported the results of trading that was actually done for investors. Gilkerson’s sole compensation under the agreement between Gilkerson and his investors was limited to a percentage of profits generated by trading. Even though no actual net profitable trading had occurred, Gilkerson used more than \$4,800 of the funds that he received from investors to pay alleged business expenses and personal expenses. Gilkerson also sent reports to his investors which showed profits and increasing account balances when the actual trading had resulted in losses.

findings to which he has consented in the Offer, by any other person or entity in this or any other proceeding. The findings to which Gilkerson has consented in the Offer, as contained in this Order, are not binding on any other person or entity named as a respondent or defendant in this or in any other proceeding.

B. RESPONDENT

Harvey T. Gilkerson, resides at 147 Dodge Avenue, East Haven, Connecticut 06512. He was the sole proprietor of BFW Enterprises. Gilkerson has never been registered with the Commission.

C. FACTS

1. Gilkerson's Solicitation of Investments for Commodity Pools through the BFW

Gilkerson developed his first commodity pool business -- BFW Enterprises -- in 1998. The trading of the pool was to be based upon recommendations generated by a commodity option trading system he developed. Gilkerson's system provides a formula that identifies when a call option in any commodity should be purchased and at what strike price based on the corresponding commodity futures contract price range. The formula further indicates when to sell the call and where to place stops should the call rise in value.

In soliciting customers for his pool through the BFW, Gilkerson falsely described his system's past success in the BFW. First, the BFW falsely stated that Gilkerson had traded profitably using his system for five years: "In trying to make a living, I have made, instead, a killing! (see month-by-month results below)." The month-by-month "results" presented in the BFW detail purchases and sales on specific dates of various domestically-traded call options, including wheat, cocoa, soybean oil and natural gas calls. The "results" purport to give a running total profit. The "results" end with a description of "ongoing Cumulative balances" showing a profit of \$319,090 at the end of an eleven-month period.

Contrary to the representations, that he had made "a killing," and the month-by-month report's appearance of describing actual trading, Gilkerson had not made any actual trades when he wrote and circulated the BFW to at least some potential investors. Indeed, when he wrote the BFW, Gilkerson had never traded commodity options, let alone traded them profitably.

Second, the BFW misleadingly claims that Gilkerson's system for trading commodity options produced a "per trade return of, at least, 160% on each completed trade" and that with his system "YOU WILL BE TRADING WITH 100% ACCURACY! SOON!!!" Although these per trade claims appear on pages five and six, it is not until page 17 that Gilkerson discloses that his definition of a "completed trade" is essentially the sale of a call at a profit.² Accordingly, the BFW is so misleading on the issue of the return per trade as to be false.

² Under Gilkerson's system, calls that are about to expire worthless are "rolled over" through the sale of the expiring call and the purchase of another call in the same commodity in the next delivery month at a specified lower strike price. The sales, at a loss, of out-of-the-money expiring calls are not "completed trades." Accordingly, by definition, all of BFW's "completed trades" are profitable.

2. Other Solicitations

Gilkerson promoted his trading system and investment opportunities with BFW Enterprises and Maverick Paradox Enterprises through general descriptions placed on business club websites. A posting on www.bbean.com for BFW Enterprises' Futures Investment Service, for instance, held out the promise of "better than a 20% return on your investment . . . each and every month." Through these postings, Gilkerson offered other club members the opportunity to share in the profits of his system for trading commodity options by investing with BFW Enterprises. Investors could invest with BFW Enterprises on a number of different investment "plans." For a \$100 payment, investors could share in the profits generated by BFW Enterprises' options trading for a year. For \$2,500, investors could receive 4.99% of the profits generated by BFW Enterprises' options trading for life.³ "Units" of Maverick Paradox Enterprises were offered at \$1,500 and the purchase of each unit entitled the investor to "2% of the years' [sic] Gross profits accumulated by Maverick Paradox Enterprises." Gilkerson offered additional promotional incentives for investors to refer others. Investors who successfully referred others were to receive 0.5% of each referral's profits with an additional 3% bonus for each fourth referral.

Individuals interested in Gilkerson's internet postings contacted him. In telephone conversations with them, Gilkerson claimed that he had been using his trading system for five years and had more than \$300,000 in profits. He claimed that, although he did not need any more money, operating a trading company fulfilled a lifelong dream. Gilkerson forwarded copies of the BFW to some of the club members who expressed interest in Gilkerson's trading system. Gilkerson never provided prospective investors with a statement disclosing that he was not registered with the Commission, and he never filed with the Commission or the National Futures Association ("NFA") the statement that would be required if he was claiming an exemption from registration as a commodity pool operator ("CPO") pursuant to Section 4.13(b)(1) of the Regulations. Ultimately, eleven investors invested a total of \$15,220 with BFW Enterprises, and two investors invested a total of \$3,000 with Maverick Paradox Enterprises.

3. Gilkerson's Operation of Commodity Pools

Beginning in June 1998, investors mailed cash and checks payable to Gilkerson, which Gilkerson deposited in a bank account opened in the name of "Harvey T. Gilkerson d/b/a BFW Enterprises" (the "BFW bank account"). After depositing the investors' funds, Gilkerson withdrew some of the funds, purchased money orders and sent the money orders to a registered futures commission merchant ("FCM"), to fund a commodity interest account opened in Gilkerson's name.

Later in 1998, Gilkerson began promoting Maverick Paradox Enterprises, a second pool to trade commodity options based on Gilkerson's trading system described in the BFW. In March 1999, Gilkerson opened a joint commodity interest account opened in his name and the name of a friend at a second FCM, into which Gilkerson transferred \$2,800 funds from a personal bank

³ Using the phrase "early withdrawals," Gilkerson's agreements with his investors treats the payments to be made by investors as contributions of capital against which they could draw in the future should they so choose with certain limitations.

account that appears to represent most of the \$3,000 raised through the sale of two units in Maverick Paradox Enterprises.

Gilkerson made withdrawals of funds from the BFW bank account that he knew to be investors' funds to pay what he claimed to be business expenses. These expenses included the purchase of a personal computer that he used for BFW Enterprises, the payment of rent to his parents for the use of a room that Gilkerson used for BFW Enterprises' operations, the payment of a subscription to *Investors Business Daily*, and the payment of travel expenses for a trip that Gilkerson took to promote BFW Enterprises at an out-of-town business convention. Gilkerson admits that the investors in the BFW Enterprises pool were not expressly informed that their money would be used for such expenses.

Unlike his purportedly profitable paper trading, Gilkerson's actual trading of commodity options on behalf of the pools generated losses. Gilkerson opened the first commodity interest account for BFW Enterprises by signing account opening documents on June 24, 1998. He began trading in the account on July 6, 1998. On Sunday, July 26, 1998, Gilkerson sent BFW Enterprises' first investor an e-mail report detailing six profitable trades in cotton, heating oil and soybean meal calls, among others, purportedly done between May 29 and June 17, 1998 – all before Gilkerson had even opened the account at the first FCM. The report showed the balance in the investor's account increasing.

Gilkerson sent similar false reports to other investors. Some reports detailed profitable trades that were never placed. Other reports merely purported to update the investors' account balances. All of these reports falsely showed the investors' account balances increasing when, in fact, Gilkerson's actual trading was losing money. Gilkerson sent these false reports to investors so that the investors would not seek to redeem their investments. He claims that he believed that his trading system would work over time, but feared that if the investors saw the real trading results they would attempt to withdraw their money depriving the trading system of the time that it needed to work.

Notwithstanding demands for full repayment by various investors in BFW Enterprises and Maverick Paradox Enterprises, Gilkerson has returned only \$1,870 to investors to date.

D. LEGAL DISCUSSION

1. Gilkerson Violated Section 4c(b) of the Act and Section 33.10 of the Commission's Regulations

Gilkerson's solicitation of investors with misleading profitability claims, diversion of investors' funds to pay business and personal expenses, and distribution of reports showing profits when, in fact, there had been losses violated Section 4c(b) of the Act and Section 33.10 of the Commission's Regulations. Section 4c(b) of the Act prohibits (1) offering to enter into or confirming the execution of a commodity option transaction (2) in violation of a Commission regulation.⁴ Section 33.10 of the Commission's Regulations makes it

⁴ *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 445-46 (D.N.J. 2000).

unlawful for any person directly or indirectly---

(a) To cheat or defraud or attempt to cheat or defraud any other person;

(b) To make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof;

(c) To deceive or attempt to deceive any other person by any means whatsoever

in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of, any commodity option transaction.⁵

To establish liability under Section 33.10, the Division must prove that that respondent acted with scienter.⁶

By soliciting funds for trading commodity options from potential pool participants, and sending reports to the pool participants falsely describing commodity options trading, Gilkerson offered to enter into, and then, confirmed the execution of commodity options. Thus, the first element of a Section 4c(b) violation is satisfied.

By violating Section 33.10 of the Commission's Regulations, Gilkerson satisfied the second element as well. Courts have found that the solicitation of commodity option customers with claims of nearly certain extraordinary profits with minimal or no risk of loss has been found to violate Section 33.10.⁷ The presentation of hypothetical commodity option trading results as actual results is a violation of Section 33.10. The distribution of false or misleading reports describing commodity option trading has also been found to violate Section 33.10.⁸ Finally, a pool operator's misappropriation of funds entrusted by pool participants has been held to be a fraud and deceit in violation of Section 33.10.⁹

⁵ 17 C.F.R. § 33.10 (2000).

⁶ *In re Staryk*, [1996 – 1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,810 (CFTC Dec. 18, 1997).

⁷ *Reed v. Sage Group, Inc.*, [1987 – 1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,942 at 34,298-99 (CFTC Oct. 14, 1987); *see also CFTC v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1352-53 (S.D. Fla. 1994); *McBlaine v. Jack Carl Associates, Inc.*, 705 F. Supp. 1340, 1342-43 (N.D. Ill. 1989) (allegation that defendant represented that commodity options were not high risk investments adequately pled Section 33.10 violation)

⁸ *Rosenberg*, 85 F. Supp. 2d at 447-49 (false reports violated Section 33.10).

⁹ *Id.* (misappropriation from options account violated Section 33.10).

Gilkerson's representations in internet postings, telephone calls and the BFW of nearly certain profits and minimal, if any, risk of loss,¹⁰ and his presentation of hypothetical trading as actual trading results violate Section 33.10. Gilkerson's distribution of false reports relating to the commodity options trading that he conducted for his investors and his use of funds entrusted to him for trading commodity options for uses other than trading also violated Section 33.10.

Thus, by offering to execute commodity option trades and confirming the execution of commodity option trades in violation of a Commission Regulation, Gilkerson violated Section 4c(b) of the Act.

2. Gilkerson's Activities Violated Section 4o(1) of the Act

Gilkerson also violated of Section 4o(1) of the Act. Section 4o(1) of the Act prohibits (1) a commodity pool operator ("CPO") from (2) engaging in fraudulent transactions. Gilkerson's activities satisfy the first element. A CPO is defined as

any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery or commodity option on or subject to the rules of any contract market.

Section 1.3(cc) of the Regulations. By running a business in which investors were to receive a share of commodity option trading profits, Gilkerson engaged in a business in the nature of an investment trust or syndicate. As set forth above, Gilkerson solicited and accepted funds for the purpose of trading commodity options on or subject to the rules of various contract markets. Accordingly, Gilkerson was a CPO.¹¹ The fact that Gilkerson was not registered as a CPO is not a bar to liability under Section 4o(1).¹²

Gilkerson's activities also satisfy the second element. Section 4o(1)(A) of the Act makes it unlawful for a CPO willfully or recklessly to employ any device, scheme or artifice to defraud any participant or prospective participant. Section 4o(1)(B) of the Act makes it unlawful for a

¹⁰ Gilkerson's claim that his system had never had a losing "completed trade" without immediately disclosing his idiosyncratic definition of the term left investors with the impression of little or no risk in violation of Section 33.10. See *McBlaine*, 705 F. Supp. at 1342-43.

¹¹ *Skorupskas*, 605 F. Supp. at 932.

¹² *CFTC v. Vartuli*, 228 F.3d 94, 103 (2d Cir. 2000) (unregistered commodity trading advisor liable under 4o(1)).

CPO to engage in any transaction, practice or course of business that operates as a fraud or deceit upon any participant or prospective participant. Although courts have interpreted Section 4o(1)(A) of the Act to require proof of *scienter*, courts have found that Section 4o(1)(B) does not, so long as the conduct operated as a fraud.¹³ Gilkerson's operation of BFW Enterprises violated both prongs of Section 4o(1) in several ways.

First, Gilkerson's solicitation of potential investors with hypothetical trading results as if they were real trading results violated Section 4o(1).¹⁴ Second, Gilkerson's claims of profits with minimal or no risk of loss violated Section 4o.¹⁵ Third, his distribution of false monthly reports to investors, representing that profitable trading was occurring when, in fact, as he knew, the trading was generating losses, violated Section 4o(1).¹⁶ Fourth, Gilkerson's misappropriation of investors' funds that had been entrusted to him for trading commodity options violated Section 4o(1).¹⁷

Accordingly, Gilkerson violated both Section 4o(1)(A) and Section 4o(1)(B).

3. Gilkerson Solicited, Accepted and Received Pool Funds Without Delivering Exemption Statements to Pool Participants and Failed to File Exemption Statements with the Commission in Violation of Section 4.13(b)(1) of the Regulations

Gilkerson also violated Section 4.13(b)(1)¹⁸ of the Regulations, requiring exempt CPOs to deliver to pool participants a written notice of their non-registered status and other facts prior to soliciting, accepting or receiving pool funds and to file copies of the written exemption statement with the Commission and the NFA.

As set forth above, Gilkerson was a CPO. Gilkerson did qualify for exemption from the CPO registration requirement under the Commission's Regulations. Section 4.13(a)(2) of the Regulations¹⁹ exempts CPOs who operate pools with a total in aggregate gross capital contributions under \$200,000 and fifteen or fewer participants in any one pool. Collecting only \$18,220 from 13 investors, Gilkerson qualified for the 4.13(a)(2) exemption. Gilkerson,

¹³ *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988); *CFTC v. Savage*, 611 F.2d 270, 285 (9th Cir. 1979); *see also In re Kolter*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,262 at 42,198 - 99 (CFTC Nov. 8, 1994).

¹⁴ *CFTC v. AVCO Financial Corp.*, 28 F. Supp. 2d 104, 119 (S.D.N.Y. 1998), *aff'd sub nom. CFTC v. Vartuli*, 228 F.3d 103 (2d Cir. 2000); *Skorupskas*, 605 F. Supp. at 933.

¹⁵ *See id.*

¹⁶ *Skorupskas*, 605 F. Supp. at 932-33.

¹⁷ *Id.* at 932; *CFTC v. Clothier*, 788 F. Supp. 490, 492 (D. Kansas 1992).

¹⁸ 17 C.F.R. § 4.13(b)(1) (2000).

¹⁹ 17 C.F.R. § 4.13(a)(2) (2000).

however, while soliciting, accepting and receiving pool funds from investors, did not provide the investors at any time with the required disclosure statement set forth in Section 4.13(b)(1), in writing or otherwise. Moreover, Gilkerson did not file any such disclosure statement with the Commission or NFA.

Accordingly, Gilkerson violated Section 4.13(b)(1) of the Commission's Regulations.

4. Lack of Required Disclaimer Language Violated Section 4.41(b) of the Commission's Regulations

Gilkerson also violated Section 4.41(b) of the Commission's Regulations,²⁰ requiring that any presentation of hypothetical performance results of a CPO must prominently display a cautionary statement alerting participants or potential participants to the limitations inherent in hypothetical performance results.²¹ The cautionary statement set forth in Section 4.41(b) itself or the similar cautionary statement drafted by the NFA must be used to satisfy this requirement.

Gilkerson failed to include the required disclaimer language in the copies of the BFW sent to investors and potential investors, and other presentations of his trading system placed on websites. Accordingly, Gilkerson violated Section 4.41(b) of the Commission's Regulations.²²

IV.

OFFER OF SETTLEMENT

Gilkerson submitted an Offer in which he neither admits nor denies the findings in the Order. Subject to the foregoing, Gilkerson: acknowledges service of this Order and admits the jurisdiction of the Commission with respect to the matters set forth in this Order; waives: (1) the service and filing of a complaint and notice of hearing; (2) a hearing and all post-hearing procedures; (3) judicial review by any court; (4) any objection to the staff's participation in the Commission's consideration of the Offers; (5) all claims which they may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994), as amended by Pub. L. No. 104-121, §§ 231-32, 110 Stat. 862-63, and Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.*, relating to or arising from this action; and (6) any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief.

The Respondent stipulates that the record basis on which this Order is entered consists of the Order and the findings to which he has consented in the Offer, which are incorporated in this Order. The Respondent consents to the Commission's issuance of this Order, which makes

²⁰ 17 C.F.R. § 4.41(b) (2000).

²¹ Section 4.41(c) provides that the cautionary statement requirement applies to all forms of promotional material.

²² *AVCO Financial Corp.*, 28 F. Supp. 2d at 119.

findings as set forth herein, and orders that the Respondent (1) cease and desist from violating the provisions of the Act and the Regulations he is found to have violated; and (2) comply with his undertakings as set forth in the Offer and incorporated in this Order; and orders that Gilkerson (1) pay restitution in an amount of up to Sixteen Thousand Three Hundred and Fifty dollars (\$16,350), pursuant to a ten-year payment plan (“payment plan”); and (2) pay a contingent civil monetary penalty in an amount of up to Sixteen Thousand Three Hundred and Fifty dollars (\$16,350), also pursuant to the payment plan.

V.

FINDINGS OF VIOLATIONS

Solely on the basis of the consent evidenced by the Offer, and prior to any adjudication on the merits, the Commission finds that Gilkerson violated Sections 4c(b) and 4o(1) of the Act and Sections 4.13(b)(1), 4.41(b) and 33.10 of the Regulations.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

- A. Gilkerson shall cease and desist from violating Sections 4c(b) and 4o(1) of the Act and Sections 4.13(b)(1), 4.41(b) and 33.10 of the Regulations;
- B. Gilkerson shall pay restitution in an amount of up to Sixteen Thousand Three Hundred and Fifty dollars (\$16,350), pursuant to a payment plan, as provided below, to those persons identified as investors and listed in Attachment A to the Offer. Those persons are investors in BFW Enterprises. Gilkerson shall make an annual payment to an account designated by a monitor designated by the Commission (the “Monitor”) on or before July 31 of each calendar year (the “Annual Restitution Payment”), starting in calendar year 2001 and continuing for ten years²³ (or until full restitution is made, if that happens first). Such funds shall be distributed annually as restitution payments to those persons in Attachment A to the Offer, in the amounts calculated by the Monitor, unless, based upon the amount of funds available for distribution, the Monitor decides to defer distribution. If, at the end of the ten year payment period, any amount of the Annual Restitution Payments has not been distributed, that amount shall instead be paid and applied as a payment to the civil monetary penalty obligation, as provided in paragraph C below;

²³ The ten year restitution period shall run from January 1, 2000 through December 31, 2009. Restitution payments for a calendar year shall take place by July 31 of the following year. Therefore, the final restitution payment for the year 2009 will occur on or before July 31, 2010.

- C. Gilkerson shall pay a contingent civil monetary penalty in an amount of up to Sixteen Thousand Three Hundred and Fifty dollars (\$16,350) pursuant to the payment plan, commencing upon Gilkerson's fulfillment or other discharge of his restitution obligation. Gilkerson shall make an annual civil monetary penalty payment ("Annual CMP Payment") following Gilkerson's satisfaction of other discharge of his restitution obligation, and continuing until December 31, 2009²⁴ (or until the civil monetary penalty is paid in full, if that happens first). Gilkerson shall make each such Annual CMP payment by electronic funds transfer, or by U.S. postal money order, certified check, bank cashier's check, or bank money order, made payable to the Commodity Futures Trading Commission, and sent to Dennese Posey, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581, under cover of a letter that identifies Gilkerson and the name and docket number of the proceeding; Gilkerson shall simultaneously transmit a copy of the cover letter and the form of payment to the Monitor and to the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21st Street, NW, Washington, D.C. 20581;
- D. The amount of Gilkerson's Annual Payment shall consist of a portion of (1) the adjusted gross income (as defined by the Internal Revenue Code) earned or received by Gilkerson during the course of the preceding calendar year, plus (2) all other net cash receipts, net cash entitlements or net proceeds of non-cash assets (collectively "Net Cash Receipts") received by Gilkerson during the course of the preceding calendar year.

The Annual Payment will be determined as follows:

Where Adjusted Gross Income Plus Net Cash Receipts Total:	Percent of Total to be Paid by Gilkerson is:
Up to \$25, 000	0%
\$25,001 - \$50,000	20% of the amount above \$25,000
\$50,001 - \$100,000	\$5,000 (this represents 20% of the amount between \$25,000 and \$50,000) plus 30% of the amount above \$50,000
Above \$100,000	\$20,000 (this represents 20% of the amount between \$25,000 and \$50,000, plus 30% of the amount between \$50,000 and \$100,000) plus 40% of the amount above \$100,000;

²⁴ Should the amount due under the payment plan for any Annual Restitution Payment be greater than the balance due on Gilkerson's Restitution Obligation, the amount due under the payment plan not paid as restitution will constitute Gilkerson's first Annual CMP Payment and be paid as set forth in paragraph C.

- E. In the event that Gilkerson does not make payments as directed in paragraphs B through D, *supra*, the Commission may bring a proceeding or an action to enforce compliance with this Order and at its option may seek payment of the unpaid Annual Restitution or Annual CMP Payments, or immediate payment of the entire amount of restitution and civil monetary penalty required by paragraphs B through D, *supra*. The only issue that Gilkerson may raise in defense of such enforcement action is whether he has made the Annual Restitution or Annual CMP Payments as directed by the Monitor. Any action or proceeding brought by the Commission compelling payment of the Annual Restitution or Annual CMP Payments, due and owing pursuant to paragraphs B through D, *supra*, or any portion thereof, or any acceptance by the Commission of partial payment of the Annual Restitution or Annual CMP Payments made by Gilkerson, shall not be deemed a waiver of his obligation to make further payments pursuant to the payment plans, or a waiver of the Commission's right to seek to compel payment of the remaining balance of the restitution or civil monetary penalty assessed against Gilkerson;
- F. The Commission notes that an order requiring immediate payment of a civil monetary penalty and restitution against Gilkerson would be appropriate in this case, but does not impose it based upon Gilkerson's financial condition. Gilkerson acknowledges that the Commission's acceptance of the Offer is conditioned upon the accuracy and completeness of the sworn Financial Statements and other evidence he has provided regarding their financial condition. Gilkerson consents that if at any time following the entry of this Order, the Division obtains information indicating that his representations concerning his financial condition were fraudulent, misleading, inaccurate, or incomplete in any material respect at the time they were made, the Division may, at any time following the entry of the Order, petition the Commission to: (1) reopen this matter to consider whether Gilkerson provided accurate and complete financial information at the time such representations were made; (2) require immediate payment of the full amount of the restitution award and immediate payment of the full amount of the civil monetary penalty, required by paragraphs B through D, *supra*; and (3) seek any additional remedies that the Commission would be authorized to impose in this proceeding if Gilkerson's Offer had not been accepted. No other issues shall be considered in connection with this petition other than whether the financial information provided by the Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect, and whether any additional remedies should be imposed. Gilkerson may not, by way of defense to any such petition, contest the validity of, or the findings in, the Order, assert that payment of a civil monetary penalty or restitution should not be ordered, or contest the amount of the civil monetary penalty or restitution to be paid. If in such proceeding, the Division petitions for, and the Commission orders, payment of less than the full amount of the restitution award or of the full amount of the civil monetary penalty, such petition shall not be deemed a waiver of Gilkerson's obligation to pay the remaining balance of the restitution or civil monetary penalty assessed against Gilkerson, pursuant to the payment plans;

- G. Gilkerson shall comply with his undertakings, as set forth in the Offer:
1. Gilkerson shall never apply for registration or seek exemption from registration with the Commission in any capacity, except as provided for in Section 4.14(a)(9) of the Regulations, 17 C.F.R. § 4.14(a)(9) (2001), and shall never engage in any activity requiring such registration or exemption from registration, except as provided for in Section 4.14(a)(9) of the Regulations, or act as a principal, agent, officer or employee of any person registered, exempted from registration or required to be registered with the Commission, except as provided for in Section 4.14(a)(9) of the Regulations; this includes, but is not limited to soliciting, accepting or receiving any funds, revenue, or other property from any person, giving advice for compensation, or soliciting prospective customers, related to the purchase or sale of any commodity futures or options on commodity futures contracts;
 2. Gilkerson, nor any of his agents or employees under his authority or control, shall take any action or make any public statements denying, directly or indirectly, any finding in this Order, or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Gilkerson's (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party; and
 3. Gilkerson shall provide the Monitor with complete copies of his signed federal income tax return (for the previous calendar year), including all schedules and attachments thereto (e.g., IRS Forms W-2) and Forms 1099, as well as any filings he is required to submit to any state tax or revenue authority, on or before June 30 of each calendar year, or as soon thereafter as the same are filed, beginning in 2002 and ending in 2011. If Gilkerson moves his residence or business at any time, he shall provide written notice of his new address to the Monitor and the Commission within ten (10) days thereof.

The provisions of this Order shall be effective on this date.

BY THE COMMISSION.

Dated: June 29, 2001

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