

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

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In the Matter of  
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SCOTT C. ANIXTER  
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OFFICE OF PROCEEDINGS  
CFTC Docket No. SD-04-038K

OPINION AND ORDER

Respondent Scott C. Anixter (“Anixter”) and the Division of Enforcement (“Division”) filed cross appeals from an initial decision by the Administrative Law Judge (“ALJ”) suspending Anixter’s floor broker registration pursuant to Section 8a(11) of the Commodity Exchange Act (“CEA or “Act”). Section 8a(11) authorizes the Commission to suspend or modify the registration of a person who has been charged but not convicted of certain felonies pending resolution of the charges. Commission Regulation 3.56 implements Section 8a(11).

In his appeal, Anixter argues that the indictment charging him with numerous felonies is insufficient to warrant his suspension. In addition, he contends that the ALJ erred by applying the wrong evidentiary standard in imposing the suspension. He argues that the ALJ failed to adhere to Section 8a(11)(B), which requires evidence that the continued registration of a person charged with a crime “does, or is likely to” either “pose a threat to the public interest or threaten to impair public confidence in any market regulated by the Commission.” Instead, Anixter argues, the ALJ improperly resorted to Section 8a(11)(A), which authorizes adverse registration action under a determination that continued registration “may” either pose a threat to the public interest or threaten to impair confidence in Commission-regulated markets. The higher standard under Section 8a(11)(B) is more favorable to respondents because the Division’s burden of proof is heavier than under 8a(11)(A).

The Division's cross-appeal is limited to the issue of whether the ALJ erred in limiting Anixter's suspension to six months. Section 8a(11) provides that any suspension or modification issued under its terms shall remain in effect until the criminal charges are resolved. See Section 8a(11)(C). The Initial Decision applied Section 6(c)(2) of the Act, which fixes the maximum length of a suspension at six months.

Based on the following, we affirm in part and modify in part the ALJ's decision.

### BACKGROUND

Anixter has been registered with the Commission as a floor broker since January 1, 1982, and currently trades on the floor of the Chicago Board of Trade ("CBOT"). On June 30, 2004, the Commission issued a Notice of Intent to Suspend or Modify Anixter's registration ("Notice"), alleging that in October 2003, the U.S. Attorney for the Northern District of Illinois had filed a superseding indictment charging him with 20 felonies, including securities fraud, bank fraud, and making false statements to financial institutions and the Securities and Exchange Commission ("SEC"). See *United States v. Welchko and Anixter*, 03 CR 268 (N.D. Ill) (filed Oct. 23, 2003). The indictment charges that from early 1998 through September 2000, Anixter, as a principal of Anicom, an Illinois-based distributor of wire and cable products, together with co-defendant Welchko and others, inflated the price of Anicom's common stock. Anixter and others allegedly overstated sales, revenue and net income by creating fictitious sales and fraudulent billings, at the same time underreporting Anicom's expenses and liabilities, thus misleading shareholders, potential investors, bank lenders and the SEC. The indictment further alleges that Anixter and others attempted to sell Anicom to third parties during this period.<sup>1</sup>

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<sup>1</sup> Anicom shares were publicly traded on the NASDAQ until trading was halted on July 18, 2000, when Anicom announced that it was investigating possible accounting irregularities and that investors should not rely on its 1998 and 1999 financial statements. Anicom reported more than 25 million shares of common stock outstanding in May 2000 and the stock closed at \$4 a share on July 17, 2000, the day before trading ceased. Anicom stock was delisted

On August 6, 2004, Anixter filed a motion to dismiss the Commission's Notice as constitutionally deficient, contending that the evidentiary standard set forth in Section 8a(11)(B) is at variance with implementing Regulation 3.56, which contains the "may" pose a threat or threaten to impair public confidence standard. The ALJ, adopting the Division's memorandum opposing Anixter's motion, expressly held that this variance between the rule and the statute had been resolved by the Commission in *In re Laken*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,458 (CFTC Feb. 8, 2001).<sup>2</sup>

The parties waived the right to call witnesses and presented their arguments in writing. After weighing their submissions, the ALJ issued an initial decision. *In re Anixter*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,123 (Initial Decision Aug. 23, 2005) ("I.D."). He made the threshold findings required under 8a(11) that the charges and specific conduct alleged in the federal indictment (1) are the type of crimes that reflect on Anixter's honesty and ability to act as a fiduciary, and (2) are punishable by imprisonment for a term exceeding one year. I.D., ¶ 30,123 at 57,465, 57,466. He then turned to the question of whether Anixter's continued registration posed a threat to the public interest or public confidence, considering for this purpose the indictment; plea agreements entered into by five other individuals; and Anixter's own 1990 guilty plea to four misdemeanor violations of the Act. *Id.* at 57,466. He stated that "[t]he indictment alleges a host of crimes that took place on securities and banking markets" and

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from the NASDAQ on November 16, 2000. Its share price fell to 75 cents when it resumed over-the-counter trading the following day, reflecting a market loss of more than \$80 million. (Division's Reply to Anixter's Answer to Complaint at 5 n.4.)

<sup>2</sup> In *Laken*, the Commission acknowledged the distinction between 8a(11)(A) and 8a(11)(B), and held that under the plain meaning rule of statutory construction, Section 8a(11)(B) governed the evidentiary burden in cases brought under Section 8a(11). *Laken*, ¶ 28,458 at 51,493. Based on that precedent, the ALJ concluded that the "the Division recognizes that, to prevail, it must establish that the Registrant does, or is likely to, pose a threat" to the public interest or public confidence in the futures markets. See ALJ's Ruling on Motion to Dismiss (Aug. 31, 2004).

that “Anixter's alleged role was as a co-schemer who made fraudulent representations to shareholders, lenders, and the SEC.” *Id.*

Based on the foregoing, the ALJ concluded:

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

*Id.* Accordingly, he suspended Anixter's registration.<sup>3</sup> Both parties filed timely notices of appeal.

## DISCUSSION

Anixter raises legal challenges to the ALJ's decision based on the inconsistent evidentiary standards between, on the one hand, Section 8a(11)(A) and Regulation 3.56 (“may pose a threat”), and Section 8a(11)(B) on the other (“does, or is likely to, pose a threat”). Despite the ALJ's ruling on his motion to dismiss, Anixter persists in arguing that the inconsistency violates his due process because it failed to give him sufficient notice of how his conduct would be judged. Anixter App. Br. at 4. He also argues that the nature and amount of evidence in the record rose only to the level of “may pose a threat,” thereby precluding the Commission from holding that the evidence meets the higher standard. Supporting this argument, Anixter contends that since there is no nexus between the felonies charged and his activities as a floor broker in the futures market, his conduct cannot as a matter of law rise to the “does, or is likely to, pose a threat” standard required by Section 8a(11)(B). *Id.*, at 5-6.

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<sup>3</sup>The suspension has been stayed pending the parties' appeals. *See* Commission Rule 3.56(e)(2) (providing that the ALJ's order “shall be effective as a final order of the Commission . . . unless a timely application for review is filed”). On September 15, 2005, the Division filed its motion seeking a waiver of the stay, arguing that the legislative intent underlying Section 8a(11) contemplates the prompt removal of registrants charged with felonies. In light of our decision today, the Division's motion is denied as moot.

The Division filed an answering brief asserting that Anixter's conduct easily meets the higher standard, and contending that his arguments otherwise lack merit.

The Commission has said that the distinction between the two evidentiary standards is "material." *Laken*, ¶ 28,458 at 51,493. It observed that the "may pose a threat" standard establishes "a relatively low hurdle," *id.*, citing *FDIC v. Mallen*, 486 U.S. 230, 245 (1988).<sup>4</sup> In contrast, the "does, or is likely to, pose a threat" standard in Section 8a (11) (B) "requires more careful scrutiny of the particular allegations in the indictment." *Id.*

That said, the variance has no relevance to this case, given the express holding in *Laken* that the "does, or is likely to" standard is the one that applies in actions brought under 8a(11):

Given the fundamental nature of the conflict, we must invoke the rule of interpretation that gives precedence to the plain meaning of the statutory language and conclude that the Division's proof must be evaluated against the "does, or is likely to, pose a threat" standard.

*Id.* Any uncertainty that may have arisen in this case was resolved when the ALJ ruled on Anixter's motion to dismiss, holding unequivocally that the "does, or is likely to, pose a threat" standard is the one that the Division had to meet. Thus, Anixter's argument that he was not sufficiently forewarned of the applicable evidentiary standard has absolutely no merit. Moreover, the ALJ used the specific terms, "does, or is likely to, pose a threat," in analyzing the factual record. I.D. at 57,466.

There is no question that the evidence in the record facially meets the Section 8a(11)(B) standard.<sup>5</sup> Anixter's indictment, standing alone, is more than sufficient for this purpose, and it is buttressed by his prior misdemeanor criminal history and the related regulatory and exchange

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<sup>4</sup> In *Mallen*, the Supreme Court affirmed a temporary suspension against a bank official based solely on the existence of an indictment charging him with fraud, recognizing that "the return of [an] indictment itself is an objective fact that will in most cases raise serious public concern" about the fitness of the affected individual to do his duties. 486 U.S. at 244-45.

<sup>5</sup> In reviewing the record below, we need not, and do not, rely on the plea agreements entered into by Anixter's associates in this case as any part of the basis for our decision today.

disciplinary actions taken against him. These matters involved trading violations in the CBOT soybean pit, suggesting that Anixter has a long-standing propensity for misconduct that undermines public trust in the market's integrity.<sup>6</sup>

Anixter's argument that his conduct cannot rise to the "does, or is likely to, pose a threat" standard because no nexus exists between the felonies charged and his activities as a floor broker is equally unfounded. His indictment alleges a massive betrayal of the fiduciary duties owed to a company and public shareholders by a corporate officer. Charges of fraud and other dishonesty, even if arising from markets that are not directly regulated by the Commission, clearly impact both a registrant's general fitness to participate in other financial markets and public perception of those other markets. Furthermore, the securities markets are so closely related to the futures markets that it is disingenuous for Anixter to assert that his indictment is peripheral to our concerns. As the ALJ noted in discussing whether Anixter's alleged crimes reflected on his ability to act as a fiduciary:

Although the Commodity Futures Trading Commission is not charged with regulating either the securities exchanges or banking markets, it may, in determining whether a registrant poses a threat to the public interest, or to the public's confidence in the commodity markets, take into account crimes and alleged crimes that occurred on these markets.

I.D. at 57,466; *accord*, *Laken*, 28,458 at 51,495; *see generally* S. Rep. No. 102-22 (1991).

Alleged crimes that lack a direct relationship to Commission-regulated markets may warrant

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<sup>6</sup> The record below establishes that on several occasions in 1987, Anixter participated in prearranged "money pass" trades in violation of the Act. This conduct led to criminal charges, a Commission enforcement action, and an exchange disciplinary action. In September 1990, Anixter pled guilty in federal court to aiding and abetting four misdemeanor violations of former Section 4c(a)(A) of the Act. He was subsequently sentenced to two years probation and fined \$40,000. *See* Div. Exhs. 2, 3. The Commission's action was resolved when Anixter entered into a Consent Order of Settlement, pursuant to which his floor broker registration was suspended for six months, and a six-month trading ban was imposed on him. *In re Anixter*, Docket No. 91-2, 1990 WL 294202 (C.F.T.C.) (Dec. 19, 1990). Lastly, in November 1991, Anixter consented to sanctioning by the CBOT for violating six exchange rules and regulations. His membership privileges were suspended for ten days and he was fined \$3,500. *See* Div. Exh. 4.

heightened scrutiny under 8a(11)(B). In this case, Anixter's prominent position in the company, his central role in the alleged violations, and the breadth of the charges against him, can withstand the most searching scrutiny of whether the Division has met its burden.

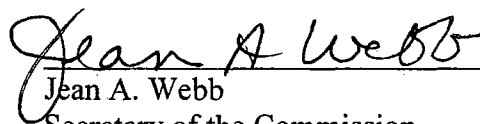
We reject Anixter's suggestions for restrictions on his registration falling short of suspension, as did the ALJ. His argument that lesser restrictions are appropriate because he does not accept orders directly from public futures customers is wholly unpersuasive. We rejected a similar argument in *Laken*. ¶ 28,458 at 51,496. We also noted therein that access to the trading floor provides numerous opportunities for "abusive practices that affect public customers." *Id.* at 51,493.

The ALJ's application of Section 6(c)(2) of the Act in determining the length of Anixter's suspension is erroneous. *See* I.D. at 57,467 (stating that "Section 6(c)(2) fixes the maximum length of the suspension the Commission may impose upon a registered person at six months"). While that is true as a general rule, Section 8a(11) carves out an exception by providing that "[a]ny notice or suspension or modification issued under this paragraph shall remain in effect *until such information, indictment, or complaint is disposed of* or until terminated by the Commission." *See* Section 8a(11)(C) (emphasis added). Accordingly, we modify the ALJ's suspension order and hold that Anixter shall be suspended until the criminal charges against him

are resolved. We have considered all other arguments raised by the parties and find that they lack merit or are not necessary to our decision; therefore, we decline to reach them.

IT IS SO ORDERED.<sup>7</sup>

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

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

Dated: December 23, 2005

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<sup>7</sup> The suspension shall become effective 30 days after the date this order is served. A motion to stay any portion of this order pending reconsideration by the Commission or judicial review shall be filed and served within 15 days of the date this order is served. See Commission Regulation 3.56(e)(2), 17 C.F.R. § 3.56(e)(2), incorporating Regulation 10.106, 17 C.F.R. § 10.106.