

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of

SHAHROKH NIKKHAH

CFTC Docket No. 95-13

OPINION AND ORDER

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The Division of Enforcement (“Division”) appeals from an Administrative Law Judge’s (“ALJ”) Initial Decision on Remand finding that the record fails to show that respondent Shahrokh Nikkhah (“Nikkhah”) has a positive net worth, and that under former Section 6(d) of the Commodity Exchange Act (“Act”) a civil money penalty may not be imposed. Nikkhah opposes the appeal and contends that the Division is prosecuting him vindictively. For the reasons that follow we vacate the initial decision, and give the parties notice that we propose to afford the Division an opportunity to seek additional information regarding Nikkhah’s net worth.

BACKGROUND

I.

This case was initiated in June 1995, when the Commission issued a complaint charging Nikkhah with fraudulently misallocating trades in his customers’ accounts. The ALJ issued an Initial Decision in 1998, finding Nikkhah liable for most of the violations charged. He imposed a ten-year trading prohibition and a cease and desist order, but declined to impose a civil money penalty, finding that “Nikkhah has a negative net worth.” *In re Nikkhah*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,460 at 47,203 (ALJ Nov. 5, 1998) (“*ALJ Nikkhah I*”).

Both parties appealed and, in May 2000, the Commission generally affirmed the ALJ's liability findings and choice of sanctions. Because there was no record on respondent's net worth, however, the Commission gave Nikkhah 30 days to "show why it would be inappropriate to impose a civil money penalty of \$200,000" in light of his net worth. *In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 at 49,879 (CFTC May 12, 2000) ("*Nikkhah I*").¹

In a second decision four months later, the Commission found Nikkhah's showing inadequate to allow a "reliable determination" of his net worth, and remanded the case to the ALJ for further development of the record. *In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,275 at 50,674 (CFTC Sept. 26, 2000) ("*Nikkhah II*"). Notably, it stated:

[G]iven our affirmance of the ALJ's negative assessment of the credibility of Nikkhah's testimony in this proceeding, Nikkhah's conclusory affidavit addressing the reliability of proffered information related to his current assets and liabilities is of little value. The documents that Nikkhah submitted in support of his affidavit are not sufficiently self-authenticating to merit substantial weight without a process to explore the reliability of the information they disclose.

Nikkhah II, ¶ 28,275 at 50,678. *Nikkhah II* held that the Division has the burden of production, as well as the burden of proof, on net worth issues. The Commission stated that, consistent with its burden of production, the Division has a right to discover relevant information,² and warned that Nikkhah's failure to cooperate could lead to negative inferences being drawn against him. *Id.* It also specified a procedure to protect a respondent's privacy.

¹ Prior to the October 28, 1992 adoption of the Futures Trading Practices Act of 1992 ("FTPA"), Pub. L. No. 102-546, § 209, 106 Stat. 3606, former Section 6(d) of the Act required that we consider the appropriateness of the penalty to either respondent's ability to stay in business or net worth when assessing a civil money penalty. In adopting Section 209 of the FTPA, Congress removed these requirements from the Act. Because the misconduct at issue in this case occurred prior to FTPA's enactment, the net worth provisions of Section 6(d) apply.

² The Commission shifted the burden of production as a result of *Slusser v. CFTC*, 210 F.3d 783, 788 (7th Cir. 2000). *Slusser*, decided three weeks before the Commission issued *Nikkhah I*, held that the Commission has the burden of production as well as the burden of proof of net worth.

On remand, the Division sought to discover Nikkhah's financial condition, which Nikkhah resisted. At Nikkhah's request, the ALJ quashed a subpoena and terminated discovery, thus preventing the Division from obtaining all of the information that it sought. A two-day hearing was held in May 2001, at which both parties appeared and presented evidence.

In a decision following the hearing, the ALJ again declined to impose a civil monetary penalty. He held that while the Division's evidence showed that Nikkhah had enjoyed intervals of high income in the decade since his misconduct, the Division "failed to show by a preponderance of the evidence that Nikkhah had a positive net worth at the time of [the net worth] hearing in May 2001." *In re Nikkhah*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,647 at 52,525 (ALJ Sept. 18, 2001) ("*ALJ Nikkhah II*"). The Division appealed and asked the Commission to draw adverse inferences with respect to Nikkhah's net worth based upon his failure to respond to discovery.

Upon considering the Division's appeal, the Commission vacated the ALJ's decision on remand "[b]ecause the Division was not given a fair opportunity to develop the record." *In re Nikkhah*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,462 at 55,001 (CFTC Apr. 11, 2003) ("*Nikkhah III*"). The Commission concluded that the ALJ improperly limited the Division's ability to carry its burdens of production and proof. The Commission specifically criticized the ALJ for setting an unreasonably short time frame for discovery, refusing to compel Nikkhah to respond to discovery, terminating discovery prematurely, and displaying undue impatience and making "abrupt rulings" at the hearing. *Nikkhah III*, ¶ 29,462 at 54,998-54,999, 55,001.

The Commission nevertheless denied the Division's request that it draw adverse inferences to find that Nikkhah had a positive net worth. It held that the ALJ's termination of

discovery ended Nikkhah's obligation to respond to the Division's discovery requests, and precluded a finding that Nikkhah failed to comply. The Commission stated that adverse inferences are appropriate only when a respondent fails to comply with outstanding discovery obligations or fails to appear and testify. Separately, the Commission determined that the Division's methodology for calculating net worth, using the limited evidence it was able to obtain, was unreliable.³ In remanding the case, the Commission provided guidance on acceptable methods of proof and offered to "consider interlocutory challenges to the ALJ's discovery rulings" in "appropriate circumstances," to avoid "further waste of resources." *Nikkhah III*, ¶ 29,462 at 55,001 n.25.

II.

On remand, the ALJ issued an order on June 6, 2003 that instructed the parties to complete discovery and submit prehearing memoranda by July 25, 2003, and notified them that a supplemental hearing would be held on August 25, 2003. June 6, 2003 Notice and Order. The Division promptly filed an unopposed motion requesting an additional 91 days to conduct discovery (through September 30, 2003), and proposing that the prehearing memoranda deadline be moved to October 24, and the hearing set for November 17, 2003. The Division also asked the ALJ to issue a subpoena to Nikkhah to produce numerous documents.⁴ The ALJ granted the

³ The Commission criticized the Division because, among other things, it did not ensure that its methodology for proving Nikkhah's expenditures during the period at issue was comparable to its means of proving income; it ignored certain expenditures, and it used extrapolated figures without demonstrating that its basis for its extrapolation was reliable. *Nikkhah III*, ¶ 29,462 at 55,002 and n.26. Further, the Commission held that assets counted toward net worth must be current at the time of the net worth determination. *Id.* at 55,003.

⁴ The Division asked for the United States and United Kingdom personal, business, and trust tax returns and attendant schedules most recently filed by Nikkhah, his wife, and his children. It requested documentation of:

- *real estate owned by Nikkhah and his family, or held by others for his benefit;
- *his and his wife's current employment reflecting all forms of compensation either current or promised in the future such as stock options, equity positions, and deferred compensation;

motion to extend time on the terms sought by the Division and issued a subpoena ordering Nikkhah to produce the documents in two weeks. June 24, 2003 Order.

On September 17, 2003, the Division filed a second unopposed motion to enlarge the time for an additional 120 days. It represented that as of yet, Nikkhah had produced no responsive documents. According to the Division, Nikkhah had promised to begin doing so shortly and expected to complete production within 30 days. The ALJ denied the motion in an order that emphasized how long the proceeding had been pending. The order did not address Nikkhah's failure to comply with the subpoena. The ALJ commented that "[e]vidence adduced" prior to the 1998 Initial Decision on the merits "proved to the satisfaction of the court that Nikkhah had a negative net worth." October 6, 2003 Order.

The Division then filed motions with the ALJ to certify his October 6 order to the Commission for interlocutory review and to stay the case pending such review. The Division

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- *all financial obligations, including documents evidencing the terms of the obligation, documents in connection with entering into the obligations, requests or demands for payments, and payments on the obligation, and correspondence relating to the obligation;
 - *the present cash value of all life insurance policies and annuities in which Nikkhah, his wife, or children have an interest;
 - *all outstanding loans or lines of credit in Nikkhah's, his wife's or his children's name or for their beneficial interest or to which they are a signatory;
 - *all outstanding tax liens levied against Nikkhah, his wife, or his children by any United States or United Kingdom authority;
 - *any current interest in a trust held by Nikkhah, his wife and children, or for their benefit; and
 - *all financial obligations, demands for payments, payments made and correspondence regarding the obligation.

For the period from January 1, 2002 to present, Nikkhah was asked to supply:

- *monthly account statements for all financial accounts held by Nikkhah and his family or held by others for his benefit;
- *documents reflecting balances, deposits, transfers and withdrawals for all types of retirement or pension accounts;
- *monthly account statements for all credit cards of Nikkhah, his wife, and his children;
- *documents relating to all things of value received from any business enterprise in which Nikkhah, his wife or children is an owner, principal, director, officer or manager; and documents relating to all investments or contributions of capital by Nikkhah, his wife, and his children to any business enterprise.

The Division also demanded documents reflecting all sources of income received and all debts or liabilities currently owed by Nikkhah, his wife or children not included in the previous requests.

argued, *inter alia*, that the ALJ's order "removes any incentive Respondent may have to comply with the subpoena," and thus "denied the Division the ability" to develop a record on Nikkhah's net worth. Motion for Certification at 5 n.3. The ALJ denied the motions without addressing the Division's arguments, stating:

[M]ore than 13 years have elapsed since Respondent committed the bad acts [leading to this case]. The record for time spent in resolving a regulatory administrative proceeding is, to the best of the court's recollection, the 15 years it took to get the liver out of Carter's Little Liver Pills. That record should be allowed to stand.

October 15, 2003 Order.

The Division then sought a Commission stay of the proceedings before the ALJ while it sought interlocutory review from the Commission. October 15, 2003 Motion. The Division withdrew this request for relief the following day, explaining that it had decided instead to file motions with the ALJ seeking discovery sanctions against Nikkhah—to impose adverse inferences and to preclude Nikkhah from introducing evidence.

Both parties filed their pre-hearing memoranda with the ALJ on October 24, 2003. The Division included a motion asking the ALJ to draw adverse inferences against Nikkhah, based on his failure to comply with discovery. The Division also filed a motion *in limine* asking the ALJ not to accept any documents voluntarily submitted by Nikkhah relating to his finances because Nikkhah had refused to cooperate with the Division. October 24, 2003 Division filings. With his pre-hearing memorandum, Nikkhah submitted approximately 30 pages of documents allegedly responsive to the subpoena. These documents purportedly documented Nikkhah's liabilities, chiefly a debt to his father who had paid off a bank loan on his behalf.

The ALJ denied both of the Division's motions, stating that adverse inferences would "inappropriately contradict the Division's obligation" to produce evidence of Nikkhah's net worth, and that preclusion of Nikkhah's evidence would "negate the purpose of the hearing."

Nov. 14, 2003 Order. As a result, the Division filed motions with the ALJ asking him to certify his denial to the Commission for interlocutory review, and to stay the upcoming hearing. The ALJ did not rule on the motions, and the hearing went forward on November 17.

The hearing lasted one-half hour. Attorneys for both sides appeared and tendered arguments. Neither side called Nikkhah as a witness. The Division renewed its motions for adverse inferences and preclusion of evidence. It argued that the ALJ's refusal to allow more time for discovery or to apply adverse inferences denied it a fair opportunity to develop the record. It called Nikkhah's production of documents subpoenaed by the Division tardy and incomplete and characterized his noncompliance with discovery as "blatant." Tr. at 12-13. The ALJ denied the motions. At the Division's request, the ALJ accepted as evidence the record of the prior net worth hearing.

Nikkhah's counsel claimed that he provided "some documentation responsive to the subpoena" and had offered the Division an opportunity to speak by telephone to four individuals who would have agreed that Nikkhah is impoverished and rendered the hearing unnecessary. Tr. at 14. Over the Division's objection, the ALJ admitted Nikkhah's proffered evidence: a document filed in a London court that counsel "believed" to be a lawsuit by Nikkhah's former landlord seeking approximately \$30,000 in back rent; and a letter to a Michael Cartillier ("Cartillier") in Switzerland signed by Nikkhah six days before the hearing promising to make payments on a debt that counsel "underst[oo]d" to be millions of dollars. Tr. at 36 and Exhibit 1. The ALJ also agreed to accept the 30 pages of documents that Nikkhah submitted to the Division on October 24, 2001. Tr. at 37.

The ALJ criticized the Division's ongoing attempt to obtain imposition of a civil money penalty, opining that Nikkhah was not being treated in the same manner as comparable

offenders.⁵ Tr. at 27-28. He challenged the Division to present direct “proof that he has a bank account, that he has real estate holdings, that he has a sloop or something?” Tr. at 21. He complained that Nikkhah’s case has been “strung ... out” and that he expected to have it on his docket until he retired or died. Tr. at 16, 18, 24.

III.

Three days later, the ALJ issued a one-page Third Initial Decision on Remand. *In re Nikkhah*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,637 (CFTC Nov. 20, 2003) (“*ALJ Nikkhah III*”). The ALJ noted Nikkhah’s “alleged failure to comply with discovery obligations,” and denied the Division’s motion to draw adverse inferences. He did not address the fact that the Division’s extensive discovery requests were met with a mere handful of responsive documents after the discovery period ended; these documents, such are they are, were not mentioned at all. *ALJ Nikkhah III*, ¶ 29,637 at 55,754. Instead, the ALJ relied on Nikkhah’s evidence introduced at the hearing, purporting to show that Nikkhah was delinquent in paying rent and substantially indebted to Cartillier. The ALJ held that these documents constituted a “reliable indicator of [Nikkhah’s] current financial circumstances.” *Id.* Accordingly, the ALJ held that the record did not show that Nikkhah has a positive net worth, and refused to impose a civil money penalty.

⁵ The ALJ compared Nikkhah to worse offenders and referred to a case in which the Commission reduced from \$550,000 to \$125,000 a civil money penalty that he had imposed and then did not try to collect. Tr. at 27.

IV.

In this appeal, the Division accuses the ALJ of “ignoring a direct Commission instruction” to impose adverse inferences against Nikkhah for noncompliance with discovery requests, and failing to allow sufficient time for discovery and to review information carefully. Div. Br. at 1-2. The Division argues that both Commission and federal case law authorize sanctions, including adverse inferences and preclusion of evidence, against non-cooperative parties in discovery. It asks the Commission to draw adverse inferences from Nikkhah’s “recalcitrant conduct,” strike his “so-called evidence” from the record, and find that Nikkhah’s net worth supports a \$200,000 civil money penalty. Div. Br. at 14, 15. Recognizing that adverse inferences, standing alone, may not establish net worth, the Division urges the Commission to use the inferences to corroborate facts that it asserts were established at the prior hearing. Alternatively, the Division asks the Commission to find that Nikkhah waived his right to have the Commission consider his net worth.

In opposing the appeal, Nikkhah accuses the Division of being “blatantly unfair and un-American” and “vindictiv[e],” and of trying to “destroy” him. N. Br. at 1, 2, 4. Nikkhah argues that he complied with discovery to the best of his ability, noting his suggestion that the Division interview his creditors. Thus, he contends that neither adverse inferences nor preclusion of his evidence is appropriate.

DISCUSSION

A net worth hearing requires evidence about income, assets, and liabilities. The Division, faced with the burden of production, obtained the issuance of a comprehensive subpoena seeking information from the person most likely to have it, Nikkhah himself.⁶ The bulk of the evidence

⁶ See *Nikkhah II*, ¶ 28,275 at 50,677 (imposing the initial burden of production, as well as the burden of proof, on the Division).

regarding his assets and liabilities lay in his possession; he presumptively either had responsive documents or knew where relevant information could be found. Nikkhah submitted evidence of his alleged liabilities but withheld, wholly without explanation, any evidence of his assets and income. The Initial Decision nevertheless excused his noncompliance, while accepting and relying on Nikkhah's voluntary proffer of evidence on the day of the hearing.

Because Nikkhah failed to comply with any aspect of the discovery request that may have contained information unfavorable to his case, his evidence should not have been entered into the record. "[I]t is fundamental that a party that does not provide discovery cannot profit from its own failure. . . . [P]arties failing to comply with discovery requests may be estopped from support(ing) or oppos(ing) designated claims or defenses." *Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir. 1977) (internal citation omitted), *cited with approval* in *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763 (1980); *see also Atlantic Richfield v. U.S. Dept. of Energy* ("ARCO"), 769 F.2d 771, 794-95 (D.C. Cir. 1984) (preclusion rule "prevents the party frustrating discovery from introducing evidence in support of his position on the factual issue respecting which discovery was sought"); *accord, NLRB v. C.H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970) (preclusion "maintain[s] the integrity of the hearing process").

Besides being improperly included in the record, Nikkhah's evidence is not probative of his overall financial condition. It merely shows that he may be in arrears in his rent payments—not that he does not have the assets to pay the rent; and that he has promised to pay someone some money—not that it is a *bona fide* obligation. Consequently, there is no basis requiring the Commission to defer to the Initial Decision. We cannot, however, resolve this proceeding ourselves based on the limited record before us.

The Division asks the Commission to find, by use of adverse inferences, that Nikkhah did not produce the requested information because it would show that he had a positive net worth sufficient to pay the proposed penalty. Its request for relief does not address the ALJ's role in producing the truncated record in this case. The ALJ's acceptance of Nikkhah's facially inadequate response to the subpoena terminated Nikkhah's obligation and thus foreclosed the Division's ability to press for adverse inferences on the ground that he failed to comply.

Appeals courts have "sustained, indeed required, the drawing of adverse inferences against persons not complying with discovery orders in adjudicatory proceedings." *ARCO*, 769 F. 2d at 794. Adverse inferences may be drawn when a respondent fails to appear and testify or has breached a discovery obligation. *Nikkhah III*, ¶ 29,462 at 55,001; *Residential Funding Corporation v. DeGeorge Financial Corp.*, 306 F.3d 99, 113 (2nd Cir. 2002). *But see Gilbert v. Lind-Waldock*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,720 at 43,992 n.24 (CFTC June 17, 1996) (refusing to draw "an adverse inference in the absence of proof that the party destroyed the evidence in bad faith"). *Cf. U.S. v. Wilson*, 322 F.3d 353, 363 (5th Cir. 2003) ("[A] party's failure to call available witnesses or produce evidence that would clarify or explain disputed factual issues can give rise to a presumption that the evidence, if produced, would be unfavorable to that party."). The absent evidence must be noncumulative, relevant and specifically in the control of the party failing to produce it or within the party's peculiar knowledge; the strength of the inference varies with the particular facts of each case. *Id.*

A party seeking an adverse inference may rely on circumstantial evidence to suggest the contents of evidence that was not produced. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 110 (2nd Cir. 2001); *In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,651-52 and n.20 (CFTC Jan. 25, 1991) (affirming an ALJ's drawing of an adverse

inference based on circumstantial evidence and noting that another adverse inference could have been drawn that would have provided added support); *cf. In re Citadel Trading Co. of Chicago*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,189 (CFTC May 12, 1986) (adverse inference drawn from refusal to testify). The trier-of-fact has broad discretion as to the “precise nature and extent of the allowable inference or inferences to be drawn,” *Bouzo v. Citibank, N.A.*, 96 F.3d 51, 60 (2nd Cir. 1996), and decides whether the documents likely had such content based on the strength of the evidence presented, *Byrnie*, 243 F.3d. at 110.⁷

The imposition of discovery sanctions on Nikkhah, however, is not an appropriate remedy for abuse of discretion by the ALJ. *Nikkhah III*, ¶ 29,637 at 55,001. The ALJ flouted repeatedly the Commission’s guidance and instructions to give the Division an opportunity to make a record on Nikkhah’s net worth. The initial timeframe that the ALJ set for discovery in this latest remand proceeding was unreasonably short. Then, after granting an extension of time, the ALJ refused to grant the Division a second extension of time to receive subpoenaed documents even though Nikkhah had produced nothing to date, giving no reason other than the longevity of the case. The ALJ thus demonstrated his intent not to enforce the subpoena that he had signed.

Nikkhah produced a handful of documents covered by the subpoena nearly a month after the discovery period had ended, limited to those favorable to his case. These documents allegedly showed Nikkhah’s liabilities—chiefly a debt to his father who had paid off a bank loan on his behalf—but no documents regarding his income or assets were included. This limited, grudging response nevertheless proved sufficient to satisfy the ALJ, as shown by his passing

⁷ When the record has not been sufficiently developed, the Commission has denied requests for adverse inferences. *In re Max E. Walters*, [2000-2001 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,657 at 52,572 (CFTC Oct. 3, 2001); *McKnight v. NFA*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,252 at 54,471 (CFTC Dec. 30, 2002); *Gilbert v. Lind-Waldock*, ¶ 26,720 at 43,992.

comment respecting Nikkhah's "alleged failure to comply with discovery obligations." *ALJ Nikkhah III*, ¶ 29,637 at 55,754 (emphasis added).

Once the ALJ found Nikkhah's response sufficient, Nikkhah's discovery obligation was satisfied.⁸ See *Nikkhah III*, ¶ 29,462 at 55,001; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. National Labor Relations Board ("Union v. NLRB")*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) (when the judge plays a role, "the inference is dissipated").

The Division also argues that by refusing to produce the subpoenaed documents, Nikkhah waived his right to have the Commission consider his net worth in imposing a civil monetary penalty. The same reason that forestalls our use of adverse inferences also prohibits us from using waiver as a procedural shortcut: Nikkhah made a show of compliance and the ALJ improperly deemed himself satisfied.

Because the ALJ lacked a reliable basis for his finding that Nikkhah had a negative net worth, the November 20, 2003 Initial Decision on Remand is vacated. Given that he abused his discretion repeatedly, we see no point in remanding this case to him again. There is insufficient evidence on the record to allow us to make an independent determination of Nikkhah's net worth.⁹ Accordingly, pursuant to Commission Regulation 10.107, we give the parties notice of

⁸ The Division neither moved to compel compliance nor petitioned the Commission for enforcement of the subpoena in an appropriate United States District Court under Commission Rule 10.68(f). Upon the ALJ's denial of its motion to enlarge the time and in response to the Commission's express invitation, the Division filed a motion for interlocutory review and then withdrew it.

⁹ On the latest remand, the Division looked solely to Nikkhah for information regarding his net worth. It did not seek separate discovery from Nikkhah's family, from persons suspected of receiving assets transferred by Nikkhah, or from others who may have had relevant information. The Division may use as necessary the panoply of discovery tools, including requesting admissions, taking depositions and interrogatories, subpoenaing witnesses and retaining experts to review and analyze the information obtained through discovery and to testify. *Nikkhah II*, ¶ 28,275 at 50,678.

our intent to reopen the record for receipt of further evidence directly to us, and an opportunity to be heard thereon.¹⁰

Notice. We propose to allow an additional 120 days for discovery, during which time the Division may, as it sees fit, make further attempts to obtain information from Nikkhah, through the means available to it under the Part 10 Regulations, including, as appropriate in its view, applying for a new subpoena, seeking enforcement of its June 2003 subpoena, or other action. We propose further that during the reopened discovery period, the Division may exercise its prosecutorial discretion to apply for subpoenas for the production of additional information from third parties who reasonably may be expected to have information relevant to Nikkhah's net worth, including Nikkhah's family members, friends and business associates. Nothing shall limit the Division's discretion to make any inquiry it believes is reasonably calculated to identify relevant evidence, within or outside the United States, with or through the assistance of foreign regulators, as necessary and appropriate to meeting its burden of production.¹¹

¹⁰ Commission Regulation 10.107, 17 C.F.R. § 10.107, states:

Any time prior to issuance of the final decision the Commission may, upon its own motion or upon application in writing by any party, after notice to the parties and an opportunity for them to be heard, reopen the hearing for the reception of further evidence. The application shall show to the satisfaction of the Commission that the additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence at the hearing. The Commission may hear the additional evidence or may refer the proceeding to the Administrative Law Judge for the taking of the additional evidence.

See also Commission Regulations 10.2(n), 10.8 (anticipating the Commission's direct participation in an evidentiary proceeding); *Vercillo v. Commodity Futures Trading Com'n*, 147 F.3d 548, 553 (7th Cir. 1998) ("The Administrative Procedure Act ("APA") states that "[o]n appeal from or review of [an] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). *Cf. Containerfreight Transp. Co. v. ICC*, 651 F.2d 668, 670 (9th Cir. 1981) (APA authorizes agency reviewing findings of ALJ to decide all issues before it *de novo*).

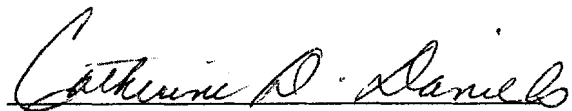
¹¹ Discovery shall proceed in the customary manner provided by the Part 10 Regulations, including provisions governing filing and service, and requests for enlargements of time. Any applications for subpoenas shall be made to the Commission, or its delegee. The Commission may appoint an appropriate person to perform any of its delegable duties. *See* Commission Regulations 10.2(n), 10.109(a)(1).

We propose in addition that, within 60 days from the close of discovery, the Division shall file a memorandum setting forth its evidence respecting Nikkhah's net worth and any arguments it may wish to make respecting the tentatively imposed civil monetary penalty. Nikkhah shall have 60 days to respond to the Division's filing, and the Division shall have 30 days to reply. The Commission shall then make further orders as necessary for the resolution of this case.

In compliance with Regulation 10.107, we give the parties an opportunity to be heard with respect to this notice. Any response to the foregoing proposal shall be filed within 15 days of the date of this order. Upon consideration of any responses filed, a further order pursuant to Rule 10.107 shall issue and deadlines, if applicable, shall be established.

IT IS SO ORDERED.

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



Catherine D. Daniels
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: March 25, 2005