UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of:	:	CFTC Docket No. 95-5
MICHAEL F. STARYK	:	OPINION and ORDER

Respondent Michael F. Staryk ("Staryk") appeals from an Administrative Law Judge's ("ALJ") decision finding him liable for fraudulent inducement and imposing a cease and desist order, permanent trading prohibition, registration revocation, and civil money penalty of $1,327,500 as sanctions. *In re Staryk*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,515 (ALJ Dec. 4, 1998) ("Remand Decision").[1]

As a preliminary matter, Staryk argues that the ALJ should have disqualified himself prior to the oral hearing because he could not be impartial in resolving the issues remanded by the Commission. In addition, he challenges the ALJ's findings regarding scienter as contrary to the record, and contends that the ALJ not only based his calculation of a civil money penalty on unreliable evidence, but also failed to give proper consideration to evidence of mitigating circumstances and limited net worth. The Division of Enforcement ("Division") defends the ALJ's impartiality and urges the Commission to affirm both his liability conclusions and choice of sanctions.

---

[1] This is the second time this case has been appealed to the Commission. The first appeal was from an ALJ decision that resolved both liability and sanctions issues without an oral hearing. *In re Staryk*, [1994-1996 ~~Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,701 (ALJ June 5, 1996) ("Summary Disposition"). In~~ December 1997, we affirmed the ALJ's conclusion that some liability issues could be resolved by summary disposition, but concluded that an oral hearing was necessary for a reliable determination of issues related to both respondent's state of mind ("scienter") and the scope of his alleged violations. As a result, we remanded the case to the ALJ for additional proceedings. *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 (CFTC Dec. 18, 1997) ("*Staryk I*").

As we explain in detail below, we conclude that the record shows that Staryk acted with scienter in committing at least 30 violations of Section 4c(b) of the Commodity Exchange Act ("Act") and Commission Rule 33.10, and that a cease and desist order, permanent trading prohibition, registration revocation, and a $450,000 civil money penalty are appropriate sanctions for his violations.

BACKGROUND

As a matter of economy, we limit our review of the factual background and procedural history to information directly pertinent to the issues raised in this appeal. Readers interested in a more thorough understanding of the earlier stages of this proceeding may consult our previous decision, *Staryk I*, ¶ 27,206 at 45,803-07.

I.

The Commission initiated this proceeding by filing a Complaint in February 1995. The Complaint's allegations related to Staryk's conduct between August 1991 and February 1995. Between August 1991 and June 1993, Staryk was an account executive for Commonwealth Financial Group, Inc. ("Commonwealth"). Staryk began working as an account executive for First Investors Group of the Palm Beaches, Inc. ("First Investors") during June 1993 and remained in that position at the time the Commission issued its Complaint.

The Complaint included a single count that described a wide variety of allegedly fraudulent conduct.[2] Staryk filed an answer denying each of the Complaint's material allegations.

[2] For example, the Complaint alleged that Staryk misrepresented, among other things: (1) the structure and effect of commissions charged by his employers; (2) his expertise and that of his employers; (3) the past profitability of his customers' accounts; (4) the protection provided by stop orders; and (5) the significance of his Commission registration.

In July 1995, the Division filed a Motion for Summary Disposition, supported by 17 exhibits, which Staryk challenged with a voluminous response. In June 1996, the ALJ granted Summary Disposition to the Division on one aspect of the Complaint's allegations of fraud. Specifically, the ALJ focused on Staryk's use of a sales pitch representing that widely-known information on seasonal pricing patterns in the physical markets for gasoline and heating oil could be exploited to increase the profit potential (and correspondingly, reduce the risk) of speculating in options on futures contracts for unleaded gas and heating oil (the "seasonality pitch"). Summary Disposition at 43,928-34. The ALJ imposed a cease and desist order, a registration revocation and a permanent trading ban. *Id.* at 43,937-38. The ALJ also imposed a $1,770,000 civil money penalty, based on his finding that all of the trading losses that Staryk's customers suffered between August 1991 and February 1995, as well as all of the commissions Staryk earned during this period, were a product of his violations. *Id.* at 43,939-40. The ALJ declined to order restitution because the Commission had not issued "implementing regulations." *Id.* at 43,941-42.

On appeal, we affirmed in part and vacated and remanded in part. We held that Staryk had not created a genuine issue of fact with regard to the misleading nature of his solicitations and that, in that respect, partial summary disposition on liability was appropriate.[3] *Staryk I*, ¶ 27,206 at 45,808-10. Nevertheless, we concluded that the ALJ

[3] In so holding, we noted that the Division submitted transcripts of telephone conversations Staryk had with prospective customers between June 1993 and March 1994, which established that he employed the seasonality pitch. We also rejected Staryk's claim that a hearing was necessary to reliably determine whether the seasonality pitch was deceptive in communicating material information, explaining that "a reasonable listener could not fail to understand Staryk's message to be that energy options trading presented opportunities for substantial and near-certain profits at very little risk." *Id.* at 45,808.

erred by resolving disputes about Staryk's scienter without an oral hearing.[4] *Id.* at 45,810-11. We further concluded that an oral hearing was necessary to resolve disputes about the scope of Staryk's wrongdoing.[5] *Id.* at 45,811-12. Accordingly, we vacated the ALJ's ultimate determination of Staryk's liability as well as the sanctions he had imposed and remanded for further fact-finding on the issues of Staryk's scienter and the scope of his alleged wrongdoing.

Finally, we addressed issues concerning possible sanctions. We undertook *sua sponte* review of the ALJ's conclusion that restitution was not appropriate. We held that the ALJ had erred in dismissing the Division's request for restitution on the basis that no rules had been promulgated to govern the implementation of a restitution award. *Id.* at 45,812. We remanded this issue to the ALJ for reconsideration after providing guidance regarding the relevant factors. That guidance included a statement regarding the relevance of a respondent's ability to pay a restitution award:

> [W]e remain mindful that restitution fulfills its purpose only when it tends to make whole those persons harmed by violations of the Act or Commission rules or at least pays a meaningful portion of the damages they suffered. Because restitution should not be ordered as an empty gesture of goodwill, we instruct the ALJ, before finally imposing any order of restitution, to scrutinize respondent's ability to repay to customers the damages the ALJ may find he has caused.

---

[4] We found that scienter could not be reliably determined on the written record because all reasonable inferences were not contrary to Staryk's position. We emphasized that Staryk's intent in making the deceptive representations shown on the record was "a subjective question" and noted the important role that demeanor has traditionally played in the reliable assessment of a party's state of mind. *Id.* at 45,811.

[5] In this regard, we noted that the transcripts of conversations Staryk had with customers only established that he employed the seasonality pitch at First Investors and that the four consultants' reports submitted by the Division did not indicate that he employed the pitch "during the entire period" covered by the Complaint. *Id.* at 45,811. We also noted that Staryk's deposition and affidavit only indicated that he "generally" or "mostly" made solicitations relating to seasonal trends, and that attachments to his deposition indicated that some of the customers he handled for First Investors maintained option positions in futures contracts other than heating oil and unleaded gas. *Id.* at 45,811-12.

"less than clear" about the materiality of net worth in calculating a civil money penalty in a case such as this, where the complaint was filed after the date the Futures Trading Practices Act of 1992 was adopted but involved conduct prior to that date. *Id.* at 12-15. The ALJ found it unnecessary to resolve this issue, however, holding that Staryk had waived the issue of net worth:

> [I] have reviewed the pre-pre-hearing memoranda and other pre-hearing submissions of Mr. Staryk in this case, and it's my conclusion he has not raised the net worth issue, either as a legal issue that he seeks to address in this case with regard to civil monetary penalties, nor has he proffered any suggestion that he would have testimony or evidence on the issue as it related to civil monetary penalties.
>
> So, similar to federal practice under Rule 16, I deem the issue waived . . . .

Id. at 16. The ALJ noted, however, that issues with respect to net worth would be addressed in the restitution phase of the proceeding. *Id.* at 16-17.

The Division presented the testimony of ten of Staryk's former customers as evidence of the scope of his fraudulent solicitation. Three of the customers used written declarations to present their direct testimony, which addressed Staryk's conduct during the periods August 1991 through an unspecified date (Patricia Schneider); May 1992 through September 1992 (Carlos Galliano); and August 1993 through December 1993 (Joann Krygowski). DX 14, 126.[7] The other seven customer witnesses testified about Staryk's conduct from August 1991 through January 1992 (Rex Johnson); March 1992 through May 1992 (L. Lamar Faulkner); January 1993 through March 1993 (Frank Simmons); January 1994 through April 1994 (Baldwin Hurns); June 1994 through

[7] References to "DX ___" are to the Division's exhibits. References to "RX ___" are to respondent's exhibits.

November 1994 (Elizabeth Guardiola-Simmons); November 1994 through an unspecified date (Orval Oliver); and December 1994 through an unspecified date (Roseanne Palladino). Staryk solicited each of the customer witnesses to trade options in either heating oil or unleaded gas futures contracts. Most of the customer witnesses specifically testified that Staryk made claims consistent with the seasonality pitch.[8]

Staryk's counsel challenged the credibility of the Division's customer witnesses through cross-examination based on account documents that the customers had executed, notes Staryk made at the time of his conversations with clients, and notes prepared by the customers and provided to Staryk during discovery. Many customer witnesses candidly admitted that they did not recall details of their dealings with Staryk.[9]

The Division attempted to present the testimony of Maura McHugh, a Division investigator. Among other subjects, the Division intended that McHugh correct certain

---

[8] Tr. 161 ("in eight of the previous ten years . . . heating oil had gone up." (Johnson)); 241 ("The demand being higher in the summertime with travel, et cetera, and the prices, therefore, increasing . . ." (Faulkner)); 288 ("He said that the graph shows unleaded gas rising every summer and he said historically gasoline rises every summer because of the increase in, you know, vacations and a general increase in gasoline consumption." (Simmons)); 338-39 ("some overwhelming number of times, all but one year in the past twelve years, fourteen years, something like that, that these [heating oil prices] have gone up." (Galliano)); 348-49 ("based on the climate at the time in the northeast, being snow covered, that there would be very little absorption of energy from the sun and thus, the air temperature would stay cold and there would be increased consumption of heating oil as a result" (Hurns)); 411 ("the time frame would be perfect to invest in because during the summertime the people take vacations, a lot of people use their cars, and because of all the vacation time and planning and everything, this is the best time to invest money" (Guardiola-Simmons)); 463 ("I can't recall the specific period of time, you know, if it was like ten years, but yes, we had discussed that in the past at that time of year when we were investing that heating oil went up." (Palladino)).

[9] Tr. 173 (didn't recall what Staryk said word for word (Johnson)); 255 (didn't recall month that his account was closed (Faulkner)); 275 (didn't recall agreeing to move a stop on second to last trade (Krygowski)); 306 (didn't recall date he asked Staryk whether any reparation complaints had been filed against him (Simmons)); 337 (didn't recall whether Staryk described the commission structure prior to his first trade (Galliano)); 354 (didn't have a direct recollection of the precise words Staryk used (Hurns)); 427 ~~(didn't recall whether she wanted to trade gold (Guardiola-Simmons)~~); 482-83 (acknowledged remembering only the gist of her conversations with Staryk (Palladino)). Oliver had a particularly difficult time recalling his specific dealings with Staryk. He did not recall the date he opened his account, the amount of his initial investment, when Staryk told him it would be a good time to purchase heating oil options, or that he had received $2,000 of his $58,000 investment back from First Investors. Tr. 443, 445, 450.

statements in an affidavit prepared by Division investigator John Gardiner (DX 2) that the Division submitted with its Motion for Summary Disposition.[10] The ALJ refused to permit McHugh to testify on behalf of the Division, finding that it would be "unfair" and amount to an unjustified reopening of the evidentiary record. Tr. 392-93. Nevertheless, the ALJ ruled that Staryk had a right to present McHugh's testimony in order to impeach the analysis included in the Gardiner affidavit. Tr. 405-06.[11]

Staryk appeared as both a witness for the Division and for his defense. In addition to challenging the testimony of the Division's customer witnesses,[12] Staryk testified about his education, early employment history, futures-related training, and experience working for a variety of futures commission merchants ("FCMs"). In this regard, Staryk emphasized that he developed his solicitation practices based on advice from attorneys and company compliance officials. Tr. 65, 97-98, 131-33, 553, 555, 560-61.

---

[10] The Gardiner affidavit provided information concerning, *inter alia*: (1) the total number of Staryk's customer accounts during the relevant period of time (388 customers); (2) the total net losses and profits across those accounts; (3) the total trading losses or gains across those accounts; (4) the total commissions and fees across those accounts; (5) the number of Staryk's customer accounts with net profits; and (6) similar figures for all First Investors accounts. DX 2.

[11] In this regard, McHugh testified that the Gardiner affidavit erred in claiming that only one of Staryk's clients at Commonwealth had an account that closed with a net profit. Tr. 492. McHugh's review, instead, showed that fourteen of Staryk's customers at Commonwealth had closed their accounts with a net profit. *Id.* She also testified that the Gardiner affidavit had underestimated the overall profit that Staryk's Commonwealth customers earned by over $18,000. Tr. 495. Finally, McHugh testified that she had checked figures in Gardiner's affidavit that related to Staryk's customers, but that she had not reviewed other claims in Gardiner's affidavit for additional errors. Tr. 497, 500.

[12] For example, Staryk denied Schneider's claim that he had made a hard sell of the heating oil market; denied Krygowski's claim that he had told her she would make a lot of money in the unleaded gas market; challenged Simmons's claim that he had already received sales literature when they initially discussed options; denied Galliano's claim that he had misrepresented the risk of trading options; denied Guardiola-Simmons's claim that he had urged her to use her credit cards to obtain money to invest; denied Oliver's claim that he had asked for a financial statement; and claimed that Palladino had lost profits by declining to follow his advice to use appropriate stops. Tr. 572, 593, 608, 619, 631, 638, 642-43. Overall, Staryk testified that this group of customers was not representative because it excluded customers who opened their accounts in gold or grain contracts. Tr. 645-46.

Staryk also testified about his good faith belief in the advice and predictions he offered in soliciting customers. For example, he explained why he believed trading in the direction of a trend presented a lower risk of loss and insisted that every recommendation he has offered had rational support. Tr. 124-25. He emphasized that his recommendations were not based solely on historical trends but also reflected ongoing events that influence the particular market at issue. Tr. 585-86. He denied intending to use a heating oil or unleaded gas pitch as a tool to deceive the public. Tr. 646-47. He explained that recommending trades that he did not believe in was self-defeating because recommending unprofitable trades was the quickest way to lose customers. Tr. 649, 653. And he acknowledged that he was aware that there were problems at Commonwealth but claimed that company attorneys assured him that he had nothing to do with them and was doing an excellent job. Tr. 661. As a result, Staryk explained, he "seriously believed that [he] was doing the right thing." *Id.*

Staryk also provided testimony pertaining to the scope of his use of the seasonality pitch. Staryk testified that during the period at issue in the Complaint, he solicited prospective clients to open accounts in dollar index contracts, precious metals and grains, in addition to heating oil and unleaded gas contracts. Tr. 135-36. Staryk volunteered that the "majority" of his solicitations at Commonwealth were directed at the heating oil and unleaded gas markets. *Id.* Under questioning from the Division, he stated that on average, he brought in eight to ten new accounts each month during the period he solicited for Commonwealth. Tr. 670. He estimated that probably 80 to 90 percent of those accounts were opened in heating oil or unleaded gas. Tr. 671. Staryk testified that, during the period June 1993 through February 1995, he opened "slightly less" than eight to ten new accounts per month at First Investors. Tr. 670-71. He estimated that "probably much less" of a percentage of these customers opened accounts in heating oil or unleaded gas because gold and grain contracts dominated during the first three or four months. Tr. 670-72.

The ALJ played an active role in questioning Staryk about what the ALJ referred to as a "ball park estimate that may be right or may be wrong," a "best guess," or a "best guesstimate" of the percentage of Staryk's clients that opened accounts in energy options.[13] Tr. 139, 673. At one point, Staryk responded to several questions from the ALJ by indicating that "75, 80, 90 percent" of his customers at both Commonwealth and First Investors opened accounts in energy options. *Id.* at 141-42. Under subsequent questioning by the Division, however, Staryk provided different information. The ALJ then intervened and questioned Staryk about his changed testimony. At that point, Staryk indicated that only 70 percent of his new accounts at First Investors involved heating oil or unleaded gas solicitations. *Id.* at 674.

In September 1998, the parties submitted post-hearing briefs. In October 1998, following a telephonic conference on issues related to restitution, the Division submitted a Memorandum Regarding the Appropriateness of Restitution ("Division Memorandum"), in which it represented that a restitution award would not be appropriate. The Division estimated that the amount of a restitution award would exceed $2 million, based on an estimate of the losses incurred by 225 of Staryk's 239 customers

[13] During this examination, Staryk indicated that his solicitation of energy products at First Investors included electricity and natural gas. *Id.* at 139.

who had opened their accounts with a trade in either heating oil or unleaded gas.[14] Division Mem. at 9. In determining whether Staryk had the requisite ability to pay such a restitution award, the Division argued that both Staryk's net worth and future earning potential should be considered. *Id.* at 5-8. Nevertheless, the Division concluded that Staryk's current and future resources were too limited to make restitution a feasible sanction. In this regard, the Division stated that:

> Staryk provided the Division with a Financial Disclosure Statement (hereinafter "Statement") under oath, and gave his current monthly income and expenses, his assets and liabilities and other general financial information. Staryk also provided supporting documentation, including his federal income tax returns for the last three years. The Division's analysis of Staryk's Statement and supporting documents reveals that Staryk's net worth, including the value of the equity in his home, does not exceed $75,000.

Id. at 5-6 (footnotes omitted).

III.

The ALJ issued his Remand Decision in December 1998. The ALJ began his discussion by addressing the issue of Staryk's scienter. The ALJ noted that the Commission's evaluation of scienter in *Staryk I* focused on Staryk's subjective state of mind. In light of this focus, the ALJ observed that:

> [I]t appears that credible testimony, on the part of Staryk, that he possessed a good faith belief that he was not misleading customers (no matter how rash he was in its formulation) would preclude a finding of fraud.

[14]The Division submitted a Declaration by McHugh in support of this estimate. It indicated that she had reviewed the account records of 239 of Staryk's customers who, during the charged time period, opened accounts at either Commonwealth or First Investors by trading either heating oil or unleaded gas options. She concluded that, of those 239 customers, 225 customers had total net losses exceeding $2 million and could be entitled to restitution. McHugh Decl. ¶¶ 3-5.

Remand Decision at 47,378 n.36. After reviewing the testimony Staryk offered on remand relevant to the scienter issue,[15] the ALJ opined that Staryk could demonstrate that he lacked the requisite scienter by establishing one of two facts: (1) that he did not understand what every reasonable listener understood: that his seasonality pitch promised substantial and near-certain profits with little risk; or (2) that he genuinely believed that he could actually fulfill such a promise. *Id.* at 47,379.

As to the first issue, the judge found that Staryk "provided no explanation . . . of how reasonable customers came to understand his solicitations to mean that the seasonal price trends in heating oil and unleaded gasoline significantly increased the likelihood or profits in options, while he, in contrast, understood his sales pitch to mean something else." *Id.* at 47,380. The ALJ further criticized respondent's reliance on repeated generalized pleas of good faith and unconvincing protests that he lacked any motive to defraud. He described these aspects of Staryk's testimony as "self-serving protestations of the innocence of his utterances" and held that they deserved no weight because they were "[u]nsupported by circumstances, logic or reasoning." *Id.* at 47,380-81.

As to the second issue, the ALJ concluded that "Staryk of course knew that his representations of near certain profits and little risk were false." *Id.* at 47,381. In support of this conclusion, the judge cited to Staryk's testimony about (1) his professional training and experience; (2) "how market prices efficiently reflect all historically available information (including historical supply and demand patterns)"; and (3) the systematic losses suffered by the customers who followed his strategy. *Id.* at 47,381-82.

---

[15] The ALJ began with some general criticism of the subjects Staryk covered in his testimony. The ALJ characterized most of the testimony as "at best tangential to assessing his state of mind in making his misleading sales pitches for gasoline and heating oil options." Remand Decision at 47,378. In addition, the ALJ characterized Staryk's testimony concerning his personal, educational and employment background as "border[ing] on being irrelevant to any of the issues in this case." *Id.* at 47,378 n.39.

Summarizing his scienter analysis, the ALJ held that Staryk's own testimony tended to corroborate the circumstantial evidence indicating that he deceived his customers either intentionally or with reckless disregard for the truth of the message conveyed in the seasonality pitch. On this basis, the judge concluded that Staryk acted with the requisite scienter necessary to establish his violation of Section 4c(b) of the Act and Commission Rule 33.10. *Id.* at 47,383.

The ALJ next addressed the scope of Staryk's fraud. He criticized both the Division's methodology for selecting its customer witnesses and the credibility of the testimony the witnesses offered.[16] Nevertheless, he held that the record reliably demonstrated that Staryk defrauded 80 percent of his customers that opened accounts at Commonwealth between August 1991 and June 1993 and 70 percent of his customers that opened accounts at First Investors between June 1993 and February 1995. The ALJ based this conclusion on Staryk's "credibl[e]" testimony that:

> '[A]t Commonwealth I'm figuring maybe 80 or 90 percent of [the] time . . . the company was soliciting heating oil and gasoline; whereas, at First Investors Group it may be 70 percent of the time [was] gasoline [and heating oil] solicitation.'

Id. at 47,387, *citing* Tr. 674.

---

[16] As to the first point, he criticized the Division for failing to present a proper statistical sample of Staryk's actual and potential customers. *Id.* at 47,384. Noting that Staryk estimated that he had orally solicited 5,000 people since 1990, the ALJ indicated that the Division should have employed a methodologically sound survey rather than presenting the testimony of individual customers. *Id.* at 47,384-85 & n.75.

As to the credibility of the testimony offered, the judge criticized the testimony as "tainted by the customers' participation in the Division's ongoing investigation" and based upon "severely-diminished recollections of conversations occurring anywhere from three-and-a half to seven years ago." *Id.* at 47,385-86 & nn.77-78. In addition, the judge characterized aspects of the testimony of three of the Division's witnesses as "simply incredible." *Id.* at 47,386 n.79. In light of these perceived defects, the ALJ ruled that the testimony offered by the Division's customer witnesses was "utterly unreliable as evidence of the specific nature, much less the scope, of Staryk's misrepresentations." *Id.* at 47,386 (footnote omitted). As a result, he gave this testimony "no weight." *Id.*

Turning to sanctions, the ALJ concluded that restitution was inappropriate because the "task of establishing the necessary causal link between Staryk's misrepresentations and his customers' losses would be fact-specific, highly individualized . . . and . . . unsuitably complex and costly, " and imposing a restitution obligation would amount to an "empty gesture" given Staryk's limited ability to pay any such award. Remand Decision at 47,390-92. As to the latter factor, the ALJ agreed with the Division's statement that Staryk's net worth was limited to $75,000. *Id.* at 47,391.

Nevertheless, the ALJ concluded that a variety of sanctions were warranted in view of the nature and gravity of Staryk's misconduct, including a cease and desist order, permanent trading prohibition, and registration revocation. In calculating the civil money penalty appropriate to Staryk's violations, the ALJ began with the level of penalty he imposed in granting summary disposition -- $1,770,000.[17] Based on his rough estimate of the scope of Staryk's fraud as "75 percent of his activity within the timeframe of the Complaint,"[18] the judge reduced his previous penalty by 25% and imposed a civil money penalty of $1,327,500. *Id.* at 47,393.

The ALJ declined to reduce the civil penalty in light of the evidence establishing that Staryk's net worth was limited to $75,000. In this regard, he ruled that Staryk waived his right to have net worth considered because he failed to request a net worth hearing or raise the issue in his first appeal to the Commission. *Id.* at 47,392 n.134.

[17] The ALJ calculated this penalty by tripling the gross commissions that Staryk earned during the time period covered by the Complaint. He noted that the $3,248,000 lost by Staryk's customers during the same time period was a "serious aggravating factor in the assessment of the civil [money] penalty." Remand Decision at 47,392-93 n.137.

[18] The judge arrived at this 75% figure by "[s]plitting the difference" between the percentage of Staryk's Commonwealth customers that he found to be defrauded (80 percent) and the percentage of Staryk's First Investors customers that he found to be defrauded (70 percent). Remand Decision at 47,393.

IV.

In his second appeal, Staryk argues that the ALJ should have disqualified himself prior to the oral hearing because of his strong feeling that the written record clearly established that Staryk acted with scienter. He claims that the ALJ's strong feelings are evidenced by the language he used in his Summary Disposition that describes the written proof as leaving "no reasonable doubt" on the issue of scienter and characterizing Staryk's state of mind as "evil"; his conduct at the hearing on remand; his criticism of the Commission's discussion of scienter in *Staryk I*; and his disparaging comments about the subjects Staryk covered in his testimony. Respondent's Brief at 16-21.

Staryk also challenges the ALJ's findings concerning scienter. *Id.* at 8-15. In this regard, Staryk argues that the ALJ failed to evaluate his demeanor, a factor Staryk claims was at "the heart of the Commission's order." *Id.* at 13. He also criticizes the ALJ for focusing his analysis of scienter solely on Staryk's taped conversations and argues that this unduly narrow framing of the scienter issue reflects the ALJ's continued assumption that "the solicitations contained on [the] audio tapes were representative of the entire period of the Complaint." *Id.* Overall, Staryk argues that the ALJ's predisposition against him turned the hearing into the "'empty ritual' that the ALJ discussed when granting summary disposition to the Division." *Id.* at 14-15.

Respondent also challenges the sanctions imposed by the ALJ as "draconian" and argues that the findings underlying his calculation of a civil money penalty rest on insufficient and unreliable evidence. *Id.* at 22-29. In particular, he criticizes the ALJ for failing to determine one of the issues the Commission specifically noted in *Staryk I*: whether Staryk employed the deceptive seasonality pitch throughout the period at issue in the Complaint. He describes his own testimony about the percentage of customers solicited to purchase heating oil and unleaded gas options as "speculative" and a "guess[ ]", and emphasizes that the judge failed to explain his conclusion that, out of all the testimony he offered, this one portion was both credible and reliable. *Id.* at 22, 24 & n.8.

In addition to challenging the findings underlying the ALJ's civil money penalty calculation, Staryk argues that the judge failed to properly weigh mitigating evidence, including testimony indicating that (1) he generally acted in good faith; and (2) was required to solicit for seasonal energy markets by his employers. *Id.* at 26-27. In addition, he argues that the ALJ misinterpreted *Staryk I* as affirming his consideration of customer losses as well as his use of a multiplier. *Id.* at 27-28. Finally, Staryk argues that the judge erred by ignoring reliable evidence regarding his net worth. On this point, he contends that the ALJ's waiver analysis is inapposite because evidence of his net worth was properly submitted for purposes of restitution.[19] *Id.* at 28-29.

DISCUSSION

I.

We begin by addressing Staryk's argument concerning the ALJ's alleged bias. Staryk essentially contends that the ALJ's comments and conduct during the proceedings on remand show that he was predisposed to reach the same conclusion on scienter that he had endorsed when he granted summary disposition to the Division.

---

[19] Staryk also filed a Motion for Leave to Adduce Additional Evidence Regarding Net Worth. In that motion, Staryk contends that he did not stipulate to a waiver of consideration of his net worth in assessing a civil money penalty and requests permission to introduce additional evidence regarding his net worth. For the reasons explained below (*see* Discussion Section VI), we deny Staryk's motion. Staryk also filed a Motion for Leave to Supplement Appeal Brief requesting leave to supplement his brief with a citation to *Miller v. CFTC*, 197 F.3d 1227 (9th Cir. 1999) ("*Miller III*"), which we grant.

Under Commission Rule 10.8(b), disqualification of a presiding officer is appropriate when the record establishes that he has either (1) a personal bias stemming from an extrajudicial source; or (2) a deep-seated favoritism or antagonism that would make fair judgment impossible. *In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,746 (CFTC Mar. 16, 1999) ("*R&W I*"), *aff'd in relevant part*, *R&W Technical Servs. v. CFTC*, 205 F.3d 165 (5th Cir. 2000) ("*R&W II*"). As Staryk's allegation does not arise from an extrajudicial source, his showing must be evaluated based upon an application of the latter standard. In applying the latter standard, the Commission looks for evidence that the presiding officer has an "unfavorable disposition" toward a party that is undeserved or excessive in degree. *In re Mayer*, CFTC Docket No. 92-21, 1998 WL 80513 at *16 (CFTC Feb. 25, 1998).

As a general rule, views expressed in earlier decisions are not considered evidence that a decisionmaker has preconceived notions as to either culpability or sanctions. *See Garver v. United States*, 846 F.2d 1029, 1031 (6th Cir. 1988). Moreover, a showing of disqualifying bias requires more than references to unfavorable rulings or intemperate, impatient, or inappropriate remarks. *See Olson v. Ulmer*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,987 at 37,627 (CFTC Jan. 23, 1991). Rather, "the ALJ's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process." *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989).

Certainly, the ALJ's Remand Decision includes language that can be interpreted as suggesting that the Commission erred in remanding the matter for a hearing on scienter. The generic points that Staryk raises, however, do not establish that the ALJ had the type of deep-seated favoritism or antagonism that would merit disqualification. The ALJ permitted Staryk to build a record on the factors material to scienter, and we are in a position to correct any error in the ALJ's analysis of those factors. In these circumstances, disqualification is not warranted.

II.

Read in combination, Section 4c(b) of the Act and Commission Rule 33.10 prohibit fraudulently soliciting customers to trade commodity options. *In re Miller*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,440 at 42,911-12 (CFTC June 16, 1995) ("*Miller I*"), *aff'd in relevant part, Miller v. CFTC*, 197 F.3d 1227 (9th Cir. 1999) ("*Miller III*"). To prove fraudulent solicitation, the Division must show: (1) that the respondent made statements that were false, deceptive or misleading; (2) that such statements were material; and (3) that respondent made the statements with scienter. Since we resolved issues relating to the first two elements in *Staryk I*, ¶ 27,206 at 45,808-10 ("a reasonable listener could not fail to understand Staryk's message to be that energy options trading presented opportunities for substantial and near-certain profits at very little risk"), we limit our discussion to issues relating to whether the record shows that Staryk acted with the requisite scienter.

To establish the requisite scienter, the Division must show that respondent either "intentionally" committed wrongful acts or "recklessly disregard[ed]" his duties under the Act. *Hammond v. Smith Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617 at 36,659 (CFTC Mar. 1, 1990); *Do v. Lind-Waldock & Co.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,516 at 43,320-21 (CFTC Sept. 27, 1995). That is, the acts complained of must "be done with knowledge of their nature and character." *CFTC v. Savage*, 611 F.2d 270, 283 (9th Cir. 1979).[20] In this context, a showing of "mere negligence, mistake, or inadvertence" fails to meet the scienter requirement. *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 748 (D.C. Cir. 1988).

In remanding this case, we emphasized the important role that demeanor can play in making determinations about a respondent's state of mind. The ALJ clearly recognized that the Commission intended that he consider whether Staryk had a "good faith belief that he was not misleading customers." Remand Decision at 47,378 n.36. The ALJ reduced this inquiry to two questions: (1) did Staryk not recognize that his seasonality pitch amounted to a promise of "substantial and near-certain profits at very little risk" (the "misunderstanding hypothesis"); and (2) did Staryk not believe that his promise of "substantial and near-certain profits at very little risk" was true (the "irrational expectation hypothesis"). *Id.* at 47,379. The ALJ described establishing either the misunderstanding hypothesis or the irrational expectation hypothesis as "Staryk's task on remand." *Id.*

On appeal, Staryk argues that the alternatives cited by the ALJ were unduly narrow. He also criticizes the ALJ for failing to consider his demeanor in analyzing his testimony about his beliefs. In essence, he urges the Commission to reweigh the evidence and credit his testimony that he did not use his seasonality pitch to mislead the public.

We find that the ALJ did not err in his use of the misunderstanding hypothesis and the irrational expectation hypothesis to evaluate Staryk's testimony. By testifying

[20] It is not necessary to show an "evil motive" or specific intent to injure. *Dohmen-Ramirez v. CFTC*, 837 F.2d 847, 857 (9th Cir. 1988).

that he employed the seasonality pitch in good faith, Staryk essentially claimed that his subjective interpretation of the seasonality pitch was not only incompatible with the interpretation of the Commission's "reasonable listener" but also essentially innocent. In essence, the ALJ used the misunderstanding hypothesis and the irrational expectation hypothesis as templates to test the credibility of Staryk's generalized claim to an innocent interpretation. In our view, this was a valid approach to assessing the credibility of Staryk's testimony.[21]

Furthermore, while portions of the ALJ's analysis of Staryk's testimony could be criticized as overbroad and unduly dismissive,[22] his overall conclusions are consistent with the record. For the most part, Staryk relied upon repeated generalized pleas of good faith and self-serving and unconvincing protests of innocence. He failed to offer clear and direct answers to questions regarding the riskiness of options. Moreover, Staryk's testimony pertaining to his knowledge of his customers' losses contradicted his

---

[21] Crediting generalized testimony about good faith is, at best, problematic. First, such testimony is easy to manufacture. In addition, because it essentially relates to the witness's subjective and sometimes unreasonable beliefs, it is not easily tested by traditional techniques of cross-examination.

[22] The ALJ's criticism of Staryk's testimony about his personal, educational and employment background, as well as his testimony about firm compliance practices, as "at best tangential" to the assessment of his state of mind is overly broad. Some or all of these factors may lend credence to a respondent's claim of good faith. *See, e.g.*, *In re ContiCommodity Services, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,038 at 37,879 (CFTC Apr. 17, 1991) (account executive believed his statements were true because they were based on data obtained from a respected FCM). The problem with this aspect of Staryk's testimony is more that it is too general to merit significant weight. For example, Staryk suggested that he believed the seasonality pitch was accurate because he acted consistently with the advice he received from attorneys and company compliance officials. However, he did not specify who these attorneys and compliance officials were, what they told him, or what basis he had for believing their advice to be accurate.

prehearing stance of ignorance concerning such losses.[23]

In light of our *de novo* review of the record, we affirm the ALJ's conclusion that Staryk's use of the seasonality pitch during the period at issue in the Complaint amounted to a violation of Section 4c(b) of the Act and Commission Rule 33.10.

III.

Sanctions in enforcement proceedings are imposed "to further the Act's remedial policies and to deter others in the industry from committing similar violations." *In re Volume Investors Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,234 at 38,679 (CFTC Feb. 10, 1992). In selecting the appropriate sanctions in a particular case, we take into account the ALJ's assessment of the gravity of a respondent's violations as well as the sanctions the ALJ imposed.[24] Nevertheless, our review of the relevant factual issues is *de novo* and the sanctions we impose reflect our independent judgment about the appropriate mix of sanctions. *In re Grossfeld,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,467 (CFTC Dec. 10, 1996) ("*Grossfeld II*"), *aff'd*, 137 F.3d 1300 (11th Cir. 1998).

A cease and desist order is appropriate where there is a reasonable likelihood that a respondent will repeat his wrongful conduct in the future. *In re Piasio*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,692 (CFTC Sept. 29, 2000)

---

[23] The record shows that Staryk knew that clients responding to his seasonality pitch systematically lost money. Moreover, his own testimony demonstrated a firmly grounded understanding of energy derivatives and indicated that he understood markets well enough to know that the study of historical price trends would not lead to superior gains.

Staryk argues that the ALJ should have given more weight to his demeanor, which the judge described as "calm, steady, courteous and pleasant enough." Remand Decision at 47,381 n.52. While these observations are certainly relevant, Staryk's many years of sales experience justify some skepticism about the weight properly accorded such apparent indicators of sincerity and reliability.

[24] Gravity refers to the seriousness of a violation. *In re Gordon*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 at 42,592 (CFTC Mar. 6, 1995) ("*Gordon II*").

("*Piasio I*"), *aff'd*, *Piasio v. CFTC*, No. 02-4032 (2d Cir. Dec. 31, 2002). In general, evidence of a knowing violation or a pattern of violative conduct is sufficient to support an inference that it is likely wrongful conduct will be repeated. *Id.* Here, the record shows both that Staryk acted knowingly and, as demonstrated by the taped solicitations alone, that he repeated his violative conduct over at least a ten-month period. In these circumstances, imposition of a cease and desist order is appropriate.

Because the record establishes that Staryk's violations involve fraudulent conduct, he is subject to a statutory disqualification from registration under Section 8a(2)(E) of the Act. Staryk may rebut the presumption of unfitness arising from his disqualification with clear and convincing evidence that his continued registration poses no substantial risk to the public. *Piasio I*, ¶ 28,276 at 50,692. As our precedent demonstrates, he may do so by showing either circumstances that indicate the seriousness of his wrongdoing was mitigated or circumstances that indicate a changed direction in his activities since the time of the wrongdoing. *Id.*

Staryk, however, has not made a reliable showing of either circumstance. Staryk's showing on mitigation emphasizes his alleged good faith belief that his recommendations were appropriate and the fact that his employers required him to discuss certain markets with customers during the initial solicitation. Staryk's mitigation evidence is, at best, weak and certainly does not amount to clear and convincing evidence that his continued registration poses no substantial risk to the public. In addition, Staryk presented no evidence of rehabilitation. Accordingly, we revoke Staryk's registration.

Trading prohibitions are appropriate when the record shows that a respondent's misconduct represents an inherent threat to the integrity of the futures markets in the public eye. *Miller I*, ¶ 26,440 at 42,914. The term of the prohibition turns on the gravity of the violations. *Id.* Permanent trading prohibitions are rarely appropriate. Such a sanction is reserved for conduct that is "both intentional and egregious." *Id.* (citing *In re GNP Commodities*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 (CFTC Aug. 11, 1992)). And as we stated in *Staryk I*, we also take into account any evidence of mitigation or rehabilitation when considering a trading prohibition.

Imposition of a trading prohibition on Staryk is consistent with recent Commission precedent recognizing that solicitation fraud threatens the public's perception of market integrity. *Miller I*, ¶ 26,440 at 42,914. While we rarely impose a permanent trading ban, the record regarding the nature of Staryk's wrongdoing is certainly as strong as the record in *Miller I*, where the Commission imposed a permanent trading prohibition on an associated person who fraudulently solicited customers to trade commodity options. *Id.* at 42,914 & n.8. In these circumstances, the record is sufficient to support the imposition of a permanent trading prohibition on Staryk. As explained above, Staryk has not offered evidence of mitigation or rehabilitation that would support a less substantial trading ban.

IV.

As noted above, the Complaint in this proceeding focused on the period August 1991 through February 1995. This focus complicates the process for calculating a civil money penalty appropriate to Staryk's violations, because Congress made significant changes to the applicable standard in October 1992. Consequently, a bifurcated calculation would be necessary if we were to impose a civil money penalty for violations that Staryk committed between August 1991 and October 1992. Because the bulk of the period covered by the Complaint falls after October 1992, and the record is sufficiently developed to justify the imposition of a substantial civil money penalty for violations committed between November 1992 and December 1994, we limit our analysis to the latter period.

For violations committed during this period, the Act requires us to consider the "appropriateness" of a civil money penalty to the "gravity" of respondent's proven violations. The Act authorizes alternative approaches for determining the maximum money penalty for a particular respondent. Under Section 6(c), the Commission may look to either the product of (1) $100,000 times the number of respondent's proven violations; or (2) three times respondent's "monetary gain" from the proven violations.[25]

As noted above, the ALJ used the latter approach in concluding that a civil money penalty of $1,327,500 did not exceed the statutory maximum applicable to Staryk. In this regard, Staryk essentially argues that the ALJ erred by basing his analysis on an unreliable calculation of his monetary gain. Our review of the record shows that the ALJ erred in several respects.

First, in calculating Staryk's monetary gain, the ALJ considered violations committed between August 1991 and October 1992. The Act's triple the monetary gain alternative, however, does not apply to such violations. *Slusser v. CFTC*, 210 F.3d 783, 786 (7th Cir. 2000). Moreover, the ALJ equated the statutory term "monetary gain" with Staryk's gross revenue. As we have noted, however, "monetary gain" is more properly

[25] The maximum civil money penalty permitted under the Act's $100,000 per violation test is subject to adjustments for inflation, based on when violative conduct occurs. 17 C.F.R. § 143.8. In this case, the maximum civil penalty permitted under the $100,000 test would not be adjusted for inflation because all of the alleged violative conduct occurred prior to November 27, 1996. *See* 17 C.F.R. § 143.8(a).

equated with net profits. *In re R&W Technical Services, Inc.*, CFTC Docket No. 96-3 (August 6, 2003) *slip op.* at 3-4 ("*R&W III*").[26]

In addition, as we held in *R&W III*, when the Division relies on the Act's triple the monetary gain alternative in proving that a civil money penalty does not exceed the statutory maximum, it must establish respondent's net profits "with reasonable precision based on actual revenue and expenses." *Id.* The ALJ, however, relied on respondent's imprecise "guess" or "guesstimate" of the frequency of his use of the "seasonality pitch" in calculating Staryk's gross profit. Indeed, despite our comments in *Staryk I* about evidence that Staryk's customers maintained positions "in options involving underlying commodities other than heating oil and natural gas," the ALJ essentially equated customers who opened accounts and traded seasonal energy contracts with customers who opened accounts and traded other commodities. On this record, there is no reliable basis for inferring that commissions Staryk earned from the latter group of customers were ill gotten gains derived from his use of the deceptive seasonality pitch.

In view of these errors, and in the absence of sufficient reliable evidence to permit a reasonably precise determination of Staryk's monetary gain, we turn our attention to the calculation of an appropriate civil money penalty under the Act's $100,000 per violation alternative.

[26] It should be noted that the ALJ's ruling in this regard, which was without the benefit of our decision in *R&W III*, was not inconsistent with then-existing Commission precedent.

V.

In our decision in *In re Slusser*, CFTC Docket No. 94-14 (CFTC Feb. 28, 2003) ("*Slusser III*") and in *In re Miller*, CFTC Docket No. 92-4 (CFTC July 23, 2004) ("*Miller IV*"), the latter of which we also issue today, we reiterated our "broad but common sense approach" to determining the number of violations at issue for purposes of the Act's $100,000 per violation alternative. Here, for example, we could parse the separate deceptive elements from the recordings of Staryk's seasonality pitch and conclude that he committed multiple violations in many conversations. Our precedent, however, focuses on the overall goal of effective deterrence rather than emphasizing approaches to violation counting that might justify expansive statutory maximums.[27] Consistent with this focus, it is sufficient to note that Staryk was clearly on notice that this proceeding involved allegations that he defrauded at least 30 customers between November 1992 and December 1994.[28] In reaching this conclusion, we specifically disavow the ALJ's blanket discrediting of the customer witnesses that the Division presented on remand.[29]

[27] As we explained in *In re Incomco, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,198 at 38,535-36 n.16 (CFTC Dec. 30, 1991):

> In enacting [then] Section 6(b) of the Act, Congress established a relationship between the number of violations a respondent commits and the maximum level of civil [money] penalty the Commission may impose. Nevertheless, our selection of appropriate sanctions in a particular case turns more on an examination of the overall nature of the wrongful conduct respondent has committed than a simple enumeration of the violations established on the record.

[28] The tape-recorded solicitations capture Staryk, on ten separate days between June 1993 and March 1994, making seasonality-type misrepresentations to approximately 27 of the 48 prospective customers with whom he recorded full initial solicitations. DX 4-DX 8. In addition, two reports from a monitor of Commonwealth explain that Staryk, on three separate days between October 30, 1992 and January 28, 1993, made seasonality pitches to prospective customers. *See* DX 10, DX 11.

[29] Based on the examples cited in the Remand Decision (at 47,386 n.78), the ALJ's criticisms relating to the witnesses' memories unrealistically presumed that a credible witness would have the ability to recall past events in vivid detail. Indeed, the ALJ's test for credibility would seem to imply an almost impossible task for the Division where the hearing is several years after the events in question. The ALJ also incorrectly made the general conclusion that the customer witness testimony was "tainted by the customers' participation in the Division's ongoing investigation." *Id.* at 47,385-86. The record does not disclose any

Having determined that a $3 million penalty would fall within the maximum authorized by the Act, we turn to the more complex issue – what level of civil money penalty is appropriate to the gravity of Staryk's violations? As we state in *Miller IV*, "because Congress did not provide precise instructions on how the Commission should determine a violation's gravity or what consideration should be given to the degree of gravity once determined," we have "exercised our discretion in the context of case-by-case determinations." Slip op. at 5. We have eschewed any formulaic approach to determining the penalty appropriate to the gravity of proven violations, *In re Grossfeld,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,467 (CFTC Dec. 10, 1996), *aff'd, Grossfeld v. CFTC,* 137 F.3d 1300 (11th Cir. 1998), and have based our gravity assessments on factors such as the relationship of the violations at issue to the regulatory purposes of the Act,[30] respondent's state of mind, the scope and frequency of

---

specific "taint" and Staryk's counsel was given significant leeway to ask questions about the Division's interactions with the witnesses. In effect, the ALJ's decision incorrectly condemned common techniques used by counsel for both the Division and respondents to prepare witnesses that they present at a hearing.

Based on our independent review of the testimony of the six customer witnesses who dealt with Staryk after October 1992, we find that customer witnesses Simmons, Hurns, Guardiola-Simmons and Palladino credibly testified about Staryk's seasonality misrepresentations. *See* Tr. 284-321 & DX 9 at 479-489 (Simmons; January 1993 through March 1993); Tr. 347-62 (Hurns; January 1994 through April 1994); Tr. 408-441 (Guardiola-Simmons; June 1994 through November 1994); and Tr. 458-489 (Palladino; December 1994). All four of these witnesses provided testimony that Staryk employed a seasonality pitch with respect to the heating oil or gasoline markets in his solicitations of each of them. *See* Tr. 287-88 (Simmons); Tr. 348-349 (Hurns); Tr. 411 (Guardiola-Simmons); Tr. 461-62, 463 (Palladino). Moreover, all four had a reasonable command of the details concerning their involvement with Staryk and his use of the seasonality pitch, taking into consideration the fact that the events had occurred several years earlier. The ALJ correctly notes that "Ms. Guardiola-Simmons is alone among the witnesses in testifying that Staryk misled her into believing that she could write-off, dollar-for-dollar, all trading losses against her taxes" and that "Staryk had led her to believe that the commissions reflected on her statements were payments to *her*." Remand Decision at 47,386 n.79. Nothing else in the record appears to bolster Guardiola-Simmons' testimony that Staryk made misrepresentations such as these and we agree that this aspect of her testimony is somewhat suspect. On balance, however, we find that Guardiola-Simmons' testimony is deserving of weight.

[30] The gravity of fraudulent conduct, for example, is high because such conduct is contrary to one of the Act's core regulatory protections. A shortcoming in recordkeeping is serious, but somewhat lower in gravity, because recordkeeping requirements are less central to the Act's core regulatory protections. *See generally In re Premex,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,890-91 (CFTC Feb. 17, 1988).

the wrongdoing, respondent's post-violation conduct, and the financial consequences flowing from respondents' wrongdoing. *Miller IV, slip op.* at 5-6.

Once gravity has been determined, the focus of our analysis shifts to assessing a specific penalty appropriate to the determined level of gravity and suitable to deter future violations. *Id.* at 6. In this context, reliable estimates of the financial consequences flowing from a respondent's wrongdoing have played a prominent role.[31] The level of civil money penalties imposed in cases involving violations of comparable gravity can also provide a useful touchstone in ensuring that a particular civil money penalty reflects an "act of reason grounded on the record." *Id.* at 12, *quoting Miller III*, 197 F.3d at 1236.

Staryk's use of the seasonality pitch in his customer solicitations involved fraud, which we have consistently identified as a core violation of the Act. The record also shows that Staryk's wrongful conduct was knowing and—as shown by his own statements and admissions—widespread and continuous over more than two years.

The record also supports reliable estimates of the gains and losses attributable to Staryk's fraudulent solicitations.[32] As for Staryk's gains, the record includes evidence of the commissions Staryk earned in 1992, 1993, and 1994. In light of this evidence, we

---

[31] As we acknowledged in *Miller IV*, the burden of establishing the reliability of a financial consequences analysis lies with the Division. *Id.* at 9. For example, commissions may not be treated as ill gotten gains if the record lacks a reliable basis for identifying the class of accounts opened due to a respondent's fraudulent solicitation. *Id.* at 11. Moreover, the weight accorded such an analysis should vary with the precision of the underlying evidence. *Id.* at 10.

[32] In *Miller IV*, we explained that reliable estimates could be used in the context of the Act's $100,000 per violation alternative as long as the weight accorded the estimates is proportionate to the precision of the underlying evidence. In applying this standard, we intentionally distinguish it from the measure of gains applicable where a penalty is based upon the Act's triple the monetary gain test. To be specific, due to differences in the statute and the evidentiary role played by "gains" in our two approaches to penalties, we may rely upon broadly reliable estimates of gains when using our $100,000 per violation test. In contrast, our triple the monetary gain test requires that we determine gains under a more stringent standard that demands gains be determined "with reasonable precision based on actual revenues and expenses." *R&W III*, slip op. at 8.

find that Staryk earned about $296,000 between November 1992 and December 1994.[33] As for the amount of customer losses attributable to Staryk's use of the seasonality pitch, the record includes reliable evidence that all of Staryk's First Investors customers from June 1993 through December 1994 incurred net losses of approximately $1.9 million.[34]

Two factors play a key role in making a reliable estimate of the portion of Staryk's $296,000 in earnings and his customers' $1.9 million in net losses that are attributable to his misconduct. First, we look to evidence showing how often Staryk used the seasonality pitch. Staryk offered both admissions and testimony that addressed this issue.[35] As discussed above, under questioning by both the Division and the ALJ, Staryk

---

[33] Staryk earned $174,229 in 1992 and $166,914 in 1993. Complaint & Answer ¶¶ 6, 7. Of the $174,229 Staryk earned in 1992, we estimate that he earned about $30,000 between November and December 1992. Staryk admitted that he earned "at least" $100,000 in 1994. Respondent's Responses to Requests for Admissions ¶ 81. We do not consider commissions that Staryk earned in 1995, because our independent review of the record reveals no reliable evidence that Staryk used the seasonality pitch in 1995.

[34] McHugh's testimony raises troubling questions about the reliability of the loss figures for Staryk's Commonwealth customers included in Gardiner's affidavit. Consequently, we have focused our loss analysis on Staryk's customers at First Investors. In this regard, McHugh's testimony confirmed the accuracy of the figures provided in Gardiner's affidavit. Indeed, Staryk has not suggested that the overall loss suffered by his customers at First Investors was less than $1.9 million.

[35] For example, Staryk admitted, declared and/or testified that:

> he "consistently . . . told [his] potential customers about past seasonal patterns in the price movements of heating oil and gasoline" (Staryk's Responses to Request for Admissions No. 112);
>
> "[i]f the supplies are low and it looks like it's going to be a cold winter, we recommend that [customers] take a long position in call options in heating oil. From about November on there's a tendency to show that heating oil moves up and can move up in December and January with cold weather" (Tr. 49);
>
> "So, whether it's a seasonal market or whether it's, as you're referring to it—if it's a seasonal demand market like heating oil, we would express to [customers] that in any kind of investing, and it's common knowledge, a trend – if there is a trend in a market, whether that market is gold or whether it's poultry, to follow the trend . . . . If you're following a trend, purchasing an option in a trend market, your . . . chances of success should be higher . . . ." (Tr. 56);
>
> "we, even today, would look at September and October are good times to see the wholesale industry to base a call option on that increase and demand, but the weather factor involved – not even taking into consideration all other geopolitical factors, the weather factor has shown us December and January. But if it's warm in December and

offered shifting versions of his guesstimate of how often he used the seasonality pitch. They ranged as high as 90 percent, Tr. 141, 671, and never fell below 50 percent, Tr. at 135-36 (a "majority" of his solicitations at Commonwealth). Review of the tapes of Staryk's solicitations, which cover approximately ten days between 1993 and 1994, show that Staryk used a seasonality pitch with about 56% of the prospective customers.

Second, in addition to evidence helpful in identifying the class of Staryk's customers who heard the seasonality pitch, we look to evidence identifying the portion of this class who acted to their detriment by opening and trading an options account. In this regard, Staryk testified that he solicited prospective clients to open accounts in dollar index contracts, precious metals, and grains, and that gold and grain contracts dominated his solicitations during his first three or four months at First Investors. Tr. 135-36, 670-72. As we acknowledged in *Staryk I*, the record includes documentary evidence showing that Staryk's customers did, in fact, maintain option positions in commodities other than heating oil and unleaded gas. Indeed, in developing the record on issues relating to restitution, the Division essentially conceded that between August 1991 and February 1995, no more than 61.5 percent of Staryk's customers initially established positions in heating oil or unleaded gas options when they opened their option accounts.[36]

January, it can have an opposite effect" (Tr. 680) (testifying in response to the question "In what months do you usually recommend to your clients to invest in heating oil, to buy a call option?");

"[g]enerally, when I return a prospective client's call . . . I also describe the nature of the relevant market mostly concerning seasonal type moves, the value of those moves, the risks incidental to commodity futures trading and the purpose and function of stop-loss orders." RX M at 15 (Decl. ¶ 8).

[36] DX 2 at ¶¶ 13, 16 (Gardner affidavit stating that Staryk had 388 customer accounts during charged period); Division Mem., McHugh Decl. at 1 (identifying 239 customers of Staryk who opened account with purchase of heating oil or unleaded gas contract).

In light of this evidence, we infer that Staryk's use of the seasonality pitch between November 1992 and December 1994 led to ill-gotten gains of between $100,000 and $120,000 and customer losses of approximately $730,000.[37]

As to civil money penalties imposed in cases involving violations of comparable gravity, the $200,000 penalty we imposed in *In re Gordon*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 at 42,592 (CFTC Mar. 6, 1995) ("*Gordon II*"), *aff'd*, *Gordon v. CFTC*, 86 F.3d 1169 (11th Cir. 1996) (Table), is pertinent to our analysis. Like Staryk's misconduct, *Gordon II* involved an account executive's fraudulent solicitation of customers. In addition, like the conduct at issue here Gordon's wrongdoing was "serious" and "wholly unmitigated." *Id.* Furthermore, the record on the financial consequences caused by Gordon's and Staryk's wrongdoing was roughly comparable: in each case, the estimated gains amounted to hundreds of thousands of dollars, while the estimated losses caused by each respondent's fraud were even higher, ranging from three-quarters of a million dollars to $1 million dollars.

In *Miller IV*, we imposed a $350,000 civil penalty on a respondent whose fraudulent conduct we found to warrant a higher penalty than the $200,000 penalty we imposed on Gordon. *Miller IV*, slip op. at 14-16. Like Staryk, Miller defrauded customers to trade commodity options with the use of deceptive oral misrepresentations. Both Staryk's and Miller's conduct continued over the course of several years and

---

[37] Despite our general rejection of Staryk's credibility, we have given some weight to his testimony about the frequency of his use of the seasonality pitch. In this regard, we note that Staryk admitted that he consistently told customers about seasonal trading patterns. Moreover, a review of his recorded solicitations for about ten days during the relevant period indicates that Staryk used a seasonality pitch with about 56% of the prospective customers. Taken together, this evidence suggests that Staryk's guesstimates about the frequency of his use of the seasonality pitch are at least broadly reliable. We recognize that Staryk was not specifically questioned about the period November 1992 through December 1994 and that he consistently claimed that he used the seasonality pitch less often during his employment at First Investors (June 1993 until February 1995).

amounted to knowing violations of the Act. In addition, there was no evidence that either respondent cooperated with authorities or attempted to make restitution.

There are some important differences, however, between this case and both *Gordon II* and *Miller IV* that warrant imposing a higher penalty against Staryk. In *Gordon II*, the Commission had to consider Gordon's limited net worth of $220,000 in assessing his civil money penalty. This suggests that it would have imposed a higher civil money penalty based solely on its assessment of the gravity of Gordon's misconduct. In addition, inflation has somewhat undermined the deterrent effect a $200,000 penalty would have on Staryk.[38] Moreover, the period at issue in *Gordon II* was 20 months, somewhat less than the period of time at issue involving Staryk's violations. With respect to *Miller IV*, the broadly reliable estimates of the losses attributable to Staryk's fraud exceeded the estimated losses incurred by Miller's customers.[39]

But the most significant difference between the cases is that Staryk committed substantially more violations of the Act than either Miller or Gordon. For these reasons, we conclude that the gravity of Staryk's fraud was more serious than either Gordon's or Miller's fraud and warrants a more severe penalty than the penalties we imposed in either *Gordon II* or *Miller IV*.

[38] We estimate the inflation-adjusted amount as approximately $242,000.

[39] The record in Miller was insufficient to allow us to arrive at a broadly reliable estimate of Miller's gains. Consequently, we have not attempted to compare Staryk to Miller in that regard.

VI.

Staryk contends that in calculating an appropriate money penalty, in addition to reviewing evidence material to the gravity of his violations, we should consider the undisputed evidence that his net worth is limited to $75,000. In effect, he claims that the policy we articulated in *Staryk I* regarding restitution --that it "should not be ordered as an empty gesture of goodwill"-- applies equally in the context of the imposition of civil money penalties.[40]

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. Consequently, under the current language of the Act, once we determine the applicable statutory maximum, we must only ensure that the civil penalty we impose is appropriate to the "gravity" of respondents' proven violations. Because a respondent's net worth is unrelated to the gravity of the violations and because, as discussed above, we are not imposing any civil money penalty for violations that took place prior to the recent amendments, there is no statutory basis for Staryk's claim that we are legally obliged to consider his limited net worth. Further, we take this opportunity to hold that, with respect to post-FTPA violations, a respondent's net worth will not be considered in determining the amount of a civil money penalty.

[40] The ALJ's finding that Staryk waived the right to build a record on this issue is inapposite because both he and the Division concede that, for purposes of imposing restitution, respondent's net worth is limited to $75,000. In this context, the issue before us is the legal significance of this fact, not whether respondent could prevail if the amount of his net worth was in dispute.

CONCLUSION

In view of the gravity of Staryk's violations of Section 4c(b) of the Act and Commission Rule 33.10, we conclude that a civil money penalty of $450,000 is appropriate. In addition, we impose a cease and desist order, a registration revocation, and a permanent trading prohibition on Staryk.

IT IS SO ORDERED.[41]

By the Commission (Chairman NEWSOME, joining the majority and also concurring separately, and Commissioner LUKKEN; Commissioner BROWN-HRUSKA concurring in part and dissenting in part.).

Catherine D. Dixon
Assistant Secretary to the Commission
Commodity Futures Trading Commission

Dated: July 23, 2004

[41] Respondent's sanctions shall become effective 30 days after the date this order is served on the party. 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 Rule 10.106, 17 C.F.R. § 10.106.

Opinion of Commissioner Sharon Brown-Hruska, Concurring in Part and Dissenting in Part

Our precedent has long recognized the importance of deterrence in preventing violations of our Act. [1] Indeed, we signaled the paramount role this value plays when in *Murlas* we emphasized that "[i]n imposing monetary sanctions, the *primary focus* of the Commission's analysis has been deterrence."[2] Although we espouse the ideal of "effective deterrence," we nevertheless adhere to a penalty standard that detracts from our ability to advance it. Instead of being governed by a cost-benefit assessment consistent with furthering this goal, we rely upon a standard that relegates deterrence to but one of many factors for determining the gravity of a violation.[3] Rather than address this shortcoming, we elevate it into a virtue when we extol, as we do here, the fact that our approach "eschew[s] any formulaic approach to determining the penalty appropriate to the gravity of the proven violations."

---

[1] *See In re Sigler,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,978 at 37,579 (CFTC Jan. 8, 1991) ("Our focus is on deterrence of the individual respondent and those who will find themselves in similar positions in the future."); *In re Mayer*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,259 at 46,141 (CFTC Feb. 3, 1999) ("The penalties we impose . . . reflect and seek to deter."). *See also A Study of CFTC and Futures Self-Regulatory Organization Penalties*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,264 at 42,209 (CFTC Nov. 1994) ("CFTC Penalties Study") ("Generally the academic literature suggests that sanctions for violations in regulated industries be based upon the goal of deterrence.") (footnote omitted).

[2] *In re Murlas,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,440 at 35,929 (CFTC Apr. 24, 1989) (emphasis added).

[3] Despite undergoing "some refinement" in recent years, *In re Grossfeld,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,468 (CFTC, Dec. 10, 1996), the Commission's standard for assessing civil penalties calls for consideration of a long list of largely subjective or non-quantifiable factors as part of its "facts and circumstances" approach to penalty assessment. With respect to gravity, for example, the Commission considers: (1) the relationship of the violation at issue to the regulatory purposes of the Act; (2) the respondent's state of mind; (3) the scope and frequency of the wrongdoing; (4) the respondent's post-violative conduct; (5) the financial consequences flowing from the violative conduct. Following this evaluation, the Commission then somewhat redundantly takes into account "reliable estimates of the financial consequences flowing from a respondent's wrongdoing," and the level of penalties imposed in cases involving violations of comparable gravity.

Aside from the multitude of factors, the Commission's standard suffers from a variety of different articulations resulting in a lack of clarity and difficulty in application. *See e.g., In re Nikkhah,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,275 at 50,674 n.4 (CFTC Sep. 26, 2000) (describing a somewhat different list of factors including the extent to which respondent cooperated with authorities). Moreover, it is not apparent from these various articulations, where deterrence fits within the Commission's penalty formula or how much weight is given to the gain/benefit formula traditionally used for assessing this principle. Indeed, the gain/benefit formula appears to be used at various times for three distinctly different purposes--to determine (1) the level of gravity (*see In re Grossfeld*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,468 (CFTC Dec. 10, 1996)); (2) the optimal level of deterrence (*see In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC Aug. 11, 1992)); and (3) the level of the penalty itself (*see In re Gordon*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,182 (CFTC, Mar. 16, 1993)).

It is my view that an open-ended, multi-factor standard reduces the deterrent value of our sanctions. To achieve deterrence, our penalties must "be appropriately severe and certain."[4] They must also be clear and predictable.[5] If potential violators are unsure about either the *expected* certainty or severity of punishment--due to the lack of clarity and predictability in our standard--then our penalty structure will have little deterrent effect on their conduct. As Judge Posner reminds us, "a threat that is not communicated cannot deter."[6]

That is why, the Administrative Conference, for example, recommends that in establishing penalty standards, federal agencies should: 1) specify the relative weights to be attached to individual elements in their penalty calculation, and 2) utilize "simplifying assumptions" relating to the benefit or the harm caused by illegal activity.[7] Our current standard does neither. Rather than specify any priority among the many elements that we consider, we simply engage in a far-ranging inquiry into all of them. Moreover, we no longer employ simplifying tools to determine the scope of the respondent's wrongdoing or the financial consequences flowing from his conduct, instead insisting that these elements be established with a degree of precision that is neither attainable nor practical from an enforcement perspective.

Thus, while the Commission properly looks to the gains that a respondent earns from his illegal activity when calculating penalties, we do not employ the necessary methodology for translating this information into a penalty that will likely deter unlawful behavior. This shortcoming, however, goes beyond that of methodology and extends to substance. Consistent with that part of our precedent that is based upon law-and-economics principles, a penalty that is intended to deter should "remove the economic benefit of the illegal activity,"[8] and "reflect[] a

---

4 Administrative Conference of the United States Recommendation 79-3, 1 C.F.R. §305-79-3, quoted in CFTC Penalties Study, ¶ 26,264 at 42,211 (CFTC Nov. 1994).

5 *See* Stephen G. Bene, Note, *Why Not Fine Attorneys? An Economic Approach to Lawyer Disciplinary Sanctions*, 43 Stan. L. Rev. 907, 921 (1991) (discussing role of predictability in calculation of benefits and costs of criminal activities under general theory of deterrence); Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 Yale L.J. 2017, 2036 (1992) (stating that predictability in sentencing scheme fosters deterrence).

6 Richard A. Posner, Economic Analysis of Law 190 (2d ed. 1977).

7 Administrative Conference Recommendation, quoted in CFTC Penalties Study at 42,211.

8 *Id. See also In re Premex,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,892-93 (CFTC Feb. 17, 1988) (civil money penalties deter "by making it beneficial financially to comply with the requirements of the Act and Commission regulations rather than risk violations."); *GNP Commodities,* ¶ 25,360 at 39,222 ("potential violators will be discouraged from illegal conduct if they know that they are unlikely to profit from it"); and *Grossfeld,* ¶ 26,921 at 44,468 (CFTC Dec. 10, 1996) ("civil money penalties should be sufficiently high to deter future violations.").

While some may question the applicability of economics in setting deterrence strategy, Nobel laureate Gary Becker observes that an economic approach "can be used to study enforcement of all laws," and notes that the U.S. Sentencing Commission "has explicitly used the economic analysis of crime to develop rules to be followed by judges in punishing violators of Federal statutes." Gary S. Becker, *The Economic Way of Looking at Life,* John M. Olin Law & Economics Working Paper No. 12 (2d Series, premium to offset the benefit of engaging in . . . undetected violations."[9] However, we rarely impose penalties that fulfill these criteria and are unlikely to do so in the future when we promulgate policy measures in our decisions that further restrict our ability to be "appropriately severe and certain."

It was not that long ago when we regarded those elements traditionally associated with the goal of deterrence to be "especially pertinent factors to be considered" for the purpose of calculating penalties.[10] Nor was it that long ago when we declared that as a general matter our penalties should "not be too low or potential violators may be encouraged to engage in illegal conduct."[11] In fact, we remonstrated our administrative law judges whenever they imposed a penalty that fell significantly below such levels, and held that their failure to do so constituted an "abuse of discretion."[12] Finally, it was only seven years ago, when we recognized that focusing on penalties imposed in prior cases *undermined* effective deterrence, resulting in our wise abandonment of that practice.[13]

In more recent times, however, we seem to have drifted from the ideal that our penalties should be firmly based upon principles of deterrence. This is reflected in the way that value is now derogated within our standard,[14] and by the replacement of a revenue-based penalty formula

---

1993) at 6. *See also,* Becker, *Crime and Punishment: An Economic Approach,* 76 J. Pol. Econ. 169 (1968) (applying economic analysis to develop optimal penalty policies to combat illegal behavior).

[9] *GNP Commodities,* ¶ 25,360 at 39,223. Even this legal formulation is not completely satisfactory because it is based upon a premium that is applied to the wrongdoer's actual gains, with the Commission compounding this shortcoming by improperly interpreting "gain" to mean net profits. A penalty based upon deterrence principles, as I explained in my separate opinion in *R&W,* requires that a *multiplier* be applied to the wrongdoer's *expected* gains, i.e., to the *revenues* that the respondent expected to attain when he contemplated wrongdoing. *See* George J. Stigler, *The Optimum Enforcement of the Laws,* 78 J. Pol. Econ. 526, 531, 533 (1970) (arguing that gains must be multiplied by probability of detection such that "[e]xpected penalties [must] increase with expected gains"); Paul H. Rubin & Robert Zwirb, *The Economics of Civil RICO,* 20 U.C. Davis L. Rev. 883, 900 (1987) ("penalties must be a multiple of [respondent's] gains . . . in order to ensure that crime does not pay in an expected sense"); Emmett H. Miller III, *Federal Sentencing Guidelines For Organizational Defendants,* 46 Vand. L. Rev. 197, 204 (1993) ("total monetary sanction should be set such that the expected penalty cost outweighs the expected gain from the offense.").

[10] *Grossfeld,* ¶ 26,921 at 44,468.

[11] *GNP Commodities,* ¶ 25,360 at 39,222.

[12] *In re Miller,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,440 at 42,913 (CFTC Jun. 16, 1995) (vacating $200,000 civil money penalty because it represented only one-quarter of customer harm and respondent gain).

[13] *Grossfeld,* ¶ 26,921 at 44,468 & n.35.

[14] One only has to compare the way that deterrence was prominently emphasized in *GNP, Sigler, Murlas, Premex, JCC, Grossfeld,* and *Gordon* with how it has been de-emphasized in more recent cases. *Compare e.g., Grossfeld,* ¶ 26,921 at 44,468 (financial benefit that accrued to the respondent and/or loss

with one based upon a respondent's *net* profits.[15] It is further demonstrated by the instruction to calculate such ill-gotten net gains with "reasonable precision," thus directly overriding the recognition in *GNP* that "[c]ivil monetary penalties cannot be calculated with precision."[16] It is also manifested by a seemingly benign policy decision to once again look to past cases for guidance in calculating penalties, which has the effect of rescinding our resolve in *Grossfeld* to abandon this practice because it undermined the deterrent value of our penalties.[17] As a result, rather than vindicate, our approach to penalties marginalizes the value of deterrence. This is illustrated by the penalty assessed here, which is set at a level that pales in comparison to either the benefit that Staryk derived from his fraudulent conduct or the harm suffered by his customers.

To be sure, this retreat from deterrent-based penalties is motivated in part by the unfavorable reception that some of our higher penalty assessments have received from the judiciary. But our response to such judicial setbacks should be to directly address the specific issues that trouble these courts, rather than to lower our legal goal posts in order to meet a perceived demand for lower penalties or to selectively acquiesce to aspects of their decisions that impede our ability to impose penalties that advance deterrence.[18] Otherwise, to paraphrase Benjamin Disraeli, our precedent will end up embalming our principles.[19]

---

suffered by customers as a result of wrongdoing "are especially pertinent factors to be considered") with *Nikkhah,* ¶ 28,275 at 50,674 n.4 (relegating the benefit/harm deterrence-based penalty formula to two of five factors to consider for assessing the negative consequences flowing from a respondent's violations, which in turn comprise one of four factors to consider for determining gravity).

[15] The majority's adherence to net gains (as opposed to gross revenues) as the proper measure of the benefit that can be attributed to respondent's fraud is premised upon an assumption that certain expenses paid out by the respondent in the course of carrying out his fraud are legitimate. Unfortunately this misses the fact that if a fraudulent pitch had not lured a customer in the first place, the customer could have avoided all of the respondent's expenses, legitimate or otherwise. It also ignores the fact that the entire enterprise here was for the purpose of perpetuating fraud.

[16] *GNP Commodities,* ¶ 25,360 at 39,222.

[17] It is even discerned by our decision in *Nikkhah* requiring the Division to bear both the burden of production and the burden of proof on the issue of a respondent's net worth. *Nikkhah,* ¶ 28,275 at 50,677.

[18] In general, I do not favor allowing speculative concerns about how certain courts might react to drive our penalty calculations. While some courts have occasionally had qualms with the level of penalties that we have set, most of them have not. *See e.g., Gordon v. CFTC,* 86 F.3d 1169 (11th Cir. 1996) (summarily affirming the Commission's decision to increase $1,000 civil money penalty imposed by ALJ to $200,000). Moreover, even those courts that have expressed reservations have gone out of their way to affirm our right to base our penalties upon principles of deterrence. *See e.g., Miller v. CFTC,* 197 F.3d 1227, 1236 (9th Cir. 1999) ("The Commission can set a penalty as a deterrent . . . Doing so, the Commission is exercising the important and delicate governmental function of punishing illegal conduct."). Indeed, by far the most serious litigation risk we face today in this area has to do with judicial misinterpretation of our case law in this area, as happened in *Slusser*, when the Seventh Circuit misconstrued our precedent on net worth, and as happened in *R&W*, when the Fifth Circuit failed to distinguish between the different remedial purposes served by penalties and those by disgorgement.

Our problems, however, lie not just with the way we formulate our standard, but also with the way we apply it. For example, in making its assessment here, the majority decided not to consider those violations that took place prior to the adoption of the Futures Trading Practices Act of 1992 ("FTPA"), thus giving Staryk a free ride for the violations that he committed between August 1991 and October 1992. The majority took this action primarily to avoid having to hold a hearing on Staryk's net worth for that set of violations.[20] But there was no need to do this since Staryk voluntarily waived consideration of his net worth at the remand hearing, even going so far as to enter into a joint stipulation with the Division to vacate its subpoena *duces tecum* to produce documents on that issue.[21]

In any event, these risks have more to do with our inability to adequately explain to courts of review our rationale for formulating penalties upon principles of deterrence and our implementation of those principles than it does with any inherent problem associated with the imposition of such penalties. That is, as long as we apply our principles in a sound manner, and explain them in relevant legal *and* economic terms, there should be no need for us to adopt a risk averse posture.

[19] "A precedent embalms a principle." Benjamin Disraeli, Speech on the Expenditures of the Country, Feb. 22, 1848.

[20] The majority also sought to avoid having to make a "bifurcated calculation" of the penalty for violations committed between August 1991 and October 1992. Even if I were to accept the premise that such violations were not subject to a multiplier, which I do not (*see* discussion *infra*), this reasoning does not strike me as a satisfactory rationale for striking from the record those violations committed during a significant period of respondent's wrongdoing.

[21] *See* Tr. 10-17. In dismissing the legal significance of Staryk's waiver due to the ALJ's acceptance of an estimate of Staryk's net worth for purposes of restitution, *see* n. 40 of the Commission's opinion, the majority glosses over the fact that the ALJ specifically ratified that waiver "as it related to civil monetary penalties." Tr. at 16. Indeed, the majority's view will be stunning news to the Division since it declined to develop a record on Staryk's net worth during the penalty phase of the hearing "[i]n reliance on this stipulated waiver." Div. Ans. Br. at 32. Notwithstanding this, the concurring opinion of my colleague suggests that Staryk did not in fact intentionally relinquish his right to have his net worth considered. This suggestion represents an unfortunate misrepresentation of the record. After initially expressing a certain degree of uncertainty regarding this issue, Staryk's counsel expressly agreed with the ALJ that the issue had been waived, *i.e,* that his client had relinquished his right to have evidence of his net worth introduced "with respect to the assessment of civil monetary penalties." This followed the ALJ's lengthy clarification that such evidence could be considered for conduct occurring prior to October 1992. *See* excerpts from the Remand hearing transcript, at Appendix A, attached to this opinion.

The majority also fails to recognize the fundamental distinction between net worth when it is considered for the purpose of a imposing a penalty and when it's for requiring a respondent to pay restitution. While the former inquiry is required as a matter of law under the CEA for violations occurring before October 1992, the latter is a creature of our case law to ensure that any order compelling the respondent to pay restitution not amount to an "empty gesture." *In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,812 (CFTC Dec. 18, 1997). More important, the net worth inquiry of former Section 6(d) envisions a more formal process than that used to determine the respondent's ability to pay restitution, entailing the issuance of subpoenas to assure that all material evidence is produced, a separate hearing to develop the record on the respondent's financial condition, and cross-examination by the Division. None of that was done here in connection with the restitutionary phase of this proceeding.

Similarly, the majority's substitution of its own findings for those of the ALJ regarding the scope of Staryk's wrongdoing, while legally permissible, nevertheless is unwarranted, because as the Division correctly points out, "Staryk's own testimony established the scope of his fraud." Div. Ans. Br. at 24. Concededly such testimonial evidence may not always be conclusive, and the majority does its best to minimize its significance by repeatedly referring to it as a "guesstimate.[22] Yet there is compelling reason why we should give Staryk's *own* testimony pertaining to the scope of *his* fraud great weight, and that is because it represents an *admission against interest* by the party making it.[23] The majority also faults the ALJ for equating customers who were lured by Staryk to open accounts trading seasonal energy contracts with customers who opened accounts to trade other commodities. But the record reveals that the ALJ took this distinction into account in rendering his decision, and incorporated it into his analysis of the scope of Staryk's wrongdoing.[24]

Bear in mind that when we originally remanded this matter in 1997, we advised the Division that it could rely upon "a properly selected sample" of customers to determine the scope

---

[22] Contrary to the majority's assertion that Staryk offered "shifting versions" of his estimate on how often he used his seasonality pitch, he consistently stated a range of 70 to 90 percent. Moreover, the majority's citation of 50 percent for the low end of the range is somewhat misleading, since it is based upon Staryk's affirmative response to a leading question put to him by the Division's attorney:

> Division Attorney: Okay. At Commonwealth isn't it true that the *majority* of your customers invested either in heating oil or unleaded gas?
>
> Staryk: The majority of solicitation during the time I worked there were those markets.

Tr. 135-36 (emphasis added). Moreover, the opinion arbitrarily assigns a value of 50 percent to the term "majority" when in fact that term could equally be equated with any percentage between 50 percent and 100 percent. Indeed, Staryk makes clear at two different points during the hearing that the true range of his estimate is 70 to 90 percent. *See* Tr. 135-41, 671-74.

[23] *Delli Paoli v. U.S.*, 352 U.S. 232, 240 (1957), *overruled on other grounds by Bruton v. U.S.*, 391 U.S. 123 (1968) (admission against interest by defendant); *U.S. v. ex rel. Leong v. O'Rourke*, 125 F.Supp. 769, 773-74 (D.C. Mo. 1954) (admission against interest by witness on own behalf may in light of surrounding circumstances be sufficient to establish the fact admitted). *See U.S. v. Harris*, 403 U.S. 573, 583 (1971) (admissions of wrongdoing, like those against proprietary interests "carry their own indicia of credibility"); *TRW Environmental Safety Systems Inc. v. U.S.*, 18 Cl. Ct. 33, 50 (U.S. Cl. Ct. 1989) (emphasis added) (admission against interest *post litem motam* exudes credence on theory that "no reasonable person would make a *false admission* against himself."); *U.S. v. Palumbo*, 639 F.2d 123, 127 (3d Cir. 1981) (statement against interest rests upon assumption that one does not make statements that would damage himself unless statement is true). Furthermore, in evaluating such a statement, courts may credit an adverse admission while rejecting the balance of the testimony. *O'Rourke*, 125 F.Supp. at 773; *TRW Environmental*, 18 Cl. Ct. at 50.

[24] *See* Tr. 135-142 (ALJ's inquiry regarding extent to which Staryk marketed "energy options as opposed to all other options"), 588-90 (ALJ's inquiry regarding extent to which Staryk emphasized "other fundamental factors beyond seasonality"). See also, *In re Staryk*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,515 at 47,383 (ALJ Dec. 4, 1998) (recognizing that Staryk solicited options "in markets other than heating oil and unleaded gasoline during the relevant period").

of Staryk's misrepresentations.[25] Instead, it chose to present the testimony of ten handpicked customer-witnesses, who, as the ALJ observes, "did little more than [establish] the obvious: that at least ten out of Staryk's hundreds of customers were solicited by him to speculate in heating oil and/or unleaded gasoline options."[26] Lacking any indication that these witnesses properly represented Staryk's customer base, however, it seems only prudent that the ALJ would look elsewhere for more reliable evidence, especially given the difficulty that many of them had in recalling and comprehending their conversations with Staryk.[27]

Yet the majority disavows the ALJ's penalty analysis, accusing him of erring "in several respects," notwithstanding the fact that, apart from the scope of Staryk's misconduct, it is identical to the analysis that he made in his first decision. Moreover, with the exception of that one issue, the Commission had no problem with the way he calculated the penalty when it initially considered this matter. But now, six years later, we suddenly discover a number of additional shortcomings with his analysis that apparently had escaped notice the first time around.

An example of such a newfound "error" relates to the ALJ's use of a multiplier in calculating Staryk's penalty. While the majority correctly points to the inapplicability of the FTPA's treble-gain penalty provision to violations occurring before November 1992, it overlooks the fact that such an action was nonetheless expressly permitted by our long-standing precedent. Indeed, more than seven years prior to the ALJ's issuance of his remand decision, we declared that "[t]he exemplary purpose of the penalty will be served *only if its amount reflects a premium* to offset the benefit of engaging in . . . undetected violations."[28] In its blanket rejection of the ALJ's approach, the majority fails to reconcile its interpretation of the Act with our precedent's call for a premium-based penalty.

The majority also charges that the ALJ erred in equating Staryk's gains with his ill-gotten revenues, rather than with his net profits. In fact, the only error that the ALJ made here was in failing to anticipate that more than five years after he would issue his opinion, the Commission would willingly acquiesce to a standard that is derived from the principles of disgorgement, rather than that of penalties.[29]

---

[25] *Staryk*, ¶ 27,206 at 45,812. Had the Division followed our advice, we could have avoided the tortuous, forensic-like examination of the record that the majority attempts to make here.

[26] *Staryk*, ¶ 27,515 at 47,385 n. 75.

[27] As the ALJ aptly observed, "without the help of Staryk's own largely incriminating testimony . . . the record on remand would have remained insufficient to determine the scope of Staryk's misrepresentations." *Id.* ¶ 27,515 at 47,385 n.75.

[28] *GNP Commodities*, ¶ 25,360 at 39,223 (emphasis added).

[29] *See SEC v. Shah*, 1993 WL 288285 at *5 (S.D.N.Y. 1993) (allowing deduction for expenses incurred while garnering illegal profits is consistent with view "that disgorgement is *not a penalty assessment*, but merely a means of divesting a wrongdoer of ill-gotten gains.") (emphasis added). *See also In re R&W Technical Services, Inc.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,556 at 55,394-396 (CFTC, Aug. 6, 2003) (Brown-Hruska, C. concurring in part and dissenting in part).

Then the majority censures the ALJ for basing his finding on the scope of Staryk's misconduct upon an "imprecise 'guess' or 'guesstimate,'" rather than upon a more precise assessment, that is, one made with "reasonable precision." Leaving aside the fact that this so-called guess came in the form of an admission by Staryk--and one that was against his interest to boot--it is not apparent to me that the majority's reliance upon the testimony of only four handpicked witnesses combined with a review of only ten days worth of audio recordings is *prima facie* more probative, let alone any more "precise." Moreover, I disagree with elevating this command, which was embraced solely for an accounting purpose, *i.e.,* to ensure that our tally of a respondent's ill-gotten gains would be "based on actual revenue and expenses,"[30] (and which is uncalled for even under the principles of disgorgement)[31] to a more general evidentiary obligation.

Finally, the majority "specifically disavows" the ALJ's criticism of the Division's ten customer witnesses for their lack of specificity in describing their conversations with Staryk. Although the majority takes the ALJ to task for using this ground to discredit this testimony, it speaks volumes that it could rely upon only four of them to make its case. Moreover, I see little basis upon which to fault the ALJ for finding the testimony of individuals suffering from "severely diminished recollections" to be unreliable. *See Dawson v. Carr Investments, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,983 at 53,316 (CFTC Apr. 10, 2002) (lapses in memory may make witness testimony insufficiently reliable to support fact-finding).[32]

Turning to the majority's penalty calculation, I am struck both by its *imprecision* and the extent to which it excludes from consideration significant portions of the evidentiary record. For example, in measuring the trading losses associated with Staryk's fraud, the majority eliminates all customer losses that occurred between August 1991 and June 1993 while Staryk was at Commonwealth, thus removing from consideration approximately $1.14 million in trading losses suffered by 173 customers.[33] It takes this drastic action apparently because a Division auditor

---

[30] *R&W,* ¶ 29,556 at 55,391 & n.15.

[31] While the disgorged amount must be causally connected to a violation, "it need not be figured with exactitude." *SEC v. Rosenfeld,* 2001 WL 118612 at *2 (S.D.N.Y. 2001). *See also SEC v. First City Financial Corp.,* 890 F.2d 1215, 1231 (D.C. Cir. 1989) (disgorgement need only be a "reasonable approximation" of illegal profit).

[32] Furthermore, I believe that we have strayed too far from our policy of deferring to the ALJ's judgment with respect to witness credibility in the absence of *clear* error. We ought to recognize that the presiding officer has a comparative advantage over us on this score since, unlike us, he can assess the crucial demeanor-based factors that are never apparent on the face of a hearing transcript. We remanded this matter, after all, in order to obtain *demeanor-based* assessments on two issues crucial to the outcome--scienter and scope of wrongdoing--because "transcripts alone are insufficient to demonstrate the extent of Staryk's misleading sales presentations." *Staryk,* ¶ 27,206 at 45,811. While that observation related to the respondent's state of mind, it applies with equal force, in my opinion, to the credibility of any witness taking the stand.

[33] *Staryk,* ¶ 27,206 at 45,803-804.

(McHugh) raised "troubling" questions about the reliability of the loss figures calculated by another Division auditor (Gardiner). But McHugh, who reviewed Gardiner's analysis, simply testified that the Gardiner analysis overstated the losses suffered by Staryk's Commonwealth customers by $12,000.[34] Such an insignificant difference does not justify, in my view, the wholesale exclusion of this record evidence. Nevertheless, it leads the majority to rely solely upon the $1.9 million of estimated losses suffered by Staryk's customers at First Investors. Even if one were to accept this reasoning, that should result in a loss estimate of $1.06 million after applying the 56 percent figure that the majority assigns to the frequency by which Staryk used his seasonality pitch, not the $730,000 cited in the opinion.[35]

Similarly, on the gain side, the majority's desire to avoid a "bifurcated" penalty calculation entailing a hearing on Staryk's net worth for violations committed prior to enactment of the FTPA compels it to eliminate from consideration at least $144,000 of Staryk earnings for 1992 and an indeterminate amount for 1991. Again, I fail to comprehend why we cannot adequately deal with this set of violations given Staryk's unequivocal waiver of his right to have his net worth considered for penalty purposes. In addition, the majority eliminates from consideration $30,000 that Staryk admitted to earning during the first two months of 1995.[36] The majority's rationale here--that the record lacks "reliable evidence" that Staryk used his seasonality pitch during that period--is belied by his testimonial admission that he solicited accounts for heating oil or gasoline at First Investors "70 percent of the time" during that period.[37] Taking into account these exclusions, the practical effect is to ratchet down the estimate of Staryk's ill-gotten gains from $590,000 that both the ALJ and the Division calculated to $296,000. That should, under the majority's analysis, lead to a final figure of $165,760, *i.e.,* $296,000 x .56, rather than the $100,000 to $120,000 range that the majority, without explanation, attributes to Staryk's misconduct.

Having calculated the gains and losses attributed to Staryk's fraudulent solicitation, the majority then sets out to compare the magnitude of Staryk's financial gain to that of two other APs who were found to have engaged in misconduct similar to that of Staryk, and then use that comparison to assist in calculating an appropriate penalty against Staryk. Relying primarily upon the $350,000 penalty imposed in *Miller*, the majority concludes that Staryk should be

---

[34] That is, instead of losing a total of $3,260,000 as Gardiner calculated, Staryk's customers at both Commonwealth and First Investors actually lost $3,248,000.

[35] In deciding upon a figure to estimate the percentage of customers who likely relied upon Staryk's specialty pitch, the majority uses a figure of 56 percent, which is based on the percentage of times Staryk used the seasonality pitch in soliciting customers during a 10-day sample period.

[36] *See In re Staryk*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,701 at 43,939 n.149 (ALJ Jun. 5, 1996).

[37] Tr. 674. In light of Staryk's admission that he earned at least $30,000 during the first two months of 1995, and that he employed his seasonality pitch 70 percent of the time while at First Investors, the gain that can be attributed to his fraud for this period is at least $21,000.

assessed one for $450,000. But once again, the decision provides no objective rationale for how we get from Miller's $350,000 penalty to Staryk's $450,000 penalty.[38] Moreover, despite the stated desire to set penalties that carry a deterrence effect, there is no assessment of whether or how the penalty in this case might achieve that desired effect. Lacking both a compelling rationale along with a discernable roadmap to its thinking, one is left with the impression that the basis for the chosen penalty, like the Wizard of Oz, ultimately lies with the logic of the man behind the curtain.

<u>Conclusion</u>

Although we reaffirm our commitment to the principle of deterrence, this commitment is undermined by our actions. Indeed, the penalty levels that we assess in our administrative adjudications appear to bear no clear relationship to the level of fraud established on the record. This implicitly results from a penalty analysis that places a higher value on attaining a "high degree of false precision," rather than "a reasoned estimate that carefully considers the evidence available."[39] I have no brief with the general notion that the weight we accord a penalty calculation "should vary with the precision of the underlying evidence." We should recognize, however, that precision for its own sake hardly serves as an adequate organizing principle for imposing a penalty, and as noted in *GNP Commodities*, monetary penalties "cannot be calculated with precision."[40]

I, therefore, believe that effective deterrence would be better served if we concentrated less on precision, and more on clarity so that prospective wrongdoers have a clearer picture of the consequences of running afoul of our norms. I also believe that we would be better off if we aligned our penalty standard more closely with economic principles. For as Posner reminds us, "the economic theory of law is a theory of law as deterrence."[41] A penalty standard that is based upon a catalog of "subjective, frequently competing, and sometimes inconsistent factors,"[42] however, will rarely measure up to these ideals because it offers little real guidance on how heavily each factor is weighed in our collective mind and because it places less value on the economic rationale for such a sanction.

---

[38] In other words, the majority appears to rely on the logic that the sum gravity of Staryk's fraud is some amount "x" greater than Miller's fraud and by that reason, Staryk's penalty should be some amount "y" greater than Miller's, where "y" is some function of "x." The problem is we do not know what that function is.

[39] *In re First Financial Trading, Inc.*, [2002-2003 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,089 at 53,699 n.159 (ALJ, Jul. 8, 2002).

[40] *GNP Commodities,* ¶ 25,360 at 39,222 (emphasis added).

[41] Posner, at 190.

[42] *In re Grossfeld,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,975 at 41,118 (ALJ Feb. 9, 1994).

Accordingly, while I concur with the non-monetary sanctions that we impose in this matter, I believe that the monetary penalty assessed against Staryk will not serve to deter this type of misconduct from occurring in the future.

Sharon Brown Hruska by RZ
Commissioner Sharon Brown-Hruska

7/23/04
Date

Appendix A

A review of the transcript of the remand hearing reveals that Staryk's attorney, Gary A. Feder, expressly waived his client's right to have evidence of net worth considered in connection with the ALJ's imposition of a civil monetary penalty. At the hearing, the Division's attorney, W. Derek Shakabpa, informed the ALJ that :

> The Division had sent a subpoena signed by Your Honor to Staryk for his appearance and attendance here. . . .
>
> It also included an attachment to produce certain documents primarily related to Mr. Staryk's attorney, Gary Feder, this morning and I think we've reached an agreement. Mr. Feder had indicated that he would have to move to quash the subpoena duces tecum if the Division intended to move forward on having Mr. Staryk produce those documents.
>
> But according to the agreement that we have reached this morning, it does not appear that we would need to have the production of those documents, because the parties will be stipulating that no net worth evidence, present net worth of Mr. Staryk's – evidence will be put forth at this hearing either by the Division or by Respondent Staryk's attorney. . . .
>
> JUDGE LEVINE: So I would think the record at this point has nothing on net worth, or no direct evidence of net worth. At least that's my understanding. Is that the parties' understanding?
>
> MR. SHAKAPBA: That's my understanding.
>
> MR. FEDER: Yes.
>
> JUDGE LEVINE: Okay. So we have a stipulation here? Could we have it a little bit more clearly for the record? I'm sorry.
>
> MR. FEDER: Would you like me to read it?
>
> Unless Your Honor chooses to want to hear net worth issues regarding a civil monetary penalty, which I believe is a closed issue under the Act, the Division and Respondent Staryk saw no need to address that issue, as Your Honor has already separated the restitution issues from being heard at this hearing. . . .

The ALJ then corrected Mr. Feder's interpretation of the CEA by stating that although the "law is less than clear." But the ALJ's characterization was in regards to whether the net worth consideration was applicable to misconduct alleged in Complaints filed after October 28, 1992. The ALJ then ruled that for purposes of this case, "former Section 6(d) of the Act governs." He then went on to find:

> Nevertheless, Respondents have not raised the issue of net worth on appeal, nor did they request a net worth hearing. Accordingly, we treat the issue of their net worth as waived. Then there's--I'll omit the citations.

So I think we have a new understanding. I think net worth, the amendment--the 1992 Act, to the extent, as it existed prior to the 1992 amendments, did pertain to this case with respect to a portion of the Complaint.

I can see no basis for concluding that the net worth provisions of the pre-1992 Act apply to any portion of the Complaint which alleges after October of 1992, and I can see no--since the Complaint itself was filed after October 1992. But I think when filed, the net worth provisions of the--that part of the Complaint that covers--that alleges misconduct in Mr.--or violations of the Act and regulations on Mr. Staryk's part from August 1991 through October 1992 was subject to provisions of the Act by which net worth could be considered prior to the 1992 amendments.

However, in this case my view is that the issue's been waived at my level, as it was waived at the Commission level in the *Glass* case, because I have reviewed the pre-pre-hearing memoranda and other pre-hearing submissions of Mr. Staryk in this case, and it's my conclusion he has not raised the net worth issue, either as a legal issue that he seeks to address in this case with respect to civil monetary penalties, nor has he proffered any suggestion that he would have testimony or evidence on the issue as it related to civil monetary penalties.

So, similar to federal practice under Rule 16, I deem the issue waived. So, in this case at this point, there's no net worth consideration with respect to the assessment of civil monetary penalties.

There is, of course, net worth—evidence is, of course, material to restitution and to the extent mandated, issues of evidence with respect to net worth will be addressed in any restitutional phase of this proceeding as appropriate.

Okay, with that, with stipulation, do I take it that you're seeking to vacate the subpoena? Would that be appropriate?

MR. SHAKAPBA: That's right.

JUDGE LEVINE: Okay. So the subpoena that was issued [for the purpose of obtaining documents relating to Staryk's net worth] that was referred to, the subpoena duces tecum, directing Mr. Staryk to produce certain documents, is vacated by the formal Order of the Court.

MR. FEDER: Thank you, Your Honor.

Tr. 10-17 (emphasis added).

Opinion of Chairman James E. Newsome, Concurring

I write separately to respectfully respond to some of the arguments made by my colleague in the dissenting portions of her opinion, while continuing to support the Majority Opinion in this case. The dissent again contends, as it did in *In re Miller*, CFTC Docket No. 92-4 (CFTC July 23, 2004) ("*Miller IV*"), which we also issue today, that the Commission is not imposing a sufficiently high penalty in this case to achieve effective deterrence. In this regard, the dissent appears to charge that the penalty does not remove Staryk's economic benefit and does not impose a premium to offset his benefit in engaging in violations of the Act and Commission regulations. However, the $450,000 penalty that the Commission imposes today achieves both of these goals. As the Majority Opinion states, Staryk's gains from his fraudulent conduct were approximately $100,000 to $120,000. The $450,000 civil penalty thus removes Staryk's gains and imposes a substantial premium, while remaining within the statutory maximum. As Commissioner Lukken explained in his concurrence in *Miller IV*, *id.*, slip op. at ___ (Lukken, Comm'r, concurring), deterrence can only be realized through the imposition of soundly reasoned penalties that are supported by the factual record of a particular case. Our penalty here achieves that goal.

The dissent also claims that the Majority minimizes the importance of the financial gains and losses flowing from Staryk's fraudulent conduct in assessing the civil penalty. Far from giving these financial consequences diminished consideration, the Majority Opinion explains its consideration of Staryk's gains and his customers' losses in some detail, slip op. at 28-31, and imposes a penalty that clearly reflects their importance in the Commission's penalty assessment. To be sure, the dissent takes issue with how Staryk's gains were calculated, charging that the Majority's calculation is too low. However, contrary to the dissent's contention, and as the Majority Opinion makes clear, Staryk's gains must be discounted by two factors: (1) the proven percentage of time Staryk used the deceptive seasonality pitch; and (2) the proven percentage of accounts in heating oil and natural gas that were opened by customers in reliance on Staryk's use of the deceptive pitch. In charging the Majority with calculation errors, the dissent fails to recognize that Staryk's gains must be discounted by the second factor as well as the first, because not all of Staryk's customers opened accounts in heating oil and natural gas. And the record simply does not permit us to draw the inference, which the dissent apparently draws, without explanation, that the commissions Staryk earned from customers who did not trade contracts in these commodities were fraudulently obtained by Staryk's deceptive pitch. Our penalties must be "grounded on the record before the agency," *Miller v. CFTC*, 197 F.3d 1227, 1236 (9th Cir. 1999), and not based on inferences not supported by that record.

In addition, the dissent criticizes the Majority for not including Staryk's gains from certain limited time periods in its gains calculation. However, not only does the dissent fail to discount these gains appropriately, thus magnifying them out of proportion to their proven extent as fraudulently obtained, but also fails to recognize the practical concerns that motivated their exclusion. Although the dissent discounts some of these concerns by suggesting that Staryk waived his right to a net worth hearing with regard to his pre-October 1992 conduct, the concept of waiver generally is the intentional relinquishment of a known right. *Matter of Garfinkle*, 672 F.2d 1340, 1347 (11th Cir. 1982); *First Interstate Bank of Arizona v. Interfund Corp.*, 924 F.2d 588, 595 (5th Cir. 1991). Waiver at common law requires "(1) the existence at the time of the waiver [of] a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage, or benefit." *Garfinkle*, 672 F.2d at 1347; *see also First Interstate Bank*, 924 F.2d at 595. The record in this case shows that Staryk's counsel was unaware that Staryk's net worth was a material issue with regard to the assessment of the civil penalty for his pre-October 1992 conduct, and entered into a Joint Stipulation with the Division of Enforcement that neither party would present evidence of net worth at the hearing on remand. Indeed, as the Majority observes, even the Administrative Law Judge announced that, in his view, Commission precedent was "less than clear" on this issue. *See* slip op. at 5-6. Such evidence indicates that were we to include pre-October 1992 conduct in the assessment of a penalty, there would be issues to adjudicate regarding whether Staryk could be found to have had constructive or actual knowledge of his right to a net worth hearing. Accordingly, there is a reasonable basis on which to exclude consideration of the limited gains from the pre-October 1992 period, and such exclusion does not impair the deterrent effect of the significant penalty imposed by the Commission.

Finally, the dissent criticizes the Majority Opinion for its use of comparable cases in its penalty assessment. In so doing, as observed by Commissioner Lukken in *Miller IV*, the dissent mischaracterizes the Commission's decision in *In re Grossfeld* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 (CFTC Dec. 10, 1996), as abandoning consideration of comparable cases. *See Miller IV*, CFTC Docket No. 92-4 (CFTC July 23, 2004), slip op. at ___ (Lukken, Comm'r, concurring). Moreover, the dissent fails to demonstrate that the Majority Opinion's consideration of comparable cases undermines the deterrent effect of the imposed penalty, which takes away Staryk's gains and imposes a substantial premium, as noted above. Finally, the dissent finds no fault in either the Majority's choice of cases with which to compare Staryk, or the reasoning that Staryk's penalty should be higher than the comparable cases it considers. Rather, the dissent criticizes the rationale for the precise amount of the penalty assessed. This criticism misconstrues the nature of comparable case analysis, which provides a contextual framework for decision-making among a number of factors to be considered, and not a precise formula for assessing penalties. To insist on this level of precision, as the dissent does with regard to comparable cases, and more generally with respect to Staryk's gains and losses, is contrary to Commission precedent pursuant to the $100,000 per violation standard, *see, e.g., In re GNP Commodities, Inc.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,360 at 39,222 (CFTC Aug. 11, 1992). Moreover, adherence to rigid formulae in determining the level of sanctions would represent an abdication of "the important and delicate governmental function" of imposing appropriate sanctions in individual circumstances. *Miller*, 197 F.3d at 1236.

James E. Newsome

Chairman James E. Newsome

7/23/04

Date