

RISK & COMPLIANCE JOURNAL

# Judge's Order Puts New CFTC Chairman in Unusual Position

Heath Tarbert and two other commissioners must answer questions about a provision in a settlement with Kraft Foods and Mondelez Global, judge says



Heath Tarbert took over as head of the Commodity Futures Trading Commission in July. PHOTO: KYLE GRILLOT/BLOOMBERG NEWS

*By Dylan Tokar*

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A federal judge in Chicago has made an unusual demand of the new chairman of the Commodity Futures Trading Commission: Testify in front of—and perhaps be cross-examined by—lawyers for two companies that were recently penalized by the regulator.

U.S. District Judge John Robert Blakey this week ordered Chairman Heath Tarbert to testify about statements he and his agency made following a \$16 million agreement with Kraft Foods Group Inc. and Mondelez Global LLC to settle wheat price-rigging allegations.

Heads of regulatory agencies aren't typically called upon to testify in court. Lawyers who specialize in CFTC cases called the move by Judge Blakey surreal and unprecedented.

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Outsourcing customers are beginning to demand the more inclusive and flexible third-party assurance report known as System and Organization Control 2+ (SOC 2+). This integrated approach to examinations and reporting can benefit outsourcing service providers as well, but it will take additional effort for these vendors and partners to become proficient in SOC 2+ processes.

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The order, which also requires two other CFTC commissioners to testify at the hearing in Chicago, is an early setback for Mr. Tarbert, who took the helm July 15. The hearing could delve into the agency's sensitive internal deliberations, and Judge Blakey on Monday raised the possibility he could make a referral for criminal contempt of court. Mr. Tarbert didn't respond to a request for comment.

The hearing, scheduled for Sept. 12, follows a motion by Kraft and Mondelez alleging that the statements by the CFTC, Mr. Tarbert and the two other commissioners violated an unconventional provision of the settlement. The provision prohibited parties to the settlement from making public comments about the deal, beyond referring to information in public records or the terms of a consent order approved by Judge Blakey.

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The clause was unusual because federal regulators often issue press releases following high-profile settlements. Such statements allow regulators to highlight their efforts to deter wrongdoers, explain why an enforcement action is warranted and reinforce policies.

On Aug. 15, a day after the settlement was finalized, the CFTC did just that: It issued a press release announcing the settlement with Kraft and Mondelez, which were one corporate entity when the agency announced its civil charges in 2015.

"America is the breadbasket of the world; wheat markets are its heart," Mr. Tarbert said in the

release. “Market manipulation inflicts real pain on farmers by denying them the fair value of their hard work and crops.”

The commission and its two Democratic commissioners, Rostin Behnam and Dan Berkovitz, also released separate statements touting the settlement and noting the restriction on public statements. The statement from Messrs. Behnam and Berkovitz took particular issue with the provision but said it didn’t restrict them from speaking individually about the settlement.

The press release and statements prompted Kraft and Mondelez to accuse the CFTC of violating the terms of the settlement. The companies have asked Judge Blakey to impose a monetary penalty on the agency.

CFTC lawyers argue that the statements didn’t violate the provision because they largely summarized information already in the public record. And individual commissioners can’t be prohibited from issuing their own opinions as a matter of law, they say. Nonetheless, the CFTC agreed Monday to temporarily remove the three statements from its website.

At a hearing Monday, Judge Blakey ordered Messrs. Tarbert, Behnam and Berkovitz to appear in court to answer questions about the statements. Lawyers for the CFTC, including its enforcement division director, and counsel for Kraft and Mondelez also are expected to testify.

Messrs. Behnam and Berkovitz didn’t respond to requests for comment left with their offices at the CFTC. A lawyer for Kraft and Mondelez also didn’t respond to a request for comment.

The legal protections enjoyed by the CFTC could make it difficult for the judge, or for Kraft and Mondelez lawyers, to question the commissioners closely about internal decision-making at the regulator.

But a decision by the court that the agency had violated the settlement would be a bad outcome for the agency and its chairman, said Matt Kluchenek, a lawyer specializing in CFTC cases at Mayer Brown LLP.

The CFTC is concerned about its reputation and maintaining confidentiality, Mr. Kluchenek said. “If the court disagrees” with the agency’s arguments, he said, “it’s embarrassing, frankly, for all concerned.”

Agreements negotiated by the CFTC also normally include a detailed summary of factual and legal findings explaining how a company violated a particular law. Those findings, which typically appear in a settlement agreement, provide guidance to the public about the agency’s interpretation of its laws.

The CFTC’s settlement with Kraft and Mondelez didn’t include such a summary, which was another anomaly of the agreement, said Elizabeth Davis, a former CFTC lawyer who now works

at Murphy & McGonigle PC.

The civil complaint filed against Kraft and Mondelez was based in part on an anti-manipulation statute in the Dodd-Frank Act, a 2010 law designed to boost regulation of the financial sector after the 2008 economic crisis. Other companies had been looking to the case for guidance on the anti-manipulation statute, Ms. Davis said.

”The fact that the settlement happened without legal conclusions means those questions are unanswered,” she said.

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### **Corrections & Amplifications**

The CFTC and its two Democratic commissioners released separate statements about the settlement with Kraft Foods Group Inc. and Mondelez Global LLC. An earlier version of this article incorrectly stated CFTC Chairman Heath Tarbert released a separate statement. (Aug. 25, 2019)

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