

RISK & COMPLIANCE JOURNAL

CFTC Commissioners, Staff Win Reprieve From Contempt Hearing

Kraft and Mondelez accused the CFTC of violating an unusual confidentiality provision in a settlement with the derivatives regulator



The CFTC has scored a victory in a dispute with Kraft and Mondelez over an unusual confidentiality provision included in the agency's recent settlement with the two food companies. PHOTO: NAM Y. HUH/ASSOCIATED PRESS

By Dylan Tokar

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The U.S. Commodity Futures Trading Commission's top brass can't be blocked from airing their views on the agency's enforcement efforts, an appeals court has ruled.

The ruling by the U.S. Court of Appeals for the Seventh Circuit is a victory for the CFTC, which has been locked in a legal battle with Kraft Foods Group Inc. and Mondelez Global LLC over statements the agency released following a settlement with the two food companies.

The dispute stems from an unusual provision in the Kraft-Mondelez settlement, under which the two companies—previously a single corporate entity—agreed to pay \$16 million to settle claims they manipulated the wheat-futures market. The provision appeared to prohibit parties to the settlement from commenting publicly on the deal.

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Despite the provision, the CFTC released three statements—including a press release, a statement by all five members of the commission, and a separate statement by the agency’s two Democratic commissioners—touting the agreement a day after the settlement was approved in court. The statements caused Kraft and Mondelez to ask a federal judge to hold the derivatives regulator in contempt of court.

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The judge, John Robert Blakey of the U.S. District Court for the Northern District of Illinois, in August ordered CFTC Chairman Heath Tarbert, the agency’s two Democratic commissioners and other agency staff to appear for an evidentiary hearing that Judge Blakey said could result in a referral for criminal contempt.

In response, the CFTC filed several emergency motions, asking Judge Blakey and the Seventh Circuit to delay or cancel the evidentiary hearing. The regulator argued that privileges protecting high-ranking executive branch officials prevented the commissioners from testifying.

After his initial order, Judge Blakey softened his stance, saying a referral for criminal contempt was unlikely, given that Kraft and Mondelez had made clear in subsequent filings that they were seeking only an order of civil contempt.

In a filing to the Seventh Circuit earlier this month, Judge Blakey argued that the CFTC’s appeal was premature. But he continued to press for appearances by the agency’s commissioners, as well as staff members who were involved in the settlement with Kraft and Mondelez.

The Seventh Circuit on Tuesday sided with the CFTC. The appeals court blocked Judge Blakey from forcing the commissioners, including Mr. Tarbert, or staff members from testifying in court, and from finding them personally liable for violating the confidentiality provision in the Kraft-Mondelez settlement.

“Every member of the commission has a right to publish an explanation of his or her vote,” the appeals court said. “If the commission has done wrong, that is because of what the commission itself said and did, not because of what any of its members or employees thought or planned.”

A lawyer for Kraft and Mondelez didn’t respond to a request for comment.

The Seventh Circuit left open the possibility for Judge Blakey to find that the agency, as an institution, violated the consent order. But it said the judge would have to conduct his inquiry by relying on the agency’s official acts and the case’s administrative record.

The confidentiality provision prohibited Kraft, Mondelez and the CFTC from making any public statements other than to refer to the terms of the settlement or public documents filed in the case. The appeals court on Tuesday highlighted four sentences from the agency’s press release, which Kraft and Mondelez have argued violated the confidentiality provision.

In one sentence, the CFTC said the \$16 million penalty was approximately three times Kraft and Mondelez’s alleged gain from market manipulation. In another, the commission said it believed the settlement advanced the agency’s mission of fostering transparent and competitive markets. The sentences were among a number of statements from the three documents published by the CFTC that the two companies have argued were violations of the provision.

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