

Securities Regulation Daily Wrap Up, ENFORCEMENT—7th Cir.: Appellate court puts freeze on hearing requiring live testimony from CFTC commissioners, (Sept. 27, 2019)

Securities Regulation Daily Wrap Up

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By [Brad Rosen, J.D.](#)

In this rapidly developing matter, the Seventh Circuit agreed with the Commodity Futures Trading Commission to stay Kraft Foods and Mondelez' contempt-related proceedings but indicated it is prepared to place all previously sealed papers in the proceeding on the public record.

In yet another stunning development in a CFTC enforcement action against Kraft Foods, the CFTC has scored a victory of sorts, as a three-judge panel from the Seventh Circuit Court of Appeals granted its motion for a stay of proceedings. As a result, the district court [struck an evidentiary hearing](#) scheduled for October 2, where Commission Chairman Heath Tarbert, Commissioners Dan Berkovitz and Rostin Behnam, and Division of Enforcement Director James McDonald were expected to provide live testimony to justify and explain having made public statements despite a gag provision regarding a Kraft Foods/Mondelez International motion for contempt and sanctions. A status hearing in the lower court for September 27 was also cancelled. However, the CFTC's victory may have come at a cost, as the appellate court has indicated that all papers in this case may become of public record, a development the agency is likely to strenuously oppose ([CFTC v. Kraft Foods Group, Inc.](#), September 26, 2019, per curiam).

The return of sunshine? Both the CFTC and the defendants have supported a cloak of secrecy that permeated both the settlement of the case and the subsequent contempt proceeding. Numerous pleadings and documents filed by the parties since the defendants' August 16 contempt motion have been sealed from public view, including the CFTC's 33-page petition for a writ of mandamus, as well as another memorandum concerning privilege. Additional sealed documents were filed by both parties as recently as [this week](#). All this secrecy might be coming to an end as the Seventh Circuit denied the CFTC's motion that all filings to be placed under seal.

In its order, the appellate panel stated, "All papers filed in this court will be placed in the public record on Tuesday, October 1, 2019, unless the parties show before then that a statute or recognized privilege requires secrecy," citing *Herrnreiter v. Chi. Hous. Auth.* (7th Cir. 2002) and *Union Oil Co. of Cal. v. Leavell* (7th Cir. 2000).

CFTC mandamus petition awaits resolution. The appellate judges—Frank Easterbrook, Ilana Diamond Rovner and Diane Sykes—also ordered the defendants and other parties-in-interest to file a response to the CFTC's mandamus petition by October 7. As the CFTC's petition for writ of mandamus is sealed, it is impossible to say what the basis of its claim is or the specific relief it is seeking. Generally, a writ of mandamus is a court order to an inferior court or government official to properly fulfill its official duties or correct an abuse of discretion.

The appellate panel also invited District Court Judge John Robert Blakey to respond to the CFTC's petition if he so chooses pursuant to the Federal Rules of Appellate Procedure. If the district judge chooses to weigh in, that response is also due by October 7.

How we got here. As this matter has seen many twists and turns, a brief recap is in order. On August 14, the parties entered into a [consent order](#) whereby they settled a CFTC enforcement action initiated in 2015 concerning the alleged manipulation of wheat prices. That consent order included [an unusual "gag" provision](#) that limited the parties' rights to make most post-settlement public statements. On August 16, Kraft filed a motion for contempt claiming the CFTC breached the gag provision as a result of public statements made by the agency and three of its commissioners. That [motion was retroactively sealed](#) from public viewing together

with a number of other filings in the case. In a resulting emergency hearing on August 19, [the court ordered](#) the CFTC's chairman and other key members of the agency's leadership to appear at an evidentiary hearing to provide testimony about their post-settlement public statements. That hearing was moved to October 2, but it is now cancelled as a result of the appellate court's order.

The case is [No. 19-2769](#).

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Companies: Kraft Foods Group, Inc.; Mondelez Global LLC; Mondelez International, Inc.

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