

[Securities Regulation Daily Wrap Up, COMMODITY FUTURES—Kraft seeks granular discovery responses from CFTC regarding wheat contract manipulation charges, \(Jun. 2, 2017\)](#)

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

Kraft Food Group, Inc. and the CFTC are embroiled in a discovery dispute in connection with an enforcement action pending in the Northern District of Illinois where the company is charged with manipulating prices in the wheat markets. Kraft brought [a motion to compel responses](#) to six interrogatory requests for which it claimed the CFTC's responses were insufficient, non-responsive, compound, and prevented it from adequately preparing a defense.

In [the CFTC's response to the motion](#), the agency asserted that four of the interrogatory requests were overly broad, burdensome, and were in the nature of "contention interrogatories" for which a response was not required. With regard to the other two interrogatories at issue, the CFTC's stated position, in part, is that Kraft was misconstruing the applicable law in that "Kraft's conduct was directed at the market in general, and indeed the CFTC need not identify every victim to prove its case."

CFTC charges and case history. In April 2015, the CFTC charged Kraft and Mondelez Global (the spun-off entity that now owns and operates the relevant businesses) with manipulating and attempting to manipulate the price of cash wheat and the CBOT Chicago Soft Red Winter Wheat futures contract. Kraft had acquired a long position in 87 percent of the open interest in December 2011 wheat futures contracts and a short position in March 2012 wheat futures contracts, distorting prices in the market. The commission claimed that Kraft, after driving prices up to make sellers think that it would take delivery when it never intended to do so, then resold most of its December 2011 shipping certificates, and earned \$5.4 million in trading profits.

In December 2015, the court denied Kraft's motion to dismiss and ruled that the CFTC had adequately pleaded its claims. In August 2016, [Kraft lost its bid](#) to have certain legal questions certified by court for an interlocutory appeal. Those questions involved whether there could be an artificial price if cash and futures prices converge (a "false signaling") absent misrepresentations. Kraft is also defending against a parallel class action matter that was filed the day after the CFTC filed its charges and which alleges the same wrongful conduct.

Kraft's discovery related claims. Kraft asserts in its motion that it is entitled to detailed and granular information regarding the identification of witnesses, dates, and other basic facts referenced in the CFTC's complaint and which support "evidentiary support" for its allegations. In particular, Kraft asks that the CFTC identify:

- each person or entity that participated in the wheat market who believed that Kraft would take delivery, load out and store the wheat underlying its December 2011 wheat futures position (interrogatory 9);
- persons or entities who expected Kraft to purchase a similar quantity of wheat in the cash market, when those persons or entities held that expectation, and why (interrogatory 11);
- each person or entity who was manipulated or deceived [by Kraft], how that person or entity was manipulated or deceived, and during what time period (interrogatory 19); and,
- each person or entity that the CFTC alleges Kraft "manipulated or that Kraft attempted to manipulate" (interrogatory 20).

Kraft's other two interrogatory requests (nos. 15 and 16) seek to investigate the CFTC's allegations that Kraft did not have a bona fide need for the wheat underlying its futures position because Kraft did not purchase a sufficient quantity of wheat in the cash market after closing its futures positions.

CFTC's response. The Commission asserts that the premise of Kraft's motion to compel is that it is refusing to disclose the identity of market participants who were manipulated and deceived by Kraft. The CFTC asserted while it does not need to identify *any* specific victims of Kraft's scheme in order to prevail on its manipulation claims, Kraft's concern that the CFTC is withholding the identity of specific known victims is unfounded.

The Commission also pointed to the court's order denying Kraft's motion to dismiss, where it recognized the gravamen of the complaint was that "Kraft intended to create false impressions of demand in the markets for both futures wheat and cash wheat. Kraft's conduct was directed at the markets in general, not to a specific victim, as the CFTC's interrogatory responses state clearly." Lastly, the CFTC also asserted that it should not be required to answer Kraft's contention interrogatories until further discovery has been conducted.

The case is No. 15-cv-02881 ([Kraft motion](#), [CFTC response](#)).

Attorneys: Michael David Frisch for the CFTC. Dean Nicholas Panos (Jenner & Block LLP) for Kraft Foods Group, Inc. and Mondelez Global LLC.

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

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