

## **Securities Regulation Daily Wrap Up, CFTC NEWS—5th Cir.: Preliminary injunction granted to prevent futures marketplace from shutting down against CFTC’s order, (Jul 24, 2023)**

By Elena Eyber, J.D.

The Fifth Circuit granted a preliminary injunction to a futures marketplace to prevent it from shutting down after the CFTC rescinded a no-action letter which allowed it to operate without registering.

The Fifth Circuit granted a preliminary injunction to an online marketplace, PredictIt Market, that lets people trade on the predicted outcomes of political events, to prevent it from shutting down after the CFTC rescinded a no-action letter which allowed it to operate without registering. The Fifth Circuit found the CFTC’s objections meritless and held that PredictIt has met all four requirements for a preliminary injunction. Thus, the Fifth Circuit remanded for the district court to enter a preliminary injunction while it considers PredictIt’s challenge to the CFTC’s actions ( [Clarke v. CFTC](#), July 21, 2023, Duncan, S.K.).

**No-action letter.** In 2014, the CFTC issued PredictIt a no-action letter, allowing it to operate without registering under federal law. However, in 2022, the CFTC rescinded the no-action letter, accusing PredictIt of violating the letter’s terms. It also ordered all outstanding PredictIt contracts to be closed in fewer than six months. PredictIt challenged the no-action letter’s rescission in federal district court in Texas and moved for a preliminary injunction. The district court has not ruled on that motion despite PredictIt’s imminent shutdown. PredictIt filed an appeal, treating the district court’s inaction as effectively denying a preliminary injunction.

**CFTC’s objections.** The CFTC raised a number of objections to the Fifth Circuit hearing the appeal, arguing that it is moot. The CFTC argued that there has been no final agency action, that revoking the no-action letter was within the agency’s discretion, and that PredictIt lacks standing. The Fifth Circuit found the objections meritless.

**Preliminary injunction.** The Fifth Circuit held that a preliminary injunction was warranted. First, the Fifth Circuit found that the CFTC’s rescission of the no-action letter was likely arbitrary and capricious because the agency gave no reasons for it. Second, PredictIt established a substantial likelihood of suffering irreparable harm absent a preliminary injunction. Third, the Fifth Circuit found that the balance of the equities and the public interest weigh in favor of granting a preliminary injunction. Thus, the Fifth Circuit reversed the district court’s effective denial of a preliminary injunction and remanded for the district court to enter a preliminary injunction while it considers PredictIt’s challenge to the CFTC’s actions.

**Judge Graves’ dissent.** Judge Graves disagreed with the majority on the issuance of the preliminary injunction. Judge Graves believes that the four requirements for the issuance of a preliminary injunction have not been met because PredictIt failed to demonstrate a substantial likelihood that they will prevail on the merits as there is no final agency action. According to Graves, the CFTC’s no-action letters fail to satisfy no final agency action conditions as they neither mark the consummation of the agency’s decision-making process nor determine PredictIt’ legal rights or obligations. Judge Graves pointed out that he can’t find any caselaw where a court has ruled that a no-action letter constitutes a final agency action.

The case is [No. 22-51124](#).

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