

Securities Regulation Daily Wrap Up, ENFORCEMENT—N.D. III.: Stage set for CFTC officials to testify to determine contempt and sanctions, (Aug. 20, 2019)

Securities Regulation Daily Wrap Up

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

A federal court has ordered the CFTC's chairman, two commissioners, as well as the agency's director of enforcement, to provide live testimony so as to ascertain whether the agency's purported breach of a consent order provision limiting public comments warrants contempt findings and sanctions.

Following the initial hearing on an emergency motion brought by defendants Kraft Foods Group, Inc. and Mondelez Global LLC, Judge John Robert Blakey issued a minute order which sets the stage for an unprecedented evidentiary hearing. The order calls on key CFTC officials to explain why public comments were made in connection the agency's settlement of an enforcement action involving market manipulation claims notwithstanding the Commission's agreement refrain from public comment for most purposes ([CFTC v. Kraft Foods Group, Inc.](#), August 19, 2019, Blakey, J.).

Stage set for evidentiary hearing. The minute order, which was issued after the [initial hearing](#), provides for an evidentiary hearing on the defendant's motion for contempt, sanctions and other relief and has been set for September 12, 2019 at 11:00 am in Chicago, Illinois. Some items set forth in the order, as well as related observations from the initial court hearing include:

- **Key officials ordered to testify.** By agreement, all counsel of record, as well as DOE Director Jamie McDonald, and Chairman Heath Tarbert, Commissioners Rostin Behnam and Dan Berkovitz are ordered to appear in person at the evidentiary hearing and provide live testimony as needed. At the initial hearing, the judge indicated that he was prepared to issue bench warrants to compel the testimony of CFTC officials. Moreover, the Judge indicated that he was prepared to *mirandize* all of the CFTC attorneys in advance of any of them providing testimony;
- **Fifth Amendment issues abound.** Assertions of the Fifth Amendment by the CFTC, and provisional assertions of the Fifth Amendment by Commissioners Rostin Behnam and Dan Berkovitz are noted for the record pending further proceedings. At the initial hearing the judge made an inquiry of the CFTC's counsel as to whether Commissioners Behnam and Berkovitz are, in fact, lawyers. Both have legal training and are lawyers. Potentially, that may be relevant in connection with a future state of mind inquiry in connection with a contempt determination by the court;
- **Website takedowns ordered.** Plaintiff CFTC and Commissioners Rostin Behnam and Dan Berkovitz agree to voluntarily remove the disputed press releases immediately from the CFTC's website until the next court date. Those press releases were promptly taken down from the Commission's website. Specifically, those removed items include a CFTC [press release](#), a [statement](#) by the CFTC, and a [joint statement](#) by Commissioners Behnam and Berkovitz;
- **Pleadings previously generally available now sealed.** By agreement of the parties, [the defendants' motion for contempt, sanctions and other relief](#), and [the CFTC's response](#) will be sealed pending further order of the Court. The public version of the defendants' motion was significantly redacted in light of the parties' agreement to limit public comment. In contrast, the CFTC's responsive document contained no such redactions which prompted the defendants to argue that the CFTC has never had the intention to refrain from or limit its public comments;

- **Office of General Counsel lawyer admitted for this case.** CFTC attorney Martin B. White's motion to appear pro hac vice is granted. This means he has been admitted to the jurisdiction to practice law for this case only. White is from the CFTC's General Counsel Office, and previously had not appeared in the case. White led the CFTC's argument at the initial hearing; and
- **Additional claims of privilege are likely.** Any other assertions of privilege or any procedural or substantive objections by any party must be filed under seal on or before September 6, 2019. During the initial hearing, CFTC counsel indicated that the agency might assert various privileges, including the attorney client privilege, work product privilege, government deliberative process privilege, as well as other privileges.

The case is [No. 1:15-cv-02881](#).

Attorneys: Robert Howell for the CFTC. Dean N. Panos (Jenner & Block LLP) and Gregory S. Kaufman (Eversheds Sutherland) for Kraft Foods Group, Inc. and Mondelez Global LLC.

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

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