Securities Regulation Daily Wrap Up, TOP STORY—N.D. Ill.: Commission, Kraft agree to 'unusual' gag order in settlement of manipulation claims over snack food ingredient, (Aug. 15, 2019)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

Kraft Foods Group, Inc., and Mondelez Global LLC will pay $16 million to resolve claims they manipulated wheat markets, but Kraft, Mondelez, and the CFTC (as a full Commission) are subject to a provision in the consent order that limits their ability to speak publicly about the case.

The CFTC, Kraft Foods Group, Inc., and Mondelez Global LLC, a separate entity created upon Kraft's being spun off, have agreed to settle charges brought in federal court that Kraft and Mondelez violated numerous provisions contained in the Commodity Exchange Act (CEA) and related regulations when they allegedly manipulated wheat markets. Under the terms of a consent order, Kraft and Mondelez are subject to an obey-the-law injunction regarding the four counts cited in the CFTC's complaint and the companies must jointly pay a civil monetary penalty of $16 million. Moreover, the consent order curbs the ability to the parties in the case to discuss it publicly (*CFTC v. Kraft Foods Group, Inc.*, August 14, 2019, Blakey, J.).

Speaking about the case. Paragraph 8 of the consent order, which CFTC Commissioners Dan Berkovitz and Rostin Behnam in a separate statement branded "unusual," limits the ability of any "party" to speak publicly about the case. Specifically, Paragraph 8 states: "Neither party shall make any public statement about this case other than to refer to the terms of this settlement agreement or public documents filed in this case, except any party may take any lawful position in any legal proceedings, testimony or by court order."

Commissioners Berkovitz and Behnam said they supported the CFTC's decision to settle the case and that the amount of the civil monetary penalty demonstrated the seriousness of Kraft's and Mondelez's violations. The commissioners, however, noted that the agreed-to gag order, along with the absence of factual findings or conclusions of law, were "two unusual features" that could hinder the CFTC's ability to communicate a message about what conduct is lawful and unlawful when it resolves enforcement cases.

Commissioners Berkovitz and Behnam further noted that the Commission as a body cannot bargain away its statutory right to speak about cases and they urged courts to respect this right. "In our view, in future situations, the Commission should not accept any confidentiality provisions or restrictions on the Commission's ability to make public statements," said the commissioners.

The Commission itself, as a collective body, issued a statement on the settlement in which it said the Commission unanimously approved the settlement and that the civil monetary penalty imposed is almost treble Kraft's and Mondelez's allegedly unlawful gain. With respect to the gag order, the Commission said that Paragraph 8 of the consent order applied only to a "party," meaning the CFTC as a full Commission, Kraft, and Mondelez, the plaintiff and defendants, respectively, in the case. However, the Commission asserted that the gag order would not apply to an individual commissioner speaking publicly on his or her own behalf about the case.

Said the Commission: "We do not expect the Commission to agree to similar language in the future, except in limited situations where our statutory enforcement mission of preventing market manipulation is substantially advanced by the settlement terms and the public's right to know about Commission actions is not impaired."

Snack food ingredient. Kraft's and Mondelez's prior motion to dismiss had painted the companies as victims of an overzealous regulator that misunderstood the economic forces that drive the business practices of the wheat market's biggest players. According to the companies, they were simply trying to hedge risk in "a broken wheat market." The CFTC said the companies sold huge long wheat futures positions (related to Soft Red Winter Wheat) in order to influence cash market prices for wheat in violation of, among other things, new CEA provisions brought about by the Dodd-Frank Act reforms (the case was one of the first opportunities for a court to rule on the CFTC's new authorities under CEA Section 6(c)(1) and Regulation 180.1).

The CFTC's complaint alleged that Kraft and Mondelez engaged in numerous violations of the CEA. Specifically, the CFTC brought a four-count complaint alleging: (1) the use of a manipulative or deceptive device in violation of CEA Section 6(c)(1) and Regulation 180.1; (2) manipulation and attempted manipulation of wheat futures and cash wheat in violation of CEA Sections 9(a)(2) and 6(c)(3) and Regulation 180.2; (3) violation of speculative position limits under CEA Sections 4a(b) and 4a(e) and Regulation 150.2; and (4) violation of wash sales, fictitious sales, and noncompetitive trading provisions contained in CEA Sections 4c(a)(1) and 4c(a)(2) and Regulation 1.38(a).

A CFTC press release announcing the settlement noted that the agency had significantly increased its enforcement of manipulation cases since 2017 versus the prior six fiscal years. In that same press release, new CFTC Chairman Heath Tarbert observed that manipulation of commodities markets can produce many victims, including farmers who may be unable to realize the value of their crops, and consumers who may pay more for food products. "Instances of market manipulation are precisely the kinds of cases the CFTC was founded to pursue," said Chairman Tarbert.

As the case progressed, Kraft ultimately lost its bid to have part of the case dismissed and was later denied an opportunity for an interlocutory appeal. Mondelez International, Inc. noted in its latest Form 10-Q that the parties had, earlier in 2019, reached an "agreement in principle" to settle the CFTC's charges. The settlement memorialized in the court's consent order ends a lengthy and contentious case that often focused on discovery of documents during the nearly four and a half year period between the filing of the CFTC's complaint and entry of the consent order. A related private civil case making similar factual allegations is ongoing.

The case is No. 15-cv-02881.

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

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