

[Securities Regulation Daily Wrap Up, TOP STORY—N.D. III.: CFTC leaders ordered to testify in Chicago courtroom on contempt charges, \(Aug. 19, 2019\)](#)

Securities Regulation Daily Wrap Up

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

In the aftermath of the CFTC settling acrimonious market manipulation litigation with Kraft Foods Group, Inc. and Mondelez Global LLC, the defendants now charge the Commission with flagrantly violating the court's consent order limiting public comment about matter.

After hearing initially from all parties in connection an emergency motion filed by Kraft Foods and Mondelez Global LLC, federal court judge John Robert Blakey has ordered CFTC Chairman Heath Tarbert, Commissioners Dan Berkovitz and Rostin Behnam, and the agency's director of enforcement to appear in his Chicago courtroom on September 10, 2019, at 1:00 pm to provide sworn testimony and present themselves for cross examination in connection with the matter. That [motion](#) alleges that the CFTC violated the consent order settling the case and should be held in contempt or subject to sanctions ([CFTC v. Kraft Foods Group, Inc.](#), August 14, 2019, Blakey, J.).

Settlement. On August 14, 2019, [Kraft, Mondelez, and the CFTC entered into a consent order](#) whereby it was agreed that the defendants would pay \$16 million to resolve CFTC claims they manipulated wheat markets. The consent order was unusual in two respects. First, Kraft, Mondelez, and the CFTC (as a full Commission) were limited in their ability to speak publicly about the case. Moreover, the order was void of any factual findings or conclusions of law, which is virtually unheard in these types of regulatory settlements.

CFTC voluntarily agrees to remove allegedly violative releases from its website. At the hearing, the CFTC indicated its agreement to remove three releases from its website. Those were promptly taken down after the hearing. They included:

- a CFTC [press release](#) announcing the \$16 million settlement which noted the \$16 million penalty was approximately three times the defendants' alleged gain;
- a [statement](#) by the Commission itself, as a collective body, reiterating the settlement amount was nearly three times the unlawful profit the Commission alleged the defendants obtained, as well as an articulation of the Commission's position that the consent order advances its mission of fostering open, transparent, and competitive markets; and
- [a joint statement by Commissioners Berkovitz and Behnam](#) noting, "the fact that a U.S. district court, through a consent order, imposes a civil monetary penalty demonstrates that the Commission has provided sufficient evidence to find that the defendants violated the law."

Defendants charge CFTC with deliberately violating the consent order. Kraft and Mondelez, in their [heavily redacted motion for contempt and sanctions](#) against the CFTC, contend that the statements of the CFTC and its commissioners demonstrate that they never intended to comply with the agreement they negotiated and that they presented them to the court as having been approved by the CFTC and its commissioners. Instead the defendants charge that the CFTC and its commissioners engaged in a deliberate, orchestrated effort to violate the court's consent order within minutes of its entry.

CFTC responds. In response, the [CFTC made a somewhat more technical argument](#) that when the Commission agreed to the settlement, it did not and could not agree to restrict Commissioners Rostin Behnam and Dan M. Berkovitz from issuing "in full" "any" separate opinion they chose, and the order does not say otherwise. Moreover, the CFTC asserts that the defendants were represented by able counsel throughout these

proceedings, and the terms of the consent order were fairly negotiated. The Commission argues that the defendants might have pushed for more concessions, but having failed to do so, they may not return to court to cry foul for a supposed violation of what they incorrectly believed to be implicit in the agreed text of the order.

CFTC takes the Fifth. At the onset of the hearing the judge queried the parties whether a full evidentiary hearing was necessary or whether the parties could stipulate to all facts by way of a proffer. It became apparent that issues surrounding certain privileges and state of mind inquiries might complicate the testimony. In particular, Judge Blakey asked CFTC attorney Martin White, the Commission attorney taking the lead during the hearing, whether the CFTC was asserting its privilege against self-incrimination as afforded by the Fifth Amendment to the U.S. Constitution. He answered, "yes," although he noted his response was subject to consultation with individuals and lawyers involved in the case, and that it might well not be applicable in any event.

This is not a pop quiz. Judge Blakey also underscored the seriousness of the issues that are presently before the court throughout the course of the hearing. On more than one occasion, he told the parties "this is not a pop quiz," and advised them of the difficult matters that need to be resolved. These include:

- whether the CFTC or individuals will assert various privileges which include the Fifth Amendment privilege against self-incrimination, the governmental deliberative process privilege, the attorney client privilege, the work product privilege, and perhaps others;
- whether the civil monetary penalty imposed against the defendants can be reduced by a potential sanction amount imposed against the agency without violating principles of sovereign immunity; and
- the relevance of an individual's state of mind in determining scienter for purposes of civil contempt and a possible referral of criminal contempt to the Department of Justice.

With regard to any claims for privilege, the CFTC indicated any assertions will depend on the particular question being asked and will not be asserted on a blanket basis. The judge has given the parties until September 4, 2019, to further brief the privilege issue in advance of the full evidentiary hearing on September 10, 2019.

The case is [No. 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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