

INSIGHTS

CFTC v. Kraft Dispute Continues with CFTC on Defensive

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Following the August 15 2019 public announcement of a [settlement](#) between the Commodity Futures Trading Commission (CFTC) and Kraft Foods Group, Inc./Mondelez Global, LLC (together “Kraft”), the parties appeared on August 19 before the Honorable John Robert Blakey on a sealed motion for contempt, sanctions and other relief filed by Kraft. This controversy stems primarily from a provision included in the [Consent Order](#) that limits the parties’ ability to talk about the case except in legal proceedings, testimony, or by court order.^[1] During the hearing, the CFTC appears to have agreed to remove the disputed press releases from the CFTC’s website until the next court date. According to a minute entry, the CFTC also invoked the Fifth Amendment. The Chairman and the two commissioners who issued a joint statement on the settlement, as well as the Director of Enforcement, are all ordered to appear in person at an evidentiary hearing on September 12, 2019, and may be called upon to provide live testimony in the matter.

Both CFTC commissioners and some industry observers have raised concerns about any limitation on the CFTC’s ability to speak about settlements. While guidance and transparency are valuable, and the ability of public officials to speak openly is important, the concerns about the “gag” component of the order in this case are misguided. We have heard from the CFTC and can continue to hear from the CFTC about market manipulation generally, and even this case specifically.

For example, the CFTC has spoken through its pleadings in the case, including a Complaint that presented the CFTC’s perspective. Moreover, the order permits CFTC commissioners to testify on the subject, which means they can testify before Congress about the case, the reasons for settling the case, and what this case means for market participants. Finally, nothing prevents the CFTC from issuing guidance or otherwise making statements about market manipulation generally, and the comments from the CFTC about the specific case have not been, and typically are not, detailed or nuanced enough to add any substantive value other than to publicly censure the company further.

^[1] “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.” (Consent Order, pg. 3)