BRACEWELL

INSIGHTS

A Divided CFTC Flexes Muscles With $12 Million ConAgra Civil Penalty

August 26, 2010

*By: **George D. Fatula***

The Commodity Futures Trading Commission issued an ***order*** August 16 approving a settlement resolving allegations that ConAgra Trade Group, Inc. caused a non-bona fide price to be reported for a NYMEX spot month crude oil futures contract in violation of the Commodity Exchange Act (CEA). The settlement is noteworthy in that (1) it required ConAgra to pay a $12 million civil monetary penalty (significantly after the event occurred) even though no fraudulent intent or specific injury was alleged, and (2) two of five commissioners dissented vigorously from the majority's decision to accept the settlement. In its order approving the settlement, the CFTC found that on January 2, 2008, ConAgra caused NYMEX floor brokers to execute trades on its behalf that intentionally pushed the price of the NYMEX February crude oil futures contract to $100, which was then an all-time high for that contract. Transcripts of conversations between a ConAgra trader and the floor broker's clerk indicated to the CFTC that the ConAgra trader intended to push the price to $100 in order to be the first to ever have traded the contract at that price. When it became clear that offers to sell crude oil futures at a lower price remained outstanding on the floor, the ConAgra trader instructed the floor broker to buy all contracts selling at lower prices in order to preserve the $100 clearing price. ConAgra then purchased a February crude oil contract at $100. According to the Settlement Order, a ConAgra trader stated that ConAgra only bought the contracts trading at less than $100 in order to preserve its position as the first to trade the contract at $100. Based on evidence including the recorded conversations between ConAgra traders and NYMEX floor brokers, as well as evidence indicating that ConAgra traders "bragged" about having driven the crude oil spot month price to $100 for the first time, the CFTC concluded that ConAgra had caused a price that was not true and bona fide to be reported on NYMEX, in violation of the CEA. Two of the five Commissioners, however, disagreed that a $12 million penalty, assessed over two and one-half years after the offending conduct, was proper. In one of the dissents, ***Commissioner Sommers*** viewed the $12 million penalty as greater than that allowed under the relevant provisions of the CEA and applicable Commission precedent. Specifically, CEA § 6(c) (as in effect at the time of the alleged wrongful conduct) would limit the penalty to the higher of $130,000 per violation (adjusted for inflation) or triple the monetary gain for each violation. Commissioner Sommers found no evidence to indicate that ConAgra actually profited from any of the alleged violations. Thus, in order to support the $12 million penalty at $130,000 per violation, ConAgra would have had to commit at least ninety-three separate violations of the

Act. Commissioner Sommers' review of the record found no support for that proposition. The second dissent by ***Commissioner O'Malia*** focused on a different issue - whether the civil monetary penalty clearly signaled prohibited conduct to the market and deterred future violations. Commissioner O'Malia characterized the penalty amount as "extremely high" in relation to other disruptive trading practice settlements, and contended that the majority had shoehorned the facts to fit that particular allegation. Commissioner O'Malia also did not agree that the factual findings supported the allegations of causing a non-bona fide price to be reported, and argued that ConAgra would more properly have been accused of attempted manipulation. The $12 million ConAgra penalty could signal an increasingly aggressive CFTC approach to enforcement, even where no direct fraud or monetary loss is alleged. However, the two dissents to this CFTC order may indicate a lack of unanimity with regard to enforcement policy. As the Commission engages in an unprecedented spate of rulemakings to implement the Dodd-Frank Act, it will be instructive to understand the varying perspectives of the Commissioners and how those perspectives influence policymaking.