



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 6, 2000

Patricia Mack Bryan, Esq.
Senate Legal Counsel
United States Senate
Senate Hart Office Building
Room 642
Washington, DC 20510-7250

Re: Commodity Trend Service, Inc. v. CFTC, No. 97-C-2362 (N.D. Ill. Sept. 29, 1999), and CFTC v. Blitz, No. 98-C-6057 (N.D. Ill. Sept. 29, 1999)

Dear Ms. Bryan:

I am writing to advise you of a determination by the Commodity Futures Trading Commission (CFTC) that it does not intend to pursue cross-appeals from the adverse portions of the district court's decisions in the cases noted above. Those portions of the decisions affect the constitutionality of one application of a provision of the Commodity Exchange Act (CEA), within the meaning of the Legislative Branch Appropriations Act, 2000, Pub. L. No. 106-57, § 101(b), 106 Stat. 414 (to be codified at 2 U.S.C. 130f(b)). The Commission has hitherto been represented by its own attorneys in this case, and I have decided not to direct attorneys from the Department of Justice to enter an appearance for the purpose of pursuing these cross-appeals. My decision in that regard is based on unusual factors affecting only this case and a few similar cases. It does not reflect a determination on the part of the Executive Branch that the statute in question is unconstitutional.

Plaintiff Commodity Trend Service, Inc. (CTS) brought the first of these cases against the CFTC.¹ That suit sought a declaration that the registration requirement of the Commodity Exchange Act, 7 U.S.C. 6m(1), is unconstitutional as applied to a publisher that falls within the Act's broad definition of the term "commodity trading advisor" (CTA), 7 U.S.C. 1a(5), but that confines its activities to the provision of "impersonal" trading advice. The district court defined "impersonal" advice to include materials such as "books, newsletters, Internet websites, detailed written instruction manuals, and computer software that provide information, analysis, and advice

¹ The second case is a subpoena enforcement action brought by the CFTC against two of the principals of CTS. For simplicity, we refer primarily to the case brought by CTS.

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on commodity futures trading," including specific buy/sell recommendations, but limited to "impersonal evaluations and recommendations * * * not tailored to the financial situation of any subscriber," and not involving personal communications with subscribers or the establishment of any fiduciary relationship. Westlaw slip op. at *7, *9 (1999 WL 965962, copy attached as Exhibit A). Although the district court initially dismissed CTS's suit as unripe, the Seventh Circuit reversed and remanded, holding that the plaintiff's First Amendment claims were properly presented. Commodity Trend Service, Inc. v. CFTC, 149 F.3d 679 (7th Cir. 1998).

On remand, the district court sustained CTS's constitutional challenge to the requirement that it register with the CFTC before continuing to publish "impersonal" commodities market news, analyses, and trading recommendations. Relying largely on Justice White's concurring opinion (for himself, Chief Justice Burger, and then-Justice Rehnquist) in Lowe v. SEC, 472 U.S. 181, 211 (1985), the court held that (i) as applied to the publication of "impersonal" commodities trading advice, the registration requirement regulates speech, not the publisher's entry into or conduct of a profession (slip op. *8-*10), and that (ii) the speech in question is "fully protected" speech, rather than "commercial" speech, or some third category of speech related to transactions in a pervasively regulated industry (slip op. *10-*12).

The court then noted that the CEA grants the CFTC "the discretion to deny a registration on the grounds set forth in 7 U.S.C. § 12a, including for 'other good cause,' which the CFTC has interpreted to include acts or patterns of conduct that demonstrate an applicant's 'potential disregard of or inability to comply with the requirements of the [CEA],' or the applicant's 'moral turpitude, or lack of honesty, or financial responsibility.'" Slip op. *13 (quoting 7 U.S.C. 12a(3)(M) and 17 C.F.R. Pt. 3, App. A). In the court's view, those provisions could allow the CFTC "to prevent speech based on the fear that someone may publish false or misleading information, regardless of whether the information is [actually] false or misleading." The court concluded that as applied to publishers of "impersonal" advice, such a requirement is an unconstitutional "prior restraint" on speech, in the nature of a licensing requirement that allows government authorities to prohibit speech based on the "mere possibility that the speech will be fraudulent." Slip op. *13-*14, in part quoting Lowe, 472 U.S. at 235 (White, J., concurring in the judgment). The court also held, however, that CTS *is* subject to the anti-fraud provisions of the CEA. Accordingly, it enforced the subpoena at issue in the Blitz action, but only insofar as it relates to the Commission's investigation of CTS's advertising practices, rather than of potential violations of the CEA's registration requirements. Slip op. *14-*16.

As the district court in this case noted (slip op. *7), the District Court for the District of Columbia recently reached the same result in a case involving an essentially identical challenge to the CEA's registration provisions by another publisher of "impersonal" commodities advice. Taucher v. Born, 53 F. Supp. 2d 464 (D.D.C. 1999), appeal pending, D.C. Cir. No. 99-5293 (argument scheduled for April 11, 1999). The CFTC informs us that a similar case is pending in the District of Maryland, but that proceedings in that case have been stayed pending the outcome of the rulemaking proceeding described below. Agora, Inc. v. CFTC, No. JFM 98-3453 (D.

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Md.). First Amendment defenses have also been raised in enforcement proceedings brought by the Commission. See CFTC v. AVCO Financial Corp., 28 F. Supp. 2d 104, 118-119 (S.D.N.Y. 1998) (avoiding constitutional issue by finding that defendant and its principals rendered "personalized," rather than "impersonal," commodities advice, and were therefore properly subject to regulation); see also Taucher, 53 F. Supp. 2d at 478 (distinguishing AVCO on that basis).

On March 3, 2000, the CFTC adopted a new rule that exempts from the CEA's registration requirements any CTA that does not (i) direct client accounts, or (ii) provide "trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients." See attached Exhibit B at 5-6 (publication in the Federal Register anticipated by March 10, 2000); see also 64 Fed. Reg. 68,307 (Dec. 7, 1999) (proposing rule for public comment).

The preamble to the new regulation makes clear that "[t]he Commission has not itself determined" that applying the registration requirements to publishers who would fall within the new exemption "violates the Constitution or that the district court decisions in Taucher and CTS represent a complete and accurate statement of the constitutional limits of Congress's power with respect to regulation" of such publishers. Exhibit B at 3. Nonetheless, according to the preamble, the Commission has determined that it is appropriate to adopt the new exemption because (i) Taucher and CTS have created uncertainty in the law, and "litigation of First Amendment issues has required the expenditure of considerable resources * * * [and] complicated the investigation and prosecution of fraud by CTAs," and (ii) "[w]hatever the courts may determine to be the precise limits of Congressional authority in this area, the Commission believes that minimizing impact on speech, other than deceptive or misleading speech, is a relevant policy consideration in determining the Commission's regulatory approach toward CTAs whose relationship with their clients is limited to standardized advice through media such as newsletters, prerecorded telephone newlines, Internet web sites, and non-customized computer software." Id. at 4. The notice specifically points out (id. at 12), as does an existing regulation (17 C.F.R. 4.15), that a publisher exempt from registration under the new rule, but within the statutory definition of a CTA, would still be subject to various provisions of the CEA, including the anti-fraud provisions, and related Commission rules, such as those prohibiting deceptive advertising.

The CFTC informs me that it has determined that a CTA whose business activities are limited to those discussed in the district court opinions in CTS and Taucher, or those allegedly involved in Agora, would be exempt from registration under the Commission's new rule. For the time being, therefore, the constitutional issue raised in the pending cases is effectively moot, and the Commission has advised me that it does not intend to continue litigating that issue on its own behalf.

As noted above, the Commission has hitherto been represented in these cases by its own attorneys. See generally 7 U.S.C. 4a(c). Under the unusual circumstances present here -- the Commission's adoption of a new exemption, and its reasonable determination not to continue

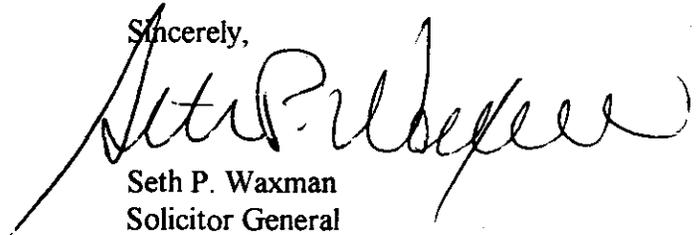
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litigating the constitutional issue in light of the availability of that exemption -- I have decided not to direct attorneys from the Department of Justice to enter an appearance in these cases, at this stage of the proceedings, in order to pursue that issue at the present time.

Protective notices of appeal have been filed in CTS and Blitz cases, and the Commission's consolidated brief in those cases is due March 13, 2000.² The Taucher case has been fully briefed, and oral argument is scheduled for April 11, 2000. Proceedings in the Agora case were stayed pending possible adoption of the Commission's new rule. The Commission informs me that it intends to file a motion to dismiss its cross-appeals in CTS and Blitz on March 13, 2000. A similar motion in Taucher, and a motion to dismiss the plaintiff's complaint in Agora, would likely be filed shortly thereafter.

I am sending a substantially identical letter, of even date herewith, to the General Counsel of the House of Representatives. See 2 U.S.C. § 288k(b).

Sincerely,

A handwritten signature in black ink, appearing to read "Seth P. Waxman", written in a cursive style.

Seth P. Waxman
Solicitor General

² The Commission informs me that it intends to continue to litigate these cases, as appellee, with regard to the issues on which it prevailed in the district court.