

Fifth Circuit Breaks From No-Action Pack: Becomes Better Bet for Letter Recipients?

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On July 21, 2023, a three-judge panel of the Fifth Circuit Court of Appeals issued an opinion asserting that the Commodity Futures Trading Commission's Division of Market Oversight likely acted arbitrarily and capriciously, potentially violating the Administrative Procedure Act, when it rescinded certain "no-action" relief that the division previously had granted. The court's reasoning, moreover, would seem also generally as applicable to SEC as to CFTC no-action letters. A concurring opinion accompanying this decision notes that it puts the Fifth Circuit at odds with opinions from the Second, Third, and Seventh Circuits that have considered the status of agency no-action letters under the APA. Consequently, in the Fifth Circuit, beneficiaries of a no-action letter may find it somewhat easier to contest attempts by agencies to withdraw their letters. Further, the Fifth Circuit might, under certain circumstances, subject the terms and conditions of even a non-withdrawn no-action letter to scrutiny under APA standards. If the rationale behind this Fifth Circuit decision gains traction, agencies may become more cautious about issuing no-action letters because of, among other things, (a) the additional care with which they may find it necessary or advisable to justify and articulate the agencies' rationales for the terms of those letters and (b) the additional types of legal proceedings to which the agencies may become enmeshed as a result of those letters. **The No-Action Letter** The no-action letter advised that the division would not recommend the CFTC take any enforcement action relating to specified activities, based on a university's representations in the letter that it would comply with certain terms. The letter (a) stated that it represented the views of the division only (and not necessarily the "positions or views of the Commission") and (b) purported to retain "the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief ... in the division's discretion." Such no-action letters are issued by the division pursuant to CFTC regulations providing that the letter is binding only on the division and can be relied upon only by the "the [b]eneficiary" of the letter. Nearly eight years after issuing the no-action letter, the division notified the university that it had not complied with the terms of the letter. Consequently, the division declared the no-action letter "withdrawn." Initially, the division did not

explain which terms of the letter had been violated. This prompted certain parties (not including the university) asserting themselves as beneficiaries of the no-action letter (the “appellants”) to contest the withdrawal. Various legal wrangling ensued, during which the CFTC reversed its withdrawal of the no-action letter and issued a further letter asserting that the no-action letter was “void and should be withdrawn.” This new letter did provide some explanation for rescinding the no-action relief and gave the university a chance to respond. **The Fifth Circuit Opinion** Nevertheless, the panel’s July 21 opinion concluded, among other things, that:

- The no-action relief functioned as a form of permission to bypass administrative requirements, qualifying as an “agency action” akin to a “license” under the APA.
- Withdrawing or deeming void the no-action relief, therefore, constituted a withdrawal of a license that was subject to APA requirements applicable to agency actions.
- This agency action was deemed “final” for APA purposes, as it is unappealable and subjected impacted parties to enforcement proceedings.
- The initial revocation of the no-action letter was “likely arbitrary and capricious because the agency gave no reasons for it,” and the agency’s subsequent attempts to retroactively justify the revocation were likely deficient both substantively and procedurally.

For these and other reasons, the court found a substantial likelihood that the appellants would prevail on their claim that the agency’s revocation of the no-action letter violated the APA and directed the lower court to preliminarily enjoin the revocation of the no-action letter pending a final determination of the appellants’ claims.

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