UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

AMERICAN FINANCIAL TRADING CORP.

v.

NATIONAL FUTURES ASSOCIATION

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American Financial Trading Corp. ("AFTC") appeals from an action by the National Futures Association ("NFA") in 2005 placing AFTC on a list of "Disciplined Firms." AFTC claims that it settled an NFA disciplinary action in 2002 on terms that precluded NFA from including it on the list. NFA asks us to dismiss the appeal for lack of jurisdiction, asserting that AFTC's placement on the list was a ministerial action not subject to Commission review. NFA states further that AFTC acquired the status of a Disciplined Firm under the settlement terms, and that AFTC knew or should have known that the settlement would result in its being listed as such.

Upon review of the record, we conclude that NFA's act of listing AFTC as a Disciplined Firm is neither a disciplinary action nor other event that we have jurisdiction to review. We also find that NFA has not breached any duty of fundamental fairness owed to AFTC under the Commodity Exchange Act ("CEA"). Consequently, we grant NFA's motion to dismiss.

BACKGROUND

NFA's Business Conduct Committee ("BCC") filed two Complaints against AFTC and other respondents in October 2001 and July 2002, both of which alleged solicitation fraud.

AFTC and NFA eventually agreed to settle the allegations raised in the two Complaints. During the settlement discussions, a disagreement arose as to whether the settlement would result in

AFTC being deemed a "Disciplined Firm" under NFA Compliance Rule 2-9 (dealing with supervisory responsibilities of NFA member firms). Under the rule, a firm that hires a significant number of telemarketers who previously worked at Disciplined Firms may be required to adopt enhanced supervisory measures, including tape recording employee telephone solicitations.¹

An NFA Interpretive Notice in force while AFTC's settlement was pending defined the term "Disciplined Firm" as follows: (1) the firm had been formally charged by either the CFTC or NFA with using deceptive telemarketing practices or promotional material; (2) those charges had been resolved; and (3) the firm had been "closed down and permanently barred" from the industry as a result of those charges. NFA Interpretive Notice issued pursuant to Rule 2-9(b).

AFTC voluntarily closed down and ceased all business operations prior to the issuance of the Complaints, and thus viewed itself as outside the definition of a Disciplined Firm because it had not been closed down "as a result of" the Complaints' charges. NFA disagreed with AFTC, and countered that if a sales practice case resulted in a firm's permanent bar from the futures industry, it was a Disciplined Firm for purposes of Rule 2-9, irrespective of whether it ceased operating before the case was resolved. NFA stated that it had consistently construed and applied the Interpretive Notice in that manner. A letter sent from NFA to AFTC during settlement negotiations illustrates the dispute:

The only language we will accept in a settlement offer for AFTC would be the following: "AFTC agrees to never again reapply at any time for NFA

¹ Compliance Rule 2-9, subparagraph (b) provides:

NFA's Board of Directors may require Members which meet specific criteria established by the Board relating to the employment history of its APs [associated persons] to adopt supervisory procedures specified by the Board for the supervision of telemarketing. This requirement may, in NFA's discretion, be waived upon a showing by the Member that the Member's current supervisory procedures provide effective supervision over its employees and agents.

membership or CFTC registration in any capacity." This language would bring the firm within the purview of the 2-9 Interpretive Notice and would cause AFTC to join the list of firms that have been disciplined for sales practice fraud. Please be advised that NFA will not agree to any other settlement offer language in this matter.

Letter dated September 4, 2002 from NFA attorney Ann-Marie Kaiser to AFTC attorney Lawrence Bonner.² AFTC submitted an offer of settlement in late October 2002 for consideration by a Hearing Panel of the BCC.³ The cover letter accompanying the settlement offer, dated October 26, 2002, states: "As a practical matter AFTC will agree to anything other than being placed on the 2-9 list as a firm 'closed down' as a result of this BCC. AFTC closed and withdrew its registration (with NFA's consent) before this BCC was a twinkle in anyone's eye." AFTC Mem. Opp., Exh. A.

In November 2002, NFA amended its Interpretive Notice to clarify the meaning of "Disciplined Firm." See NFA Letter to Commission Secretary Jean A. Webb at 7 (Nov. 27, 2002)(proposed Amended Interpretive Notice). The amendment eliminated the language "closed down" from the third criterion. NFA explained that it "ha[d] always taken the view that 'closed down' and 'permanently barred' describe the same thing, namely, a final resolution in a sales practice case which results in a permanent bar and closure of a firm." Id. (emphasis in original). NFA noted that a particular firm (which NFA did not identify) had argued recently in the course of settlement negotiations that the two terms should be interpreted as independent criteria. NFA

² The letter was filed as Exhibit B to Appellant's Memorandum in Opposition to Appellee's Motion to Decline Acceptance or Dismiss Appeal (Dec. 20, 2005)("AFTC Mem.Opp.").

³ Documents submitted by both AFTC and NFA refer to a settlement offer in which AFTC agreed to a permanent bar from the industry. BCC Hearing Panel Decision at 3 (Dec. 16, 2002)("Hearing Panel Decision"); AFTC Mem. Opp. Exh. A (letter of Dec. 23, 2002 from AFTC attorney R. Lawrence Bonner to NFA attorneys Ann-Marie Kaiser and Ronald V. Hirst referring to an October 28, 2002 settlement offer consenting to a permanent bar)("AFTC Dec. 23 Letter"). Based on the parties' statements, we proceed on the assumption that such an offer was made, although we have not identified a document meeting that description among the documents we have received. The record before us contains a settlement offer dated October 25, 2002, which contains no express reference to an industry bar. AFTC Mem. Opp., Exh. C.

indicated that it disagreed with the firm's interpretation, observing:

If the firm's interpretation were to prevail, any firm that is the subject of a sales practice investigation could merely cease operations, prior to the issuance of a Complaint, reopen under a different name and, thereby, avoid being designated as a "Disciplined Firm." Such a result would neutralize the Interpretive Notice and render it useless.

Id. By letter dated December 9, 2002, the Commission notified NFA that it would not formally review the proposed amendment, and that the amendment could become effective as of December 9, 2002. NFA settled its case against AFTC one week later, when the Hearing Panel issued a decision accepting AFTC's settlement offer and imposing a permanent bar: "AFTC shall never again reapply for NFA membership or CFTC registration in any capacity." Hearing Panel Decision at 5. The decision also recited that AFTC went out of business voluntarily and not on account of NFA's disciplinary action. Id. at 3-4.

The settlement did not end the dispute. One week later, AFTC's attorney wrote NFA again, asserting that the amended Interpretive Notice could not be applied retroactively to AFTC and reiterating the firm's position that the earlier version of the Interpretive Notice did not reach AFTC. See generally AFTC Dec. 23 Letter. NFA responded on January 31, 2003, rejecting AFTC's arguments and notifying AFTC that it would be placed on the Disciplined Firms list on February 15, 2003. AFTC Mem. Opp., Exh. G. In response, AFTC petitioned the Hearing Panel to enforce the settlement and bar NFA from listing it. AFTC Mem. Opp., Exh. H. Neither NFA staff nor the Hearing Panel responded. NFA added AFTC to its Disciplined Firms list nearly three years later, on October 12, 2005.

⁴ The Commission does not review or enforce settlement agreements between NFA and its members. We have examined the agreement in this case for the limited purpose of informing ourselves of the terms on which NFA resolved its disciplinary action against AFTC.

⁵ According to NFA, in September 2005, its Compliance Department "conducted a review of prior NFA and CFTC sales practice cases to determine if there were any firms that were not on the Disciplined Firms list that should be on the list. This review turned up six firms, including AFTC, which met the criteria for designation as a Disciplined

On October 28, 2005, AFTC filed with the Commission a notice of appeal from its designation as a Disciplined Firm, claiming that NFA's action amounted to a disciplinary proceeding and breached its settlement agreement. NFA promptly responded with a motion asking the Commission either to dismiss or decline acceptance of the appeal, arguing that AFTC improperly sought review of a nonappealable ministerial action. AFTC filed a motion to strike NFA's motion to dismiss. By delegated authority order issued November 30, 2005, the Commission denied AFTC's motion to strike, but granted AFTC's alternative request for an opportunity to respond to NFA.

AFTC then filed a memorandum opposing dismissal, arguing that "[g]iven the heightened conditions to NFA registration placed both on APs who have been registered with a disciplined firm and the Member firms with whom those APs subsequently register, there can be no doubt that NFA's decision . . . constitutes a final decision of 'disciplinary action' subject to review under Commission Rules." AFTC Mem. Opp. at 8. AFTC argued further that even if NFA's action did not fall squarely within the Commission's scope of review, fundamental fairness required the Commission to invoke its waiver authority under Regulation 171.14 to reach it. *Id*. Both parties filed additional pleadings in support of their respective positions.

DISCUSSION

The Commission's appellate authority with respect to decisions of registered futures associations is set forth in CEA Sections 17(h), (i) and (o) and the Commission's Part 171 Regulations promulgated thereunder.⁶ Regulation 171.1(a) limits the Commission's review of

Firm." NFA Motion to Dismiss or Decline Acceptance of Appeal at 1-2 n.1 (Nov. 7, 2005)("Mot. to Dismiss"). The record does not explain why NFA allowed nearly three years to elapse before it added AFTC to the list.

⁶ CEA Section 17(h) authorizes Commission review of final disciplinary actions and membership denial actions. A member responsibility action is a summary form of disciplinary action provided for in NFA's rules. Section 17(i) sets forth the minimum procedural requirements that NFA must follow in taking such actions and the standards of review that the Commission must apply, and authorizes a "person aggrieved" by a final Commission order to

NFA decisions to those issued in disciplinary, membership denial, registration and membership responsibility actions. NFA's placement of AFTC on a list of Disciplined Firms fits into none of these categories. A "disciplinary action"—which AFTC claims is at issue here—"includes *any proceeding* brought by the National Futures Association to enforce its rules that may result in expulsion, suspension, censure, bar from association with a member, fine in excess of \$100 or any comparable sanction being imposed on a member or person associated with a member." Regulation 171.2(b)(emphasis added).⁷

The addition of a barred firm's name to the Disciplined Firms list is not a "proceeding," and the burden of the designation does not fall on a Disciplined Firm itself. The burden potentially is "imposed" on subsequent employers of associated persons who formerly worked at AFTC, who must adopt enhanced supervisory procedures, and on the associated persons themselves. AFTC states that the "immediate consequences" of its listing are that "[e]very AP who ever worked at AFTC is now forever branded as a result of NFA's actions." AFTC Mem. Opp. at 10 (emphasis added). Without accepting AFTC's view of the consequences as "branding," we note that AFTC identifies no impact affecting itself, and thus it cannot show that the listing operates as a "comparable sanction" under which it labors. Moreover, it lacks standing to seek redress of any putative burden imposed on others.

Regulation 171.14 empowers the Commission in extraordinary circumstances to waive

petition for further review with a United States court of appeals. Section 17(o) authorizes the Commission to delegate its registration functions to a registered futures association, and authorizes Commission review and subsequent judicial review of a final registration order issued by the association. See also Section 17(b)(9)(requiring the rules of a registered futures association to "provide a fair and orderly procedure" with respect to the disciplinary and membership denial actions).

⁷ See also Regulations 171.2(g), (h) and (l), respectively defining "membership denial action," "registration action," and "membership responsibility action." No claim is made that any of these categories apply.

⁸ AFTC apparently is out of business. According to NFA, AFTC was dissolved as a Florida corporation on October 1, 2004. Mot. to Dismiss at 6 n.6.

any of its Part 171 rules "[t]o prevent undue hardship on any party or for other good cause shown." AFTC contends that NFA altered the resolution of a final disciplinary action by summarily imposing a further sanction without affording AFTC notice and an opportunity to defend itself. *Id.* at 8-10. Such a claim, if well-founded, would be a facial breach of the duty of fundamental fairness imposed on NFA by the CEA and Part 171. *See* CEA Sections 17(b)(9) and 17(i)(1)(A)(iii); Regulation 171.34(a)(1). The claim, however, is wholly without foundation. AFTC's due process argument rests on its erroneous assumption that its inclusion on the list is a "sanction" imposed without benefit of a "proceeding." The argument fails because designation as a Disciplined Firm does not affect AFTC, and because the list is a supervisory tool used to prevent future misconduct, not a disciplinary measure to remediate past misconduct.

Nor did NFA apply its amended Interpretive Notice retroactively to AFTC, despite AFTC's attempt to argue otherwise. AFTC relies on the following provision in the settlement agreement: "AFTC's voluntary closure and cessation of business operations were not the result of NFA's initiation or issuance of the Complaints or the charges thereunder." Decision at 3-4. AFTC contends that this language takes it outside the scope of the Interpretive Notice and forecloses NFA from listing it, and that the language was included for this purpose.

Although the version of the Interpretive Notice in force before December 9, 2002 provided that a firm had to be "closed down" and "permanently barred," AFTC knew that NFA

⁹ Cf. Commonwealth Financial Grp., Inc. v. NFA, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,520 at 43,327 (CFTC Sept. 27, 1995)(rules may be waived when there is a facial defect that causes a prejudicial outcome)(citations omitted).

Of. Fed. R. Civ. P. 60(b) (authorizing relief from a final judgment for mistake, inadvertence, surprise, or "any other reason justifying relief from the operation of the judgment."). See In re Brenner, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) § 26,538 at 43,376 (CFTC Nov. 15, 1995) (reviewing a motion to vacate sanctions pursuant to guidance provided by Fed. R. Civ. P. 60(b)(5) and denying the motion as unreasonably delayed and lacking a meritorious basis for the relief sought); In re Dickstein, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) § 26,412 at 42,838 (CFTC May 30, 1995) (denying a motion to modify sanctions because petitioner showed mere inconvenience, not hardship).

treated the terms as interchangeable, not as independent criteria to be satisfied separately. Ample evidence shows that NFA maintained this position throughout the negotiations, and that AFTC was aware of NFA's views, although it disagreed with them. NFA's interpretation of its Notice was reasonable. *Cf. Marzano v. NFA*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,163 at 57,640 (CFTC Jan. 4, 2006)(in reviewing NFA registration decisions, the Commission "considers whether . . . NFA's determination rests on a reasonable interpretation of the NFA rules at issue and is consistent with the purposes of the Act")(citations omitted). 11

Any room for disagreement evaporated after NFA amended its Interpretive Notice to clarify its construction. AFTC argues that "NFA enacted this amendment solely because it was fully aware that AFTC would not qualify as a "Disciplined Firm" under the pre-amendment version of Interpretive Notice 2-9," AFTC Mem. Opp. at 11. To the contrary, NFA's position remained unchanged before and after the amendment. This case does not involve the retroactive application of either a new substantive rule or a new interpretation of an existing rule. The rule, and NFA's interpretation of it, predated AFTC's settlement negotiations with NFA. NFA published a clarifying amendment when it became aware that its extant interpretation of its rule had been misunderstood by a member firm.

AFTC's status as a Disciplined Firm became fixed when it entered into a settlement that permanently barred it from the industry. The collateral consequences flowing from a permanent

¹¹ Cf. Gonzales v. Oregon, __U.S. __, 126 S. Ct. 904, 914 (2006)("An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation.")(citations omitted). Deference, however, is warranted only when the rules are promulgated pursuant to congressionally delegated rulemaking authority. *Id.* at 915.

¹² The Interpretive Notice amendment occurred through a public process on the records of NFA and the Commission, and we reject AFTC's assertion that NFA failed to provide notice of the proposed amendment. AFTC Mem. Opp. at 11. NFA notes in its brief that the Interpretive Notice "has been revised many times over the years. All of these revisions have been submitted to and approved by the Commission. Members are given notice of the revisions and become subject to those revisions retrospectively" when the revision becomes effective. NFA Resp. to AFTC Mem. Opp. and Supplemental Memorandum at 4 (Dec. 30, 2005).

bar under Rule 2-9 were fully disclosed and debated before the settlement took effect. As NFA

contends, adding AFTC's name to the list was a nondiscretionary ministerial action that we have

no authority to review. NFA's delay in performing that ministerial act does not affect the legal

relationship between the parties, which, we reiterate, was fixed on December 16, 2002.

Accordingly, we find no reason to exercise our waiver authority under Regulation 171.14 and

decline to do so.

CONCLUSION

Because AFTC asks us to review an act by NFA that is neither a disciplinary action nor

other event that we have jurisdiction to review, and because AFTC demonstrates no hardship or

other good cause warranting extraordinary relief under our waiver authority, we dismiss AFTC's

appeal.

IT IS SO ORDERED.

By the Commission (Chairman JEFFERY and Commissioners LUKKEN and DUNN;

Commissioner HATFIELD not participating).

Eileen A. Donovan

Acting Secretary of the Commission

Commodity Futures Trading Commission

Dated: December 21, 2006

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