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Commodities Rulings
Appealable to Circuit
Decision Breaks With Eighth Circuit Holding

BY DANIEL WISE

A UNANIMOUS federal appeals panel yesterday rejected a contention by the Commodity Futures Trading Commission that appeals of its rulings reviewing administrative disciplinary orders must be taken to U.S. district court.

In finding that the appropriate review path was a direct appeal to a federal appellate court, the Second Circuit created a split in the circuits by refusing to follow a 1995 ruling from the U.S. Court of Appeals for the Eighth Circuit.

The decision will be published Monday.

The ruling was a procedural victory for Michael J. Clark, a floor broker on the Commodities Exchange (COMEX), who had sought review directly in the Second Circuit. The panel's ruling did not address the merits of Mr. Clark's claims that he should not have been fined $25,000 and suspended from trading for three months on several violations, including withholding customers' orders for the benefit of another broker and trading in a manner that conflicted with his customers' interests.

The initial findings and penalties were imposed in 1996 by COMEX, an exchange where futures and option contracts related to a variety of commodities are traded, and affirmed in

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July 1998 by the Commodities Futures Trading Commission (CFTC), which supervises a number of trading exchanges.

The Second Circuit’s analysis starts with the proposition that the statute governing appeals from CFTC orders, when it is acting in its review capacity, is “ambiguous,” Judge Roger J. Miner wrote in Clark v. Commodities Futures Trading Commission, No. 98-4291. The Commodities Exchange Act, 7 USC 812c(c), Judge Miner pointed out, merely refers to the availability of “judicial review” without specifying a court.

‘Florida Power’ Factors

The fact that the Commodities Exchange Act provides for direct review to the circuit for disciplinary orders issued by the CFTC when it acts on cases in the first instance, rather than in a review capacity, was pivotal under the factors announced by the U.S. Supreme Court in its 1985 ruling, Florida Power & Light Co. v. Lorion, Judge Miner concluded.

In Florida Power, the Supreme Court set forth four factors for determining the procedures for judicial review of administrative decisions: overall structure of the relevant statute; legislative history; congressional purposes behind the legislation; and general principles regarding the allocation of review authority.

The Eighth Circuit, in Jaunich v. U.S. Commodities Futures Trading Commis-