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*"Rummaging in the government's attic"*

Description of document: Two Commodity Futures Trading Commission (CFTC) policies regarding retaliation prohibition and a copy of the Contracting Officer Representative training programs, 2016-2017

Requested date: 24-February-2017

Released date: 28-February-2017

Posted date: 10-July-2017

Source of document: FOIA Compliance Office  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street NW  
Washington, DC 20581  
[Online FOIA Request Form](#)

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FOIA Office

## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre  
1155 21<sup>st</sup> Street, NW, Washington, DC 20581  
[www.cftc.gov](http://www.cftc.gov)

February 28, 2017

RE: 17-00062-FOIA

A digital/electronic copy of each of the two recent CFTC policies relating to retaliation prohibition. I limit this request to the two policies developed in late 2016 or early 2017. I also request a digital/electronic copy of the recently updated Contracting Officer's Representative (COR) training programs.

This is in response to your request dated February 24, 2017, under the Freedom of Information Act seeking access to a digital/electronic copy of each of the two recent CFTC policies relating to retaliation prohibition and a digital/electronic copy of the recently updated Contracting Officer's Representative (COR) training programs. In accordance with the FOIA and agency policy, we have searched our records, as of February 24, 2017, the date we received your request in our FOIA office.

We have located 57 pages of responsive records. I am granting partial access to, and am enclosing copies of, the accessible records. Portions of some pages fall within the exemptions to the FOIA's disclosure requirements, as explained below.

Some responsive records constitute confidential commercial or financial information, which is exempt from disclosure under FOIA Exemption 4. 5 U.S.C. § 552(b)(4), *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

In addition, some records contain information the disclosure of which could reasonably risk circumvention of the law. This information is exempt from disclosure by FOIA Exemption 7(E). 5 U.S.C. § 552(b)(7)(E).

You may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The

contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, email at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 8<sup>th</sup> Floor, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581, within 90 days of the date of this letter. Please enclose a copy of your original request and a copy of this response.

If you have any questions about the way we handled your request, or about our FOIA regulations or procedures, please contact Tameka Tilliman at 202-418-5091.

Sincerely,

A handwritten signature in blue ink that reads "Candace Ambrose".

Candace Ambrose  
Counsel




## U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581  
Telephone: (202) 418-5000  
Facsimile: (202) 418-5521  
[www.cftc.gov](http://www.cftc.gov)

Office of the  
Chairman

### MEMORANDUM

**TO:** All CFTC Employees and Contractors  
**FROM:** Timothy G. Massad   
**DATE:** July 22, 2016  
**SUBJECT:** Anti-Retaliation and Reprisal Statement

As the Chairman, I expect all CFTC employees to maintain a healthy and safe work environment free from retaliation and reprisal. Retaliation and reprisal of any kind contradicts CFTC's values and undermines employee performance and the efficient operations of this Agency.

The CFTC is committed to fulfilling its mission and conducting all business affairs in compliance with all Federal laws, regulations, and agency policies, including those that prohibit retaliation and uphold the fair and equal treatment of Federal employees and contractors who make good faith reports of potential wrong doing.

Whistleblower protections are an integral part of many Federal laws and are designed to prevent employers from taking adverse actions against individuals who report wrongdoing. As one example, the Dodd-Frank Act specifically prohibits employers from retaliating against whistleblowers for providing information to the CFTC relating to a violation of the Commodity Exchange Act. Other laws provide protections for whistleblowers in the Federal workplace. The purpose of this statement is to encourage all CFTC employees as well as contractors to report suspected incidents of wrongdoing and remind everyone of their rights and protections in doing so.

Specifically, it is a prohibited personnel practice to retaliate against an employee, former employee, or applicant for employment who acts as a whistleblower by reporting a suspected violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority or, a substantial and specific danger to public health or safety.

In accordance with 41 U.S.C. § 4712, contractors are also protected from reprisal for reporting suspected gross mismanagement of a Federal contract or grant, gross waste of funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific



danger to public health or safety, or a violation of law, rule or regulation related to a Federal contract or grant.

Managers and supervisors are responsible for fostering a culture of compliance with all Federal laws and regulations in their organizations by monitoring to ensure that any reprisal or retaliation does not occur and, if found, it is incumbent upon them to take prompt and corrective action. Any CFTC employee who is found to have engaged in retaliation/reprisal will be subject to appropriate disciplinary action, up to and including removal from the Federal service in accordance with laws and regulations.

If you have any questions or believe you have been retaliated against for engaging in protected activity, you may contact the following offices:

Office of the Inspector General

Telephone: 202-418-5510

E-mail: [oig@cftc.gov](mailto:oig@cftc.gov)

Fax: 202-418-5522

Workforce Relations

E-mail: [WorkforceRelations@cftc.gov](mailto:WorkforceRelations@cftc.gov)

Fax: 202-418-5284

Office of Special Counsel (External)

Website: [www.osc.gov](http://www.osc.gov)

Fax: 202-653-0015

Mailing Address: 1730 M St. N.W., Suite 218  
Washington, D.C., 20036-4505

**From:** [Thompson, Anthony C.](#)  
**To:** [All CFTC \(FTE\)](#); [All CFTC \(Contr\)](#)  
**Subject:** CFTC Announcement : Prohibited Personnel Practices and Whistleblower Protections  
**Date:** Wednesday, November 02, 2016 6:49:02 PM

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Dated: October 27, 2016

RE: Whistleblower Protection/Prohibited Personnel Practices

The purpose of this email is to ensure that all agency employees and contractors are aware of and understand prohibited personnel practices and whistleblower protections.

The December 5, 2013 White House National Action Plan calls for covered agencies to certify compliance with the Whistleblower Protection Act's notification requirements. To that end, we have included below links to information about the U.S. Office of Special Counsel (OSC), which is an independent agency that protects federal employees from prohibited personnel practices, including whistleblower retaliation and unlawful hiring practices. OSC also provides an independent, secure channel for disclosing and resolving wrongdoing in federal agencies.

The Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012 provide the right for all covered federal employees to make whistleblower disclosures and ensure that employees are protected from whistleblower retaliation. Whistleblowing is defined as the disclosure of information that an employee reasonably believes evidences: a violation of any law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety; or censorship related to scientific research or analysis.

Employees have the right to be free from prohibited personnel practices, including retaliation for whistleblowing, and may make lawful disclosures to anyone, including, for example, management officials, the Inspector General of an agency, and/or OSC.

Additionally, in accordance with 41 U.S.C. § 4712, contractors are also protected from reprisal for reporting suspected gross mismanagement of a federal contract or grant, gross waste of funds, and abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule or regulation related to a Federal contract or grant.

Please review the following fact sheet, "[Your Rights as a Federal Employee](#)," which provides detailed information on the thirteen prohibited personnel practices and

employees' rights to file complaints with OSC. Additionally, we encourage employees and contractors to review the following materials: "[Know Your Rights When Reporting Wrongs](#)" and "[The Role of the U.S. Office of Special Counsel](#)," which describe different avenues for making whistleblower disclosures and OSC's role in resolving them.

The CFTC is committed to making sure that all employees and contractors are aware of their rights as well as the safeguards that are in place to protect them.

If you have any questions regarding this notice you can contact the IG Hotline at x5510, Lauren Colon, Chief of Workforce Relations at x5032 or Jon Van Doren, Counsel, Office of the General Counsel at x5505.

Regards,

Tony

**Anthony C. Thompson**  
**Executive Director**  
**Office of the Executive Director, Commodity Futures Trading Commission**  
1155 21<sup>st</sup> Street, NW | Washington DC 20581 | Tel: 202.418.5697



# Working with Contractors and Effective Contract Management

ODT Town Hall Meeting  
December 13, 2016





# Today's Discussion

- Blended Workforce
- Personal Services
- Anti-Retaliation and Reprisals
- Whistleblower Protection / Prohibited Personnel Practices
- Ethics
- EEO Considerations Associated With Blended Workforce
- Socializing Between Federal Employees and Contractors
- Ratification of Unauthorized Commitments

# Blended Workforce

# “Blended Workforce”

Contractor personnel comprise a portion of CFTC’s workforce and are valuable contributors to fulfillment of the mission.

## Definition

A blended workforce is a workforce in a government office consisting of both government and contractor personnel. In such a workforce it may be difficult to distinguish between the government’s and the contractor’s staff.



# How are contractor employees different from government employees?

- Contractor employees work for the contractor not the government.
- The terms of their employment are governed by their relationship with their employers and not with CFTC.
- Contractor employees are hired, evaluated, disciplined, rewarded, promoted, and fired as necessary by the companies that employ them—not by CFTC.
- Government supervisors supervise government employees, not contractor employees.



# How are contractor employees different from government employees? (cont.)

- Contracting Officer's Representatives (CORs) are delegated limited authority to oversee the contractor's performance—not the performance of individual contractor employees.
- CFTC does not have a contractual relationship with contractor employees. The relationship is with the contracting company.
- Work performed by contractors is governed by the requirements of the written contract, which may be changed only by the Contracting Officer.
- Contractor employees do not have civil service or federal union bargaining unit status.

# Respect the employer-employee relationship between contractors and their employees.

- Do not attempt to get friends, family members, acquaintances or any other individuals hired by CFTC contractors.
- Do not interfere in the contractor's hiring process or otherwise pressure the contractor to hire specific individuals.

*[Doing so can give the appearance that you are misusing your position and can be a violation of government-wide ethics regulations.]*

- Do not facilitate or participate in any manner in the movement of contractor personnel from one active CFTC contract to another.

*[Doing so unfairly disadvantages the first contractor in future procurements with CFTC, and may adversely impact the contractor's profitability and its ability to successfully perform the contract. Doing so also diminishes the ability of the Commission to hold its contractors accountable for their performance.]*



# Respecting the contractor's employer-employee relationship (cont.)

- Do not involve yourself in disputes that may arise between contractor staff and contractor management.

*[In doing so, you may be placing yourself, the Commission, and the employee you are seeking to help in jeopardy. If you believe that a contractor's behavior towards its employees violates the law or the terms of the contract, discuss the matter with the Contracting Officer, who will then address the matter with the company.]*

- Do not engage in any actions involving the contractor staff and its Human Resources organization.

# Personal Services



# What is a Personal Services contract and why does it matter?

## Definition

A personal services contract is a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, government employees. (FAR 2.101)

- This happens when contractor personnel are placed under the relatively continuous supervision and control of a government office or employee. (FAR 37.104)
- Personal services contracts are prohibited unless specifically authorized by law, and no such contracts have been authorized by law for CFTC.

Note that giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that creates a personal service contract.

# Personal Services Contract Indicators

Signs that an otherwise valid contract is being improperly administered as a personal services contract appear when Government personnel—

- Select or recruit contractor personnel;
- Approve contractor leave, complete or sign time cards for contractor personnel;

*[GAO has opined that factors such as the contractor's right to hire and fire employees, to grant or deny individual leave requests, and to reassign employees are indicators of a non-personal services contract. See W.B. Jolley, B-234146, Mar 31, 1989, 89-1 CPD 339.]*

- Direct, schedule or critique activities of individual contractor personnel on a continuous basis;



# Personal Services Contract Indicators (cont.)

- Supervise contractor personnel;
- Use government and contractor personnel interchangeably; or
- Interfere in the contractor's human resource policies or activities, or its chain of command.

## Solution

The COR holds the contractor responsible for providing deliverables at a reasonable cost consistent with the quality and schedule requirements defined in the contract. The contractor determines the appropriate method(s) of contract performance, and is held accountable for the outcomes.

# Anti-Retaliation and Reprisals



## Statement from Chairman Massad (7/22/16)

- It is a prohibited personnel practice to retaliate against an employee, former employee, or applicant for employment who acts as a whistleblower by reporting a suspected violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority or, a substantial and specific danger to public health or safety.
- Contractors are also protected from reprisal for reporting suspected gross mismanagement of a Federal contract or grant, gross waste of funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule or regulation related to a Federal contract or grant. (41 U.S.C. § 4712)

## Statement from Chairman Massad (cont.)

- Any CFTC employee who is found to have engaged in retaliation/reprisal will be subject to appropriate disciplinary action, up to and including removal from the Federal service in accordance with laws and regulations.
- In addition to the offices listed in the Chairman's statement, the Contracting Officer and Senior Procurement Executive are also available to answer questions involving suspected retaliation and reprisals related to CFTC contracts.

<http://cftcnet/Commission/About/Communications/Pages/Anti-Retaliation-and-Reprisal-Statement.aspx>

# Whistleblower Protection / Prohibited Personnel Practices



## Statement from Executive Director (11/2/16)

CFTC is committed to making sure that all employees and contractors are aware of their rights as well as the safeguards that are in place to protect them.

### Definition of “Whistleblowing”

The disclosure of information that an employee reasonably believes evidences:

- a violation of any law, rule or regulation;
- gross mismanagement;
- gross waste of funds;
- an abuse of authority;
- a substantial and specific danger to public health or safety; or
- censorship related to scientific research or analysis.



## Statement from Executive Director (cont.)

- Employees have the right to be free from prohibited personnel practices, including retaliation for whistleblowing, and may make lawful disclosures to anyone, including, for example:
  - management officials;
  - the Inspector General of an agency; and/or
  - The U.S. Office of Special Counsel (OSC).
- Contractors are also protected from reprisal for reporting suspected:
  - gross mismanagement of a federal contract or grant;
  - gross waste of funds;
  - abuse of authority relating to a federal contract or grant;
  - a substantial and specific danger to public health or safety; or
  - a violation of law, rule or regulation related to a Federal contract or grant.

(41 U.S.C. § 4712)

# Statement from Executive Director (cont.)

## References

- “White House National Action Plan”  
([https://www.whitehouse.gov/sites/default/files/docs/us\\_national\\_action\\_plan\\_6p.pdf](https://www.whitehouse.gov/sites/default/files/docs/us_national_action_plan_6p.pdf))
- “Whistleblower Protection Act of 1989”  
(<https://www.gpo.gov/fdsys/pkg/STATUTE-103/pdf/STATUTE-103-Pg16.pdf>)
- “Whistleblower Protection Enhancement Act of 2012”  
(<https://www.gpo.gov/fdsys/pkg/PLAW-112publ199/pdf/PLAW-112publ199.pdf>)
- “Your Rights as a Federal Employee” fact sheet which provides detailed information on the 13 prohibited personnel practices and employees’ rights to file complaints with OSC.  
(<https://osc.gov/Resources/Your%20Rights%20as%20a%20Federal%20Employee.pdf>)
- Additional materials describing different avenues for making whistleblower disclosures and OSC’s role in resolving them:
  - “Know Your Rights When Reporting Wrongs”  
(<https://osc.gov/Resources/Know%20Your%20Rights%20When%20Reporting%20Wrongs.pdf>)
  - “The Role of the U.S. Office of Special Counsel”  
(<https://osc.gov/Resources/oscrole.pdf>)

# Ethics



# Core Ethics Concepts

- Do not use your public office for private gain.
- Act impartially and do not give preferential treatment to any private organization or individual; and
- Seek counsel and strive to avoid any action that would create the appearance that you are violating the law or ethical standards.

# Ethics & the FAR

“Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. [Your] official conduct must, in addition, be such that [you] would have no reluctance to make a full public disclosure of [your] actions.” [FAR 3.101-1]

# CFTC Ethics Program

- Administered by Office of the General Counsel:
  - Jonathan Marcus, Designated Agency Ethics Official
  - Heather Gottry, Deputy & Alt. DAEO
  - John Dolan, Alt. DAEO
  - Bianca Gomez, Ethics Counselor
  - Heather LoPresti, Ethics Counselor
  - William Proctor, Ethics Program Assistant



# *Financial Conflicts of Interest*

- You are prohibited from working on official matters that affect your financial interests.
- Conflict of interest issues are magnified when you regularly work with contractors and contracts.
- Issues frequently arise if:
  - You own stock in a company that is bidding on a contract, is a contractor, or a subcontractor.
  - You have a pension with a former employer, who is also a contractor participating in a procurement at the CFTC
  - Your spouse works for a contractor and his or her salary or employment would be affected if the contractor is awarded (or loses) a contract with CFTC.

# Maintaining Impartiality

- Even if you do not have a financial conflict of interest with a contract, your impartiality may be called into question in certain situations, and in those cases, you may have to disqualify yourself from certain work at the CFTC.
- The appearance of impropriety can be created if you are asked to work with contractors and/or contract staff who:
  - You have a business, contractual or other relationship;
  - Is a member of your household or a relative with whom you have a close personal relationship;
  - Are an entity for whom your spouse, parent or dependent child serves or seeks to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or
  - Are an entity for whom you have, within the last year, served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.



# Gifts

- You may not solicit or accept a gift from any person or entity seeking official action from CFTC, doing business with the CFTC, or regulated by the CFTC. Specifically, you may not accept gifts that are given because of your official position that come from “prohibited sources.” CFTC contractors and their employees are “prohibited sources.”
- A gift is anything with monetary value.
- Exclusions to the definition of a gift, including the following:
  - Modest items of food and refreshments, such as soft drinks, coffee, and donuts, provided they are not part of a meal;
  - Greeting cards and items with little intrinsic value such as plaques, trophies and certificates; and
  - Anything paid for by the government or secured by the government under government contract.



# Exceptions to the Prohibition on Gifts

- Following are some of the limited exceptions to the prohibition on accepting gifts from contractors are:
  - Anything for which you pay market value.
  - Opportunities and benefits, including favorable rates and discounts available to the public or to all government employees.
  - Unsolicited gifts with a market value of \$20 or less may be accepted from a prohibited source. You may only accept a total of \$50 from any one prohibited source in a calendar year. If the gift is worth more than \$20, you may not pay the amount over \$20. Instead you must either decline the gift or you may pay the total value.
  - Invitations to events (such as holiday parties) which have been reviewed and approved by CFTC Ethics.
- NOTE: Although paying the market value of a gift is permissible under law, it may present the appearance of a conflict of interest. Before paying, consult with CFTC Ethics and a contracting officer.

# Non-public Information

- You may not disclose non-public information to further private interests, including your own private interests or those of another person such as a contractor or contractor employee. 5 C.F.R. § 2635.703.
  - For example, you cannot disclose the details of a bid or offer, and also cannot disclose a contractor's proprietary information.
  - In addition to the general rules prohibiting the disclosure of non-public information, the Procurement Integrity Act specifically prohibits you from disclosing contractor bid or proposal information, or source selection information. 48 C.F.R. § 3.104-4(a).



# Letters of Reference

- Generally, you are prohibited from using your official position, title or authority to endorse any product, service or enterprise. 5 C.F.R. § 2635.702(b),(c).
  - In some cases, a contractor with whom you are working may ask for a personal recommendation or for an endorsement about the contractor's products or services. You may factually state that a contractor's or its employee's work has satisfied the government's requirements, even if you anticipate that the contractor will share the information with prospective customers.



# Seeking Employment

- You are prohibited from working on government matters affecting contractors with whom you are seeking employment. 18 U.S.C. § 208(a) and 5 C.F.R. § 2635.604.
  - Seeking employment includes, but is not limited to, unsolicited contacts about possible employment, such as sending a resume to a contractor.
  - Likewise, you may not work on government matters affecting a contractor if you do not reject a contractor's unsolicited overture about possible employment.
  - If you are seeking, negotiating, or arranging for future employment with contractors, please consult with CFTC Ethics for further guidance.
- The Procurement Integrity Act imposes additional requirements on seeking employment with a contractor if you are performing specific procurement related functions.
  - Please seek additional guidance from CFTC Ethics.

# Post Employment

- You are covered by various post-employment restrictions on representations made back to the Government.
  - A "representation" means making a communication or appearance with the intent to influence the Government, and includes attending a meeting.
- You are permanently barred from representing another person before the Government on the same matter (such as a contract) on which you worked as a Government employee. 18 U.S.C. § 207(a)(1).
- If you had official responsibility for a matter (such as the award or administration of a contract) during your last year of Government service, he or she is barred for two years from representing another person before the Government concerning that same matter.
  - To be covered by this restriction, an employee need not have worked on the contract, so long as it was under that employee's supervision. 18 U.S.C. § 207(a)(2).
- "Senior employees" are subject to additional restrictions.

# EEO Considerations Associated With A Blended Workforce



# EEO Considerations In A Blended Workforce

- CFTC has an obligation to maintain a workforce free of harassment and discrimination based on race, color, religion, sex (including pregnancy and gender identity), national origin, mental and physical disability, age (40 years and over), and genetic information.
- CFTC employees need to ensure that their words and actions concerning contractor personnel cannot be reasonably interpreted as hostile, abusive or discriminatory.
- CFTC employees who are found to have engaged in discriminatory or harassing conduct may be disciplined in the form of a reprimand, suspension or removal from the Federal Service.

# EEO Considerations In A Blended Workforce

- If a contract staff member informs you that they feel like they have been harassed or discriminated against, you should encourage them to speak to their company's human resource department and also notify CFTC's Senior Procurement Executive.
- CFTC's Senior Procurement Executive will notify the Director of OMWI and other CFTC offices as appropriate.
- If you have any questions about the EEO process generally, please contact the Director of OMWI or send an e-mail to (b)(7)(E) [REDACTED]

# Socializing Between Federal Employees and Contractors



# Socializing with Contractors

## Is it okay?

Answer – In certain cases.

- Friendships may develop when people are located within the same workplace.
- However, please be mindful that Federal employees and contractor employees have different employers, which creates unique responsibilities.
- While not expressly prohibited by ethics rules, government personnel should tread carefully and remain mindful of the potential for appearance of bias when dealing with contractors.
- Remember that the CFTC cannot pay contractors for time their employees spend in parties or other morale building activities, as we pay only for time worked in performing the requirements of their contracts. Finally, contractor employees may not be tasked or permitted to plan or organize parties or other morale building activities.

# Socializing with Contractors

## When is it an issue?

It is inappropriate for a government employee (i.e., COR or those in the **sphere of influence**) to evaluate the performance of a contractor when he/she socializes with their personnel.

- Such government employees may not be viewed as objective when evaluating proposals submitted by these companies or their competitors.
- Situations like this can result in the need for federal employees to recuse themselves from performing the very work they were hired to do, can compromise the integrity of the Commission's contracting program, jeopardize mission activities, and can put the agency at risk for litigation and payment of damages.
- There are instances at CFTC where social interactions between government and contractor staff have resulted in damaged working relationships, on-the-job tension, resignations, and potential lawsuits.



# Personal Liability For Acting Outside Scope of Employment

- Generally, CFTC employees acting within the scope of their employment are shielded from personal liability for performing their official duties.
- Official duties are those which are performed in the course of one's job, or some authorized activity reasonably associated with it.
- Official duties do not include socializing with contractors outside of the workplace, i.e. attending happy hours or other social events. Consequently, CFTC employees must be careful in these circumstances because they can be personally liable for their actions.



# Socializing with Contractors

## Examples

### Appropriate (no involvement relevant to contract)

- CFTC staff who do not have a formal role in the contract and are not otherwise in the sphere of influence routinely goes to lunch with one or more contractor staff.

### May be Appropriate (if limited and equal treatment to other similarly situated contractors)

- A CFTC employee goes to lunch occasionally with a contractor employee, and the CFTC employee pays for his/her own lunch.
  - The CFTC employee is the COR for the contractor employee's contract (but not if the COR is evaluating proposals).
  - The COR also goes to lunch with other Federal and contractor personnel on occasion, and COR pays for his/her own lunch.

### Inappropriate (appearance of bias)

- The COR of a contract regularly goes to lunch with a group of the contractor's employees and often meets up with them afterhours.
  - The COR is responsible for evaluating the contractor's performance and will be involved in a subsequent recompetes of the contract.

# Ratification of Unauthorized Commitments



# “Unauthorized Commitment”

## What is it?

### Unauthorized Commitment

“An agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.” [FAR 1.602-3(a)]

### FAR Policy on Unauthorized Commitments

“Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in [the FAR] for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel.” [FAR 1.602-3(b)(1)]



# Unauthorized Commitments

## Examples

- No contract in place

You may not authorize contractors to perform work without a contract in place for the goods or services. This includes authorizing a contractor to perform work in anticipation of a formally executed contract. **(An approved requisition is not a contract.)**

- Changes to an existing contract

You may not direct or permit a contractor to perform activities in excess of the dollar value or scope of work of their contract, such as installing an electrical outlet when the contract required only the installation of a light fixture.

- Work after a contract expires

You may not allow or direct a contractor to continue work after expiration of the contract. For example, if funds are not available to exercise an option to extend the contract, the contractor must stop work. Knowingly allowing a contractor to continue furnishing services would constitute an unauthorized commitment.

# Unauthorized Commitments

## Consequences

Per CFTC's Policy:

- You may be personally liable for payment of contractor costs;
- You may have disciplinary action taken against you;
- The Commission may not get the work that it contracted for;
- The Commission may not pay the contractor for the work;
- An unfunded liability may be created, resulting in a potential violation of the Anti-Deficiency Act, a criminal statute; and
- Contract terms that protect the Commission's interests will not be binding against the contractor.

(b)(4)





# Unauthorized Commitments

## Conditions for Ratifying

### Ratification

“The act of approving an unauthorized commitment by an official who has the authority to do so.” [FAR 1.602-3(a)]

**There is no guaranty CFTC will ratify the unauthorized commitment.**

### Required Conditions

- Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
- The ratifying official has the authority to enter into a contractual commitment;
- The resulting contract would otherwise have been proper if made by an appropriate Contracting Officer;
- The Contracting Officer reviewing the unauthorized commitment determines the price to be fair and reasonable;
- The Contracting Officer recommends payment; and funds are available and were available at the time the unauthorized commitment was made.

FAR 1.602-3(c)

(b)(4)





# Unauthorized Commitments

## Process for Ratifying

- After receipt of the contractor's invoice, the Director of the office that instructed the contractor to work must submit a written and signed statement to the Contracting Officer that includes the following information:
  - The name of the employee that instructed the contractor to perform the work;
  - A statement of facts as to why the proper contracting process was not followed;
  - A statement that goods or services have been provided to and accepted by the CFTC or a statement defining the benefit CFTC has or will obtain from performance of the unauthorized commitment;
  - Availability of funds currently and at the time the unauthorized commitment was made; and
  - Documentation supporting the reasonableness of the price of the work.

# Unauthorized Commitments

## Process for Ratifying (cont.)

- The Contracting Officer will prepare a written report documenting findings and recommending approval or denial of the proposed ratification to the Senior Procurement Executive. At a minimum, this report must demonstrate whether all conditions for ratifying have been met.
- If the ratification is approved, the Contracting Officer will prepare and execute the appropriate contract document. If the ratification is denied, the Contracting Officer will disclose the decision and a brief rationale in a letter to the contractor. A copy of the Contracting Officer's decision will be provided to the employee and his or her supervisor.



# Unauthorized Commitments

## Final Notes

### Reminders

- Ratifications are not guaranteed.
- Never assume that an unauthorized commitment will be ratified, even if all conditions are met.
- Ratification is discretionary. The Commission is under no obligation to ratify any commitment made by an individual lacking authority to bind the Government.

### Risks to the Responsible Individual (per CFTC policy)

#### Personal Liability

If a ratification is denied, the contractor that performed the work will not be paid for its invoice by CFTC. As a result, the contractor may take legal action directly against the Government representative that directed or allowed the contractor to work outside of a valid contract with the Government.

#### Remedial Action

Making an unauthorized commitment may result in remedial action in the form of a reprimand, suspension or removal from the Federal service.



# Conclusion

- CFTC's "blended workforce" includes Federal employees and contractors alike, both of whom play an important role in fulfilling CFTC's mission.
- Allow contractors to supervise and control their personnel. Do not administer contracts in a manner that effectively makes them personal services contracts.
- Never retaliate against anybody who acts as a whistleblower by reporting a suspected violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority or, a substantial and specific danger to public health or safety.

## Conclusion (cont.)

- Strive to avoid any action that would create the appearance that you are violating the law or ethical standards. Recuse from participating in contracts where you have a financial interest, and always ask yourself whether your actions would cause someone to question your integrity or the integrity of the CFTC. Remember to seek guidance from CFTC Ethics.
- CFTC has an obligation to maintain a workforce free of harassment and discrimination. CFTC employees need to ensure that their words and actions concerning contractor personnel cannot be reasonably interpreted as hostile, abusive or discriminatory.

## Conclusion (cont.)

- Conduct government business with impeccable standards of conduct, in a manner above reproach, with complete impartiality, and with preferential treatment for none.
  - Be mindful of the potential appearance of bias in managing contracts.
- Do not authorize contractors to perform work without a contract in place for the goods or services.



# Questions?

If you have questions about any contract issue, please contact—

- William M. Roberson, Senior Procurement Executive (x5367)
- Scott Sadler, Assistant General Counsel, OGC (x5639)





**U.S. Commodity Futures Trading Commission**  
Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581

J. Christopher Giancarlo  
Acting Chairman

(202) 418-5030  
JCGiancarlo@CFTC.gov

**MEMORANDUM**

**TO:** All CFTC Employees

**FROM:** Acting Chairman, J. Christopher Giancarlo

**DATE:** January 24, 2017

**SUBJECT:** CFTC EEO and Sexual Harassment Policy Statement

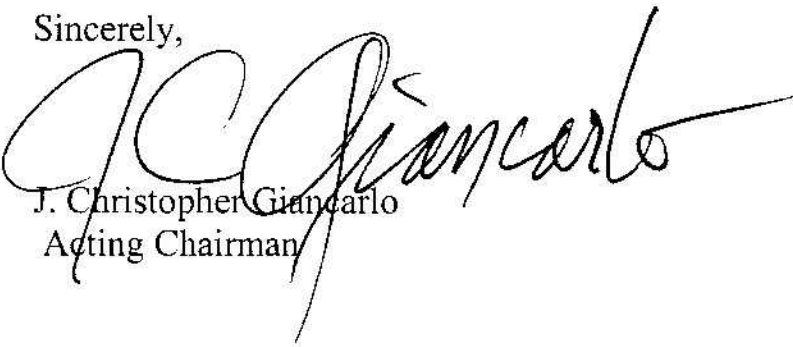
In respecting and valuing the diversity among our employees, managers are expected to ensure a working environment that is free of all forms of discrimination, including sexual harassment. It is further incumbent upon every CFTC employee, at every level of seniority, to ensure that we stand as an exemplar of EEO and diversity in the financial industry and the Federal Government. As such, I ask each member of our workforce to take responsibility for implementing the Commission's EEO and sexual harassment policy and cooperating fully in its enforcement.

A CFTC employee or applicant must contact the Office Of Minority and Women Inclusion (OMWI) within 45 days of an alleged discriminatory action if s/he believes s/he has been harassed or otherwise discriminated against based on race, color, religion, sex (including pregnancy and gender identity), national origin, mental and physical disability, age (40 years and over), and genetic information. CFTC employees who believe they have been harassed or discriminated against are fully able to exercise their right to file a complaint or grievance, or otherwise oppose unlawful discrimination, without fear of retaliation.

For more information about the CFTC EEO program, please visit [cftc.gov](http://cftc.gov) or send an e-mail to (b)(7)(E)

Thank you for your hard work and dedication to fulfilling the CFTC mission.

Sincerely,

A handwritten signature in black ink, appearing to read "JC Giancarlo", with a long horizontal flourish extending to the right.

J. Christopher Giancarlo  
Acting Chairman