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Description of document:	Commodity Futures Trading Commission (CFTC) Investigation Report on Salary Overpayments, September 2019
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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)

November 29, 2021

RE: 21-00153-FOIA

This is in response to your request dated September 22, 2021, under the Freedom of Information Act seeking access to: [A copy of each report on the investigation into a potential anti-deficiency act (ADA) violation.] In accordance with the FOIA and agency policy, we have searched our records, as of September 22, 2021, the date we received your request in our FOIA office.

We have located 11 pages of responsive records. I am granting partial access to, and am attaching copies of, the accessible records. Portions of some pages fall within the exemptions to the FOIA's disclosure requirements, as explained below.

Some records contain personal information, which is exempt from release under FOIA Exemption 6 because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information. 5 U.S.C. § 552(b)(6); *see also The Lakin Law Firm v. FTC*, 352 F.3d 1122 (7th Cir. 2003). Additionally, portions of the pages are exempt from disclosure by FOIA Exemption 7(C), which provides protection for personal information in law enforcement records, the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

If you have any questions about the way we handled your request, or about our FOIA regulations or procedures, please contact me at 202-418-5912, or Jonathan Van Doren, our FOIA Public Liaison, at 202-418-5505.

Additionally, 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.

Sincerely,

A handwritten signature in black ink, appearing to read "Rose Bajorek". The signature is fluid and cursive, with the first name "Rose" written in a larger, more prominent script than the last name "Bajorek".

Rosemary Bajorek  
Assistant General Counsel



**U.S. COMMODITY FUTURES TRADING COMMISSION**

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**MEMORANDUM**

**TO:** Anthony Thompson  
Executive Director

**FROM:** Joel Mattingley  
Budget Officer, Financial Management Branch

**DATE:** September 24, 2019

**SUBJECT:** Formal Investigation Report on Salary Overpayments

As directed by the CFO in the February 17, 2017 memorandum, attached is the report and recommendations on the investigation into whether the Commission violated the Anti-Deficiency Act or other statutory limitations when it overpaid certain senior political officials from January 2014 through 2017.

If you have any questions regarding this report, please contact Joel Mattingley, at 202-418-5310.

Attachment



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INTERNAL INVESTIGATION  
OF POTENTIAL VIOLATION  
OF THE  
ANTIDEFICIENCY ACT  
RELATED TO SENIOR  
POLITICAL EMPLOYEES'  
COMPENSATION  
REPORT AND RECOMMENDATIONS

Financial Management Branch

APRIL 15, 2019  
1155 21<sup>ST</sup> ST, NW  
WASHINGTON, DC 20036



# **Internal Investigation: Overpayment of Certain Political Employees' Compensation Report and Recommendations**

## **SUMMARY**

The Commodity Futures Trading Commission, CFTC or Commission, has independent pay administration authority. The Commission utilizes a shared services provider to administer its pay band structure. This requires agency staff to be knowledgeable in all areas of pay administration and statutory laws governing pay. In 2017, while performing a review of pay setting for new political employees (Schedule C), Commission staff identified potential improper payments made to Schedule C employees, which were made in 2017. This event occurred concurrently with the review of the annual Chief Human Capital Officer (CHCO) guidance memorandum implementing the General Schedule pay increase. The potential improper payments led to an Antideficiency Act investigation based on the processes and authorities cited in Commission documents used to support the potential improper payments.

## **BACKGROUND**

### CFTC PAYROLL SYSTEM

The CFTC uses the U.S. Department of Agriculture's National Finance Center (NFC), through an Interagency Services Agreement (ISA), to perform all payroll processing for CFTC. NFC is certified by the U.S. Office of Personnel Management (OPM) as a Human Resources (HR) Shared Service Center (SSC). The CFTC renews the ISA annually with NFC. The payroll personnel system (PPS) is a full-service integrated payroll/personnel system offering services from initiation of personnel actions through to payroll processing activities via modular subsystems that allow organizations to be compliant with Department of Treasury's Office of Financial Innovation and Transformation system requirements. CFTC staff direct NFC, as the payroll provider, to adjust employee compensation in accordance with *CFTC Policy: Compensation Program* (CFTC PCP) dated April 29, 2009.

### CFTC POLICY: COMPENSATION PROGRAM (CFTC PCP)

The CFTC PCP describes the policy and process used to establish employee pay, the components of employee pay (base and locality pay), the pay structure of the Commission, and methods with which employees can receive pay increases.

### CFTC POLICY: COMPENSATION PROGRAM (PCP) – TYPES OF PAY INCREASES

The CFTC PCP specifies the types of pay and pay increases that affect individual employee pay, which can include: (1) an across the board increase to base pay, (2) changes to the locality pay

rates, or a (3) a merit pay increase. Merit pay is the only increase awarded to an employee based on the individual employee's performance during the annual performance review cycle. Across the board increases to base pay are authorized by the Commission by seriatim, either by policy or separately. For CFTC, locality pay is defined as a geographic component of our pay system and is not considered the same as the locality pay element of the General Schedule (GS) pay system, although we use those rates. Our PCP states that we follow the General Schedule locality rates, so a locality pay increase is based on Executive Order or other legislation affecting the General Schedule locality rates.

#### STATUTORY AND OPM GUIDANCE

On December 27, 2016, the Office of Personnel Management (OPM) issued memorandum CPM 2016-20, *January 2017 Pay Adjustments*, which references the Executive Order 13756 implementing the January 2017 Pay Adjustments and the continuation of the pay freeze for senior political appointees. CPM 2016-20 contains a section on the continuation of the pay freeze for certain senior political officials in accordance with the Further Continuing and Security Assistance Appropriations Act, 2017 (PL 114-254) of December 10, 2016. It states the section 738 of Division E of the Consolidated Appropriations Act, 2016 remains in effect.

On January 10, 2017, the OPM issued a memorandum, CPM 2017-02, to all federal agency Human Resource Directors titled "*Pay Freeze for Certain Senior Political Officials*". This memorandum contained references to the freeze on payable pay rates for certain senior political appointees at the 2013 level and provided the applicable section and public law relevant to fiscal year (FY) 2016 appropriations. At this time, all federal agencies' funding was authorized through the Further Continuing and Security Assistance Appropriations Act, 2017 (PL 114-254) which continued the authorities and conditions of the FY 2016 appropriation law through April 28, 2017. Further, CPM 2017-02 provided a reference to the original OPM memorandum, CPM 2014-03, which provided detailed guidance on the types of positions covered by the senior political appointee pay freeze, the rates of pay affected, and exceptions to the pay freeze.

OPM memorandum CPM 2014-03, *2014 Pay Freeze for Certain Senior Political Officials*, cites section 741 (herein referred to as section 741) of Title VII of Division E of the Consolidated Appropriations Act, 2014 (PL 113-76) that calls for freezing pay rates for the Vice President and certain senior political appointees at 2013 levels during calendar year (CY) 2014. Attached to the memorandum was a detailed guidance document discussing which positions were considered "covered positions" and what type of positions were considered non-covered to aid agencies in distinguishing between the types of appointments that should be included or excluded from the pay freeze.

Specifically, section 741 included a pay freeze on senior political appointees defined as—

- a. An employee serving in an Executive Schedule (EX) position, or in a position for which the rate of pay is fixed by statute at an EX rate, and who holds a position under a political appointment;



- b. A non-career appointee in the Senior Executive Service (SES) paid at or above the officially established rate for EX-IV (\$157,100 in 2014);
- c. A limited term appointee or limited emergency appointee in the SES serving under a political appointment and paid at or above the officially established rate for EX-IV; and
- d. Any other type of employee paid at or above the officially established rate for EX-IV who serves under a political appointment.

CPM 2014-03 also provided a section detailing which types of pay were affected by the freeze:

Section 741 applies to rates of pay—i.e., rates of basic pay including, if applicable, any locality payment under 5 U.S.C. 5304 or any similar supplement under other authority. Section 741 does not address other types of payments in addition to the rate of basic pay.

OPM issued annual guidance to agencies on authorized pay adjustments in each of the succeeding years following the initial pay freeze in 2014. For CY 2015, CPM 2014-17 dated December 19, 2014 was issued and for CY 2016, CPM 2015-14 dated December 18, 2015 was issued. OPM issued these guidance documents to agencies using the Chief Human Capital Offices Council (CHCO.gov) email subscription and the documents remain available on the OPM.gov Memos to Agencies/Transmittals web page at [www.chcoc.gov/transmittals](http://www.chcoc.gov/transmittals).

## IDENTIFICATION OF ISSUE AND INITIAL ACTIONS

### IDENTIFICATION OF ISSUE BY THE HUMAN RESOURCES OFFICE

The CFTC, on January 11, 2017,<sup>1</sup> began a review of the January 10, 2017 OPM memorandum CPM 2017-02 for impacts to employees, other than Presidential Appointments. OPM memorandum CPM 2017-02 included guidance for agency use in reviewing the pay rates and pay limitations for political and executive appointments, which is the pay rate for EX-IV of \$161,900. The initial review of CPM 2017-02 guidance conducted by the CFTC determined this guidance was a continuation of the 2014 pay freeze<sup>2</sup> and applied to current and new political appointees. A further review conducted by CFTC staff discovered that several employees were receiving compensation above the \$161,900 pay rate and had received pay increases along with all other CFTC employees in the years in which the pay freeze was effective (2013-2017). The improper increases included the annual cost of living and merit pay increases granted to Commission employees for years 2014, 2015 and 2016.

Based on the review of the compensation records conducted by the CFTC, it was determined that four employees in the category of “other senior political appointees” were receiving compensation above the EX-IV pay rate, and another five employees had received payments that were

<sup>1</sup> (b)(6); (b)(7)(C) email, *OPM Memo Attached: Pay Freeze for Certain Senior Political Officials*, January 11, 2017

<sup>2</sup> CPM 2014-03 Pay Freeze for Certain Senior Political Officials and Section 741 of title VII of division E of the Consolidated Appropriations Act, 2014 (Public Law 113-76, January 17, 2014).

questionable under the CPM guidance. One employee that received compensation exceeding the statutory limitation of the pay freeze was no longer employed at the Commission. Table 1 presents a summary of the potentially affected staff.

**Table 1: Estimated Potential Gross Debt**

Potential Gross Debt				
Name	Total	Salary	Lump Sum	Note
(b)(6); (b)(7)(C)	\$40,347	\$38,947	\$1,400	
	\$30,590	\$15,914	\$14,676	
	\$19,533	\$18,133	\$1,400	
	\$15,704	\$8,581	\$7,123	
	\$1,400		\$1,400	
	\$1,400		\$1,400	
	\$1,400		\$1,400	
	\$638	\$638		Separated 5/9/14
	\$1,090		\$1,090	Separated 10/31/15

### Initial Legal Opinion and Initial Employee Notifications

In an email obtained during the investigation, staff reached out informally to both the General Accountability Office and the OPM's OGC<sup>3</sup> to determine if other financial regulatory agencies<sup>4</sup> with similar authorities for pay and benefits as the CFTC applied the statutory pay freeze provisions to its rates of pay and employees. Unofficially, the staff were informed these other regulatory agencies (National Credit Union Administration and Securities and Exchange Commission, specifically) had applied the restriction to their Schedule C positions paid above the GS-15 rate.

The Chief of Staff was informed of the issue on or near February 2, 2017, and subsequently notified the currently employed impacted employees verbally of the overpayments dating back to 2014, or since their respective employment date. CFTC staff provided documentation that the Chief of Staff advised the impacted employees that any future overpayments would be their responsibility to repay, as the CFTC could only provide debt waivers for the administrative errors that occurred before the agency had realized the mistake.

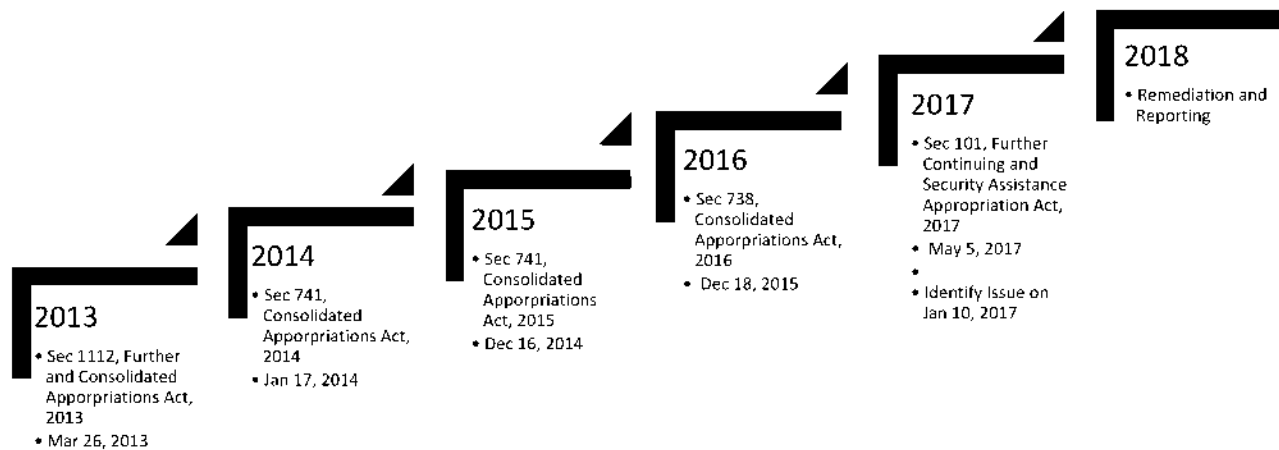
## **SCOPE AND OBJECTIVE OF THE INVESTIGATION**

Based on the initial inquiry performed by the CFTC staff, the investigation focused on six areas

- (1) Identify processes and issues related to implementation of pay increases between the years of 2013-2017;
- (2) Review the impacted employee notification process and the estimated overpayment amounts;
- (3) Review the official overpayment amounts (debt) and procedures used to correct the impacted employees' pay rates;

<sup>3</sup> (b)(6); email of February 9, 2017 titled *Senior Political Pay Issue*

<sup>4</sup> Financial Institutions Reform, Recovery, and Enforcement Act of 1989



- (4) Review the debt waiver process;
- (5) Total debt amount waived resulting from the overpayments; and
- (6) Determine whether the overpayments are reportable as improper payments and as an Antideficiency Act violation in accordance with applicable laws and policies.

The potential violations stem from three laws governing financial management activities, with two of the laws requiring reporting as Antideficiency Act violations:

**Figure 1: Appropriation Act Timeline**

1. 31 USC 1301(a). "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."
2. 31 USC §1341(a) (1) (A). "Limitations on expending and obligating amounts (a) (1) an officer or employee of the United States Government or of the District of Columbia government may not— (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation."
3. 31 USC §3321 note, and Improper Payments Information Act of 2002, sec 2(d). An "improper payment" is defined as any payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements.

## **METHODOLOGY OF INVESTIGATION**

This report examines documentation and interviews with CFTC staff. A variety of documents were obtained during the course of the investigation, both internal and external documents related to the discovery of the issue and the remediation of the issue. The investigator collected and reviewed relevant documents concerning the issue including email communications, statutory references, OPM CHCO guidance documents, Commission policy, employee reports, NFC documentation and accounting reports. The investigator interviewed employees that had knowledge of the overpayment issue, who were involved in calculating the annual pay raises for Commission employees, or part of the original team directed to review the 2017 OPM pay freeze memorandum.

## PERIOD OF INVESTIGATION

The investigator began collecting relevant documentation, in February 2017. The period of the investigation is from January 2013, when the original pay freeze was implemented in accordance with the Section 741 of Title VII, Division E of the *Consolidated Appropriations Act, 2014*<sup>5</sup> to January 2017<sup>6</sup>, when the issue was discovered by CFTC staff<sup>7</sup>. The corrective action and remediation phase began in January 2017 and extended through July 2018. The Chairman administratively waived the employee indebtedness in January 2018, which then required staff to complete various administrative actions with NFC that extended through April 2018. The written report documents the actions taken and the follow up activities completed by the investigator.

## **INVESTIGATION PHASE**

### CFTC PAY STRUCTURE AND LEGAL AUTHORITIES FOR PAYING EMPLOYEES

The Commission is an independent agency and legislatively empowered to establish its own pay scale and locality rates for employees outside of 5 U.S.C, Government Organizations and Employees. The CFTC compensates *most* of its employees under authority granted by 7 USC Section 2(a) (7). In the 2014 FIRREA Pay Parity seriatim, it states the Farm Security and Rural Investment Act of 2002<sup>8</sup> provided CFTC the authority to fix compensation of its employees and to adjust basic pay without regard to statutorily mandated pay provisions of Title 5 U.S. Code, Government Organization and Employees. The CEA was amended by the 2002 law to provide CFTC with the ability to provide additional compensation and benefits to employees if the same type of compensation or benefits are provided by other Financial Institution, Reform, Recovery, and Enforcement Act of 1989 (FIRREA) agencies, which became the referenced citation in 7 USC Section 2(a)(7). The Commission employs a single plan; the "CT pay plan" for employees in all grades (01-18) established in April 2003 after enactment of this authorizing legislation in May 2002.

### WAIVING OF THE DEBT

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<sup>5</sup> Section 741 of title VII of Division E of the *Consolidated Appropriations Act of 2014* (PL. 113-76, Jan. 17, 2014)

<sup>6</sup> Section 101 of *The Further Continuing and Security Assistance Appropriations Act, 2017* (PL. 114-254, Dec. 10, 2016)

<sup>7</sup> CPM 17-02, *Pay Freeze for Certain Senior Political Officials* dated January 10, 2017

<sup>8</sup> Section 10702 of Farm Security and Rural Investment Act of 2002 (PL 107-171, May 13, 2002)

**Table 2: Total Demand Notices by Individual**

Name	Debt Receivable
(b)(6); (b)(7)(C)	\$ 861.56
	\$ 22,056.79
	\$ 9,392.73
	\$ 27,195.23
	\$ 28,807.75
	\$ 88,314.06

After NFC generated the Demand Notices, staff monitored the NFC activities and the Demand Notices issued between October-December 2017. The Figure 6 provides an overview of the next steps in this process executed by HRB staff.

CFTC staff notified the investigator in March 2018 that the waivers for the overpayments had been processed and the issue was almost resolved. In January 2018, staff drafted a generic waiver memorandum in order to provide the individual employees a sample document to use as a template if they desired to request a waiver of the debt. The Chief of Staff discussed the waiver process with the impacted employees during the initial notification in January 2017. Each of the employees returned a signed waiver request reflecting each employee's respective amount

#### RECONCILIATION OF THE OFFICIAL OVERPAYMENT AMOUNTS

The investigator reviewed the data provided by NFC upon completion of the overpayment calculations and issuance of the debt collection notices. For employees no longer employed with the Commission, (b)(6); (b)(7)(C), the calculations accounted for the period of their active employment with the Commission. (b)(6); (b)(7)(C) retired in May 2014. (b)(6); (b)(7)(C) was notified in December 2017 upon receipt of the demand notices issued by NFC. (b)(6); (b)(7)(C) contacted the CFTC seeking clarification of the debt notices. At this time, he was informed the corrective adjustments would affect his retirement calculations. In February 2017, HRB staff contacted OPM and Federal Retirement Thrift Investment Board to determine the impact on retirement and employee elected contributions to the Thrift Savings Plan. This information was passed along to the impacted employees and to (b)(6); (b)(7)(C).

#### **CORRECTIVE ACTION TAKEN**

Based on discussions with staff, corrective actions coordinated with NFC will provide the long-term solution. CFTC expects that the adjustments made will preclude future overpayments as the type of position impacted is now separated from other Commission positions, similar to the separation of the Commissioners from the CT pay plan.

CFTC directed NFC to correct the specific employee pay affected by misapplication of legal authorities for the pay increases. This corrected the specific issues for these specific employees. However, it does not address implementing other safeguards or procedural changes to prevent future occurrences and assumes NFC was responsible for the improper payments.

## **FINDINGS AND RECOMMENDATIONS**

Based on the investigation into the events and circumstances that led to the overpayments, it is determined that the actions were not undertaken knowingly or with willful intention. There is no indication of fraudulent activity occurring related to the overpayments. The repetitive occurrence of the event indicates an opportunity to improve internal controls over pay processes at the CFTC, specifically those of Human Resources, Finance, and the General Counsel. These organizations should meet and discuss the appropriations language annually after Congress passes the budget to ensure the CFTC is aware of limiting language.

The investigation did not find any specific individual solely responsible for the overpayments.

There is sufficient evidence that an Antideficiency Act violation occurred of 31 USC 1301(a), the Purpose Statute. In this case, the Commission did not have authority to make the payments to these individuals based on the general provision contained in each fiscal year's appropriation act. Therefore, the funds were not legally available for the purpose.

The second Antideficiency Act statute, 31 US 1341(A) was also violated at the time the payments were made as the Commission has a single annual appropriation available to make salary expenditures against. No other appropriation or funds were available to make the payments to the employees. Therefore, the authorization of the original salary overpayments violates the statute.

The third statute, 31 USC §3321 note, and Improper Payments Information Act of 2002, was also violated as the overpayments are improper payments and reportable.

Each of these events should be reported to the appropriate authorities.