



U.S. Commodity Futures Trading Commission
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Rostin Behnam
Acting Chairman

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September 30, 2021

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
Washington, D. C. 20510

Dear Comptroller General Dodaro,

The purpose of this letter is to officially report two violations of the Antideficiency Act (“ADA”), as required by section 1351 of Title 31, United States Code. The first violation pertains to lease contracts that contain liabilities outside of the government’s control that were entered into by the U.S. Commodity Futures Trading Commission (the “CFTC” or “Commission”) from fiscal years (“FY”) 1995 to 2015. The second violation pertains to the overpayment of certain senior political officials from FY 2014 to 2017. The Commission has instituted new internal controls to prevent a reoccurrence of both of these types of violations.

Lease Contract Liabilities

A violation of 31 U.S.C. § 1341(a) occurred in account 339 1400, Expenses, Commodity Futures Trading Commission, from FY 1995 through FY 2015 in an undeterminable amount. The violations resulted from the CFTC entering into contracts to lease real property for office space in Washington, District of Columbia; New York, New York; Chicago, Illinois; and Kansas City, Missouri, containing provisions that constituted open-ended liabilities in violation of the ADA.

On March 6, 2018, the United States Government Accountability Office (“GAO”) issued Comptroller General Decision B-328450, Commodity Futures Trading Commission Liabilities Outside of the Government’s Control (“Decision”). This Decision concluded that the Commission’s lease agreements for its four locations contained provisions in which the CFTC agreed to liabilities which it did not control. The GAO further explained that:

“an agency violates the Antideficiency Act when it enters into an uncontrolled liability that has no fixed limit that the government may ascertain when it agrees

to assume the liability, unless the agency has specific statutory authority that permits it to do so.”

The leases and related documents covered in the GAO opinion span a period of over 20 years, which significantly limited the CFTC’s ability to recreate a complete historical record of its budgetary and accounting records related to its real property leases. The CFTC carefully reviewed all available historical agency records, both paper and electronic, in an effort to identify all instances where the CFTC agreed to uncontrolled liabilities.

The review included an in-depth analysis of the four leases, totaling approximately 1,300 pages, and approximately 300 personnel hours. As a result, the investigation identified 103 instances where the CFTC did, in fact, agree to assume uncontrolled liabilities that were unlimited as to the amount.

After reviewing the GAO’s opinions related to the CFTC’s leases, the Commission took steps to ensure that future contracts entered into by the CFTC contain no legal liabilities where the total amount is outside of the CFTC’s control and that it records an obligation for the total potential amount. The Commission has implemented new internal controls to ensure proper legal and financial oversight of all future contracts, including leases. In addition, in 2016, the Commission signed a memorandum of understanding with the U.S. General Services Administration (“GSA”) to procure all future space needs of the CFTC.

The Commission has determined that the lease agreements were executed with no willful or knowing intent to violate the ADA and no specific individual is solely responsible for the actions. As noted above, the CFTC has instituted new internal controls and agreements with the GSA to prevent a reoccurrence of this type of violation.

Overpayment of Certain Senior Political Officials

A violation of 31 U.S.C. § 1341(a) occurred in account 339 1400, Expenses, Commodity Futures Trading Commission, from FY 2014 to 2017 in the total amount of \$88,314.06. The violations were a result of overcompensation paid to certain senior political officials that should have been limited based on their political appointee employment status with the Commission.

In January 2017, the Commission reviewed the Office of Personnel Management (“OPM”) Compensation Policy Memorandum (“CPM”) 2017-02 for impacts to its employees. CPM 2017-02 included guidance for agency use in reviewing the pay rates and pay limitations for certain senior political officials as a result of a government-wide pay rate increase freeze applicable to these officials. Specifically, the guidance explained that the pay freeze set forth in the Consolidated Appropriations Act, 2016, Division E, Section 738, continued to apply to certain senior political appointees under the continuing resolution, Further Continuing and Security Assistance Appropriations Act, 2017, had restricted the pay for political appointees “at or above level IV of the Executive Schedule . . . notwithstanding any other provision of law . . .” unless such appointees are “in another pay system whose position would be classified at GS-15 or below . . .” During review of the CPM 2017-02 guidance, the CFTC determined it was a continuation of prior guidance regarding pay freezes that applied to certain current and new

political appointees (*i.e.*, those paid at or above the EX-IV level) since FY 2014. The CFTC discovered that some of its political appointees were receiving compensation above the EX-IV level and had received pay increases along with all other CFTC employees in the years in which the pay freeze was effective at FY 2013 levels (FY 2014-2017). The improper increases included the annual cost of living and merit pay increases granted to Commission employees during this period of time.

Based on a review of the compensation records conducted by the CFTC, it was determined that four employees were receiving compensation above the EX-IV pay level and one employee that received compensation exceeding the statutory limitation of the pay freeze was no longer employed at the Commission. The amount of overpayments to the five individuals totaled \$88,314.06 and each employee submitted a signed waiver request to the Commission to waive the debt. The waivers were subsequently approved by the Chairman in 2018.

The Commission did not have the authority to increase the pay for these individuals given the government-wide provisions prohibiting pay rate increases for certain senior level political officials contained in each applicable fiscal year's appropriation act. Therefore, the funds were not legally available for the purpose. The ADA was violated at the time the payments were made because the authorization of the original salary overpayments from the single annual appropriation violated the ADA.

The CFTC has coordinated corrective actions to ensure that a political employee's position type is clear and separate from other Commission positions in the human resources and payroll system to preclude future overpayments of this nature. Also, due to the repetitive occurrence of pay adjustments with statutory limitations, the Commission is improving the internal controls over its pay-setting processes among the Human Resources Branch, the Finance Management Branch, and the Legal Division. These organizations will review appropriations language annually to ensure that the CFTC is aware of limiting language and executing appropriately.

The Commission has determined that the overpayment activity occurred with no willful or knowing intent to violate the ADA, and no specific individual is solely responsible for the actions. As noted above, CFTC has instituted systemic changes and new internal controls intended to prevent a reoccurrence of this type of violation.

Identical reports will be submitted to the President.

Most respectfully,

A handwritten signature in cursive script, appearing to read "R. Behman".

From: [Busch, Andrea](#)
To: AntideficiencyActRep@gao.gov
Cc: [Mattingley, Joel](#); [Santos, Lindsey](#)
Subject: ADA Notification
Date: Thursday, September 30, 2021 5:44:56 PM
Attachments: [Letter to Comptroller General re Antideficiency Act Leases and Appointee Compensation September 2021.pdf](#)
[image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Hello,

Please find attached the required notifications on Anti Deficiency Act violations.

Please let us know if you have additional questions or concerns.

Thank you,
Andrea



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