



U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of the
Inspector General

MEMORANDUM

TO: Gary Gensler, Chairman

FROM: A. Roy Lavik, Inspector General *ARL*

DATE: January 28, 2013

SUBJECT: Transmittal of Audit Report

This memorandum transmits the Office of the Inspector General's final report, *Audit on the Impact of the Freedom of Information Act Exemption Related to Protecting the Identity of Whistleblowers in Fiscal Years 2012 and 2011*, OIG-AU-13-01. This audit was conducted to address a requirement in the Dodd Frank Wall Street Reform and Consumer Protection Act for the Inspector General to conduct a study:

- (aa) on whether the exemption under section 552(b)(3) of title 5, United States Code (known as the Freedom of Information Act) established in paragraph (2)(A) aids whistleblowers in disclosing information to the Commission;
- (bb) on what impact the exemption has had on the public's ability to access information about the Commission's regulation of commodity futures and option markets; and
- (cc) to make any recommendations on whether the Commission should continue to use the exemption.

On behalf of the Office of the Inspector General, Toski & Company, conducted this audit and issued the attached report. The OIG concurs with the findings in this report. In finalizing this report, we solicited management's comments to our draft report and have included those comments in their entirety as Appendix A.

The audit presented two recommendations for improving the operations of this program area. Specifically, we recommend that:

1. written policies and procedures be established within the FOIA office and CFTC Whistleblower office for interacting with the FOIA Office if a FOIA request involves a whistleblower.
2. the Consumer Protection webpage within the CFTC website and CFTC Form TCR be revised to highlight 7 U.S.C. Section 26(h) regarding the protection for whistleblowers.

In the next 30 days, please provide me with your management decisions describing the specific actions that you will take, including timeframes, to implement each recommendation.

As a result of OIG interviews with current whistleblowers the audit concluded that the protections afforded to whistleblowers by 7 U.S.C. Section 26(h) (2) have aided whistleblowers in disclosing information to the Commission. Furthermore, it is our recommendation that the Commission continue to use 7 U.S.C. Section 26(h) (2) in conjunction with Exemption 3 as a protection to whistleblowers in the future.

Thank you and your staff for the assistance extended to my team during this audit.



U.S. COMMODITY FUTURES TRADING COMMISSION

**Performance Audit Report on the Impact of the Freedom of Information Act
Exemption Related to Protecting the Identity of Whistleblowers in
Fiscal Years 2012 and 2011**

January 16, 2013

U.S. Commodity Futures Trading Commission
Office of the Inspector General
Washington, D.C.

We are pleased to present our findings in regard to the performance audit procedures that we performed for the fiscal years 2012 and 2011. The report includes an introduction, a description of the audit objective, audit procedures, findings/comments/recommendations and a conclusion.

Introduction:

The U.S. Commodity Futures Trading Commission (CFTC) was created by the U.S. Congress in 1974 as an independent agency with a mandate to regulate commodity futures and option markets in the United States. CFTC consists of five commissioners appointed by the President, with the advice and consent of the U.S. Senate, to serve staggered five year terms. One of the commissioners is designated by the President to serve as the Chairman of CFTC. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was signed into law on July 21, 2010¹. The Dodd-Frank Act established new mandates for the Commodity Futures Trading Commission. Among the mandates was the establishment of a Whistleblower Program Office and Consumer Outreach Program Office

Audit Objective:

Toski & Co., P.C. was engaged by the CFTC on behalf of the Inspector General to conduct a performance audit to comply with Section 748 of the Dodd-Frank Act. Section 748 added to the Commodity Exchange Act new section 23, 7 U.S.C. 26, establishing commodity whistleblower incentives and protection, and new subsection 23(h)(2)(C)(iii)(I). It requires the Inspector General of the Commission to conduct a “Study on Impact of FOIA Exemption on Commodity Futures Trading Commission”. The relevant sections of the Act are as follows:

- (I) Study – The Inspector General of the Commission shall conduct a study –
 - (aa) on whether the Exemption under 552(b)(3) of title 5, United States Code (known as the Freedom of Information Act) established in paragraph (2)(A) of the Dodd-Frank Act aids whistleblowers in disclosing information to the Commission;
 - (bb) on what impact the exemption has had on the public’s ability to access information about the Commission’s regulation of commodity futures and options markets; and
 - (cc) to make any recommendations on whether the Commission should continue to use the exemption.

¹ Pub. L. 111-203.124 Stat. 1376

Audit Objective (Continued):

The Freedom of Information Act allows for the application of nine (9) exemptions that may be cited by an agency for withholding information on a FOIA request. The specific subject matter of the engagement was Exemption 3. This Exemption incorporates the disclosure prohibitions that are contained in various other Federal statutes. The engagement included a review of the law indicated in 7 U.S.C. Section 26(h)(2) which provides confidentiality to whistleblowers and a determination as to whether the confidentiality provision came into play on any of the FOIA requests that fell under Exemption 3.

The objective of the performance audit was to assess whether the Exemption under Section 552(b)(3) of title 5, USC (known as the Freedom of Information Act) established in Section 748 of the Dodd-Frank Act aids whistleblowers in disclosing information to the Commission. Our intention was to examine the Commission's disposition of requests made under FOIA and the CFTC's utilization of Exemption 3. Our audit set out to include the examination of records and reports retained by the Commission supporting the FOIA requests received for the fiscal years ending September 30, 2012 and 2011. We also intended to interview whistleblowers to obtain direct feedback in regard to whether 7 U.S.C. Section 26(h)(2), which provides confidentiality to whistleblowers, aided them in disclosing information to CFTC.

The objective also included a review of the application of the requirements for Exemption 3 for FOIA requests. This included a review of the guidance indicated in 7 U.S.C. Section 26(h)(2), which provides confidentiality to whistleblowers, and its relevance to the FOIA requests for which Exemption 3 was utilized. We also sought to verify the aggregate totals for all Exemption categories as reported within the CFTC FOIA Annual Reports for FY12 and FY11, which included reconciling the Exemption totals to detailed source reports. Each Fiscal Year the CFTC is required to prepare a report of FOIA related activities which serves as a basic document for the public on CFTC FOIA activities including total of Exemptions applied to FOIA requests received at the CFTC. This document is known as the CFTC FOIA Annual Report.

Our performance audit was conducted in accordance with auditing standards generally accepted in the United States of America and conformed to the Government Accountability Office and Government Auditing Standards prescribed by the Comptroller General of the United States.

Audit Procedures:

The following procedures were conducted as part of the performance audit:

Internal Control

The Auditor conducted interviews to obtain an understanding of the internal control system sufficient to plan the audit and establish a risk level and scope. This involved interviewing a number of CFTC personnel and examining documentation to support established processes. The internal controls observed and tested included procedures related to receiving, logging, tracking, researching, timeliness, appeals and fulfilling or denying FOIA requests. We also addressed the Commission's standards related to utilization and substantiation of Exemptions. In addition to a

Audit Procedures (Continued):

number of meetings with the Contracting Officer's Representative from the Office of the Inspector General the following interviews were conducted:

- Paralegal Specialist with the CFTC's Office of the General Counsel – Discussed the process for receiving an initial FOIA request. Requests are received via mail and e-mail. The items received in the mail are sent directly to the CFTC mail room and they are delivered to the Office of the General Counsel. The mail is then time-stamped and identified as a FOIA request in the Office of the General Counsel. The request is entered into the FOIA software application, which is a database management tool utilized by the CFTC. The email receipts are sent directly to a FOIA submission mailbox at CFTC.gov, which is only accessible by certain Office of the General Counsel staff who work within the FOIA program. The requests received via e-mail are automatically entered into the FOIA database.
- Staff Attorney with the CFTC's Office of the General Counsel – Discussed the process for incoming FOIA requests, which involves logging the request in the FOIA software system. The cases are assigned to staff attorneys or paralegal specialists and they are reviewed for completeness. If appropriate, the division or program office is then contacted to determine if the specific requested information is available. Then the reviewers examine the information and determine if any Exemptions apply. The CFTC may issue a full release, partial denial or full denial of responsive documents. CFTC FOIA regulations call for a turnaround of 20 business days to process a case from receipt date to response date². We did not examine the turnaround time for processing a case.
- Deputy General Counsel for Intergovernmental Affairs – An appeal is routed in the same manner as an original FOIA request. The Senior Assistant to the General Counsel assigns the appeal to a member of the Intergovernmental Affairs team. The appeal is reviewed, any necessary legal research is completed and a response letter is drafted. The appeals are usually the result of legal issues relating to Exemptions. During the period of review the Deputy and Acting Deputy did not encounter any appeals known to be related to whistleblowers over the course of the period of review.
- Counsel with the Office of the General Counsel – The Auditor had several discussions with the individual who serves as FOIA Counsel. She decides the assignment of the initial review of all FOIA cases. It was confirmed that she determines how FOIA requests are assigned to staff for record collection and initial review and she conducts the final review of all FOIA requests before the response letter is sent to the requester. She stated that there has not been an Exemption 3 case logged into the FOIA software system that utilized 7 U.S.C. Section 26(h)(2) which relates to protecting the identity of a whistleblower.

² 17 CFR 145.7(h)(3)

Audit Procedures (Continued):

- **Director of the CFTC Whistleblower Office** – Per discussion with the Director, the Auditor determined that the purpose of the CFTC Whistleblower Office is to accept whistleblower submissions and verify whether the required information is complete. It was noted that a potential whistleblower must first submit a Tip, Complaint or Referral Form (TCR) to the Whistleblower Office. The office serves as the agency point of contact, for both whistleblowers and Commission personnel, with respect to issues and questions regarding the whistleblower program. There is a Whistleblower Award Determination Panel that decides whether the whistleblower is eligible to receive an award and determines the award percentage. The Director stated that he has never had any discussions with a whistleblower, or an attorney representing a whistleblower, regarding 7 U.S.C. Section 26(h)(2) which relates to protecting the identity of a whistleblower.
- **Consumer Outreach Officer for the Office of the Executive Director** – The Auditor had a discussion to understand the role that the Consumer Outreach Program plays in raising awareness of the existence of the Whistleblower Office. It was noted that there is a monthly newsletter to consumer groups and federal agencies which mentions the Whistleblower Office and there is a Consumer Protection webpage on the CFTC website which includes a link to the Whistleblower Program. The Consumer Outreach Officer has also designed a draft brochure for the Whistleblower Office.

Compliance

The Auditor reviewed the requirements for the application of Exemption 3 for FOIA requests which included a review of the law indicated in 7 U.S.C. Section 26. Section 26(h)(2) provides protection to whistleblowers. It states “Except as provided in subparagraphs (B) and (C), the Commission, and any officer or employee of the Commission, shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C).”

We identified FOIA requests in Fiscal Year 2012 and 2011 for which Exemption 3 was cited as a reason for partial or full denial. We did not find any requests that had been denied due to 7 U.S.C. Section 26(h)(2), protection to whistleblowers. Therefore it was not necessary to interview anyone or to review documentation. It was a narrow focus to determine if the protection indicated in 7 U.S.C. Section 26(h)(2), which provides confidentiality to whistleblowers, aided them in disclosing information to the CFTC.

The Director of the Whistleblower office was interviewed to gain an understanding of the internal policies and procedures. The Auditor reviewed the CFTC Whistleblower Office Policies and Procedures document and the Whistleblower Rules. In addition, we researched the CFTC website, CFTC Consumer Protection webpage, which includes the whistleblower program and

Audit Procedures (Continued):

reviewed Form TCR to determine if the provisions of 7 U.S.C. Section 26(h)(2) are highlighted for the public to see. We discussed the legislative provision that prohibits the Commission from disclosing any information, including information provided by a whistleblower to CFTC which could reasonably be expected to reveal the identity of a whistleblower.

Substantive Testing

The Auditor reviewed the Commodity Futures Trading Commission FOIA Annual Reports for the fiscal years ending September 30, 2012 (FY 12) and 2011 (FY 11) and noted the following statistics. For FY 12 there were 175 requests received and 170 processed during the fiscal year. There were 64 partial grants/denials and 11 full denials based on exemptions. The Exemption 3 statute was relied upon 13 times. For FY 11 there were 168 requests received and 145 processed during the fiscal year. There were 28 partial grants/denials and 17 full denials based on Exemptions. The Exemption 3 statute was relied upon 16 times. As part of the audit procedures we obtained the detailed reports from the FOIA Office that were utilized to accumulate the Exemption totals in the FY12 and FY11 annual reports. The auditor reconciled the data to the annual reports. There were two exceptions identified during the reconciliation but they were determined not to be material in regard to the integrity of the reports.

We selected the entire population of FOIA requests for which Exemption 3 was cited as a reason for partial or full denial. Based on our review of the FY12 and FY11 FOIA Annual Reports, Exemption 3 was cited 13 and 16 times, respectively. Due the relatively low number within the total population, we chose to test 100% of the FOIA requests for which Exemption 3 was relied upon rather than choose a sample.

For each instance where Exemption 3 was cited we reviewed the Exemption descriptions to determine if any cases dealt with whistleblowers. It was determined that all of the denials involved 7 U.S.C. 12 which prohibits the disclosure of data and information that would separately disclose the business transaction of any person and trade secrets or names of customers gathered in the course of CFTC investigations under the Commodity Exchange Act. There were no denials that involved 7 U.S.C. Section 26(h)(2) which provides confidentiality to whistleblowers.

The Office of the Inspector General obtained a list of all whistleblowers that have come forth during FY12 and FY11. It should be noted that each whistleblower had received an identification number. There was no information on the list that provided the identity of the individuals or that could reasonably be expected to reveal the identity of a whistleblower, per Dodd-Frank Section 748(h)(2)(A). The list contained a total of 58 whistleblower TCR Forms. The Auditor chose a statistical sample of 20 selections to interview, which was based on a confidence level of 95% and a confidence interval of 18. For each selection, we conducted a voluntary interview by telephone. The interviews were conducted by an employee from the Office of the Inspector General. In order to protect the whistleblower's identity the Auditor was not present while the individuals were contacted.

Audit Procedures (Continued):

The Auditor received the information to support the results of the survey from the Office of the Inspector General employee who conducted the interviews. He signed an acknowledgement to attest that the information provided to the Auditor was true and accurate.

Based on the responses received, we assessed whether the guidance indicated in 7 U.S.C. Section 26(h)(2), which provides confidentiality to whistleblowers, aided them in disclosing information to the CFTC.

Findings/Comments/Recommendations:

Based on the results of our performance audit procedures we offer the following findings, comments and recommendations in regard to the existing process:

- Policies and Procedures – There are no written policies and procedures within the FOIA Office nor does the CFTC Whistleblower Office have written policies and procedures for interacting with the FOIA Office if a FOIA request involves a whistleblower.

Recommendation: We recommend that written policies and procedures be established and they should include a protocol to ensure that the confidentiality of the whistleblower remains intact.

- FOIA Office – The Auditor met with personnel from the FOIA Office and reviewed all 29 instances where Exemption 3 was used during FY12 and FY11. It was determined that all of the denials involved 7 U.S.C. 12, which prohibits the disclosure of data and information that would separately disclose the business transaction of any person and trade secrets or names of customers gathered in the course of CFTC investigations under the Commodity Exchange Act. There were no denials that involved 7 U.S.C. Section 26(h)(2) which provides confidentiality to whistleblowers.
- CFTC Website – The CFTC website has a Consumer Protection webpage where information about the Whistleblower Program can be found. Under the Resources section of the Whistleblower Program information, 7 U.S.C. Section 26 - Commodity Whistleblower Incentives and Protection is available for download, however, there is no specific focus on Section 26(h) regarding the protection for whistleblowers. We also reviewed metrics related to the volume of visitors to the CFTC website and the whistleblower webpage. During calendar 2012, it was noted that the whistleblower portion of the CFTC website experienced 17,716 visitors. However, it should be noted that confidential protection identity offered to whistleblowers is not apparent to the webpage viewer.

In addition, Form TCR makes no mention of 7 U.S.C. Section 26(h) and does not highlight CFTC's protection of whistleblowers in any way.

Findings/Comments/Recommendations (Continued):

Recommendation: The Consumer Protection webpage within the CFTC website and Form TCR should be revised to highlight 7 U.S.C. Section 26(h) regarding the protection for whistleblowers. As reviewed, it would seem that the volume of visitors seem to justify the availability of whistleblower information. Accordingly, the protections afforded potential whistleblowers should be readily available.

- **Whistleblower Office** – As a result of the feedback received from the whistleblower survey, and the study carried out on behalf of the Inspector General of the Commission it was determined that:
 - (aa) The protections afforded by 7 U.S.C. Section 26(h)(2), appear to positively aid whistleblowers in disclosing information to the CFTC. Our testing showed that a total of seventeen of the twenty whistleblowers that were contacted stated that they were aware of the legislative provision that prohibits the Commission from disclosing any information, including information provided by a whistleblower to CFTC which could reasonable be expected to reveal the identity of a whistleblower. Of these seventeen, twelve indicated that this protection positively impacted their decision as a whistleblower. The whistleblowers that were interviewed were asked to what extent the confidentiality provision aided them in disclosing information to CFTC. The responses were as follows:
 - 8 – A great extent
 - 1 – Some to a great extent
 - 2 – Some extent
 - 1 – Little to some extent
 - 5 – No extent
 - 3 – Not applicable
 - (bb) 7 U.S.C. Section 26(h)(2) which provides for whistleblower confidentiality was not cited in conjunction with Exemption 3 within the period of our examination. Therefore, we found no evidence that it has helped or hindered the public’s ability to access information about the Commission’s regulation of commodity futures and options markets.
 - (cc) Based on the results of the performance audit and the whistleblower survey, the impact of 7 U.S.C. Section 26(h)(2) has been positive and there is strong evidence to support the Commission’s continued usage of 7 U.S.C. Section 26(h)(2) in conjunction with Exemption 3.



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**Office of the
Inspector General**

OIG audit AU-13-01

Performance Audit Report on the Impact of the Freedom of Information Act Exemption Related to Protecting the Identity of Whistleblowers in Fiscal Years 2012 and 2011

**APPENDIX A
MANAGEMENT'S RESPONSE LETTER**



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW
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Response Letter

January 25, 2013

Roy A. Lavik, Inspector General
U.S. Commodity Futures
Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: OIG AU 1301

Dear Mr. Lavik:

Thank you for the opportunity to respond to the audit report, entitled "Performance Audit Report on the Impact of the Freedom of Information Act Exemption Related to Protecting the Identity of Whistleblowers in Fiscal Years 2012 and 2011." Based on our review of the audit, the Commodity Futures Trading Commission ("Commission") offers the following responses:

Recommendation 1

We recommend that written policies and procedures be established and they should include a protocol to ensure that the confidentiality of the whistleblower remains intact.

Response

The FOIA office agrees with the recommendation to prepare written materials documenting the office's policies and procedures. These materials will include the protocol the agency uses to ensure that whistleblower confidentiality is protected.

Recommendation 2

The Consumer Protection webpage within the CFTC website and Form TCR should be revised to highlight 7 U.S.C. Section 26(h) regarding the protection for whistleblowers. As reviewed, it would seem that the volume of visitors seem to justify the availability of whistleblower information. Accordingly, the protections afforded potential whistleblowers should be readily available.

Response

Information about the confidentiality protections afforded to whistleblowers under 7 U.S.C. § 26(h)(2) and 17 C.F.R. § 165.4 is available on the Commission's "Whistleblower

Program” webpage because copies of Section 23 of the Commodity Exchange Act, the Whistleblower Rules, and frequently asked questions about the program are linked on the page. However, given the web traffic cited in the audit report, the Whistleblower Office agrees to display the information more prominently on the page. The Whistleblower Office also agrees to include such information on the Form, provided that the Office of Management and Budget approves such a change to the Form.

On behalf of the Commission, thank you once again for the opportunity to respond. Please let me know if we can provide any further information or assistance.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Eric Juzenas", with a long, sweeping horizontal stroke extending to the right.

Eric Juzenas
Chief Operating Officer and
Senior Counsel to the Chairman