



**U.S. COMMODITY FUTURES TRADING COMMISSION
OFFICE OF INSPECTOR GENERAL**

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TO: J. Christopher Giancarlo, Chairman
Brian Quintenz, Commissioner
Rostin Behnam, Commissioner
Dawn Stump, Commissioner
Dan Berkovitz, Commissioner

FROM: A. Roy Lavik, Inspector General

ARL/R

DATE: October 16, 2018

SUBJECT: Inspection and Evaluation of the February 2018 CFTC-SEC harmonization briefing

Summary

On February 27, 2018, CFTC held a “CFTC-SEC harmonization briefing” (the briefing). Chairman Giancarlo and Commissioner Quintenz attended this meeting, while Commissioner Behnam was not invited. On March 7 and March 8, 2018, our Office received two separate but similar allegations that the briefing violated the Government in the Sunshine Act, (“Sunshine Act”). Each allegation presented no supporting evidence other than the existence of the meeting coupled with the presence of Chairman Giancarlo and Commissioner Quintenz.

Lacking a specific allegation of misconduct by an individual, we determined to conduct an inspection and evaluation of the meeting. We followed the *Quality Standards for Inspections and Evaluations* (issued by the Counsel of Inspectors General on Integrity and Efficiency).¹ Due to competing priorities, we delayed our start date.

We reviewed the briefing program, and interviewed briefing participants. We determined the briefing did not violate the Sunshine Act; however, we do believe it would be better to include all Commissioners at informational briefings.

Please contact me at x5107 if you have any questions regarding this evaluation.

¹ Available at: <https://www.ignet.gov/sites/default/files/files/iestds12.pdf>.

The Sunshine Act

The Government in the Sunshine Act, 5 U.S.C. § 552b (1976), requires that meetings of multi-member federal agencies shall be open to the public, with the exception of discussions in ten narrowly defined areas. Legislative history explains:

The basic premise of the Sunshine legislation is that, in the words of Federalist No. 49, “the people are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived.” Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.

In a theoretical sense, the agencies in the executive branch are already accountable to the people through the President, who is indirectly elected, and the Congress, whose members are directly elected. This theoretical accountability, though, leaves agency commissioners far removed from the public view in their day-to-day activities.

Absent special circumstances, there is no reason why the public should not have the right to observe the agency decision making process first-hand.²

However, in order for the Sunshine Act to apply, the gathering must meet the Sunshine Act’s definition of “meeting.” The Sunshine Act defines “meeting” as follows:

[T]he term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e).³

Whether a meeting is a “meeting” for purposes of the Sunshine Act therefore turns not only on the identity of the participants in attendance and the stated purpose of the meeting, but also on what actually transpires. The CFTC Office of General Counsel (OGC) provided Commissioner Behnam with an explanation of the Sunshine Act which we have attached. We do not object to the OGC’s analysis.

² H.R. Rep. 94-880 (Part I), *2, 94th Cong., 2nd Sess. 1976, 1976 U.S.C.C.A.N. 2183, **2184, 1976 WL 13965 (July 31, 1975).

³ 5 U.S.C. 552b(a)(2). Deliberations “required or permitted” under subsections (d) and (e) are administrative decisions necessary to implement the Sunshine Act itself, such as a vote to implement an exception to the notice requirement. 5 U.S.C. 552b(e)(1).

Background

The briefing. The briefing took place on February 26, 2018. It was scheduled for 90 minutes. After an introduction, it consisted of 11 separate presentations given jointly by Securities and Exchange Commission (SEC) and CFTC staff, with each presentation allotted 5 minutes,⁴ as follows:

- I. Welcome and introductions
- II. CFTC status – (5 minutes)
- III. SEC status – (5 minutes)
- IV. Areas with broad [CFTC and SEC staff] agreement:
 - a. MOU (5 minutes)
 - b. Recordkeeping requirements (5 minutes)
 - c. Security futures margin (5 minutes)
 - d. Business Conduct – CCO [Chief Compliance Officer] (5 minutes)
 - e. Statutory disqualification (5 minutes)
- V. Areas where staff is reaching out to industry for further information
 - a. Business Conduct – ISDA Protocols (5 minutes)
 - b. Business Conduct – Church plans (5 minutes)⁵
- VI. Areas where further [CFTC and SEC staff] discussions are needed
 - a. Transaction Data (5 minutes)
 - b. Execution Facilities (5 minutes)

The Chairman and three of his staff attended this briefing, along with Commissioner Quintenz and one staff. In addition, two staff from the Division of Swaps and Intermediary Oversight, three staff from the Division of Market Oversight, one staff from the Division of Clearing and Risk, and one staff from the Office of General Counsel attended. All eleven CFTC staff attendees (across all Divisions and Offices) were attorneys; two were staff level attorneys and nine were at the Associate Director level or higher.⁶

The allegations. Subsequent to the briefing, CFTC OIG received complaints from a private citizen and from Public Citizen,⁷ which issued a press release, and posted its complaint to

⁴ We realize that 11 presentations of 5 minute duration would only occupy 55 minutes. We presume the balance was intended for questions and answers, and as well as the welcome and introduction.

⁵ For purposes of a limited exclusion from the definition of “commodity pool operator,” CFTC has exempted from the definition of “commodity pool” any “plan defined as a church plan in Section 3(33) of title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d).” 17 CFR § 4.5.

⁶ There were 19 attendees from the SEC, including Chairman Clayton.

⁷ Public Citizen states that it “is a nonprofit consumer advocacy organization.” www.citizen.org/about/about-us.

its website.⁸ Both complaints noted the presence of a quorum of CFTC Commissioners at the briefing, and that the briefing was not public. Neither complaint alleged that deliberations actually took place during the meeting.

Scope and Methodology

To complete our review, we interviewed eight of the eleven CFTC staff attendees at the meeting.⁹ Our interviews included staff from the Office of Chairman Giancarlo, the Office of General Counsel, the Division of Swap and Intermediary Oversight, the Division of Clearing and Risk, the Division of Market Oversight. We requested and reviewed relevant documents including the meeting agenda and the previously mentioned opinion offered to Commissioner Behnam by the OGC (attached).

Facts

Prior to the CFTC-SEC harmonization briefing,¹⁰ there was a high level awareness that, due to the then three-person Commission, attendance by two Commissioners would constitute a quorum,¹¹ and the Sunshine Act would therefore apply. The General Counsel met with the Chairman and Commissioner Quintenz to discuss the Sunshine Act and its possible application during the briefing, and to warn against any deliberations. The General Counsel was not able to attend the meeting, but sent an attorney in his place to monitor the discussion as it occurred. The CFTC Chief of Staff introduced the OGC attorney early in the meeting. The OGC attorney explained the Sunshine Act requirements, and the Chief of Staff warned that the attorney would step in if any deliberations took place.

All witnesses who spoke with us stated no deliberations took place. Witnesses uniformly relayed that small teams comprised of SEC and CFTC staff briefed the Chairman and Commissioner Quintenz on the current status of harmonization efforts. At the time of the briefing, staff-level harmonization efforts were not yet complete. Witnesses recalled that Chairman Giancarlo and the SEC Chairman asked questions about process and timing – for example, when would SEC and CFTC staff finish their collaboration? And would it be better to have SEC and CFTC proposed rulemakings published at the same time? As described by the

⁸ Available here: <https://www.citizen.org/media/press-releases/public-citizen-challenges-closed-meeting-between-cftc-and-sec>.

⁹ We did not interview an attorney working directly for the Chairman, an attorney working directly for Commissioner Quintenz, nor the Director of DMO.

¹⁰ It appears CFTC referred to the meeting as the CFTC-SEC harmonization meeting. This recalls a 1981 CFTC/SEC jurisdictional agreement which the SEC called the Shad-Johnson Agreement, but the CFTC called the Johnson-Shad Agreement. (John Shad was the SEC's Chairman at the time, and Phillip Johnson the CFTC's.) Judge Easterbrook, writing for the U.S. Circuit Court of Appeals for the Seventh Circuit, determined simply to call that agreement the Accord, "to avoid offending either agency." *CME v. SEC*, 883 F.2d 537, 544 (7th Cir.1989).

¹¹ "A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter pursuant to § 200.60 or are otherwise disqualified from such consideration, is two, two members shall constitute a quorum for purposes of such matter." 17 C.F.R. § 200.41.

witnesses, we surmise that deliberations were not anticipated or appropriate due to the posture of the issues that were briefed. It appears none of the issues covered were anticipated for a Commission vote in the near future.

Between the February 2018 briefing and the installation of two additional Commissioners in September 2018,¹² the Commission reported the publication of three final rules:¹³

- In June 2018, the Commission voted on a final regulation titled *17 CFR Part 49 Amendments to the Swap Data Access Provisions of Part 49 and Certain Other Matters*.¹⁴ There is no indication that this regulation was presented at the February 27, 2018, briefing.
- On June 29, 2018, CFTC published “correcting amendments” to 17 CFR Part 1.¹⁵ There is no indication that these technical amendments were discussed at the briefing.
- On August 27, 2018, the Commission adopted final rules for Chief Compliance Officer (CCO) duties, which was a topic at the February 2018 briefing.¹⁶ The topic “Business Conduct – CCO” was listed on the briefing agenda as a matter with current “broad” CFTC and SEC staff agreement. There is no indication that staff presented this topic as ready for deliberation, nor that deliberations took place in February for a rule to be voted on in August. The Commission previously proposed this rule for comment in May 2017.¹⁷ Eleven comments were received.¹⁸ The Commission unanimously proposed and adopted the rules; no CFTC Commissioner voted in the negative.¹⁹

To sum up, nothing in the Commission’s activities following the briefing indicates to us that deliberations occurred during the briefing that could have determined or resulted in the joint conduct or disposition of official agency business. We find the meeting was informational in nature, that no deliberations occurred, and that the Sunshine Act therefore was not violated. Nevertheless, we believe it would be prudent and appropriate to offer all Commissioners the opportunity to be briefed at all informational meetings.

Thank you for your continuing support of my Office.

cc:

Michael Gill, Chief of Staff
Daniel J. Davis, General Counsel

¹² Commissioner Berkovitz was sworn in to serve as a CFTC Commissioner on September 7, 2018, and Commissioner Stump was sworn in on September 12, 2018. CFTC Press Release 7781-18, September 7, 2018 (<https://www.cftc.gov/PressRoom/PressReleases/7781-18>); CFTC Press Release 7783-18, September 12, 2018 (<https://www.cftc.gov/PressRoom/PressReleases/7783-18>).

¹³ The Commission posts final rules on its website at: <https://comments.cftc.gov/FederalRegister/Final.aspx>.

¹⁴ 83 FR 27410 (June 12, 2018).

¹⁵ 83 FR 30533 (June 29, 2018).

¹⁶ 83 FR 43510 (Sept. 26, 2018).

¹⁷ 82 FR 21330 (May 8, 2017).

¹⁸ 83 FR 43510, 43511 (Sept. 26, 2018).

¹⁹ 82 FR 21330, Appx. (May 8, 2017); 83 FR 43510, Appx. 1 (Sept. 26, 2018).