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COMMENT

December 3, 1999

Jean A. Webb, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st St. NW
Washington, DC 20581

BY HAND DELIVERY
C/O MARVIN JACKSON,
REGIONAL COORDINATOR, CFTC ERO

Dear Ms. Webb:

Federal Register release number 99-035 and Federal Register release number 99-036 ("the releases"), which the Commodity Futures Trading Commission ("CFTC") published in the Federal Register on September 30, 1999, provide for comments to be submitted in response to the releases. For purposes of commenting on the releases, please find enclosed the joint comments of American Federation of Government Employees Local 3827 and American Federation of Government Employees Local 3477 ("the unions").

Where the unions' comments refer to language of the Privacy Act Overview, references are taken from the Freedom of Information Act Guide & Privacy Act Overview, pages 759-773. The unions offer their comments based on their understanding of the Privacy Act Overview, the releases, and the labor contracts between CFTC and the unions, and do not represent that their comments reflect opinions of counsel or other legal conclusions. These comments are further offered based on the limited amount of time that CFTC has granted the unions for purposes of addressing these complex matters.

Alfonso A. Holston

Alfonso A. Holston, President
American Federation of Government Employees--
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Steve Garitta, President
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COMMENT 1

According to EEOC's new Federal Sector EEO Regulations, a complaint is eligible for processing under EEOC's rules if the complainant contacts an EEO counselor within 45 calendar days of the alleged discriminatory action ("the EEOC's 45 day rule"). Complaints which meet the test of this 45 day rule are eligible for processing under EEOC regulations. Conversely, complaints which do not meet this 45 day threshold test are time barred from the EEOC's elaborate menu of protections and benefits.

Unless a complaint filed under CFTC's sexual harassment policy, the subject of the releases, is filed concurrently with an EEO counselor within 45 calendar days of the alleged discriminatory action, that complaint will not meet the EEOC's 45-day rule. A complaint filed under CFTC's sexual harassment policy at any point beginning on day 46, and extending outward for up to a year after the alleged discriminatory action, is time barred by definition from EEOC processing.

Without a concurrent claim filed with the EEOC under the EEOC's 45 day rule, a complaint filed under CFTC's sexual harassment policy will not be eligible for the enforcement of remedial action or other sanctions under EEOC law and regulations. Any remedial action or sanction which results from CFTC's investigation of the complaints filed under its sexual harassment policy is based on agency policy, and lies entirely independent of the EEOC.

If more than 45 days has elapsed since the date of the alleged discriminatory action, the investigative files which are the subject of the releases cannot be characterized as being for EEOC's law enforcement purposes: no law can be enforced by EEOC on the basis of, or as a result of CFTC's investigatory files where the 45 day rule is expired. Unless a parallel complaint is filed with EEOC within the 45 day rule, CFTC's investigatory files are limited to enforcement of CFTC policy, but CFTC policy with respect to sexual harassment and other forms of activity covered under EEOC regulations does not endow CFTC with the power to enforce the EEOC's law.

The EEOC enforces its law through its hearing and adjudication processes subsequent to its pre-complaint counseling procedures. At no point will the EEOC attend to any enforcement which is not brought under the EEOC itself; and once a complaint qualifies for processing under EEOC regulations, the EEOC's regulations govern the investigative file.

To the extent that the investigative files which are the subject of the releases are not for law enforcement purposes, the unions believe that those files fail to meet the Privacy Act's statutory tests for the exemptive treatment sought by the releases. The releases themselves acknowledge as much:

> Neither the Sexual Harassment Policy nor the system of records is part of the EEOC's Federal Sector Complaint Processing system. See 29 CFR part 1614. Both the policy and maintenance of the system of records are, however, consistent with the EEOC's mandate to federal agencies to 'maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies.'" 29 CFR 1614.102(a)

While the unions acknowledge CFTC's efforts to comply with the EEOC's mandate as specified above, based on discussion as outlined above the union strictly differs with the following assessment published in the releases:

> In the Commission's view, the materials in this system of records are investigatory materials for law enforcement purposes within the meaning of Privacy Act Section 502a(k)(2).

Investigatory materials--they are; for law enforcement purposes--they are not, once the 45-day rule precludes a concurrent filing with EEOC; and as for the meaning of Privacy Act Section 502a(k)(2)--the unions believe that the meaning of 502a(k)(2), with respect to the releases, is best demonstrated with reference to the qualifying language ("the proviso") which is the subject of COMMENT 2:

> Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence.....

COMMENT 2

As noted at COMMENT 1 above, the union believes that investigatory files which originate in response to alleged sexual harassment that fails to meet the 45-day rule also fail, for that reason, the test of whether a law enforcement purpose underlies those investigatory files. In COMMENT 2 as follows, the unions wish to address how the proviso affects the nondisclosure language of subsection (k)(2). In particular, the proviso bears directly upon the terms and conditions under which material otherwise qualifying for treatment as "investigative files compiled for law enforcement purposes" is in fact expressly disqualified by the proviso from treatment as such.

The proviso provides a barrier which investigatory files which meet the standards of "compiled for law enforcement purposes" must surmount in order to be protected from nondisclosure. Based on the proviso, files such as those which are announced in the releases, and which are otherwise qualified as investigatory files for law enforcement purposes, are disqualified for treatment as such if maintaining those files results in remedial action or sanction which falls within the proviso. The remedial action or sanction specified by the proviso--the denial of any right, privilege, or benefit that any individual would otherwise be entitled by Federal law, or for which he would otherwise be eligible--comfortably falls within the purposes declared by the releases:

> The purposes of the records system include centralization information on this workplace issue and the Commission's response to it, identification of repeat offenders, and support for disciplinary action.

And alternatively:

> The Commission is proposing that the routine uses of these records be limited to use in proceedings in which the Commission or any present or former member or employee is a party and in any investigation to which the information is relevant. In addition, the Commission is proposing that the records be available to any other federal or state agency for use in meeting the responsibilities assigned to them under the law or to another federal agency, if relevant, in connection with a personnel action concerning the employee about whom the record is maintained.

The declared purposes stated in the releases, pointing as they do toward "identification of repeat offenders", "support for disciplinary action", and "personnel action concerning the employee about whom the record is maintained", easily contemplate remedial action or sanction as a consequence of the maintenance of material that is the subject of the releases. If that remedial action or sanction consists of denying an individual any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, then the investigatory files upon which such remedial action or sanction is taken are ineligible for the exemptions otherwise available under 552a(k)(2).

If CFTC fires, demotes, or transfers a person based on findings of sexual harassment covered by the releases, then in all those instances the affected persons would be denied benefits (pay, seniority, etc.) which they otherwise would be entitled to. On this basis, the proviso could compel disclosure of the investigative files if those files resulted in the remedial action or sanction taken.

If disclosure of the investigative file is the predictable consequence in all such cases, the unions are concerned about why nondisclosure would be sought by the releases in the first place. In summary, as a practical, common sense matter, why would CFTC want to promulgate rules which would require investigatory files to be disclosed to the very persons against whom CFTC presumably intends to prevail in sexual harassment claims involving "repeat offenders", "disciplinary action", and "personnel action"?

As a strictly hypothetical matter, a CFTC regulation that adopts subsection (k)(2) could be detrimental to a claimant who might seek disclosure of a file because the claimant, for good cause, believes that he/she was the subject of an investigation that was mishandled, and as a consequence of that investigative file, the claimant has been denied the "right, privilege, or benefit" of a fair and impartial investigation . In that instance, in order to expose an investigative file that was botched or tampered with, a claimant who alleged sexual harassment might subsequently be placed in the awkward position of alleging that the very investigative file which was opened first in response to a claim of sexual harassment also denied the claimant a right, privilege, or benefit--namely a workplace free of sexual harassment, AND a fair and impartial investigation of a claim of wrong-doing. In short, if a complainant alleges that, as a result of the investigative file, the wrong person is sanctioned--namely, the claimant rather than the alleged harasser-- will the claimant gain disclosure to the investigative file?

In an instance where CFTC closed an investigation, or did not prevail in action against an alleged wrong-doer, a claimant seeking to review the file of which he/she is the subject would not be able to expose the investigative files' unfair, biased, incomplete, or other inappropriate investigative practices which occurred during the investigation itself. Courts reviewing an agency's administrative determinations often defer to the agency's judgment where an administrative dispute arises between the agency and an opposing party. Once subsection (k)(2) is adopted, a claimant under the hypothetical circumstances described above could be precluded from exposing a flawed investigation unless he/she could be persuasive in the role as defendant subsequent to the very action in which he/she was first a witness.

The unions believe that CFTC should not adopt any regulation that could block a flawed investigation from rightful exposure. For this reason, the unions are concerned that the releases could, albeit unintentionally, grant wrong-doers the benefit and privilege of having their misdeeds undisclosed, at the expense of a claimant who is denied the right, privilege, and benefit of a fair and impartial investigative file to address a matter of sexual harassment.

Finally, the unions are concerned about the following characterization of the Proviso, which is taken from the Privacy Act Overview: "Given the very limited case law interpreting subsection (k)(2)'s limiting exception and what constitutes denial of a 'right, privilege, or benefit', it is worth noting...." Where regulatory language derives from such "very limited case law", the unions are concerned that comments cannot be adequately informed, interpretation of the law is risky, and collective bargaining is hindered.

The unions also note the tenuous nature of the language which carves out an exception to the disclosure encompassed by the proviso. That exception applies to any individual who is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual,--

> except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence.....

The unions are uncertain whether CFTC has the necessary authority to grant an express promise that the identity of a source will be held in confidence, and in addition, whether such promise is subject to waiver when investigative files are made available beyond CFTC itself. As noted in the Privacy Act Overview, '" the 'express' promise requirement' of (k)(2) was not satisfied where a witness 'merely expressed a 'fear of reprisal.' "'

As a practical matter, a witness might commonly seek an express promise agreement precisely to seek protection against reprisal, retaliation, recrimination, and retribution. Where such protection falls outside the statutory reach of subsection (k)(2), the unions are concerned that the application of subsection (k)(2) as stated in the releases fails to provide sufficient protection for either the physical or mental health and safety of employees.

COMMENT 3

COMMENT 1 above refers to where the unions believe that the releases fail to meet the standards for distinguishing between investigative files in general, and the specific investigative files compiled for law enforcement purposes. As noted in COMMENT 3 below, the unions wish to address several noteworthy characteristics which, according to the Privacy Act Overview, serve to distinguish investigative files compiled for law enforcement purposes.

Where a complaint to an inspector general is the "catalyst" of an investigation, 552a(k)(2) applies. Likewise, without "specific allegations of illegal activities" being involved, subsection (k)(2) is not applicable. Even under the criteria of "specific allegations of illegal activities", an investigation "might well be characterized as a law enforcement investigation" "so long as the investigation was realistically based on a legitimate concern that federal laws have been or may be violated...." A test of "original purpose" serves to place an investigation under subsection (k)(2) because "plain language of the exemption states that it applies to the purpose of the investigation, not to the result". The unions are concerned that certain language in the purposes which CFTC declares in the releases is note consistent with these various tests which apply to investigatory files compiled for distinguishable law enforcement purposes.

For instance, with respect to law enforcement of sexual harassment matters, what law is at issue where the releases declare the following purpose: "centralization information on this workplace issue and the Commission's response to it?" Alternatively, the unions are concerned about the breadth of unspecific language which is stated as follows:

> The Commission is proposing that the routine uses of these records be limited to use in proceedings in which the Commission or any present or former member or employee is a party and in any investigation to which the information is relevant. In addition, the Commission is proposing that the records be available to any other federal or state agency for use in meeting the responsibilities assigned to them under the law or to another federal agency, if relevant, in connection with a personnel action concerning the employee about whom the record is maintained.

"Any investigation to which the information is relevant" is particularly difficult to comment upon, since the unions do not know--and the releases do not specify--what specific law enforcement, other than law governing sexual harassment, is intended to be the subject of the investigatory files referred to in the releases. Similarly, the unions are concerned where specific information is singularly lacking with respect to what "relevant" refers to. If "relevant" is not among the distinguishing characteristics noted above which are the foundational tests of investigative files compiled for law enforcement purposes, how can subsection (k)(2) be applicable to the releases? Reference in the releases to "inter alia" cause the unions serious concern. "Inter alia" is not sufficiently specific to permit the unions to comment adequately, or to know what law enforcement purposes underlie "inter alia."

COMMENT 4

The unions note that the Executive Director is proposed as the custodian of the records which are the subject of the releases. In this regard, the unions endorse the appointment of a custodian of records. Nevertheless, the unions are emphatically opposed to granting this authority to the Executive Director.

CFTC is a highly political agency which is particularly sensitive to the broader political concerns of various branches of government, including both the executive and the legislative branches. The unions think that the Executive Director is an unsatisfactory choice for the custodian of records. If, after collective bargaining is concluded, the releases will have any effect upon the Eastern Regional Office, the unions further request that at least one member of the bargaining unit be officially recognized to participate in the performance of the duties assigned to the custodian of records.

The unions note how the releases call for an indefinite retention period of the investigative files which are the subject of the releases. Indefinite retention, without any statute of limitations, concerns the unions. Unless the Privacy Act Overview specifically addresses a document retention period, the unions expect further discussion of this point in the course of collective bargaining.

COMMENT 5

The unions request that CFTC share with the unions any information that CFTC knows, or has received, concerning the experience of other Federal agencies which have regulations adopting subsection (k)(2). In short, what Federal agencies have adopted subsection (k)(2) regulations? With respect to subsection (l)(2), have these other agencies shared their experience with CFTC? In order to satisfy their own appropriate desire for such information, the unions anticipate soliciting such information if CFTC has not already done so. The unions believe that such information will likely support the collective bargaining which the unions have requested with respect to the releases.

COMMENT 6

As noted in the unions' cover letter which accompanies these comments, as well as in the unions' prior correspondence with CFTC, neither these comments, nor CFTC's process of soliciting comments by notice in the Federal Register, is within the collective bargaining which the unions have called for with respect to the releases. While the unions' comments herein are intended to be responsive and thoughtful, the comments provided as outlined above are strictly outside the collective bargaining process. Collective bargaining may include these comments, but these comments are not designed to limit or bind the course of collective bargaining.