

Review of the Commodity Futures Trading  
Commission's Response to Allegations Pertaining to the  
Office of the Chief Economist

Prepared by the  
Office of the Inspector General  
Commodity Futures Trading Commission

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## Executive Summary

In December 2012, the Chicago Mercantile Exchange (“CME”)<sup>1</sup> alleged that certain publications by CFTC economists revealed information in violation of Section 8(a)(1)<sup>2</sup> of the Commodity Exchange Act (the Act).<sup>3</sup> CME further questioned why the CFTC was permitting outside economists to access CFTC data, why the CFTC was permitting the publication of academic articles using that data, and finally, the administrative process by which the CFTC was employing these outside economists.

The Office of General Counsel (OGC) at the request of Chairman Gensler began an administrative review of the Office of the Chief Economist (OCE). Responsibility for the administrative review was assigned to the Deputy General Counsel for (b)(6),(b)(7)(C). The administrative review revealed that there had been poor record-keeping with regard to the so-called “on-boarding” process for OCE economists.<sup>4</sup> The deficiencies included inadequate documentation of security clearances, issues regarding nondisclosure agreements, and non-submission of employment data to the National Finance Center, as well as incomplete personnel forms, one contract lacking the contractor’s signature, and other administrative errors. There were no indications of fraud by OCE economists, or that OCE economists were not actually appointed by the Chief Economist, just a number of administrative errors pertaining to the Agency’s so-called on-boarding processes. The review also uncovered information security concerns. Specifically, personally owned external hard drives and thumb drives were found in close vicinity to the computers that served the OCE economists. In addition, badges for former CFTC OCE economists were located in the Chief Economist’s desk.

On December 7, 2012, the assigned Deputy General Counsel, in consultation with the Chairman’s Office, instructed the Chief Economist to direct the OCE economists “to immediately cease sharing, publishing, distributing, or otherwise making available any papers or

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<sup>1</sup> CME Group, Inc., is the holding company for five exchanges, CME, the Board of Trade of the City of Chicago, Inc., the New York Mercantile Exchange, the Commodity Exchange, Inc., and the Board of Trade of Kansas City, Missouri, Inc. *The Future of CFTC: Perspectives on Customer Protections*, 113<sup>th</sup> Cong., 1<sup>st</sup> Sess., Testimony of Terrance A. Duffy, Executive Chairman & President, CME Group, Inc., before the Subcommittee on General Farm Commodities and Risk Management of the House Committee on Agriculture (October 2, 2013) (available at: <http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/pdf/hearings/Duffy131002.pdf>). For a detailed description and history, see CME Group 2012 Annual Report, pages 2-3 (available at: <http://www.cmegroup.com/investor-relations/annual-review/2012/downloads/cme-group-2012-annual-report.pdf>). All internet addresses cited in this report were last visited on February 20, 2014.

<sup>2</sup> Section 8(a)(1) prohibits the Commission from “publish[ing] data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” 7 USC 12(a)(1).

<sup>3</sup> Letter from Mark Young and Jerrold Salzman on behalf of CME to Dan Berkovitz, dated December 14, 2012, is attached as Appendix I and is available here:

(b)(6),(b)(7)(C)

<sup>4</sup> OCE economists include full-time employees (FTEs), consultants, and contractors.

other products generated with Commission data to any non-Commission individuals or parties.”<sup>5</sup> On December 11, 2012, the Chief Operating Officer notified our Office of the CME complaint and ongoing administrative review. On December 12, 2012, CFTC staff terminated access to OCEnet, and terminated access to all agency systems and databases for all OCE economists except for full-time employee economists in OCE.

On January 24, 2013, the Chairman wrote to our Office in detail, described CME’s concerns and OGC’s review, and stated that the review thus far indicated “there are issues regarding the use of non-public data by OCE and visiting academics.”<sup>6</sup> The Chairman also stated that “there appear to be issues regarding the manner in which academic consultants and contractors were brought into the agency, their status with respect to the agency, their access to CFTC systems and information, and the adequacy of related documentation.” The Chairman stated, “I have directed the CFTC staff to suspend the external publication of research conducted or supported by OCE.” The Chairman also stated that he directed CFTC staff “to terminate access to non-public data by OCE personnel other than CFTC full-time employees within OCE.” The Chairman stated that “all of these issues warrant your review.” We agreed, and opened a preliminary investigation.<sup>7</sup>

In February 2013, Agency management issued stop work notices to 13 research economists working on contract and placed an additional eight research economists working as consultants on hold.<sup>8</sup> For a year, OCE did not bring on new economists.<sup>9</sup> OCE did not even employ unpaid consultants and unpaid interns. We estimate the total number of OCE economists between December 7, 2012, and January 2014, decreased from 39 to 11.<sup>10</sup>

In addition, in February 2013 the Office of the Chairman in consultation with OGC formed a technical committee of economists, statisticians, and others to review 24 OCE research

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<sup>5</sup> See the Chairman’s Letter to the Inspector General, January 24, 2013, attached as Appendix 2; December 7, 2012 email from (b)(6),(b)(7)(C), attached as Appendix 3.

<sup>6</sup> See Appendix 2.

<sup>7</sup> Later in the Spring, with no revelations of violations of Section 8 or other statutes or regulations by OCE economists, we converted our preliminary investigation to a review of review of research and publication practices in the Office of the Chief Economist. On April 4, 2013, CFTC publicly revealed that it “had not confirmed specific incidents of improper or unauthorized data disclosure, but review is ongoing.” Lynch, S. “CME Group Sparked Shutdown of CFTC’s Academic Research Program.” *Reuters* April 2, 2013 (available at: <http://www.reuters.com/article/2013/04/24/cftc-cme-research-idUSL2N0D91IT20130424>).

<sup>8</sup> In addition, the Agency determined not to appoint three additional research economists in the appointment process at the time.

<sup>9</sup> On December 5, 2013, the CFTC posted four job positions in the Office of Chief Economist on [www.usajobs.gov](http://www.usajobs.gov). We view this as a positive development. On December 16, 2013, the CFTC announced the replacement of the current Acting Chief Economist with the appointment of Sayee Srinivasan as Acting Chief Economist (<http://www.cftc.gov/PressRoom/PressReleases/pr6794-13>). In our experience, it is unusual for a Chairman to reorganize a CFTC operating unit or division within days of his departure.

<sup>10</sup> Between December 7, 2012, and January 2014, we estimate the number of full time staff in OCE decreased from 13 to nine, the number of OCE consultants decreased from 10 to two, and OCE contractors dropped from 16 to zero. Our estimates are based on information received from Agency staff.

papers for information protected under Section 8, and for other confidential or sensitive information. A simple search conducted by our Office revealed that 18 of the 24 papers were available online, apparently prior to December 2012, and remain online today.<sup>11</sup> There is no indication that the Agency sought to remove any OCE research papers from the Internet.<sup>12</sup> However, the December 2012 instruction from the assigned Deputy General Counsel clearly prohibited all further publication and presentation absent prior permission.<sup>13</sup>

In any event, the Office of the Chairman (without a full Commission vote) installed OGC with authority to make the final determination regarding whether OCE research papers could be published (following Committee review and clearance), and this assignment fell to the assigned Deputy General Counsel. Since December 2012, the Committee has cleared ten papers for publication. OGC cleared three papers for publication in October 2013, and four additional papers in February 2014 (as of February 20).

Section 18 of the Commodity Exchange Act requires the CFTC to “establish and maintain” a “research and information program” that disseminates “educational and other informational materials” to market users and the public.<sup>14</sup> Since 1976, OCE economists have implemented the requirements of Section 18(a) by conducting scholarly research on topics authorized by the Chief Economist, and publishing that research in academic journals. And throughout all that time, the research has included access to confidential information, including trade and other information protected under Section 8 of the Act. We believe shutting down the OCE research program in December 2012 and permitting the shutdown to endure for over 14 months has risked violating section 18 of the Act, especially in the absence of any significant movement toward restarting the program.

Section 8 prohibits the Commission from “publish[ing] data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.”<sup>15</sup> We find no indication in the law that the Commission’s practice of permitting OCE economists to use Section 8 data to conduct independent economic research on topics approved by the Chief Economist violates Section 8. We find no indication in the law that the use of Section 8 data in the preparation of academic articles – so long as the articles do not contain information protected under Section 8 – violates Section 8.

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<sup>11</sup> In addition to the 24 papers, the Agency identified three additional economic research papers that they set aside for later review; all three are available online. We also located online five additional economic research papers published by CFTC economists during the past three years that were not pending before the Committee. Two of these papers had been reviewed by OGC prior to December 2012.

<sup>12</sup> In response to our discussion draft, the management response states that one paper was removed from the Internet prior to receipt of the complaint from CME. See Appendix 6, page 57. This removal was sought after concerns were raised regarding the possible use of information protected under section 8, even though Agency management determined that information protected under section 8 was not disclosed in the economic research paper. *Id.*

<sup>13</sup> See Appendix 3.

<sup>14</sup> 7 USC 22(a). Section 18 also requires the Commission to “include in its annual reports to Congress plans and findings with respect to implementing this section.” 7 USC 22(b).

<sup>15</sup> See fn. 2.

We agree with the initial findings of the OGC review that the administrative employment records for OCE economists contained administrative errors; however, we find no indication in the law that errors in administrative paperwork standing alone, in the absence of any statutory or other material impediment to an appointment, alters the status of otherwise properly appointed employees, consultants, or contractors. The authority of the Chief Economist to permit OCE economists to conduct economic research using information protected under Section 8 of the Act is not altered by such administrative error.<sup>16</sup>

We also agree with the initial findings of OGC's review that information security issues, both physical and technological, are present and need to be addressed; however, these same issues are present Agency-wide, and need to be recognized and addressed as such.

In December 2012, the Agency imposed a prior restraint on publication by all OCE economists. While it appears a public employer may, consistent with the First Amendment,<sup>17</sup> institute a prior restraint on publication by public employees writing as private citizens if certain requirements are met, we find no precedent to support the process the Agency has adopted here. The length of time Agency management has taken to review and approve economic research papers is not acceptable. While we are sensitive to the complexities of the issues faced in connection with any valid pre-publication review of economic research by Agency employees, and we agree that the Agency has an interest in protecting information protected under Section 8 from unauthorized disclosure, we emphasize that Agency management did not determine during their initial review, and has still not determined over 14 months later, that any research proposed or published by an OCE economist has contained information protected from disclosure under Section 8.

Throughout our field work on this matter, we have repeatedly encouraged Agency management to begin permitting the publication of OCE economic research papers and to re-start the economic research program. In October 2013, some 10 months after the initial December 2012 shutdown, the Office of General Counsel approved three papers for publication. On December 18, 2013, we issued a discussion draft to the Agency in order to prompt corrective action. Agency management responded on February 12, 2014 (the management response).<sup>18</sup> In February 2014, four more papers were cleared for publication (as of February 20, 2014).

We recommend that the Agency restart the OCE research program, including OCEnet, as soon as feasible. We recommend that administrative deficiencies in record-keeping and security

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<sup>16</sup> We find it interesting that though the procedural lapses largely occurred in other administrative units, OCE bore the brunt of penalty for these errors.

<sup>17</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I.

<sup>18</sup> The management response is attached as Appendix 6. The management response, and other comments received in response to our discussion draft, prompted clarifying changes and corrections of minor facts; however, our conclusions and recommendations are not altered.

clearances in OCE be resolved in like fashion as currently resolved for other CFTC employees. We believe information and physical security issues are not unique to OCE, and should be addressed agency-wide. We recommend that the Commission assure the legality of any prior review process for OCE research papers and presentations, and that any prior review undertaken by the Agency be prompt.

Finally, we stress the importance of economic research at CFTC, an economic regulatory agency. For over 35 years OCE has attracted some of the highest qualified economists in the country among both its full-time staff and its limited term appointments. In order to continue to attract outstanding scholars, the Commission must support the goals of economic research coupled with academic integrity, and must make any pre-clearance process (whether voluntary or mandatory) a priority in terms of both legality and speed.

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## Introduction

### CME Issues an Oral Complaint; OGC Indefinitely Halts all Publication by CFTC Economists after a Two-Day Review

On or about Wednesday, December 5, 2012, two attorneys representing CME spoke with then-CFTC General Counsel Dan Berkowitz to express concerns about a recent publication by former CFTC economist (b)(6),(b)(7)(C).<sup>19</sup> CME explained that it had received questions from several market participants, and that the concern was that this paper revealed trade information in violation of Section 8 of the Commodity Exchange Act. CME questioned Mr. Berkowitz regarding (b)(6),(b)(7)(C)'s status at CFTC, how he received access to the material, and regarding what controls were placed on the use of CFTC data.

After being briefed on CME's concerns, the Chairman directed the Deputy General Counsel for (b)(6),(b)(7)(C),<sup>20</sup> to review the situation in OCE. OGC set out to examine the activities of OCE's employees, contractors, and consultants. OCE economists can be employed as regular employees (full or part-time), consultants, or contractors, and OGC learned that Andre Kirilenko, the former Chief Economist, did not know the particular employment status of all the economists, including some he had hired. Employees in the Office of the Executive Director (OED) initially were not able to inform OGC whether (b)(6),(b)(7)(C) was a contractor or a consultant; however, he did have a CFTC email account and network access. Employees within OED also did not immediately know if (b)(6),(b)(7)(C) had a CFTC building badge.

By December 7, 2012, the assigned OGC deputy was unable to obtain detailed information on staffing in OCE.<sup>21</sup> At close of business on December 7, 2012, the OGC Deputy, in consultation with the Chairman's Office, "directed the Chief Economist to insure that all OCE employees, consultants, and contractors cease sharing, publishing, distributing, or otherwise making available any papers or other products generated with Commission data to any non-Commission individual or parties."<sup>22</sup>

On December 10, 2012, the General Counsel notified the Commissioners by email of CME's phone call of December 5 and the decision to suspend OCE publications. The email did not describe the Chairman's involvement. The Chief Operating Officer forwarded the General Counsel's email to this Office the same day. Meanwhile, OGC's review continued.

<sup>19</sup> (b)(6),(b)(7)(C) is a graduate of (b)(6) (b)(7)(C) and (b)(6),(b)(7)(C).  
(b)(6),(b)(7)(C)  
(b)(6),(b)(7)(C) (b)(6),(b)(7)(C)

<sup>20</sup> The Deputy for (b)(6), started with the Commission on (b)(6),(b)(7)

<sup>21</sup> Flaws in administrative record-keeping for OCE economists were eventually revealed.

<sup>22</sup> See Appendix 3.

### **Further OGC Review Reveals Information Security Concerns and Prompts Further OCE Restrictions**

On or about December 10, 2012, an OGC attorney consulted with the Chief Economist regarding trade data used by OCE economists. She learned that OCE used a dedicated server to store trade data to facilitate its work. The Chief Economist could not tell her what was on the server, nor could he tell her who had access to the server. The server was physically accessible by anyone with access to the OCE offices, which means any CFTC employee or authorized guest with a temporary pass card. The server could be used only with a valid CFTC username and password.

The OGC attorney learned that information could be removed from the server through any thumb drive or external hard drive. Thumb drives and an external hard drive that may not have been CFTC-purchased or approved were found near the server.<sup>23</sup> The OGC attorney removed the thumb drives and external drive, and gave them to CFTC information technology personnel with expertise in forensic analysis. The forensics team (usually assigned Enforcement-related forensics examinations) was tasked with examining the OCE server.

The Chief Operating Officer briefed the Chairman on these new information security issues, and the Chairman informed that, “[o]n December 12, 2012, the CFTC terminated access to the agency systems and databases, including OCENet, of all individuals in the OCE research program other than full-time agency employees within OCE.”<sup>24</sup>

Separately, OGC learned that OCE economists may have blocked (or attempted to block) system administrator access to the OCENet by ODT computer specialists assigned to the system; this assertion was disputed. We focused on this allegation during our fieldwork. All interviewees with knowledge agreed that ODT did experience a delay in accessing OCENet when their usual method of access did not work. We are not sure whether the usual method of access was altered by OCE and, if so, whether it was done for the purpose of somehow wresting control of OCENet from ODT. What we learned from staff was that there were alternative methods of access to OCENet, and staff in ODT was well aware of these methods because they had set up OCENet. ODT was able to access OCENet after a relatively brief delay, and in any event they were able to access OCENet on the same day they first attempted access.

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<sup>23</sup> ODT personnel informed us that equipment used for OCENet was not always documented, including external hard drives.

<sup>24</sup> See Appendix 2.

### CME Submits Detailed Allegations

CME documented its concerns in a letter dated December 14, 2012 (CME letter).<sup>25</sup> The letter stated that CME became concerned when it reviewed an article “co-authored by Andrei Kirilenko.”<sup>26</sup> CME did not identify the title of this article. The letter also addressed a second article co-authored by Kirilenko concerning the “Flash Crash,” published in 2010. Finally, the CME expressed concern regarding a third article, authored by (b)(6),(b)(7) (C)<sup>27</sup> on the subject of high-frequency trading.

CME asserted that “the use of Section 8 data – including trade secrets – for the preparation of non-Commission sponsored publications violates Section 8.”<sup>28</sup> CME alleged that “the Commission’s Chief Economist has both used Section 8 data and provided access to Section 8 data to non-CFTC economists and their assistants for purposes of publishing academic research,” and again asserted that such access would violate Section 8.<sup>29</sup> CME included a list of seven issues it believed to be raised by this conduct:

1. Has the Commission authorized its Chief Economist to use Section 8 data for purposes of his academic research? Is the choice of research topic reviewed in advance by any officer of the Commission? If so, which officer? Are the Commissioners given any advance notice that the research is being conducted? Are the Commissioners required to give formal approval before the research is published?
2. If the Commission has authorized its Chief Economist to use Section 8 data for purposes of his academic research, what is the statutory or other legal basis for that authorization?
3. What system of supervision is in place to review any such research before publication, and what was done in the cases referenced above? Who approved the publication of Dr. Kirilenko’s research? Who approved the selection of individuals to whom the data was provided? In what form was the data provided? What specific data elements were provided? What safeguards were employed to protect the data that was exposed to non-Commission employees? Did Dr. Kirilenko or anyone else at the CFTC utilize data aliasing mechanisms to protect identifying data elements? What data is allowed to leave CFTC premises? If so, what was done to protect that data after it leaves the premises? Is the data provided to third parties

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<sup>25</sup> See Appendix 1.

<sup>26</sup> Andrei Kirilenko served as Chief Economist from December 2010 until December 2012; he was an economist with OCE from May 2008 to December 2010. He received his PhD in Economics from the University of Pennsylvania, where he specialized in Finance. Currently he serves as Professor of the Practice of Finance at the MIT Sloan Center for Finance and Policy.

<sup>27</sup> Available here: (b)(6),(b)(7)(C)

<sup>28</sup> CME Letter (Appendix 1).

<sup>29</sup> *Id.*

reviewing the research as part of a peer review process? What processes are in place to provide assurance that all data provided to third parties is returned to the CFTC and is not used by third parties for any reason not authorized by the CFTC?

4. Absent specific Commission authorization, does the Chief Economist have authority to use Section 8 data for purposes of his academic research?
5. Has the Commission or the Chief Economist authorized non-Commission employees, including “academics” or their assistants, to have access to Section 8 data for any purpose?
6. If so, for what purpose, subject to what limitations and protections and under what legal authority?
7. If the Commission or its Chief Economist provides Section 8 data to non-Commission employee “academics,” how does the Commission select which non-Commission employee “academics” to favor with Section 8 data for their private research?

#### Continuing Responsive Action by OGC

OGC drafted a new and more strongly worded non-disclosure agreement, and obtained non-disclosure agreements from most OCE employees, consultants, and contractors, including those employees for whom an NDA was already on file.<sup>30</sup> Multiple flaws in administrative record-keeping for OCE economists were eventually revealed. With regard to (b)(6), (b)(7)(C) staff in OED concluded that he was properly appointed but his SF52 was not completed properly in all regards.<sup>31</sup> For one OCE consultant, there was no record of on-boarding documentation other than the required clearance documentation.

On January 24, 2013, Chairman Gensler formally requested assistance from our Office.<sup>32</sup> The Chairman stated that a review of the OCE research program indicated “there are issues regarding the use of non-public data by OCE and visiting academics.” The Chairman stated:

Additionally, there appear to be issues regarding the manner in which academic consultants and contractors were brought into the agency, their status with respect to the agency, their access to CFTC systems and information, and the adequacy of related documentation.

<sup>30</sup> We received no indication that the language of the existing NDAs was deficient.

<sup>31</sup> On December 17, 2012, a CFTC security officer completed a repeat security clearance report for (b)(6), (b)(7)(C) noting no issues or concerns. An initial security clearance had been completed prior to (b)(6), (b)(7)(C) start date at CFTC, also with no concerns or issues noted.

<sup>32</sup> The Chairman’s letter is attached as Appendix 2.

The Chairman stated that he had “directed the CFTC staff to suspend the external publication of research conducted or supported by OCE,” and terminated “access to non-public data by OCE personnel other than CFTC full-time employees within OCE.” The Chairman stated that CFTC’s “review of the matter is ongoing,” that it included review of “the human resources, procurement, logistics, data, and legal issues raised by the OCE research program,” and that the Agency “will take any further steps that we deem appropriate.” The Chairman stated that he believed that “all of these issues warrant your review.” On or about January 30, 2013, the Chairman publicized his referral to our office, and briefed the press, Congress, and the staff of OCE. OED reported that in February 2013, it issued stop work orders for 13 OCE economists working on contract, and placed on hold eight OCE consultants.<sup>33</sup>

The Deputy General Counsel for (b)(6),(b)(7)(C) instructed CFTC OIG that: 1) someone with incomplete on-boarding paperwork (or on-boarding paperwork with administrative errors) is not properly appointed; 2) anyone not properly appointed may not access CFTC data protected under Section 8; and 3) anyone not properly appointed may not publish or present economic research produced during a period of improper documentation. These considerations apparently played a role in the decrease in OCE contractors and consultants, as well as the continued shutdown of OCE research, and cessation of publication and presentation by OCE economists. Data security concerns also played a role, if not with regard to publication, at least with regard to the shutdown of OCEnet.

The initial review by OGC revealed that the paper by (b)(6),(b)(7)(C) had been reviewed by the Chief Economist and by a staff attorney in the Office of General Counsel (b)(6),(b)(7)(C). The initial review by OGC did not reveal that, for the past several years, whenever there were concerns regarding appropriate aggregation<sup>34</sup> of trade data in a proposed economic research paper (b)(6),(b)(7)(C) would refer the matter to an economist in the Division of Market Oversight (DMO) experienced with aggregation issues. (b)(6),(b)(7)(C)<sup>35</sup> The (b)(6),(b)(7)(C) paper was reviewed by (b)(6),(b)(7)(C), (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) collectively had more than 60 years experience in the field. (b)(6),(b)(7)(C), (b)(6),(b)(7)(C), and the Chief Economist all concluded that the (b)(6),(b)(7)(C) paper presented no instances of misuse of information protected under Section 8.

Nevertheless, in February 2013, the Office of the Chairman in consultation with OGC formed a technical committee of economists, statisticians, and others to review 24 OCE research papers (including the (b)(6),(b)(7)(C) paper) for information protected under Section 8, and for other confidential or sensitive information. Eighteen of the 24 papers were already readily available online, and other economic research papers were available online but not included on

<sup>33</sup> See fn.10 and accompanying text.

<sup>34</sup> Aggregation is used to mask the individual identity of firms or individuals.

<sup>35</sup> In February 2014, Agency management clarified that their initial review “did not reveal the (b)(6),(b)(7)(C) paper, or any other paper.” See Appendix 6, pages 57-58.

<sup>36</sup> In February 2014, Agency management informed that the (b)(6),(b)(7)(C) paper was presented or published on three occasions prior to review by Agency staff in the OIG and DMO in 2012. See Appendix 6, page 57 and fn.272.

the list of 24.<sup>37</sup> The Office of the Chairman installed the Office of General Counsel with authority to make the final determination regarding whether OCE research papers could be published, and this assignment fell to the Deputy General Counsel for (b)(6), (b) In June 2013, the Committee cleared three papers for publication, and cleared an additional seven after that. In October 2013, the OGC approved three papers for publication. OGC cleared four additional papers for publication in February 2014 (as of February 20).

## Scope and Methodology

Due to staffing limitations and competing priorities, fieldwork for our review began in March 2013. Our objective was to address the following concerns raised by the Chairman in his January 2013 letter, to wit: “issues regarding the use of non-public data by the OCE and visiting academics,” and “issues regarding the manner in which academic consultants and contractors were brought into the agency, their status with respect to the agency, their access to CFTC systems and information, and the adequacy of related documentation.”

In order to complete our review, we interviewed over 30 individuals in the Office of the Chief Economist, the Office of General Counsel, the Office of Data Technology, the Office of Security and Emergency Management (within the Office of Logistics and Operations), and within the Office of the Executive Director, employees in the Office of Human Resources and the Procurement sub-office within the Office of Financial Management. Some witnesses were interviewed on multiple occasions. We reviewed available hiring documents for OCE economists for the past three years, and reviewed relevant economic research papers prepared by them. We researched pertinent legal principals and the history of the Office of Chief Economist.

## Background

### History of Economic Research by CFTC: Section 18 of the Commodity Exchange Act

*Last year the CEA held two hearings on the subject of Commodity Puts and Calls. The national administrator had stated at that time that previous studies of puts and calls had been conducted by the Agriculture Department. I subsequently learned that the studies were made, believe it or not, in 1934! Worse, the 1934 study was based on data and information gathered in 1927 - 1930!...*

*This is but a single example of the kind of naïve and meaningless research conducted by the CEA in vital areas entrusted to its responsibility.*

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<sup>37</sup> See fn.11.

-Legislative History of the Commodity Exchange Act of 1974.<sup>38</sup>

The Commodity Futures Trading Commission Act of 1974<sup>39</sup> included new section 18,<sup>40</sup> which provides as follows:

*Section 18. Research and Information Programs:*

The Commission shall establish and maintain, as part of its ongoing operations, research and information programs to (1) determine the feasibility of trading by computer, and the expanded use of modern information system technology, electronic data processing, and modern communication systems by commodity exchanges, boards of trade, and by the Commission itself for purposes of improving, strengthening, facilitating, or regulating futures trading operations; (2) assist in the development of educational and other information materials regarding futures trading for dissemination and use among producers, market users, and the general public; and (3) carry out the general purposes of this Act.

Regardless of whether section 18 was a direct response to the testimony quoted at the start of this section, in adopting it Congress clearly intended for the CFTC to include as part of its operations a robust research program. It is equally clear that Congress intended that the research program include economic research.<sup>41</sup>

### **A Brief History of the Office of the Chief Economist**

Section 18 of the Act mandates the production and dissemination of economic research, and the Commission has complied since its creation. The name and organizational placement of the Office of Chief Economist has varied during the CFTC's history, but economic research activities have been described in nearly every Commission annual report:

- The Commission's 1976 annual report included a description of the "Division of Economics and Education," and described research on "electronic data processing" and other topics, including topics dealing with economics.<sup>42</sup>
- The CFTC 1977 annual report reported that the new Office of Chief Economist "began a research program to determine if futures markets really work in the national interest and

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<sup>38</sup> Senate Committee on Agriculture and Forestry, *Hearing on S. 2485, S. 2578, S. 2837, and H.R. 13113*, 93<sup>rd</sup> Cong., 2d Sess., May 21 and 22, 1974, pg. 811.

<sup>39</sup> Pub. L. No. 93-463, 88 STAT. 1389 (Oct. 23, 1974).

<sup>40</sup> *Id.* at sec. 416, *codified at* 7 USC 22(a).

<sup>41</sup> Legislative history includes recognition that "computerized trading may well be the wave of the future, but many questions of both technological and economic feasibility must be answered before it can or should be implemented." H.Rept. No. 93-975, 93<sup>rd</sup> Cong., 2d Sess., 52 (April 4, 1974) (*quoting* Mr. Caldwell, Administrator of the Commodity Exchange Authority).

<sup>42</sup> 1976 CFTC Ann. Rep. pages 100-103.

to develop better public understanding of how and why the markets function.”<sup>43</sup> OCE “carries the major CFTC responsibility for analyzing and improving competitive performance and increasing public understanding of futures market contributions to the allocation of basic resources.”<sup>44</sup>

- The CFTC 1978 annual report stated that OCE “sponsors long-term research into the functioning of futures markets to ensure that the markets are as competitive as possible.”<sup>45</sup> It referred to completion of “projects pertaining to ... a longer-term understanding of futures markets functions.”<sup>46</sup>
- From 1984 through 1994, CFTC annual reports contained the recitation that OCE “conducts economic research as part of the Commission’s mandate under the Commodity Exchange Act.”<sup>47</sup>
- CFTC annual reports between 2001 and 2006 stated that OCE economists presented papers or published papers, stating: “[s]taff members write and review papers for professional journals and participate in a variety of industry meetings and seminars.”<sup>48</sup> In 2004, CFTC’s annual report contained a detailed description of research performed.<sup>49</sup>
- More recent CFTC annual reports state that “[t]he Chief Economist provides economic support and advice to the Commission, conducts research on policy issues facing the agency, and provides education and training for Commission staff.”<sup>50</sup>

CFTC currently states on its public website:

OCE conducts research on major policy issues facing the Commission; assesses the economic impact of regulatory changes on the futures markets and other sectors of the economy; participates in the development of Commission

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<sup>43</sup> 1977 CFTC Ann. Rpt. pages 38-39, 77-83.

<sup>44</sup> *Id.* at 80.

<sup>45</sup> 1978 CFTC Ann. Rpt. 96.

<sup>46</sup> *Id.*

<sup>47</sup> This quote is found in CFTC annual reports from 1984 through (and including) 1994.

<sup>48</sup> 1995 CFTC Ann. Rpt. 48. Reference to presented papers by research economists is found in 2001 CFTC Ann. Rpt. 63, 2002 CFTC Ann. Rpt. 83, 2003 CFTC Ann. Rpt. 67, 2004 CFTC Ann. Rpt. 65, 2005 CFTC Ann. Rpt. 35, 2006 CFTC Ann. Rpt. 52.

<sup>49</sup> CFTC’s 2004 Annual Report stated:

OCE staff members continue to present their research findings at industry conferences and academic annual meetings and frequently have those findings published in refereed academic journals. During FY 2004, staff papers presented or published in this way covered topics relating to price discovery, hedging and risk aversion, the theory of storage, electronic versus open outcry trading, and factors affecting derivatives market success or failure. Papers were accepted for publication or published in academic journals such as *The Journal of Finance*, *The Journal of Business*, *The Journal of Futures Markets*, and *The Southern Economics Journal*.

2004 CFTC Ann. Rpt. 65.

<sup>50</sup> This quote is found in CFTC annual reports for 2009-2012. It appears that only the 2007 and 2008 annual reports contain no reference whatsoever to economic research conducted by OCE.

rulemakings; provides expert economic support and advice to other CFTC offices; conducts special studies and evaluations; and participates in the in-house training of staff on matters related to futures, options, swaps, and risk management.<sup>51</sup>

The CFTC's 2013 *President's Budget and Performance Plan* listed among OCE's Fiscal Year 2011 accomplishments the following: "Composed at least 7 working papers on Commission oriented topics made available to the public with 25 presentations and 3 publications."<sup>52</sup> We found no reference to OCE publications or presentations in CFTC's 2014 budget document.<sup>53</sup>

CFTC currently posts four OCE research papers on its public website;<sup>54</sup> the papers are published with disclaimers<sup>55</sup> such as: "This paper reflects the opinions of its authors only, and not those of the CFTC, the SEC, the Commissioners, or other staff upon either Commission. All remaining errors and omissions, if any, are the authors' sole responsibility"<sup>56</sup> and "[t]he views expressed in this paper are those of the authors only and do not reflect the views of the CFTC or its staff."<sup>57</sup>

Current and former CFTC economists publish papers in a variety of journals, including the *Journal of Alternative Investments*,<sup>58</sup> the *Energy Journal*,<sup>59</sup> and the *Journal of Futures*

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<sup>51</sup> See <http://www.cftc.gov/About/EconomicAnalysis/index.htm>.

<sup>52</sup> CFTC, *2013 President's Budget and Performance Plan*, available at <http://www.cftc.gov/reports/presbudget/2013/2013presidentsbudget0802.html>.

<sup>53</sup> CFTC, *2014 President's Budget and Performance Plan*, available at: <http://www.cftc.gov/reports/presbudget/2014/2014presidentsbudget020302.html>.

<sup>54</sup> Buhksahin, Haigh, and Robe, *Commodities and Equities: A "Market of One"?*, June 9, 2008. This paper was published in the *Journal of Alternative Investments*, 12(3):61-75 (available on the CFTC public website: [http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/amarketofone\\_update0608.pdf](http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/amarketofone_update0608.pdf)); (b)(6),(b)(7)(C)

(b)(6),(b)(7)(C) This paper is on the list of papers for review by the Committee). The other two papers are noted at fn.45 and fn.46.

<sup>55</sup> Disclaimers that are "reasonably prominent" and that convey that "the views expressed in the article do not necessarily represent the views of the agency," are required by regulation at 5 CFR 2635.807(b).

(b)(6),(b)(7)(C)

(b)(6),(b)(7)(C) this paper is on the list of papers for review by the Committee).

<sup>57</sup> Haigh, Hraniova, and Overdahl, *Price Dynamics, Price Discovery and Large Futures Trader Interactions in the Energy Complex* (working paper, April 28, 2005). This paper is available on the CFTC public website: <http://www.cftc.gov/files/opa/press05/opacific-managed-money-trader-study.pdf>.

<sup>58</sup> See fn.54.

<sup>59</sup> Buhksahin, Lee, Moser, and Robe, *Physical Market Conditions, Paper Market Activity, and the WTI-Brent Spread*, *The Energy Journal*, Vol. 34, No. 3 (2013). This article was also published by the Energy Information Agency (see fn.61).

Markets.<sup>60</sup> The Federal Reserve Board and the Energy Information Agency currently publish papers co-authored by CFTC OCE economists.<sup>61</sup> Of course, economists in OCE are not the only CFTC economists writing and publishing papers addressing economic thought as it pertains to futures trading. A partial list of 103 economic research papers authored by OCE economists, Commissioners, and other CFTC employees, is attached as Appendix 3.

### OCEnet

OCEnet was a stand-alone computer network created in 2008 to assist an inter-agency collaboration to conduct energy market research using CFTC and other data.<sup>62</sup> The Commission kept the network separate for security purposes; it did not want to grant individuals from other agencies access to the entire CFTC network. OCEnet also permitted users to run complex programs necessary to analyze economic data.<sup>63</sup>

With regard to inter-agency collaboration, other agencies would identify the data they wanted to review and request that it be transferred from the CFTC network to the stand-alone server. A CFTC employee would load the requested data onto an external hard drive and then transfer it to OCEnet. For additional security, the server and desktops were placed in a separate room; keys were provided to designated individuals in OCE.

Over time, inter-agency use appears to have dropped off, while internal use by OCE economists increased. As overall demand for OCEnet grew, additional equipment was provided for its use. What began as approximately five desktops (and a server) grew to nearly twenty. The advantages of OCEnet for research purposes were many: like any server, it stored data so

<sup>60</sup> Aulerich, Fisha, and Harris, *Why do Expiring Futures and cash Prices Diverge for Grain Markets?*, *Journal of Futures Markets*, Vol. 31, Issue 6 (2010).

(b)(6),(b)(7)(C)

(b)(6),(b)(7)(C)

this paper is on the list of papers currently under review by the Committee); Bunnissana, Lee, Moser, and Kove, *Physical Market Conditions, Paper Market Activity, and the WTI-Brent Spread*, November 2012 (available at: [http://www.eia.gov/finance/markets/reports\\_presentations/2012PaperBrentWTI.pdf](http://www.eia.gov/finance/markets/reports_presentations/2012PaperBrentWTI.pdf)).

<sup>62</sup> The result of this collaboration, *Interagency Report on Crude Oil* (July 2008), is available here: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/interagencyreportoncrudeoil0708.pdf>.

<sup>63</sup> The Federal Reserve Board (FRB) offers similar research capabilities to its economists. Its website states: "Economists at the Federal Reserve Board conduct innovative research on a broad range of topics in economics and finance. In addition to presenting their research to policymakers, Board economists share their research at academic conferences and publish it in peer-reviewed journals and other scholarly outlets." The FRB economists:

. . . conduct research and other analysis on high-performance computer servers, which run both Linux and Windows operating systems. These servers offer a full suite of econometric and statistical software packages on both platforms.1 Economists and technical staff regularly review and improve, as needed, the capacity and speed of processors and the range of software available to Board economists for their research. Several hundred datasets covering a range of topics from micro-level banking/financial data to aggregate macroeconomic time series statistics are available for use by economists in their research.

This information is available online at <http://www.federalreserve.gov/econresdata/default.htm> and <http://www.federalreserve.gov/econresdata/researchsupport.htm>.

that it did not need to be separately loaded onto the many desktops; it was faster, meaning that the manipulation and study of datasets could occur more quickly; and it contained unique programs for the manipulation of data. Additionally, it allowed OCE to bring on outside economists to do research while limiting access to the CFTC network.

By late 2011, the Office of Data and Technology had enhanced control over the network in order to increase information security. A new system of individual user accounts had been established; previously, access for all users had apparently been via a single log-in and password.<sup>64</sup> While information security increased, physical security declined; OCEnet computers and server were moved from a separate, lockable room to a common area. This decrease in physical security occurred, apparently, because the original justification for physical security of the server and desktops was no longer supported; OCEnet was now being used primarily by CFTC economists rather than individuals from other agencies. OCEnet continued operating in this manner until it was shut down in December 2012.

### **Procedures for Publishing and Presenting OCE Papers (Pre-December 2012)**

The Chief Economist approved all topics for economic research papers written by OCE economists working as employees, contractors and consultants.<sup>65</sup> For contractors, the economic research issue was determined in advance and was described in the contract. For consultants and employees, the process of selecting a topic for economic research was not determined in advance. Rather, potential topics could be suggested by the Chief Economist, by any Commissioner, Division Director, or any CFTC employee, including OCE economists. Regardless of the source, all research topics required approval of the Chief Economist.

Prior to December 2012, submission of a completed research paper to the Chief Economist was not strictly required; however, OCE economic research papers were subject to a rigorous academic review process and we believe most if not all papers were separately (and voluntarily) submitted to the Chief Economist. If the paper included aggregated trade information protected under Section 8, the Chief Economist would refer the paper to the Office of General Counsel for further review. OGC would assign the paper to a staff level attorney. Most recently, the staff attorney assigned (b)(6),(b)(7) had more than 25 years experience at CFTC. The OGC attorney reviewed trade data in the economic research paper for conformity with accepted aggregation standards for other CFTC publications. In case of doubt, the OGC attorney would seek advice from an economist (b)(6),(b)(7) in the Division of Market Oversight (DMO) with expertise in trade data aggregation standards for Commission publications, and over 35 years experience at CFTC. This process of voluntary internal review had been in place since at least the 1990s.

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<sup>64</sup> These accounts were separate from the username and password accounts to access the CFTC network generally. ODT and OCE retained administrative access to the new system.

<sup>65</sup> We are not aware of any publications by CFTC interns in OCE.

(b)(6),(b)(7)(C)'s paper on high frequency trading,<sup>66</sup> went through this process prior to publication. It was reviewed by the Chief Economist, by the staff attorney (b)(6),(b)(7)(C) in OGC, and by the economist in DMO (b)(6),(b)(7), and was cleared for publication. All concluded that the paper did not include information protected under Section 8.

## The Commission's Use of Information Protected under Section 8 of the Commodity Exchange Act

### Overview

Section 8 of the Commodity Exchange Act reads as follows:

For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the Commission may make such investigations as it deems necessary to ascertain the facts regarding the operations of boards of trade and other persons subject to the provisions of this Act. The Commission may publish from time to time the results of any such investigation and such general statistical information gathered therefrom as it deems of interest to the public: *Provided*, That except as otherwise specifically authorized in this Act, the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers . . .

Commodity Exchange Act, Section 8(a)(1); 7 USC § 12(a)(1).

In brief, the Act grants the Commission wide discretion to investigate and publish the results of such investigations. It also contains a prohibition; the Commission may not "publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers."<sup>67</sup> This restriction is a limited one; a statutory prohibition against publication is not as strict as a statutory prohibition against disclosure.<sup>68</sup>

In *Freeman v. Seligson*,<sup>69</sup> the Federal Court of Appeals for the District of Columbia Circuit addressed whether Section 8 prohibited compliance with a subpoena in a judicial proceeding, and determined that the requested information protected under Section 8 must be disclosed. Of course this is not the situation here; however, the court's discussion of the history

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<sup>66</sup> Available here: (b)(6),(b)(7)(C)

<sup>67</sup> CEA, Section 8(a)(1); 7 USC sec. 12(a)(1).

<sup>68</sup> *In re England*, 375 F.3d 1169, 1180 (C.A.D.C., 2004) (*recognizing* existing precedent that "general statutory bans on publication do not bar limited disclosure in judicial proceedings" and recognizing the difference between statutory prohibitions against publication, which are less strict, and statutory prohibitions categorically barring disclosure).

<sup>69</sup> *Freeman v. Seligson*, 405 F.2d 1326 (C.A.D.C. 1968).

and meaning of Section 8 is informative. The court stated that “the language used and the statutory setting plainly reflect Congressional concern with widespread dissemination of information not otherwise available to the public.”<sup>70</sup> The court stated that “[t]he bar to publication is linked to, and should be read against the backdrop of, the Secretary’s duties under the Act to furnish information and data about futures trading and commodities to the concerned public at large.”<sup>71</sup>

The *Freeman* court went on to state that the legislative history of Section 8 “does establish as a matter of fair implication that the prohibition was not intended to embrace the separate and limited kind of disclosure that arises in judicial proceedings.”<sup>72</sup> While the court in *Freeman* did not address the use of Section 8 data *within* the Agency, we believe that an equally “fair implication” to that drawn by the court in *Freeman* is that the prohibition to publish “was not intended to embrace the separate and limited kind of disclosure” that arises when individuals employed by CFTC and physically present at the CFTC are granted access to information protected under Section 8 in the course of their work for the Commission. In fact, we would not expect a court to interpret Section 8 to prohibit the Commission from sharing data protected under Section 8 from any person as determined by the Commission necessary to carry out the Commission’s mission under the Commodity Exchange Act, so long as the disclosure is not public. We note that the Commission’s regulations and Privacy Act notices indicate that a number of non-public disclosures of information protected under Section 8 may be permissible.<sup>73</sup>

We also note that no penalty is provided for violations of Section 8; however, the theft of confidential government information, including business information, may be a criminal offense in certain circumstances under 18 U.S.C. 641.<sup>74</sup>

### Aggregation and Section 8

Section 8 prohibits the Commission from “publish[ing] data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers,”<sup>75</sup> but it does not prohibit publication of aggregated and anonymized trade data. The Commission recognizes this distinction when it publishes aggregated and

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<sup>70</sup> *Id.* at 1349. Indeed, more recent cases have stated similarly that, in adopting the prohibition against publication in Section 8, “Congress was concerned with ‘widespread dissemination of information not otherwise available to the public’ . . .” *In re England, supra*, 375 F.3d at 1180 (quoting *Freeman v. Seligson, supra*, 405 F.2d at 1349).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> The Commission’s Privacy Act Systems Notices for record systems, including systems that include information protected under Section 8, may be found at 78 Fed. Reg. 5974 (Feb. 2, 2011) (<http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2011-2133a.pdf>)

<sup>74</sup> *U.S. v. Di Gilio*, 538 F.2d 972 (2d Cir. 1976), *cert. denied sub nom, Lupo v. U.S.*, 429 U.S. 1038 (1977). The First Amendment ramifications of attempting to penalize under 18 U.S.C. 641 disclosures of confidential government information have been noted in case law. *See, U.S. v. Truong Dinh Hung*, 629 F.2d 908, 925 and n.17 (4<sup>th</sup> Cir. 1980); *U.S. v. Vincenzi*, 1988 U.S. Dist. LEXIS 17436 \*27-\*29.

<sup>75</sup> *See* fn. 2.

anonymized trade data in its Bank Participation (BPR) and Commitments of Traders Reports (COTR). The Commission has stated:

For the purposes of protecting the confidentiality of participants' business transactions or market positions as required under Section 8(a)(1) of the CEA, the Commission has historically created guidelines for various market information reports (e.g., Bank Participation Reports ("BPRs") and Commitments of Traders ("COT") reports) that prevent market participants and the public from reverse-engineering aggregate data to determine the participants that submitted the data.<sup>76</sup>

In other words, the Commission routinely publishes business transactions and market positions – but it aggregates and anonymizes that data to prevent anyone from discovering the identity of the firms in the aggregated dataset.

Specifically, the BPRs "aggregate large-trader positions of banks participating in various financial and non-financial commodity futures,... [and] includes data for every market where five or more banks hold reportable positions."<sup>77</sup> The Commission goes on to state:

For purposes of protecting the confidentiality of participants' market positions (as required under § 8(a) of the Commodity Exchange Act), when the number of banks in either category (U.S. Banks or Non-U.S. Banks) is less than four, the number of banks in each of the two categories is omitted and only the total number of banks is shown for that market.<sup>78</sup>

CFTC also publishes its Commitment of Traders Reports (COTR)<sup>79</sup> in a manner that, in its opinion, does not result in disclosures that violate Section 8. The Commission describes the COTR as "a weekly breakdown of each Tuesday's open interest for markets in which 20 or more traders hold positions equal to or above the reporting levels established by the CFTC."<sup>80</sup> The following description is available on the CFTC website:

Reports are available in both a short and long format. The short report shows open interest separately by reportable and nonreportable positions. For reportable positions, additional data is provided for commercial and non-commercial holdings, spreading, changes from the previous report, percents of open interest by category, and numbers of traders.

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<sup>76</sup> 75 Fed. Reg. 76139 (Dec. 7, 2010) (available at: <http://www.cftc.gov/LawRegulation/FederalRegister/ProposedRules/2010-29994>).

<sup>77</sup> CFTC, *Bank Participation Report: Explanatory Notes*, available at: <http://www.cftc.gov/MarketReports/BankParticipationReports/ExplanatoryNotes/index.htm>.

<sup>78</sup> *Id.*

<sup>79</sup> The Commission's COTR dates back to 1924.

<sup>80</sup> CFTC, *About the COT Reports*, available at [http://www.cftc.gov/MarketReports/CommitmentsofTraders/AbouttheCOTReports/cot\\_about](http://www.cftc.gov/MarketReports/CommitmentsofTraders/AbouttheCOTReports/cot_about).

The long report, in addition to the information in the short report, also groups the data by crop year, where appropriate, and shows the concentration of positions held by the largest four and eight traders. The Supplemental report is published for Futures-and-Options-Combined in selected agricultural markets and, in addition to showing all the information in the short format, shows positions of Index Traders.<sup>81</sup>

On November 20, 2013, the Commission announced a new weekly swaps report that is modeled on the COTR. In an announcement the Commission stated: “To prevent the disclosure of individual market participants’ positions and proprietary trading strategies, the CFTC Weekly Swaps Report is prepared using a series of statistical screens, helping to ensure that the values presented do not inadvertently reveal confidential information.”<sup>82</sup>

While aggregation of information protected under Section 8 has been standardized for purposes of various CFTC market publications, no aggregation standards have been set for research papers by OCE economists. Our interviews indicated that any review of OCE research papers for possible impermissible disclosures of information protected under Section 8 can be complex, requiring an examination of context to determine whether aggregated trade data in an economic research paper may be reverse engineered – by reference to publicly available data or otherwise – to permit the reader to ascertain the identity of the trader.

## Findings

### The Decision to Suspend Economic Research Risks Violating Section 18 of the Commodity Exchange Act

In December of 2012, the OGC, in consultation with the Office of the Chairman, “directed the Chief Economist to ensure that all OCE employees, consultants, and contractors cease sharing, publishing, distributing, or otherwise making available any papers or other products generated with Commission data to any non-Commission individuals or parties.”<sup>83</sup> In addition, CFTC terminated access to agency systems and databases, including OCEnet, to all OCE personnel other than CFTC full-time employees within OCE.<sup>84</sup> The OCE research program as it existed prior to December 2012 remains halted over a year later, OCEnet has not been revitalized (or replaced with comparable research capabilities), and the Agency has not approved most of the economic research papers it decided to review in December 2012.<sup>85</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> CFTC Press Release 6780-13 (available at: <http://www.cftc.gov/PressRoom/PressReleases/pr6780-13>).

<sup>83</sup> See Appendix 2.

<sup>84</sup> *Id.*

<sup>85</sup> Research by OCE economists to support other ongoing Agency work continues.

We realize that section 18 does not specifically require the Commission to conduct economic research through the publication and presentation of juried economic research; however, it has been the practice at CFTC for over 35 years. Historically, the CFTC has stated that the Office of Chief Economist performs a Commission mandate through the publication of independent economic research, a statement with which we strongly agree.<sup>86</sup> To jeopardize the sponsorship of juried economic research is to limit knowledge imparted to Congress, to the public, and to the Commission itself on economic issues impacting trillions of dollars -- such as high frequency trading.

We believe the OCE shutdown potentially violated Section 18 of the Commodity Exchange Act. The duration of the shutdown increases this potential.

### **OGC Management Conflated Improper Administrative On-boarding Paperwork with Improper Access to and Improper Use of Information Protected under Section 8**

As previously stated, OGC management concluded that someone with incomplete paperwork is not properly on board, and that someone not properly on board may not access CFTC data protected under Section 8. OGC further concluded that someone who was not properly on board may not publish or present economic research papers produced during a period of improper documentation because the employee was never properly authorized to view information protected under Section 8. When we specifically requested precedent for this interpretation, we were told this interpretation derives solely from the language of Section 8. Multiple witnesses told us their understanding was that on-boarding documentation was relevant to the consideration whether an OCE economist could view information protected under section 8, and conduct, present, and publish research based on such access. We reviewed multiple spreadsheets prepared by OED showing the on-boarding status of each OCE economist, which indicates to us that the policy was at the least being considered, if not implemented. However, the Chief Operating Officer maintained that this interpretation was never adopted by the Commission as an official policy.

Instances of administrative errors leading to on-boarding failure included examples such as the failure to report to the National Finance Center (NFC) information regarding unpaid consultants.<sup>87</sup> For (b)(6),(b)(7)(C) it appears that two of three required signatures were in place on his SF52 (including the Chief Economist's signature), but the third individual tasked with signing it -- the OHR employee -- only partially signed her signature. It also appears that the SF52 was mostly but not fully completed. In the personnel records we reviewed, we also noted a

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<sup>86</sup> See fn.47 and accompanying text.

<sup>87</sup> NFC is the federal entity that processes CFTC's payroll. Even though unpaid consultants are not paid, their information is apparently supposed to be sent on to NFC anyway.

<sup>88</sup> Office of Personnel Management (OPM) Standard Form (SF) 52, Request for Personnel Action. Available here: [http://www.opm.gov/forms/pdf\\_fill/sf52.pdf](http://www.opm.gov/forms/pdf_fill/sf52.pdf).

number of unsigned SF52s and SF50s.<sup>89</sup> For one OCE contractor, OED staff determined that the contract was not signed by the contractor.<sup>90</sup>

Another instance of administrative irregularity involved the OCE economist, (b)(6).  
(b)(6)<sup>91</sup> Former Chief Economist James Moser requested network access for this economist on June 9, 2010, but his contract with CFTC was not executed until (b)(6),(b)(7). Contemporaneous records relating to (b)(6),(b)(7) on-boarding and network access indicated that network access was not granted until the contract was signed; however, the delay appears to have been due to technical difficulties, and not due to the fact that the economist, though appointed by the Chief Economist, was not yet under contract. In fact, we found no indication of an awareness that the submission for network access predated (b)(6),(b)(7) contract date, and no indication that it was brought to the attention of management at the time.

There was also an economist, (b)(6),(b)(7)<sup>92</sup> for whom it initially appeared CFTC had no records at all, yet he had already published a paper as a CFTC employee. Staff in OED eventually located (b)(6),(b)(7)'s security clearance, but they were never able to locate an SF52 showing his appointment as an unpaid consultant.

We interviewed Agency employees in the Office of Human Resources (responsible for administrative on-boarding for consultants and employees), the Procurement Office (responsible for administrative on-boarding for contractors), and the Security Office (responsible for security clearances for all employees, consultants, contractors and others). We were told that OCE economists were processed the same as other employees, consultants, and contractors at CFTC. We did learn that, occasionally, OHR or Procurement would find that an OCE economist selected by the Chief Economist and submitted as a consultant or as a contractor had already been processed or was already being processed by the other Office – that is, the Chief Economist would submit the same individual to be hired as both contractor and consultant at the same time, apparently intent on getting the person onboarded as quickly as possible.

These parallel on-boarding processes were not characterized by OHR or Procurement employees as a fatal flaw to the individual's ability to come on board as a CFTC employee, consultant, or contractor. But they were definitely an annoyance. After discovery of a dual process, it appears that the OCE economist simply would remain in the status processed furthest

<sup>89</sup> OPM SF 50, Notification of Personnel Action. Available here: <http://www.opm.gov/forms/pdfimage/sf50.pdf>.

<sup>90</sup> We offer no opinion on the legal effect of this missing signature as it pertains to the contractual relationship between the contractor and CFTC.

<sup>91</sup> (b)(6),(b)(7) is a graduate of (b)(6),(b)(7)(C) and the (b)(6),(b)(7)(C). He currently works in the (b)(6),(b)(7)(C).

<sup>92</sup> (b)(6),(b)(7) is a graduate of (b)(6),(b)(7)(C) (b)(6),(b)(7)(C) (b)(6),(b)(7)(C) (b)(6),(b)(7)(C)

to completion at the time of discovery. We were also told that the Chief Economist had been very aggressive trying to onboard economists, with the early submission of (b)(6),(b)(7) for network access prior to official on-boarding appearing to be the most serious example.

Because there was no indication of fraud or bad faith by the economists, or evidence that the appointments by the Chief Economist were unauthorized, the nature of the administrative errors appeared to us to be non-substantive, and capable of being fixed. Other than the submission of individuals to be consultants and contractors at the same time, there appeared no explanation for the administrative errors that would indicate OCE employees were treated differently than other agency employees as it pertains to administrative onboarding. We did not investigate if similar deficiencies in the administrative on-boarding paperwork have been found for employees, consultants, and contractors in other CFTC Divisions.

We did ask if deficiencies in security clearances for other CFTC employees have been encountered, which in our view would be a more serious matter. We learned that during a fairly recent period in which CFTC implemented new security badges, CFTC employees agency-wide were found with lapsed security clearances. For some long-term employees, CFTC had no security clearance on file at all for the duration of the employee's career at CFTC. Employees with lapsed or absent security clearances included employees with access to information protected under Section 8 and other sensitive information.

The process for dealing with the discovery of inadequate security clearances, we were told, was to leave the employee in place and to process the security clearance. Only if the security clearance could not be completed due to problems with the employee's background would action be taken to remove the employee. Moreover, even if the employee could not be retained, prior work completed by the employee would remain valid unless there was extrinsic evidence that the work was not adequately performed. This approach finds support in the law.

Comptroller General opinions could not be more clear that "[a]n officer 'de facto' is one who performs the duties of an office with apparent right and under color of an appointment and claim of title to such office. That is, where there is an office to be filled, and one acting under color of authority fills said office and discharges its duties, his actions are those of an officer 'de facto.'"<sup>93</sup> This rule is not ironclad, but the two exceptions to this rule are not present here:

- (1) The appointment was made in violation of an absolute statutory prohibition, or
- (2) The employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter.<sup>94</sup>

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<sup>93</sup> *Assistant Comptroller General Yates to the Secretary of the Treasury*, B-98693, 30 Comp.Gen. 228, 1950 U.S. Comp. Gen. LEXIS 93 \*5 (Dec. 5, 1950) (cited in, *In the Matter of Compensation for Services Rendered Pending Appointment*, B-181934, 55 Comp. Gen. 109, 1975 U.S. Comp. Gen. LEXIS 103 \*6 (July 23, 1975)).

<sup>94</sup> *Matter of: Sidney P. Arnett and Mary Ann Barron – Erroneous Appointments - De Facto Employment*, B0220720, B0220791, 1986 Comp. Gen. LEXIS 576 (Sept. 8, 1986) (examples of statutory bars would include anti-nepotism statutes, etc.).

The Comptroller General recognizes as a general rule -- regardless of whether a *de facto* employee may be paid for his or her efforts or may continue in his position<sup>95</sup> -- that "acts performed while a person is serving in a *de facto* status are as valid and effectual insofar as they concern the public and the rights of third persons as though he were an officer *de jure*."<sup>96</sup> It is also clearly the law that the government has every authority to ratify the acts of agents acting with apparent authority: "a sovereign may waive its right to be bound only by actually authorized acts."<sup>97</sup> In fact, in the Comptroller General opinions we reviewed, we encountered no cases where a *de facto* employee's work was invalidated due to administrative error in hiring documentation.

In short, it appears that there is no basis to equate improper on-boarding paperwork with improper access to CFTC confidential data in a situation (such as this) where a heightened security clearance is not required.<sup>98</sup> Similarly, there appears to be no basis to invalidate or indefinitely delay work product by OCE economists who suffer administrative irregularities in their on-boarding paperwork.

We note with approval that it appears the OGC's proposed policy has not been officially adopted by the Chairman or the Commission. Nevertheless, we would be remiss if we did not note the potential unfairness inherent in the proposed policy. It appears that no one in OCE or

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<sup>95</sup> In Comptroller General opinions addressing administrative errors affecting federal employee status, the ultimate issue is always whether the employee may be paid, which is not what we are looking at today. We cite these opinions for their statements on the subsequent treatment of employee work when the employee is not properly brought on board.

<sup>96</sup> *Matter of the Acting Federal Insurance Administrator's Status and Authority*, B-183012, 56 Comp. Gen. 761; 1977 U.S. Comp. Gen. LEXIS 100 (June 29, 1977). See also, *Matter of Earle W. Cook - Compensation for Services Prior to Appointment*, B-198575, 1981 U.S. Comp. Gen. LEXIS 83 (Aug. 11, 1981) (When an Acting Insurance Administrator appointed by the director of the Department of Housing and Urban Development lacked authority to serve for a period of about nineteen days, during which time he signed decision letters, issued regulations, and testified before Congress in his unauthorized official capacity, the Comptroller General stated: "[W]e cannot consider [the Acting Administrator] a usurper, devoid of any color of authority. At all times relevant he performed the duties of the office of Insurance Administrator with the knowledge and apparent acquiescence of the Secretary and the President. In our view, he meets the definition of a *de facto* officer or employee....").

<sup>97</sup> Restatement (Third) Of Agency § 2.03, comment g. (2006). Ratification, of course, does not apply solely to contract actions. "Any act which, if done under proper authority, would be lawfully charged to a principal may be ratified when done without authority by an agent or subagent." 2A CJS Agency § 55 (2013). In *Matter of the Acting Federal Insurance Administrator's Status and Authority*, B-183012, 56 Comp. Gen. 761; 1977 U.S. Comp. Gen. LEXIS 100 (June 29, 1977), the Comptroller General suggested that a successor consider ratification of those actions by a *de facto* Acting Insurance Administrator -- which included decision letters, new regulations, and Congressional testimony -- with which she agreed, to avoid any confusion as to their binding effect.

<sup>98</sup> Certainly the lack of a security clearance is relevant to these considerations. In *In the matter of Compensation for Services Rendered Pending Appointment*, 55 Comp. Gen. 109, B-181934 (July 23, 1975), a retired Army officer assigned as Executive Assistant to an Ambassador-at-Large served in that position for seven months before the Department of State determined he could not be appointed due to his failure to pass a required security clearance. Despite the failure of appointment, this individual served in good faith, performed services under color of authority, and with no indication of fraud, and with the Comptroller General noting that the employee did not handle classified material and that "the lack of security clearance apparently had little impact on his job performance." In this circumstance, the Comptroller General determined that this individual was a *de facto* employee during the period of service.

OGC was aware of the administrative errors in OCE economists' on-boarding paperwork until December 2012. Moreover, it appears that, at least until December 2012, irregularities in on-boarding processes and paperwork were simply addressed by fixing the irregularity at staff level. For instance, the discovery of dual hiring processes for new OCE economists were not documented or brought to the attention of management that we can see. Similarly it appears that, at the time, nobody documented or brought to the attention of management the fact that (b) (b) s initial request for network access was made by the Chief Economist and in process with ODT for more than two weeks before his contract was signed.

Given the importance OGC now gives to on-boarding paperwork – at least for some OCE staff<sup>99</sup> – we are at a loss to understand why accuracy was never emphasized before December 2012. Further, we do not understand why this policy, if necessary at present, is not being implemented Agency-wide.

In any event, we simply fail to see any connection whatsoever between a public employee's on-boarding paperwork and that same employee's right to publish on matters of public concern as a private citizen, even if the public employee's efforts are sponsored by the government.

### **The Decision to Prohibit Publication of Completed Research and Institute Mandatory Prior Review Raises First Amendment Issues**

As previously discussed, without regard to the content of research papers prepared by OCE economists, the Deputy General Counsel for (b)(6),(b)(7) determined that any employee, consultant, or contractor with administrative onboarding deficiencies may not view information protected under section 8, and to apply the prohibition retroactively. As previously stated, we have found no legal support for this course of action.

Separately, CFTC management determined to form a committee which is reviewing the content of all papers written by OCE economists (regardless of on-boarding documentation and regardless of whether the author included or had access to information protected under Section 8) and which will permit publication only of research papers approved by the committee and by the Office of General Counsel. We believe this course of action may potentially violate the law.

#### The First Amendment and Federal Employee Publications

Federal employees clearly do not enjoy the same First Amendment<sup>100</sup> rights as private citizens. The Supreme Court has recognized that "even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government

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<sup>99</sup> Indeed, it appears that OCE onboarding errors were not all treated the same even after December 2012. Earlier this year, one of the OCE contractors was simply transferred to the Office of Data Technology even though Agency staff recognized that his contract previously had been implemented while lacking the contractor's signature.

<sup>100</sup> See fn.17.

employees,”<sup>101</sup> and that the federal government has “far broader powers” to regulate the speech of federal employees than it has to regulate the speech of the public at large.<sup>102</sup> But that does not mean that federal employees lose all First Amendment protections merely by virtue of their status as employees.

In order to be protected by the First Amendment, speech by a public employee must speak on a matter of public concern, and the employee’s interest in expressing himself, as a private citizen, in commenting upon matters of public concern must outweigh the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees.<sup>103</sup> It is clear that the First Amendment does not shield from discipline the expressions public employees make pursuant to their professional duties; however, the Supreme Court has specifically declined to determine whether the fact of public employment similarly alters the First Amendment rights of public employees engaged in speech related to scholarship or teaching.<sup>104</sup> Context is key in determining whether an individual who works for the government is speaking as a private citizen or as a public employee performing official duties.

We believe the employment situation for OCE economists is clear-cut in this regard: in addition to their assigned tasks relating to ongoing Agency operations, OCE economists are hired by CFTC to perform independent academic research. The position description for a level CT-12 research economist states that, in addition to supporting the Commission in its work:

[T]he incumbent also participates in the planning and execution of special projects, primarily long-term studies with little precedent. The incumbent is expected to be prepared to present and review papers at professional meetings and conferences and to contribute to the literature in the field and identify the effects associated with implementing proposed standards, regulations, and policies.<sup>105</sup>

Similarly, the position description for a level CT-15 supervisory economist states that, in addition to supporting the Commission in its work:

As a recognized expert in the economic and statistical analysis of futures and swaps markets, the incumbent is expected to be sought out to serve on panels and

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<sup>101</sup> *Waters v. Churchill*, 511 U.S. 661, 671-672 (1994).

<sup>102</sup> *Id.*

<sup>103</sup> *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

<sup>104</sup> In *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006), the Supreme Court rejected “the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties,” but specifically declined to address the application of First Amendment rights to speech by public employees related to academic scholarship. *Id.* at 425 (“There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

<sup>105</sup> Position description for (b)(6),(b)(7)(C)

to present and review papers at professional meetings and conferences, to contribute to the literature in the field...<sup>106</sup>

The position descriptions in our view indicate that OCE economists are required to create and publish economic research not merely to the extent that such research supports the Commission in its work. They are required to create economic articles that comport with academic standards and expand knowledge in the field; and we believe the requirements of academic integrity would require such research to be developed independently of Commission policy.<sup>107</sup>

Independence from Commission policy is also evidenced by the fact that the Commission requires OCE economists to publish their research papers and presentations with a disclaimer that their views do not represent those of the Chairman, the Commission or its employees.<sup>108</sup> Even if the Commission has hired an employee, consultant, or contractor for the purpose of requiring research on a specific economic topic selected by the Chief Economist, the disclaimer is required when the research is complete and ready for publication. Assurance of academic integrity would require no less, in our view.<sup>109</sup>

Of course, the Commission may publish economic research through Commission-approved publications prepared by staff economists, and has done so in the past.<sup>110</sup> The fact that the Commission has published OCE staff economic research in the past, as an official CFTC report and without any disclaimer, indicates to us that the Commission is fully aware – as it has performed this function since 1976 – that economic research papers published under a disclaimer are done so because the author is publishing not as a Commission employee voicing official CFTC policy or opinion, but as a private citizen.<sup>111</sup>

Consideration of CFTC OCE economist position descriptions, CFTC's required disclaimers for OCE economist research papers, the fact that the papers undergo a juried review, and the contrasting staff economic research reports published without disclaimer, lead to the

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<sup>106</sup> Position description for (b)(6),(b)

<sup>107</sup> Some contract employees in OCE are hired solely to perform independent research on topics approved by the Chief Economist. Others are hired to perform other services, such as IT services.

<sup>108</sup> Disclaimers that are "reasonably prominent" and that convey that "the views expressed in the article do not necessarily represent the views of the agency," are required by regulation at 5 CFR 2635.807(b).

<sup>109</sup> We would contrast disclaimers used in situations where staff is speaking at the direction of or with the approval of Commission management as part of their official duties in situations that do not involve scholarship, such as: staff no-action letters, Commission-sponsored or Commission-attended meetings and conferences, and Agency website postings. In such situations the Commission representative does not speak as a private citizen, but the disclaimer makes clear that the representative's statements may not necessarily represent the Commission's views.

<sup>110</sup> For instance, in 2008 the Office of Chief Economist published in cooperation with representatives of other regulators a paper titled, "Interim Report on Crude Oil," which was not published with a disclaimer. Available here: <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/iffinterimreportoncrudeoil0708.pdf>.

<sup>111</sup> As late as 2012, OGC staff attorneys applied the CFTC regulations pertaining to writing completed in an employee's personal capacity to OCE economic research papers, at least on occasion. See Appendix 6, page 41 n.190. This practice has stopped.

conclusion that CFTC knows and acknowledges that OCE economists publish their scholarly research as private citizens.<sup>112</sup> The fact of their employment, pay (for some economists), required topic approval, and access to confidential information, all authorized by the Commission, in our view should not change this conclusion.

### Prior Restraints and the First Amendment

#### *Introduction*

A prior restraint has been described as any governmental order “that prohibit[s] the publication or broadcast of particular information or commentary – orders that impose a ‘previous’ or ‘prior’ restraint on speech.”<sup>113</sup> The repugnance of prior restraints has been recognized from the earliest expressions of the Anglo-American legal tradition. Blackstone wrote:

Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.<sup>114</sup>

The Supreme Court has recognized that prior restraints are abhorrent:

[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law’s sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.<sup>115</sup>

The Supreme Court has cautioned that the government’s required prior review of protected speech, even when permissible, must afford affected citizens due process prior

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<sup>112</sup> The fact that OCE economic research papers often concern the articulation of new or controversial ideas, and could reasonably be described as an exercise of so-called “academic freedom” also weighs in favor of treating OCE economic research papers as private speech. See *Weihua Huang v. U.Va.*, 896 F.Supp.2d 524, 543 n.12.

<sup>113</sup> *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976).

<sup>114</sup> 4 Bl. Com. 151, 152 (quoted in *Near v. Minnesota*, 283 U.S. 697, 714 (1930)).

<sup>115</sup> *Nebraska Press Ass’n v. Stuart*, *supra*, 427 U.S. at 559.

to any final restraint, and must assure a prompt final judicial decision.<sup>116</sup> The Supreme Court has cautioned that any government system of prior restraint must take place “within a specified brief period,” and has criticized a prior review and judicial appeal process running to 10 months.<sup>117</sup> The Supreme Court has stated that “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>118</sup>

*Prior Restraints and Mandatory Prior Review of Public Employee Publications*

The government clearly may require prior submission of a public employee’s speech as a private citizen if the government can demonstrate sufficient interest in staying informed of public employees’ public statements about matters of concern to the workplace.<sup>119</sup> We believe the Commission has a clear interest in being apprised of OCE economic scholarship before it is presented or published. However, we have found no precedent to support the length of time currently involved with the Agency’s review process.

In order to impose a prior restraint on speech by a public employee, speaking or publishing as a private citizen, the government must demonstrate that

...the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.<sup>120</sup>

In addition, the standards used to evaluate employee speech “must possess ‘narrow, objective, and definite standards’ to guide the decision-maker.”<sup>121</sup>

Even when a prior restraint is warranted, the Government may be limited in the action it may take, internally, to prevent violative speech from publication.<sup>122</sup> Even a permissible prior

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<sup>116</sup> *Freedman v. Md.*, 380 U.S. 51, 55-59 (1964).

<sup>117</sup> *Id.* See also, *Déjà vu of Nashville, Inc., et al. v. Nashville, et al.*, 2006 U.S. App. LEXIS 16323, \*13 and n.4; 2006 FED App. 0432n (6<sup>th</sup> Cir. 2006) (recognizing the “stringent standard” set out in *Freedman* for prompt judicial review for government-imposed prior restraints on First Amendment activities).

<sup>118</sup> *Bantam Books, Inc. v. Sullivan*, 372 US 58, 70 (1963). See also, *Shelton Police Union, Inc. v. Voccola*, 125 F. Supp. 2d 604, 623 (D. Conn. 2001) (“The government’s burden of demonstrating that its interests outweigh the interests of the speakers is greater in cases involving a prior restraint as opposed to cases involving isolated disciplinary action.”).

<sup>119</sup> *Latino Officers Association, et al. v. Safir, et al.*, 170 F.3d 167, 172 (1999); *Weaver v. United States Information Agency (Weaver)*, 87 F.3d 1429, 1442 (D.C. Cir. 1996), cert. denied, 1997 U.S. LEXIS 3405 (1997).

<sup>120</sup> *U.S. v. National Treasury Employees Union (NTEU)*, 513 U.S. 454, 468 (1995) (citing *Pickering*, 391 U.S. at 571).

<sup>121</sup> *Harman v. City of New York (Hannan)*, 140 F.3d 111, 120 (2d Cir. 1998) (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S. Ct. 935, 938, 22 L. Ed. 2d 162 (1969)).

review process could be invalidated if it involves lengthy delays because, “[i]f the prior review were extensive, of course, it might delay constitutionally protected speech to a time when its only relevance was to historians.”<sup>123</sup> In addition, the government’s determination to suppress speech must afford the affected party prompt judicial review.<sup>124</sup>

In contrast, the Supreme Court has recognized that the Central Intelligence Agency may enforce against its employees reasonable publication restrictions over classified information.<sup>125</sup> This authority stems from the “compelling interest” that the government has “in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”<sup>126</sup> It includes the authority to bar publication by current and former CIA employees without prior authorization.<sup>127</sup> Nothing in the Commodity Exchange Act indicates that information protected under Section 8 may receive the same protections as classified information, and it appears very clear that similar restrictions do not apply to non-classified information generally.

The Office of Government Ethics has recognized that required prior review and approval of federal employee publications risks violating the First Amendment. In 1991, the Office of Government Ethics proposed the following regulation of federal employee publications (proposed § 2635.807(c)):

*Approval of content.* An employee shall comply with any requirement for advance agency review, clearance, or approval of the content of any speech, book, article or similar product.<sup>128</sup>

This proposed regulation did not survive the rulemaking process. OGE explained:

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<sup>122</sup> In *Weaver*, the Court suggested that “[a]n agency confronted with a recalcitrant employee who refused to eliminate classified information might wish to seek an injunction against publication of the offending section of the employee’s material.” *Weaver, supra*, 87 F.3d at 1442 n.5.

<sup>123</sup> *Weaver, supra*, 87 F.3d at 1441 (the quoted language is *dicta*; the court noted that “Weaver has not alleged that the review under § 628.2 is lengthy”); *Hannan, supra*, 140 F.3d at 120 (“By delaying the review process, the employer has the power to destroy the immediacy of the comment on agency affairs, and thus, in many cases, its newsworthiness. In such cases, ‘dissemination delayed may prove tantamount to dissemination denied.’” (citations omitted)); *Freedman, supra*, 380 U.S. at 59 (noting the deterrent effect of delay in a review process running to 10 months). We note the Agency has delayed publication of economic research papers for 14 months and counting.

<sup>124</sup> *Freedman v. Maryland, supra*, 380 U.S. at 55, and 58-60.

<sup>125</sup> *Snepp v. United States*, 444 U.S. 507, 510 (1980) (“[E]ven in the absence of an express agreement – the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the *First Amendment*”).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 511 n.8 (The Court noted that the employment contract at issue “requires no more than a clearance procedure subject to judicial review”).

<sup>128</sup> 56 Fed. Reg. 33778 (July 23, 1991).

In response to comments made by four agencies and one organization, OGE has deleted proposed §2635.807(c) which stated that employees must comply with agency requirements for advance approval of the content of any speech, writing or similar product. Each of the commenters argued that the provision is overbroad and would violate the First Amendment. Consistent with our original intent, the final rule simply notes that some agencies may have policies requiring advance approval, review, or clearance of certain speeches or writings to determine whether they contain an appropriate disclaimer, disclose nonpublic information or otherwise comply with this part.<sup>129</sup>

The OGE's final rule today contains this neutral statement:

Note: Some agencies may have policies requiring advance agency review, clearance, or approval of certain speeches, books, articles or similar products to determine whether the product contains an appropriate disclaimer, discloses nonpublic information, or otherwise complies with this section.<sup>130</sup>

More recently, in 2008 the OGE issued advisory material on federal employee book publications and took a similarly neutral approach on required prior approval, merely stating:

Many agencies have supplemental regulations that require employees to obtain prior approval to engage in certain outside activities, including writing. Some of these agencies' supplemental regulations may contain other provisions related to writing.<sup>131</sup>

CFTC's supplemental standards of ethical conduct state that "Commission members and other employees are encouraged to engage in teaching, speaking, and writing activities."<sup>132</sup> CFTC's supplemental standards do not require prior submission and approval of employee publications. CFTC's supplemental standards do require advance approval for outside employment, regardless of payment, but advance approval for outside employment only "includes writing when done under an arrangement with another person for production or publication of the written product." Moreover, the advance approval requirement "does not include participation in the activities of a nonprofit ... educational ... organization, unless such activities involve the provision of professional services or advice or are for compensation other than reimbursement of expenses." CFTC's regulations also provide: "[a] Commission employee or former employee shall not divulge, or cause or allow to be divulged, confidential or non-public

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<sup>129</sup> 57 Fed. Reg. 35006 (Aug. 7, 1992).

<sup>130</sup> 5 CFR § 2635.807(b)(3) (note).

<sup>131</sup> U.S. Office of Government Ethics, DO-08-006, Book Deal DAEOgram, Part I: Regular Employees and SGEs, Paragraph VI. B. (March 6, 2008), available at <http://www.oge.gov/displaytemplates/modelsub.aspx?id=2147483821>.

<sup>132</sup> 5 CFR § 5101.103(a).

commercial, economic or official information to any unauthorized person, or release such information in advance of authorization for its release."<sup>133</sup> The CFTC's regulations do not specifically address the current processes for publications by OCE economists.

Regulations adopted by the Securities and Exchange Commission (SEC) require prior review of publications and speeches by employees, but includes a self-imposed deadline to answer the employee "as promptly as possible, with due regard to publication deadlines, but in any event within 30 days of receipt of the written document."<sup>134</sup>

### Information Security Concerns are Agency-Wide

During our field work, OGC employees expressed concern that anyone with OCENet access could download – to a privately owned thumb drive, disk, or external hard drive – any information from any network accessible on OCENet, and remove it from the building. Data technology staff told us that it is possible that downloading information from OCENet could be accomplished without creating any record of the download, depending on the relevant computer and network settings.<sup>135</sup> This of course would include sensitive information and information protected under Section 8. CFTC staff charged with responsibility for physical security in the CFTC workplace told us that, without thoroughly searching all employees as they leave the building, such removal of information would be impossible to prevent. Moreover, there was no way to tell what data the OCE economists had accessed through OCENet, because no logs were kept of data transfers from the CFTC network to OCENet. We agree that these are serious concerns.

Our interviews indicate that OCE economists believe it to be unlikely that data left the building, while information technology and security employees believe it possible that such misconduct occurred, due to the lack of controls, but are in disagreement regarding whether it is likely misconduct occurred. Forensic analysis appears at this time to be inconclusive due to the lack of controls. The absence of controls is key; the bottom line appears to be that it is most likely that CFTC will never know whether or not data protected under Section 8 left the building.

(b)(6), (b)(7)(C)

(b)(6),  
(b)(7)  
(C)

<sup>133</sup> 17 CFR § 140.735-5. No enforcement mechanism is provided. Separately, the Commodity Exchange Act makes it a felony to misuse any nonpublic Commission information which may affect or tend to affect the price of any commodity futures or commodity in connection with certain market transactions. 7 USC § 13(d).

<sup>134</sup> 17 CFR § 200.735-4(d)(2)(i). We offer no opinion on the SEC's rule. The Court of Appeals for the District of Columbia Circuit in *Weaver* recognized the requirement for a prompt decision and judicial review in permissible prior restraint schemes (*Weaver, supra*, 87 F.3d at 1436), but also noted the lack of any "case holding that a review process—or indeed any form of prior restraint, even one including substantive prohibition of speech—in the context of an employment relationship is constitutionally invalid for want of a specific deadline on action." *Id.* at 1443.

<sup>135</sup> In addition, staff remarked that information could also be printed out and removed from the building.

(b)(6),(b)(7)(C)

CFTC management was also distressed that the badging process for outgoing OCE economists was not properly performed. We learned that the former Chief Economist had “extra” badges in his desk that had belonged to former OCE economists and had not been returned. CFTC management in OGC and Logistics and Operations surmise that these badges may have still worked, and may have been used to permit outside individuals to obtain access to CFTC headquarters offices.<sup>137</sup> CFTC management feared that unauthorized economists could use old badges to enter CFTC headquarters, and then have an existing OCE economist give them access to OCEnet (using their own usernames and network passwords), without detection. CFTC management also surmised that, prior to the installation of the welcome desk and badge readers in the lobby at CFTC headquarters, OCE economists could bring guests into the building without detection, with or without any badge for the guest. CFTC management seemed fairly convinced that improper access had occurred, although it appeared equally clear that no improper access had been documented.

For their part, the OCE economists we interviewed either stated that they had no way of knowing what other OCE economists were doing at headquarters with regard to possible impermissible guest access, or stated they did not believe that anyone had misused expired badges. None stated that they witnessed any improper access to information protected under Section 8 occurring within OCE. OCE economists told us that, when they were working with economists who were not CFTC employees, contractors, or consultants, they met off-site to discuss economic research projects.<sup>138</sup>

### CFTC's Remediation Efforts

Since December 2012, some progress has been made addressing the issues confronting OCE. OCE prepared a draft memorandum giving background on the work of OCE which was presented to the Division Directors and furnished to the Chairman.<sup>139</sup> The paper explains OCE's

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<sup>136</sup> Removing confidential information from federal buildings can be a serious problem. In 1987, a secretary to Lt. Colonel Oliver North testified before Congress that she smuggled highly classified documents out of the Old Executive Office Building in her boots. Dan Morgan & Walter Pincus, Hall Testifies of Necessity “To Go Above Written Law,” Wash. Post, June 10, 1987, at A1 (available at: <http://www.washingtonpost.com/wp-srv/local/longterm/toms/scandal/fawnhall.htm>). In any event, the level of intrusion that would be necessary to detect all instances of removal of confidential information from the federal workplace is extreme.

<sup>137</sup> We learned that, because CFTC retains badge access data for only 90 days, it will not be possible to determine whether defunct badges were used improperly after the departure date for the relevant employee, consultant, or contractor. CFTC retains guest logs for only 60 days.

<sup>138</sup> It is not uncommon for CFTC economists to work with non-CFTC economists to produce economic research papers. According to OCE economists, the contribution of the non-CFTC economist does not involve access to information protected under Section 8.

<sup>139</sup> OCE White Paper (draft), dated May 7, 2013.

practice of hiring academic economists to research and publish academic articles on subjects of interest to the Commission. Efforts to re-establish OCEnet are ongoing; the relevant personnel in the Office of Data Technology drafted a plan during 2013 that would permit the OCE economists to return to the practice of conducting research on a standalone server. While this sounds hopeful, we understand that a restart for OCEnet has not yet moved forward. With regard to information security concerns, to our knowledge the Agency has not yet addressed the issue of information security for desktop computers Agency-wide, but is in the process.

As discussed above, improvements to badging and security clearance processes had been underway since 2011. CFTC employees working in Logistics and Operations told us that the recent improvements have resulted in greater controls over CFTC badges that will prevent the potential for misuse of defunct badges in the future. The new badges may be terminated remotely, and can be programmed to expire on an employee's, consultant's, or contractor's last day at CFTC. Moreover, the recent installation of card readers in the lobby at CFTC headquarters along with a manned front desk decrease the likelihood of unauthorized visitors, including visitors improperly using someone else's badge.

Human Resources, the Office of Data and Technology, and the Office of Security and Emergency Management have coordinated with OCE to analyze the existing processes for hiring and retaining academics and to plan improvements. OCE has lost staff and has not been permitted to bring on unpaid interns and consultants, but on December 5, 2013, CFTC posted four economists positions in OCE. We view this as a positive development.

As previously stated, in February 2013, the Chairman's Office and Office of General Counsel formed a committee – consisting primarily of subject-matter experts from OCE and DMO – to review for possible violations of Section 8 and other nondisclosure provisions all 24 research papers that were pending publication as of December of 2012. We understand that the Chief Economist furnished the committee with the text of Section 8 and other relevant provisions. The Committee has not been given written guidance by OGC on the standards to be applied with regard to the identification of information protected under Section 8 (including acceptable aggregation policies) and regarding the identification of trade secrets.

The Committee is drawing on substantial expertise within the Agency to review the papers. In consultation with the authors, the Committee is performing the following tasks:<sup>140</sup>

1. Please identify the CFTC data and information used to produce the paper. Please provide detailed information about the source of the data (ISS, TSS, Special Calls, other sources including DOE, DSIO, DMO, and other CFTC records), the market sector(s), any date restrictions, and which specific data fields were reviewed (account numbers, specific trade information, etc.)

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<sup>140</sup> The Deputy General Counsel for (b)(6),(b)(7)(C) sent these questions to OCE and the Chief Operating Officer on February 13, 2013.

2. Please describe how the data used was aggregated, masked and/or anonymized so that it does not separately disclose the business transactions or market positions of any persons and trade secrets or names of customers.
3. Please describe any baseline of aggregation number(s) identified as sufficient for anonymization and the justification for the baseline of aggregation.
4. Please identify if any of the CFTC data and information used to produce the paper was shared with non-CFTC affiliated individual(s) or organization(s)? If so, please describe the steps that were taken to ensure that it was appropriately aggregated, masked and/or anonymized. If the CFTC data and information used to produce the paper was shared and was not aggregated, masked and/or anonymized, then please describe the steps taken to protect the CFTC data and information from further dissemination or use.
5. Please describe the internal OCE review process for the paper. Please discuss whether the review considered if charts, graphs, algorithms, formulas, and other analysis in the paper could be reverse engineered to separately disclose the business transactions or market positions of any persons and trade secrets or names of customers. Please describe the basis for clearance.
6. Please identify the CFTC staff, contractors and consultants involved in any reviews of the paper or the CFTC data and information used to produce the paper.

In addition, the Committee, in consultation with the authors, answers the following questions:<sup>141</sup>

1. For each author, identify the affiliation with the CFTC during the production of this paper and during any period of contact with CFTC data.
2. Identify any division of labor or specialization among authors utilized to prevent unauthorized access to CFTC data by co-authors or assistants not affiliated with the CFTC.
3. Identify any aggregation, masking, or other anonymization techniques utilized to prevent unauthorized access to CFTC data.
4. Identify any other steps taken during the production of the paper to prevent access to CFTC data by unauthorized persons. For example, describe how data was protected if a co-author became unaffiliated with the CFTC after previously being affiliated with the CFTC.

If a paper is approved by the Committee, the next step is review by the Office of General Counsel. Staff in the Office of General Counsel state that their review is not intended to second

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<sup>141</sup> This checklist was created by the Acting Chief Economist in June 2013.

guess the determination of the Committee regarding adequacy of aggregation or disclosure of trade data. Instead, the Office of General Counsel reviews the work of the Committee to assure that it has considered the trade data and presented its analysis clearly.

The Committee has sent some papers back to authors with questions. In our fieldwork, OCE economists described these inquiries as requests for clarification as opposed to requests to change the substance of a discussion. OCE economists affected by these suggestions who spoke with us voiced no complaints or misgivings regarding the level of inquiry.

All witnesses with an opinion told us that the Committee has not identified any violations of Section 8 among the papers reviewed thus far. As of December 9, 2013, the committee had approved ten papers; three were approved in June 2013, the others were approved thereafter. On October 23, 2013, the assigned Deputy General Counsel permitted three papers to be published. These three papers discussed economic theory without reference to information protected under Section 8, not even in aggregated form. We are puzzled why such seemingly simple papers required 10 months of review. OGC cleared four additional papers for publication in February 2014.<sup>142</sup>

## Conclusions and Recommendations

After the receipt of one complaint regarding OCE economic research papers and a two-day internal review, the Office of the General Counsel in consultation with the Office of the Chairman indefinitely suspended OCE publication and presentation activities. The Agency thereafter shut down OCE's dedicated server, and issued stop work orders for all contractors and terminated most OCE consultants. The motivations for the decision to prohibit publication and presentation of completed economic research were: 1) administrative flaws in on-boarding paperwork for OCE economists; 2) concerns regarding the existing review and clearance process for OCE papers; and 3) physical and information technology security concerns.

We agree that the physical and information technology concerns exist; however, they are Agency-wide, and are currently being addressed at least in part in connection with an OIG audit of CFTC's Fiscal Year 2013 implementation of the Federal Information Security Management Act.<sup>143</sup> The absence of controls is significant; lacking a reliable way to determine whether confidential information was improperly taken from the CFTC, we will not jump to the conclusion that misconduct did or did not occur based on contradictory opinions of Agency employees. We can make no finding.

While continuing the indefinite suspension of OCE publication and presentation activities, the Agency formed a Committee to review proposed academic research papers. By June 2013 the committee had approved three papers for publication, and by December 2013 had approved seven additional papers. Throughout this process, the Committee found no violations

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<sup>142</sup> See Appendix 5.

<sup>143</sup> Pub. L. No. 107-347, Title III, 116 Stat. 2899 (Dec. 17, 2002).

of Section 8 among any research article it reviewed, though it did recommend alterations that it described as clarifying. During our field work, we repeatedly advised Agency management to restart the OCE research program, and encouraged them to speed up the process for permitting the publication of OCE research articles. In October 2013, the assigned Deputy General Counsel gave final approval for three papers to be published. OGC approved four additional papers for publication in February 2014 (as of February 20).<sup>144</sup>

We appreciate the gravity of the concerns that motivated the OCE shutdown, including the Commission's substantial interest in protecting confidential information from illegal disclosure; however, we nevertheless believe that in shutting down all server-assisted research and all publication by OCE economists for the length of time that it has, Agency management has risked violating Section 18 of the Commodity Exchange Act, especially given the long tradition of describing the research program as fulfilling a mandate.<sup>145</sup> We recommend that the Agency remain mindful of the requirements of Section 18.

We do not agree that issues with administrative on-boarding documentation and security clearances present a bar to the performance of duties for any CFTC employee who is otherwise properly appointed. We believe the Agency did not act in accordance with Comptroller General opinions addressing analogous situations in the federal workplace, and apparently treated OCE economists differently than other Agency employees with similar administrative deficiencies (and treated at least one OCE employee with an administrative on-boarding error differently than the others).<sup>146</sup> We recommend that the Agency remain mindful of the general rule that acts performed while a person is serving in a *de facto* status are generally as valid and effectual as those of an officer *de jure*, and that the Agency has every authority to ratify the acts of employees who are working in good faith albeit with administrative deficiencies in their personnel records. We recommend that the Agency take action to remedy administrative errors in on-boarding documentation Agency-wide without disturbing employee work activities whenever possible.

We agree that the Agency may assign research topics to OCE economists, and we find support for the Agency's authority to require OCE economists to submit their written research papers and presentations to the Agency prior to publication. We agree with Commission management and staff that any evaluation of economic research papers for possible impermissible disclosures of information protected under Section 8 in many instances may not be easy. We understand Agency management's desire to determine whether aggregated trade data in an economic research paper may be combined with other publicly available data and reverse engineered to permit the reader to ascertain the identity of the trader. The process to determine whether a trade secret has been disclosed may be similarly complex in many instances. Given these complexities, and the gravity of being accused of violative conduct, we are not surprised that for more than twenty years, OCE economists have voluntarily submitted their research papers to the Chief

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<sup>144</sup> See Appendix 5.

<sup>145</sup> See fn.47 and accompanying text.

<sup>146</sup> See fn.99.

Economist for review prior to publication, and have acquiesced to further review by OGC and DMO staff as recommended by the Chief Economist.

While we are sensitive to these important concerns, and understand the Agency's desire to avoid illegal disclosures in Agency-sponsored research, we cannot find support in the law for the Agency's new system, which bars all publication and presentation of economic research papers published with a disclaimer until approved by a Committee and by OGC over a period that can last more than 14 months.<sup>147</sup> It appears that the OCE economists have not been furnished narrow, objective, and definite standards for the evaluation of their independent research papers, and this is disturbing, as it seems unworkable to expect scholars to conform their independent research papers and presentations to disclosure standards that are not clearly defined at the outset. It does not appear that the current system provides for prompt judicial review. We cannot emphasize enough that the current process is taking, in our view, far too long.

We recommend that the Agency assure the legality of any mandatory prior review process for employee publications, keeping in mind both that "any system of prior restraints of expression comes to [ ] Court bearing a heavy presumption against its constitutional validity,"<sup>148</sup> and that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. . . ."<sup>149</sup> We caution the Agency to remain mindful that "dissemination delayed may prove tantamount to dissemination denied."<sup>150</sup>

Our inability to find legal precedent to support the Agency's current review process is unfortunate given the Agency's legitimate concerns; however, we do not seek to reduce this matter to a mere legal issue. Even if the Agency identifies precedent to support the current review process, we recommend the Agency remain aware of the adage, "just because it's legal, doesn't make it right." It is the length of time involved that is the greatest concern.

We therefore recommend that the Agency restart the OCE research program, including OCENet (or comparable research capacity), as soon as feasible. We of course agree that improvement to all related processes and controls should continue; however, in the absence of any findings (by the Agency or its OIG) of violative disclosures by OCE economists, we believe there is no reason to halt economic research and publication. We recommend that any review process for OCE research papers and presentations undertaken by the Agency be prompt. Any delay in publication risks diminishment of the research's relevance and of its usefulness to Congress and the public. Moreover, it

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<sup>147</sup> At the end of the review process, OGC staff issues a memo with language such as: "OCG concurs with the conclusion of the Paper Review Committee and clears this paper for publication subject to the use of the disclaimer provided below." See Appendix 5 (OGC review memos for four OCE economic research papers).

<sup>148</sup> *Bantam Books, Inc. v. Sullivan*, *supra*, 372 US at 70.

<sup>149</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

<sup>150</sup> Laurence H. Tribe, *American Constitutional Law* 1042 (2d ed. 1988) (quoted in *Harman*, 140 F.3d at 120).

provides a strong disincentive for economic research scholars to apply to CFTC for research opportunities.

Finally, we stress the importance of economic research at the CFTC, an economic regulatory agency. For over 35 years OCE has attracted some of the highest qualified economists in the country among both its full-time staff and its limited term appointments. The quality of research economists attracted to the CFTC has resulted from the quality of information available at the Commission coupled with the high level of analytical support for research publications and presentations that permanent OCE staff have historically offered visiting scholars.

We believe the current prohibition against publishing coupled with the lengthy delays in the new pre-publication review process has hampered the OCE research program, at least temporarily, and has potentially damaged academic careers.<sup>151</sup> It has halted the dissemination of economic research to Congress and to the public.<sup>152</sup> It has endangered the Agency's ability to attract the high quality of economic research historically achieved at this Agency. In order to continue to attract outstanding scholars, the Commission must support the goals of economic research coupled with academic integrity, and must make any pre-clearance process (whether voluntary or mandatory) a priority in terms of both legality and speed.

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<sup>151</sup> We understand that economic research papers currently under review in connection with academic juries and PhD programs were recalled pending the outcome of the required Committee and OGC review process. In addition, Agency management sought the removal of one economic research paper from the Internet prior to receipt of the complaint from CME. See fn.12.

<sup>152</sup> However, it seems that some OCE economists are disregarding the Agency's prohibition in any event. It appears that (b)(6), (b)(7)(C) presented the same paper that gave rise to the events discussed in this review at the (b)(6), (b)(7)(C) with the paper available and linked with the workshop's program (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) (b)(6), (b)(7)(C). Similarly, it appears that (b)(6), (b)(7)(C) presented his paper titled (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) earlier this year (b)(6), (b)(7)(C) (b)(6), (b)(7)(C). His paper is not available online with the workshop program; however, it may be requested separately from the program administrator (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) published a separate paper on (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) (b)(6), (b)(7)(C).

## **APPENDICES**

**Appendix 1 – The CME Letter**

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP  
1440 NEW YORK AVENUE, N.W.  
WASHINGTON, D.C. 20005-2111

TEL: (202) 371-7000  
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SHANGHAI  
SINGAPORE  
SPRING  
TORONTO  
VIENNA

Confidential

December 14, 2012

Dan M. Berkovitz, Esq.  
General Counsel  
U.S. Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street, NW  
Washington, DC 20581

Dear Dan:

Thanks for your attention to our concerns regarding the use of Section 8 data by certain CFTC employees and third parties. We became concerned when we reviewed an article that was co-authored by Andrei Kirilenko and that specifically disclaimed status as a Commission publication. Thank you for pointing out that Dr. Kirilenko had also co-authored an article in 2010, regarding the flash crash, that also used CME Section 8 data and that also disclaimed being a Commission publication. We believe that the use of Section 8 data – including trade secrets -- for the preparation of non-Commission sponsored publications violates Section 8.

Our concern was magnified when we learned of the circulation of another article authored by [REDACTED] which claimed to be based on [REDACTED] [REDACTED] thanks Dr. Kirilenko, among others, for help with the empirical component of his paper.<sup>1</sup>

<sup>1</sup> "I thank [REDACTED] Andrei Kirilenko, [REDACTED] for their assistance with the empirical component of this paper, and I thank [REDACTED] for their invaluable advice and comments."

Dan M. Berkovitz, Esq.  
December 14, 2012  
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It appears that the Commission's Chief Economist has both used Section 8 data and provided access to Section 8 data to non-CFTC economists and their assistants for purposes of published academic research in violation of Section 8. We appreciate that your Office is looking into this situation.

In order to avoid any doubt, we have listed below the issues that we believe are raised by this conduct.

1. Has the Commission authorized its Chief Economist to use Section 8 data for purposes of his academic research? Is the choice of research topic reviewed in advance by any officer of the Commission? If so, which officer? Are the Commissioners given any advance notice that the research is being conducted? Are the Commissioners required to give formal approval before the research is published?
2. If the Commission has authorized its Chief Economist to use Section 8 data for purposes of his academic research, what is the statutory or other legal basis for that authorization?
3. What system of supervision is in place to review any such research before publication, and what was done in the cases referenced above? Who approved the publication of Dr. Kirilenko's research? Who approved the selection of individuals to whom the data was provided? In what form was the data provided? What specific data elements were provided? What safeguards were employed to protect the data that was exposed to non-Commission employees? Did Dr. Kirilenko or anyone else at the CFTC utilize data aliasing mechanisms to protect identifying data elements? What data is allowed to leave CFTC premises? If so, what was done to protect that data after it leaves the premises? Is the data provided to third parties reviewing the research as part of a peer review process? What processes are in place to provide assurance that all data provided to third parties is returned to the CFTC and is not used by third parties for any reason not authorized by the CFTC?
4. Absent specific Commission authorization, does the Chief Economist have authority to use Section 8 data for purposes of his academic research?
5. Has the Commission or the Chief Economist authorized non-Commission employees, including "academics" or their assistants, to have access to Section 8 data for any purpose?
6. If so, for what purpose, subject to what limitations and protections and under what legal authority?
7. If the Commission or its Chief Economist provides Section 8 data to non-Commission employee "academics," how does the Commission select which non-Commission employee "academics" to favor with Section 8 data for their private research?

As you might expect, a number of customers of our client CME Group, Inc. have expressed their concern that Section 8 data has been shared with non-Commission employees engaged in academic research. CME provides that data to the Commission and its staff

Dan M. Berkovitz, Esq.  
December 14, 2012  
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routinely because the Commission requires the CME to do so for the Commission's regulatory purposes. Market participants world-wide expect the integrity and confidentiality of all Section 8 data to be maintained. Any misuse of Section 8 data, we know, would be considered a serious violation of law by the CME and its customers and, we believe, the Commission itself.

We look forward to discussing these matters further with you upon the completion of your inquiry.

Sincerely,



Mark D. Young



Jerrold E. Salzman

**Appendix 2 – The Chairman’s Letter**



U.S. COMMODITY FUTURES TRADING COMMISSION  
Three Lafayette Centre  
1155 21st Street, NW, Washington, DC 20581  
Telephone: (202) 418-5000  
Facsimile: (202) 418-5621  
www.cftc.gov

Office of the  
Chairman

January 24, 2013

VIA HAND DELIVERY

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

Re: OCE Research Program

Dear Roy,

I am writing to follow-up on my staff's communication with your office on December 11, 2012, regarding matters relating to research conducted or supported by the Office of Chief Economist ("OCE") within the Commodity Futures Trading Commission ("CFTC"). The OCE economic research program focuses on the quantitative analysis of changes in trading technology, trading instruments, and types of market participants, and makes the results of its research available to the public. Review of the OCE research program to-date indicates that there are issues regarding the use of non-public data by the OCE and visiting academics. Additionally, there appear to be issues regarding the manner in which academic consultants and contractors were brought into the agency, their status with respect to the agency, their access to CFTC systems and information, and the adequacy of related documentation. I believe all of these issues warrant your review.

Separately, as further described below, I have directed the CFTC staff to suspend the external publication of research conducted or supported by OCE, and to terminate access to non-public data by OCE personnel other than CFTC full-time employees within OCE. I have also directed the CFTC staff to recommend or implement, as appropriate, corrective measures or programmatic improvements that may be warranted. Our review of this matter is ongoing.

On December 5, 2012, counsel for an outside person contacted the CFTC's General Counsel and raised questions concerning research based upon CFTC non-public data. In this and in subsequent communications, the person raised questions regarding the use of non-public CFTC data in publicly available research papers, the authority of OCE employees and others to conduct such research, and the types of controls the CFTC has regarding access to, use or release of data that is protected from release under Section 8 of the Commodity Exchange Act.

January 24, 2013

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At my direction, the Office of General Counsel ("OGC") immediately began to look into these matters. On December 7, 2012, after OGC's initial review of the conduct of OCE-supported research activities identified deficiencies in documentation, OGC, in consultation with my office, directed the Chief Economist to insure that all OCE employees, consultants, and contractors cease sharing, publishing, distributing, or otherwise making available any papers or other products generated with Commission data to any non-Commission individuals or parties. The Chief Economist immediately issued this suspension. Also at my direction, on Tuesday, December 11, 2012, Eric Juzenas, the Chief Operating Officer, informed your office of the concerns that had been raised regarding OCE-supported research and that there were possible issues that the agency was reviewing. On December 12, the CFTC terminated access to the agency systems and databases, including a stand-alone system called OCEnet, of all individuals within the OCE research program other than full-time agency employees within OCE. Following these actions, the CFTC staff has been reviewing the human resources, procurement, logistics, data, and legal issues raised by the OCE research program and will take any further steps that we deem appropriate.

CFTC staff and I are available at your convenience to brief you or your staff in more detail on these issues and our review to date. If you have any questions, please do not hesitate to contact Mr. Juzenas.

Thank you for your attention to this matter.

Sincerely,



Gary Gensler

**Appendix 3 – December 7, 2012 email**

**From:** (b)(6),(b)(7) [Deputy General Counsel]  
**Sent:** Friday, December 07, 2012 06:22 PM  
**To:** Kirilenko, Andrei  
**Cc:** Juzenas, Eric; Berkovitz, Dan M; Thompson, Anthony C.; (b)(6),(b)(7)(C)  
**Subject:** Follow Up on OCE Review Discussion

Andrei – Thank you for meeting with us today. As you know, the Commission was notified about the potential disclosure of protected, confidential or non-public, economic or official Commission information in a paper produced by an unpaid consultant in the Office of the Chief Economist. We are currently reviewing the Commission information referenced and used for compliance with section 8(a) of the Commodity Exchange Act, Commission regulations on the disclosure of information, and the terms of any applicable Non-Disclosure Agreements.

As we discussed, throughout the duration of the review, please direct all of your staff (including employees, consultants (both paid and unpaid), and contractors) in the Office of the Chief Economist to immediately cease sharing, publishing, distributing, or otherwise making available any papers or other products generated with Commission data to any non-Commission individuals or parties. Additionally, please remind your staff that they are prohibited from discussing or otherwise disclosing any Commission information that that they have received in the course of their work for or engagement with the Commission to non-Commission individuals or parties. See 17 C.F.R. § 140.735-5.

We ask that you please document these instructions to your staff in writing and provide confirmation to us once you have completed notifying all of your staff.

If you have questions about the review or this e-mail, please do not hesitate to contact me. Thank you.

(b)(6),(7) [Deputy General Counsel]

**Appendix 4 – A Partial List of Economic Research Papers**

Publication year	Journal	Title
1976	American Journal of Agricultural Economics	Food policy: implications for the food industry
1977	American Journal of Agricultural Economics	Commodity futures exchanges and the north-south dialogue
1977	Western Journal of Agricultural Economics	Government Regulation and the Futures Markets
1978	International Organization	Food Markets and their Regulation
1979	American Journal of Agricultural Economics	A regulator's perspective on regulatory research
1980	American Journal of Agricultural Economics	Futures Markets: The Interaction of Economic Analyses and Regulation: Discussion
1981	Financial Analysts Journal	A Comparison of Options and Futures in the Management of Portfolio Risk
1982	Financial Analysts Journal	A Comparison of Margin Requirements for Options and Futures
1984	Review of Futures Markets	Regulation of Futures Markets: Theory and Practice
1985	American Journal of Agricultural Economics	Market regulation and international use of futures markets
1985	Journal of Futures Markets	Futures trading and the price volatility of GNMA certificates - further evidence
1986	American Journal of Agricultural Economics	Cross-compliance for erosion control: anticipating efficiency and distributive impacts: comment
1986	Journal of Futures Markets	Insider trading in futures markets: a discussion
1987	American Journal of Agricultural Economics	Expectations and commodity price dynamics: the overshooting model: comment

Publication year	Journal	Title
1987	Economic Affairs	Regulating financial services: how severe are the dangers?
1987	Financial Analysts Journal	Stock Index Futures: does the dog wag the tail?
1987	Journal of Futures Markets	Factors affecting agricultural futures price variance
1987	Journal of Futures Markets	Transactions data tests of the black model for soybean futures options
1987	Journal of Futures Markets	An analysis of cash and futures prices in the delivery period of maturing contracts in the coffee "c" market, 1972-1981
1988	Financial Analysts Journal	Stock index futures and stock market activity in October 1987
1988	Journal of Futures Markets	A note: do futures prices always reflect the cheapest deliverable grade of the commodity
1988	Journal of Futures Markets	Optimal exercise of the switching option in treasury bond arbitrages
1988	Review of Futures Markets	The Intradaily Variability of Soybean Futures Prices: Information and Trading Effects
1989	Book: Research in Financial Services: Private and Public Policy	Thrift - Institution Failures: Estimating the Regulator's Closure Rule
1989	Book: Stock Market: Bubbles, Volatility and Chaos	Statistical Analysis of Price and Basis Behavior: October 12-26, 1987 S&P 500 Futures and Cash
1990	Book: Advances in Futures and Options Research	Empirical Analysis of the Liquidity of The S&P 500 Index Futures Market During the October 1987 Market Break

Publication year	Journal	Title
1990	Journal of Applied Corporate Finance	The new regulation of hybrid debt instruments
1990	Journal of Finance	Initial public offerings and underwriter reputation
1991	Financial Management	Share repurchase mechanisms: a comparative analysis of efficacy, shareholder wealth, and corporate control effects
1991	Journal of Real Estate Finance and Economics	Temporal Relationships Among Adjustable Rate Mortgage Indexes
1991	Review of Futures Markets	On the Existence of an Optimal Tick Size
1991	Review of Futures Markets	Do Circuit Breakers Moderate Volatility? Evidence from October 1989
1991	Review of Futures Markets	Who Owns the Quotes? A Case Study into the Definition and Enforcement of Property Rights at the Chicago Board of Trade
1991	Western Journal of Agricultural Economics	Impact of Cash Settlement on Feeder Cattle Basis
1992	Journal of Banking & Finance	Tests of the nominal contracting hypothesis using stocks and bonds of the same firms
1992	Journal of Futures Markets	The effects of amendments to rule 80a on liquidity, volatility, and price efficiency in the S&P 500 futures
1992	Journal of Real Estate Finance and Economics	Determinants of the ARM Share of National and Regional Lending
1992	Real Estate Economics	Seasonal variation in cost of funds at thrift institutions
1993	Journal of Applied Econometrics	Intra-day futures price volatility: information effects and variance persistence

Publication year	Journal	Title
1993	Journal of Business	Tests of Unbiasedness in the Foreign Exchange Futures Markets: an Examination of Price Limits and Conditional Heteroscedasticity
1994	Business Lawyer	Using Finance Theory to Measure Damages in Cases Involving Fraudulent Trade Allocation Schemes
1994	Journal of Derivatives	Market Maker Competition on Futures Exchanges
1994	Journal of Derivatives	The Exercise of Equity Options: Theory and Empirical Tests
1994	Journal of Futures Markets	An Intraday Analysis of Bid-Ask Spreads and Price Volatility in the S&P 500 Index Futures Market
1994	Journal of Futures Markets	A Time Series Approach to Testing Market Linkage: Unit Root and Cointegration Tests
1994	Journal of Law and Economics	Residual Claims in Bankruptcy
1994	Management Science	An analysis of the risk in discretely rebalanced option hedges and delta-based techniques
1995	Journal of Futures Markets	The Failure of the Mortgage-Backed Futures Contract
1995	Journal of Business	Standard & poor's 500 index futures volatility and price changes around the New York Stock Exchange close
1996	Journal of Financial Intermediation	The performance and market impact of dual trading: CME rule 552
1996	Journal of Futures Markets	Market making with price limits
1996	Review of Financial Studies	Index arbitrage and nonlinear dynamics between the S&P500 futures and cash

Publication year	Journal	Title
1997	Journal of Futures Markets	Crop year influences and variability of the agricultural futures spreads
1997	Journal of Futures Markets	Futures market transaction costs
1998	Journal of Futures Markets	Trading volume and transaction costs in futures markets
1999	Journal of Banking & Finance	Maturity structure of public debt and expected bond returns
1999	Journal of Financial and Quantitative Analysis	Market liquidity and trader welfare in multiple dealer markets: evidence from dual trading restrictions
1999	Journal of Futures Markets	Modeling nonlinear dynamics of daily futures price changes
1999	Journal of Statistical Computation and Simulation	A Monte Carlo Investigation of The BDS Statistic
1999	Review of Futures Markets	Do Professional Traders Exhibit Loss Realization Aversion?
2000	Journal of Financial Services Research	A Test of Integration and Cointegration of Commercial Mortgage Rates
2000	Journal of Futures Markets	Examining futures price changes and volatility on the trading day after a limit-lock day
2000	Journal of Futures Markets	Trading volume, bid-ask spread, and price volatility in futures markets
2003	Review of Quantitative Finance and Accounting	The Split of the S&P 500 Futures Contract: Effects on Liquidity and Market Dynamics
2004	Futures Industry	Do Block trades Harm Markets?
2004	Journal of Business	Causality and Price Discovery: An Application of Directed Acyclic Graphs

Publication year	Journal	Title
2004	Journal of Futures Markets	Contract modifications and the basis behavior of live cattle futures
2004	RAND Journal of Economics	Patterns of retail price variation
2004	Southern Economic Journal	Integration and causality in international freight markets modeling with error correction and directed acyclic graphs
2004	Journal of Consumer Policy	How Retailers Select Products to Go on Sale: Evidence from Store-Level Data
2005	Journal of Finance	Do professional traders exhibit myopic loss aversion? An experimental analysis
2005	Journal of Financial Research	Estimating the value of delivery options in futures contracts
2005	Journal of Forecasting	Conditional volatility forecasting in a dynamic hedging model
2005	Journal of Futures Markets	Asymmetric volatility of basis and the theory of storage
2005	Journal of Futures Markets	Information transmission in electronic versus open-outcry trading systems: an analysis of U.S. equity index futures markets
2005	Journal of Futures Markets	Derivative pricing model and time-series approaches to hedging: a comparison
2005	Journal of Public Economics	Credible assignments can improve efficiency in laboratory public goods games
2005	Proceedings of the National Academy of Sciences of the United States of America	A Simple Test of Expected Utility Theory Using Professional Traders

Publication year	Journal	Title
2005	Review of Futures Markets	When Contract Size Matters: The Case of Equity Index Futures
2005	Review of Futures Markets	Liquidity and Price Discovery on Floor versus Screen-Based Trading Systems: An Analysis of Foreign Exchange Futures Markets
2005	Review of Economics and Statistics	Generic drug industry dynamics
2006	Journal of Futures Markets	Causality in futures markets
2006	Journal of Futures Markets	Transaction tax and market quality of the Taiwan stock index futures
2007	Journal of Alternative Investments	Hedge Funds, Volatility, and Liquidity Provision in Energy Futures Markets
2007	Journal of Finance	Information Cascades: Evidence from a Field Experiment with Financial Market Professionals
2007	Journal of Industrial Economics	The effect of group size and asymmetries on the incentive to reveal group-specific information
2007	Managerial and Decision Economics	"Branded Generics" as a strategy to limit cannibalization of pharmaceutical markets
2007	Berkeley Electronic Journal of Theoretical Economics	Pricing behavior of Multi-Product Retailers
2007	Book: European Pharmaceutical Policy and the Global Market	Competition in Generic Drugs: The American Experience and Lessons for Europe
2009	Book: Finance et Valeurs	The Changing Structure of Energy Futures Markets

Publication year	Journal	Title
2009	Book: Financial Derivatives: Pricing and Risk Management	Clearing and Settlement
2009	Book: Financial Derivatives: Pricing and Risk Management	The development and current state of derivatives markets
2009	Book: Financial Derivatives: Pricing and Risk Management	Speculation and hedging
2009	Book: Financial Derivatives: Pricing and Risk Management	Equity derivatives
2009	Book: Financial Derivatives: Pricing and Risk Management	The regulation of U.S. commodity futures and options
2009	Journal of Futures Markets	Reversing the lead or a series of unfortunate events? NYMEX, ICE, and Amaranth
2010	Journal of Alternative Investments	Commodities and Equities: Ever a "Market of One"?
2010	Journal of Futures Markets	Why do expiring futures and cash prices diverge for grain markets?
2010	Aestimatio	The Puzzle of Privately Imposed Price Limits: Are the Limits Imposed by Financial Exchanges Effective?
2011	Journal of Futures Markets	Demutualization and customer protection at self-regulatory financial exchanges
2011	Journal of Alternative Investments	The Role of Speculators During Times of Financial Distress

<b>Publication year</b>	<b>Journal</b>	<b>Title</b>
2012	Journal of Policy Modeling	New regulatory authority over significant price discovery contracts: An example of natural gas swaps with econometric applications
2013	Book: Handbook on Systemic Risk	Strategic Interactions of Financial Networks for the Analysis of Systemic Risk

**Appendix 5 – OGC Review Memos for Four OCE Economic Research Papers**

Paper #3 (b)(6),(b)(7)(C) by (b)(6),(b)(7)(C)  
(b)(6),(b)(7)(C) and Andrei Kirilenko

The Office of the General Counsel has completed its review of Paper #3. Our review included an evaluation of the findings of OCE Paper Review Committee, review for compliance with the Standards of Ethical Conduct for Employees of the Executive Branch, review for compliance with contracting requirements under the Federal Acquisition Regulations, and an analysis of whether the paper fits within the permitted research activities set forth in 7 U.S.C. § 22. (b)(6),(b)(7)(C) Economist in the Office of Chief Economist, has confirmed for us that the writing of this paper was undertaken as one of the permitted research activities set forth in Section 18 of the Commodity Exchange Act(CEA), codified at 7 U.S.C. § 22, to assist CFTC in the development of educational and other informational materials regarding futures trading among producers, market users and the general public and to carry out the general purposes of the Commodity Exchange Act, as amended. In particular, (b)(6),(b)(7)(C) has noted that the research fosters the public interest by providing insight into the price discovery mechanisms of markets and investigating the impacts of technology and the interaction of different trader types on the dynamics of the price process. Additionally (b)(6),(b)(7)(C) further explained that research on price discovery is relevant to the Commission's interest in fostering transparency in the futures and swaps markets and the paper includes specific results that have a direct bearing on price discovery role of the centralized market of DCMs.

According to information provided by the Office of the Executive Director and the Procurement Office, two of the three authors were contractors and they received compensation from the CFTC for the research and production of the paper. CFTC contractor (b)(6),(b)(7)(C) worked under contracts (b)(6),(b)(7)(C) (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) and received compensation from the CFTC for the research and production of the paper. CFTC Contractor (b)(6),(b)(7)(C) performed work under two contracts, one in (b)(6),(b)(7)(C) and one in (b)(6),(b)(7)(C). In both cases, (b)(6),(b)(7)(C) received compensation from the CFTC for the research and production of the paper.

The third author, former CFTC employee Andrei Kirilenko wrote this paper as part of his official duties. As a federal employee, Mr. Kirilenko was subject to the federal ethics regulations and other agency-specific and government wide laws and regulations for federal employees. OCE has confirmed that Mr. Kirilenko produced this paper in his official capacity within the scope of his duties. In addition, he received no additional compensation for this paper from sources outside the government.

This paper was cleared by the Paper Review Committee for publication based on a review of the paper itself, a review of information provided by the authors and the committee's conclusion that "release of the paper did not present a significant disclosure risk" of information protected by Section 8 of the CEA, codified at 7 U.S.C. § 12. More specifically, the Paper Review Committee has informed OGC that "the paper utilizes confidential CFTC data but aggregates the data to present results that do not present an unacceptable risk of disclosure." During the Paper Review Committee's examination of this paper in the summer of 2013, the Committee conducted a detailed review of the paper including all tables. The Paper Review Committee noted "Reading the entirety of the paper, the Committee concluded that the number of HFTs [High Frequency Traders] examined does not fall to a level that presented substantial disclosure risk." The Paper Review Committee also noted that "the information about the participants in the market did not represent an inappropriate disclosure, but rather provided useful information that did not reveal confidential information. This is especially true, given that the conclusions relate to the HFT industry, rather than to any particular HFT firm." Aside from their analysis of the conclusions in the paper, the Paper Review Committee also considered whether information protected by Section 8 of the CEA is disclosed within the tables contained in the paper. For example with regard to Table 3 in the paper, the

Paper Review Committee noted "... this information was aggregated over a particular (one month) time interval, and that the cells were constructed using data from many firms and pair wise groupings. As noted before, each firm type (aggressive HFTs, passive HFTs and mixed HFTs) is an aggregate of many firms." The Paper Review Committee went on to conclude that the data in Table 3 provided "no significant disclosure risk." Consequently, OGC concurs with the conclusions of the Paper Review Committee that there is no significant risk of disclosure of Section 8 data relating to the release of this paper.

Aside from the determination relating to Section 8, the paper is considered a government work product and may not be individually copyrighted by the authors. OGC concurs with the conclusion of the Paper Review Committee and clears this paper for publication subject to the use of the disclaimer provided below.

The following disclaimer must be used:

The research presented in this paper was co-authored by (b)(6),(b)(7)(C) a former CFTC contractor who performed work under contracts (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) a former CFTC contractor who performed work under contracts (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) (b) Andrei Kirilenko, former CFTC Chief Economist, was also a co-author who wrote this paper in his official capacity with the CFTC. The Office of the Chief Economist and CFTC economists produce original research on a broad range of topics relevant to the CFTC's mandate to regulate commodity future markets, commodity options markets, and the expanded mandate to regulate the swaps markets pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. These papers are often presented at conferences and many of these papers are later published by peer-review and other scholarly outlets. The analyses and conclusions expressed in this paper are those of the authors and do not reflect the views of other members of the Office of Chief Economist, other Commission staff, or the Commission itself.

**Paper #10**

(b)(6),(b)(7)(C)

by (b)(6),(b)(7)(C)

The Office of the General Counsel has completed its review of Paper #10. Our review included an evaluation of the findings of the OCE Paper Review Committee, review for compliance with the Standards of Ethical Conduct for Employees of the Executive Branch, review for compliance with contracting requirements under the Federal Acquisition Regulations, and an analysis of whether the paper fits within the permitted research activities set forth in 7 U.S.C. § 22. (b)(6),(b)(7)(C) Economist in the Office of the Chief Economist, has confirmed for us that the writing of this paper was undertaken as one of the permitted research activities set forth in Section 18 of the Commodity Exchange Act ("CEA"), codified at 7 U.S.C. § 22, in the development of educational and other informational materials regarding futures trading among producers, market users and the general public and to carry out the general purposes of the Commodity Exchange Act, as amended. In particular, (b)(6),(b) has noted that the research fosters the public interest by providing insight into the behavior of potentially large, potentially correlated actors in futures markets: central banks. Specifically, the growth of central bank reserve assets and the active use of central banks in listed and over-the-counter derivatives markets represents a significant occurrence in futures markets trading, and the impact is not well understood. This research examines the magnitude of trading by central banks and whether activity across central banks appears to be coordinated among actors. Additionally, (b)(6),(b) further observed that understanding the effects of potentially large participants in futures markets is highly relevant to the Commission's interest in regulating activities in these markets.

One of the co-authors, (b)(6),(b)(7)(C) was a CFTC contractor under contract (b)(6),(b)(7)(C), and he received compensation from the CFTC for the research and production of the paper. According to appointment documentation provided by the Office of Human Resources, the second author, (b)(6), (b) was appointed as a limited term employee with the position title of consultant. (b)(6), has been serving on a series of one year appointments with CFTC since (b)(6). As a limited term employee, (b)(6) is bound by the federal ethics regulations. The final author, (b)(6),(b)(7)(C) was appointed as a limited term employee with the position title of consultant. (b)(6),(b) has been serving on a series of one year appointments with CFTC since (b)(6). As a limited term employee, (b)(6),(b) is bound by the federal ethics regulations. Both (b)(6), and (b)(6), produced this paper in their official capacities and the paper was written within the scope of their official duties. Neither (b)(6), nor (b)(6),(b) received any compensation from an outside source for this paper. All three authors of Paper #10 signed the December 2012 non-disclosure agreement.

This paper was cleared by the Paper Review Committee for publication based on a review of the paper itself, a review of information provided by the authors, and the committee's conclusion that no information protected by Section 8 of the CEA, codified at 7 U.S.C. § 12, is revealed by the paper. More specifically, the Paper Review Committee has informed OGC that "it is unlikely that the paper could be used to identify any particular central bank in a manner that allows identification of that bank's positions, transactions, or strategies." In regard to specific Tables in the paper, "the Committee concluded that no specific details about a particular institution were revealed from the information provided" and that information "was too qualitative and incomplete to reveal confidential information." Based upon these representations, OGC concurs with the conclusion of the Paper Review Committee relating to Section 8 data.

Aside from the determination relating to Section 8, the paper is considered a government work product and may not be individually copyrighted by the authors. OGC concurs with the conclusion of the Paper

Review Committee and clears this paper for publication subject to the use of the disclaimer provided below.

The following disclaimer must be used:

The research presented in this paper was co-authored by (b)(6),(b)(7)(C) a former CFTC contractor who performed work under CFTC OCE contract (contract (b)(6),(b)(7)(C)) a CFTC limited term employee who was appointed as a consultant, and (b)(6),(b)(7) a CFTC limited term employee who was appointed as a consultant. The Office of the Chief Economist and CFTC economists produce original research on a broad range of topics relevant to the CFTC's mandate to regulate commodity futures markets, commodity options markets, and the expanded mandate to regulate the swaps markets pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. These papers are often presented at conferences and many of these papers are later published by peer-review and other scholarly outlets. The analyses and conclusions expressed in this paper are those of the authors and do not reflect the views of other members of the Office of the Chief Economist, other Commission staff, or the Commission itself.

(b)(6),(b)(7)(C)

Assistant General Counsel

U.S. Commodity Futures Trading Commission

**Paper #12**

(b)(6),(b)(7)(C) by Andrei Kirilenko, (b)(6),(b)(7)(C)

The Office of the General Counsel has completed its review of Paper #12. Our review included an evaluation of the findings of the Paper Review Committee, review for compliance with the Standards of Ethical Conduct for Employees of the Executive Branch, review for compliance with contracting requirements under the Federal Acquisition Regulations, and an analysis of whether the paper fits within the permitted research activities set forth in 7 U.S.C. § 22. (b)(6),(b)(7)(C) Economist in the Office of the Chief Economist, has confirmed for us that the writing of this paper was undertaken as one of the permitted research activities set forth in Section 18 of the Commodity Exchange Act ("CEA"), codified at 7 U.S.C. § 22, in the development of educational and other informational materials regarding futures trading among producers, market users and the general public and to carry out the general purposes of the Commodity Exchange Act, as amended. In particular, (b)(6),(b)(7)(C) has noted that the research fosters the public interest by providing insight into the "Flash Crash" of May 6, 2010. (This event was previously discussed in a joint SEC-CFTC report on the "Flash Crash".) The research poses three questions: 1) How did High Frequency Traders (HFTs) trade on May 6? 2) What may have triggered the Flash Crash? 3) What role did HFTs play in the Flash Crash? The analysis provides specific insight into the behavior and interactions of different trader types during this extreme event, facilitated by technological innovations.

One of the co-authors of this paper, Andrei Kirilenko, was a full-time CFTC employee who produced this paper in his official capacity within his scope of duty and received no other compensation for this paper. Another co-author, (b)(6),(b)(7)(C), was a full-time CFTC employee for a portion of the time when he worked on this paper. From (b)(6),(b)(7)(C) his work on the paper was conducted in his official capacity within his scope of duty, and he received no other compensation for the paper. From (b)(6),(b)(7)(C) to (b)(6),(b)(7)(C) was a CFTC contractor under contract (b)(6),(b)(7)(C) and received compensation from the CFTC for the research and production of the paper. From (b)(6),(b)(7)(C) to (b)(6),(b)(7)(C) was a CFTC contractor under contract (b)(6),(b)(7)(C) and received compensation from the CFTC for the research and production of the paper. The third co-author, (b)(6),(b)(7)(C) was a CFTC contractor under contract (b)(6),(b)(7)(C) and received compensation from the CFTC for the research and production of the paper. The final author, (b)(6),(b)(7)(C) was a CFTC contractor under contract (b)(6),(b)(7)(C) and received compensation from the CFTC for the research and production of the paper.

This paper was cleared by the Paper Review Committee for publication based on a review of the paper itself, a review of information provided by the authors, and the committee's conclusion that no information protected by Section 8 of the CEA, codified at 7 U.S.C. § 12, is revealed by the paper. More specifically, the Paper Review Committee has informed OGC that the smallest grouping of aggregated data within the paper was for 15 market participants, and that "15 was a sufficient level of aggregation for this sample" and "a grouping of 15 was likely to be sufficient to ensure that individual entity information was not revealed." The Paper Review Committee also discussed another table in the paper where "some cells might have a small population," but concluded that "this was unlikely to be an issue." The table presented summary statistics of the aggregate market over a short time frame, "limiting the Committee's concern over improper revelation of confidential data." Based upon these representations, OGC concurs with the conclusion of the Paper Review Committee relating to Section 8 data.

Aside from the determination relating to Section 8, the paper is considered a government work product and may not be individually copyrighted by the authors. OGC concurs with the conclusion of the Paper

Review Committee and clears this paper for publication subject to the use of the disclaimer provided below.

The following disclaimer must be used:

The research presented in this paper was co-authored by Andrei Kirilenko, a former full-time CFTC employee, (b)(6),(b)(7)(C) a former CFTC contractor who performed work under CFTC OCE contract (b)(6),(b)(7)(C) (b)(6),(b)(7)(C) a former full-time CFTC employee and former CFTC contractor who performed work under CFTC OCE contracts (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) a former CFTC contractor who performed work under CFTC OCE contract (b)(6),(b)(7)(C). The Office of the Chief Economist and CFTC economists produce original research on a broad range of topics relevant to the CFTC's mandate to regulate commodity futures markets, commodity options markets, and the expanded mandate to regulate the swaps markets pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. These papers are often presented at conferences and many of these papers are later published by peer-review and other scholarly outlets. The analyses and conclusions expressed in this paper are those of the authors and do not reflect the views of other members of the Office of the Chief Economist, other Commission staff, or the Commission itself.

(b)(6),(b)(7)(C)

Assistant General Counsel

U.S. Commodity Futures Trading Commission

**Paper #24**

(b)(6),(b)(7)(C)

The Office of the General Counsel has completed its review of Paper #24. Our review included an evaluation of the findings of the Paper Review Committee, review for compliance with the Standards of Ethical Conduct for Employees of the Executive Branch, review for compliance with contracting requirements under the Federal Acquisition Regulations, and an analysis of whether the paper fits within the permitted research activities set forth in 7 U.S.C. § 22. (b)(6),(b)(7)(C) Economist in the Office of the Chief Economist, has confirmed for us that the writing of this paper was undertaken as one of the permitted research activities set forth in Section 18 of the Commodity Exchange Act ("CEA"), codified at 7 U.S.C. § 22, in the development of educational and other informational materials regarding futures trading among producers, market users and the general public and to carry out the general purposes of the Commodity Exchange Act, as amended. In particular, (b)(6),(b)(7)(C) has noted that the research fosters the public interest by providing methodological research into the classification of trader types by algorithm using market data rather than by self-identification or through classification by simple summary statistics. This methodological research provides a building block for a better understanding of price discovery mechanisms of markets and for investigating the impacts of technology and the interaction of different trader types on the dynamics of the price process. Additionally, (b)(6),(b)(7)(C) further explained that research on price discovery is relevant to the Commission's interest in fostering transparency in the futures and swaps markets and the paper includes specific proposals that have a direct bearing on price discovery role of the centralized market of DCMs.

According to information provided by the Office of the Chief Economist and the Procurement Office, (b)(6),(b)(7)(C) was a CFTC contractor under contract (b)(6),(b)(7)(C) and received compensation from the CFTC for the research presented in this the paper.

This paper was cleared by the Paper Review Committee for publication based on a review of the paper itself, a review of information provided by the authors, and the committee's conclusion that no information protected by Section 8 of the CEA, codified at 7 U.S.C. § 12, is revealed by the paper. More specifically, the Paper Review Committee has informed OGC that "very little of the paper is based on internal CFTC data" and that "the author has sufficiently aggregated or masked information to avoid revealing position or other information protected under Section 8." Based upon these representations, OGC concurs with the conclusion of the Paper Review Committee relating to Section 8 data.

Aside from the determination relating to Section 8, the paper is considered a government work product and may not be individually copyrighted by the authors. OGC concurs with the conclusion of the Paper Review Committee and clears this paper for publication subject to the use of the disclaimer provided below.

The following disclaimer must be used:

The research presented in this paper was authored by (b)(6),(b)(7)(C) a former CFTC contractor who performed work under CFTC OCE contract (contract (b)(6),(b)(7)(C)). The Office of the Chief Economist and CFTC economists produce original research on a broad range of topics relevant to the CFTC's mandate to regulate commodity futures markets, commodity options markets, and the expanded mandate to regulate the swaps markets pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. These papers are often presented at conferences and many of these papers are later published by peer-review and other scholarly outlets. The analyses and conclusions expressed in this

paper are those of the authors and do not reflect the views of other members of the Office of the Chief Economist, other Commission staff, or the Commission itself.

(b)(6),(b)(7)

Assistant General Counsel

U.S. Commodity Futures Trading Commission

**Appendix 6 – Management Response**

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Commodity Futures Trading Commission Management Response  
to the Office of the Inspector General's  
Confidential Discussion Draft of the  
Review of the Commission's Response to Allegations Pertaining to the Office  
of the Chief Economist

Dated: February 12, 2014

Joseph R. Cisewski, Co-Chief of Staff &  
Co-Chief Operating Officer  
Anthony C. Thompson, Executive Director  
Janet L. Marcus, General Counsel  
John L. Rogers, Chief Information Officer  
Sayee Srinivasan, Chief Economist

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### Introduction

In January 2013, then-Commodity Futures Trading Commission ("CFTC" or "Commission") Chairman Gary Gensler ("Chairman") requested a formal investigation into issues regarding the use of non-public data by the Office of the Chief Economist ("OCE") and the manner in which academic consultants and contractors were brought into the agency, their status with respect to the agency, their access to CFTC systems and information, and the adequacy of related documentation.<sup>1</sup> In his request, the Chairman noted that CFTC staff were reviewing issues spanning several important functions at the agency: human resources, procurement, logistics, data, and legal.<sup>2</sup> He also noted that all of these issues warranted the Inspector General's review.<sup>3</sup> In response to this letter, the Inspector General opened an investigation to review the facts relevant to the issues raised in the Chairman's letter.

On December 18, 2013, the Office of the Inspector General ("OIG") provided a Confidential Discussion Draft of its Review of the Commission's Response to Allegations Pertaining to the Office of the Chief Economist (hereinafter "the Draft Report") to CFTC Management.<sup>4</sup> CFTC Management appreciates the opportunity to review and respond to the Draft Report and also appreciates the time and attention that the OIG has spent reviewing the issues raised by the Chairman. While the Draft Report sets forth certain internal control issues and deficiencies, we want to bring to your attention several issues we have identified that we believe warrant certain revisions in the Draft Report.

As explained below, CFTC Management requests corrections to ensure the complete accuracy of the document and to address certain instances in which statements in the Draft Report may be read as conflicting and contradictory. We also request further sourcing and attribution of some of the facts alleged in the Draft Report, as well as the relevant witness statements or other documentation, such as employee administrative paperwork, reviewed and relied upon by the OIG to reach specific conclusions and make recommendations. As further explained below, CFTC Management also disagrees with certain legal conclusions set forth in the Draft Report concerning the applicability of the First Amendment to work conducted in OCE and the review process implemented by the agency, the appointment authority of the Chief Economist, retroactive corrections of paperwork, and the applicability of outside employment ethics regulations to OCE economists.

<sup>1</sup> Letter from Gary Gensler, Chairman, Commodity Futures Trading Commission, to Eric Liviak, Inspector General, Commodity Futures Trading Commission (Jan. 24, 2013) (hereinafter "Gensler Letter to OIG on OCE").

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> OFFICE OF THE INSPECTOR GEN., COMMODITY FUTURES TRADING COMM'N, CONFIDENTIAL DISCUSSION DRAFT, REVIEW OF THE COMMODITY FUTURES TRADING COMM'N RESPONSE TO ALLEGATIONS PERTAINING TO THE OFFICE OF THE CHIEF ECONOMIST (2013) (hereinafter "DRAFT REPORT").

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In this response, we include specific suggestions to address some of the identified issues, including revisions to some portions of the Draft Report or requests for more facts to enable CFTC Management to make appropriate decisions on how to respond to the OIG's findings and conclusions. We welcome the opportunity to discuss the issues identified and our recommendations with the OIG further.

Part I of this memorandum provides background and a summary of CFTC Management action taken in response to the issues identified in the Chairman's referral to the OIG. Part II responds to the OIG's conclusion that the temporary suspension of publications produced by OCE economists potentially violates Section 18 of the Commodity Exchange Act ("CEA").<sup>5</sup> Part II also discusses the use of CFTC data in economic research papers and responds to the OIG's findings and conclusions that the OCE economists properly accessed Commission data under the economic research program, and such access to data and information did not violate Section 8 of the CEA<sup>6</sup> or the Privacy Act of 1974 ("Privacy Act").<sup>7</sup> Part III sets forth CFTC Management's view of the correct First Amendment review standard for papers produced by OCE economists and responds to the Draft Report's allegation that the CFTC paper review process may potentially serve as a prior restraint on First Amendment protected speech. Part III also responds to certain factual statements in the Draft Report and requests that the OIG eliminate the attribution therein of the temporary suspension on published papers written by OCE economists during the pendency of the review to the Deputy General Counsel for (b)(6), (b)(7)(C). Part IV discusses the scope and impact of errors in administrative paperwork for OCE economists. Finally, Part V identifies additional factual issues and statements for which there does not appear to be adequate support.

**I. Background and Summary of CFTC Management Action**

On December 5, 2012, Mark Young and Jerry Salzman of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), contacted Dan Berkovitz, then CFTC General Counsel, on behalf of the Chicago Mercantile Exchange ("CME") regarding a paper entitled (b)(6), (b)(7)(C). Mr. Young and Mr. Salzman raised concerns that individuals who may have been given confidential CFTC information had used their access to that information and knowledge of the CME Order Book to market themselves and this knowledge to traders and competitors of CME.<sup>8</sup> In a subsequent letter, CME raised a series of questions about what authority was delegated to the Chief Economist with respect to using non-public information, particularly Section 8

<sup>5</sup> 7 U.S.C. § 22(a) (the Commission must maintain a research program to provide information to the public and carry out the general purposes of the CEA).

<sup>6</sup> 7 U.S.C. § 12(a) (the Commission cannot disclose certain non-public information, including business transactions, market positions, trade secrets, or customer names).

<sup>7</sup> 5 U.S.C. § 552a.

<sup>8</sup> E-mail from Dan M. Berkovitz, then General Counsel, to Eric Juzwas, (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C) Dec. 5, 2012 (Re: FW: Use of CFTC data in a publicly accessible study).

<sup>9</sup> *Id.*

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information, and what criteria and procedures the Commission established for approving research, particularly for individuals conducting personal research.<sup>10</sup> Following the initial conversation with the Skadden attorneys and at the direction of the Chairman, the then-CFTC General Counsel, Deputy General Counsel for (b)(6), (b)(7)(C) and other OGC attorneys initiated a review of the research work and papers produced by OCE. OGC reached out to OCE, the Office of the Executive Director ("OED") and the Office of Data and Technology ("ODT") to coordinate the review and assess corrective measures and programmatic improvements.

A. Role of the Office of Chief Economist

As explained on the CFTC website, the mission of OCE is described as follows:

The Office of the Chief Economist provides economic support and advice to the Commission, conducts research on policy issues facing the Commission, and educates and trains Commission staff. The OCE plays an integral role in the implementation of new financial market regulations by providing economic expertise and cost-benefit considerations underlying those regulations.<sup>11</sup>

One function of OCE is to conduct economic research that assists the Commission in fulfilling obligations set out in Section 18 of the CEA, codified at 7 U.S.C. § 22, which requires the CFTC to:

"establish and maintain . . . research and information programs to:

- (1) determine the feasibility of trading by computer, and the expanded use of modern information system technology, electronic data processing, and modern communication systems by commodity exchanges, boards of trade, and by the Commission itself for purposes of improving, strengthening, facilitating, or regulating futures trading operations;
- (2) assist in the development of educational and other informational materials regarding futures trading for dissemination and use among producers, market users, and the general public; and
- (3) carry out the general purposes of this chapter." 7 U.S.C. § 22.

Since approximately 2010, OCE economists have focused on high-frequency trading and its effects on the markets, new trading instruments and market participants, and other new trading technologies as they are developed and deployed. This research furthers the CFTC's ability to meet mission-critical challenges, and OCE makes the results of its research available to the public through information published on the CFTC's website and by presenting its research at

<sup>10</sup> Letter from Mark D. Young and Arnold E. Solomon, Skadden, Arps, Slate, Meagher & Flom LLP, to Dan M. Barkovitz, General Counsel, Commodity Futures Trading Commission (Dec. 14, 2012).

<sup>11</sup> CFTC Organization, Office, Chief Economist (OCE), U.S. COMMODITY FUTURES TRADING COMMISSION, <http://www.cftb.gov/About/CFTCOrganization/index.htm>.

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CFTC meetings or academic conferences. In addition to its full-time, permanent staff, OCE has staffed the office with contractors, compensated consultants appointed as limited-term employees, and uncompensated consultants appointed as limited-term employees.<sup>12</sup> The work conducted by OCE is overseen by the Chief Economist.

**B. Review of CME Initial Concerns**

On December 7, 2012, OGC discussed the scope of the (b)(6),(b)(7)(C) paper and the economic research with Andrei Kirilenko, then-CFTC Chief Economist ("Chief Economist"), in order to assess the concerns raised by CME. The Chief Economist informed OGC that in order to attract talent, the Commission enticed the economists with the opportunity to work on research that benefited their professional aspirations and goals and also benefited the Commission.<sup>13</sup> He explained the process whereby OCE economists determined their tasks and output.<sup>14</sup> Initially, OCE economists asked for data sets that they were interested in analyzing and would spend six to eight weeks performing analyses and familiarizing themselves with the data.<sup>15</sup> As far as the Chief Economist knew, there were no restrictions on the types of data the OCE economists could review.<sup>16</sup> Following the initial review period, the OCE economist would present his or her preliminary results to other OCE economists.<sup>17</sup> Thereafter, for four to eight weeks, the OCE economist would receive feedback from other OCE economists. The OCE economist would then spend four to twelve weeks writing a paper, which was presented internally.<sup>18</sup> At this point, while the paper was not "public," the Chief Economist informed the OCE economist that the paper could be submitted for peer review, conferences, seminars, and workshops.<sup>19</sup> The Chief Economist determined, on a case-by-case basis, whether OGC should be consulted to review the papers prior to publication.<sup>20</sup>

<sup>12</sup> Hereinafter, full-time, permanent staff, contractors, compensated consultants appointed as limited-term employees, and uncompensated consultants appointed as limited-term employees will be referred to collectively as "OCE economists" unless otherwise specified.

<sup>13</sup> Interview notes of an interview by (b)(6),(b)(7)(C) Cunniff, and (b)(6),(b)(7)(C) with Andrei Kirilenko, in Washington, D.C. (Dec. 7, 2012) (hereinafter "Interview with Andrei Kirilenko").

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* While OGC does not have facts about all papers produced by OCE economists, at least one paper, (b)(6),(b)(7)(C) was presented at conferences and seminars in (b)(6),(b)(7)(C) used

Chief Economist's authorization, however, the paper was subsequently sent to OGC and cleared in (b)(6),(b)(7)(C)

(b) *Id.*; Notes of the telephone interview by (b)(6),(b)(7)(C) (b)(6),(b)(7)(C)

(b)(6),(b)(7)(C) (b)(6),(b)(7)(C)

7. E-mail from (b)(6),(b)(7)(C) to Andrei Kirilenko (Nov. 1, 2012) (re: Paper sent for OGC Clearance)

(b)(6),(b)(7)(C)

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Two OCE economists shared the responsibility to transfer the requested data from the CFTC main network to a separate computer network for OCE economists ("OCENet").<sup>21</sup> Originally, only the Division of Enforcement ("DOE") and the Division of Market Oversight ("DMO") were delegated authority to share the data; therefore, all data requests had to go through DOE or DMO.<sup>22</sup> However, after the Chief Economist made a request, he was delegated limited authority to disclose confidential information to a contract market, swap execution facility, swap data repository, registered futures association or self-regulatory organization<sup>23</sup> and to disclose confidential information to any Federal or State department or agency, or foreign government agencies and foreign futures authorities acting within the scope of their jurisdiction.<sup>24</sup>

In an interview with OGC attorneys on December 11, 2012, (b)(6), (b)(7) an OCE economist tasked with transferring data, explained the procedures he followed to load data to OCENet.<sup>25</sup> When other OCE economists requested data, (b)(6), (b)(7) pulled the data from the appropriate system on the CFTC main network and loaded it onto a Commission external hard drive.<sup>26</sup> (b)(6) did not routinely notify DOE, DMO, or DSIQ of the data requests, nor did he track the requests.<sup>27</sup> The OCE economist who requested the data would log on to an individual machine (b)(6), (b)(7) did not believe he had the permissions to log on as himself, and (b)(6), (b)(7) utilized the external hard drive to download the data.<sup>28</sup> (b)(6), (b)(7) routinely left the hard drive connected to the machine and returned to his office while the data was downloading.<sup>29</sup> When the download was complete, he did not immediately retrieve the external drive and the drive could remain connected to the machine for up to a week.<sup>30</sup> The external hard drives were not encrypted, and the data included account numbers and positions.<sup>31</sup> (b)(6), (b)(7) believed, but could not confirm, that the data also contained other personal identifiers.<sup>32</sup> The data was downloaded to any location the OCE economists chose, including the OCENet server or the local hard drive.<sup>33</sup> (b)(6), (b)(7) was uncertain whether OCE economists had individual accounts where data could be stored and, although OCE economists could elect to limit access to the data they requested, there was no requirement to do so.<sup>34</sup> OCE economists could easily attach external

<sup>21</sup> Interview with Andre Kasjanek, *supra* note 13; interview notes of an interview by (b)(6), (b)(6), (b)(7) with (b)(6), (b)(7) former OCE economist, in Washington, D.C. (Dec. 11, 2012) (December 11 interview with (b)(6), (b)(7)).

<sup>22</sup> After the Commission reorganization, this authority was also delegated to the Division of Swaps and Intermediary Oversight ("DSIO").

<sup>23</sup> 17 C.F.R. § 1.40.72.

<sup>24</sup> 17 C.F.R. § 1.40.73.

<sup>25</sup> Interview with (b)(6), (b)(7) *supra* note 21.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

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thumb drives and hard drives and download the data.<sup>35</sup> As far as (b)(6),(b)(7) knew, there was no effort to remove the data sets from OCENet upon completion of an OCE economist's project.<sup>36</sup>

**C. Structure and Use of OCENet**

After discussions with the Chief Economist and (b)(6),(b)(7) OGC and OED reviewed information security issues related to OCENet. According to John Rogers, CFTC Chief Information Officer ("CIO"), OCENet was established based on criteria provided by the Chief Economist. The CIO noted that it was ODT's practice to provide CFTC main network access to any staff for whom a security form (CFTC Form 719) was submitted to ODT. The CIO noted that internet-only access was available in the research workspace which contained OCENet, but was segregated from the CFTC main network, and OCENet and did not require a CFTC main network ID. Although some OCE economists were given CFTC main network accounts, OCE staff had the ability to provide individuals with access to OCENet, regardless of whether the individual had access to the CFTC main network. Originally, the OCE economists were not given CFTC main network access or access to the internet. At some point, however, some OCE economists were given CFTC main network access and internet connections that were adjacent to the OCENet server. The server, while encrypted, was positioned in an open and widely accessible area next to the elevator lobby, which required a CFTC badge to access unescorted. Finally, when originally created, ODT established only one user identification and password that was shared among all OCE economists.<sup>37</sup> At some point (believed to be in 2011 or 2012), ODT began giving OCE economists unique login names and passwords.

OCE economists with OCENet access had unrestricted access to any data that was transferred onto OCENet by OCE economists. That data may have included information received, created, and maintained by the Commission which was covered by Section 8 of the CEA, information subject to the Privacy Act, information received pursuant to Memoranda of Understanding ("MOU"), and other non-public information.

**D. Onboarding and Appointment of OCE Economists**

During the review of issues raised by CME, OGC and OED also discovered that there were a number of questions surrounding the onboarding and appointment of OCE economists. Due to incomplete or missing documentation, OED was not able to quickly identify the status of individuals who had been provided badges or were affiliated with OCE. Based on the available information, the agency also was not able to quickly determine whether certain OCE economists were consultants or contractors and whether the appropriate and required paperwork had been completed prior to the start of their work in OCE.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Interview with Andrei Kivlancko, *supra* note 13, DRAFT REPORT, at 10-11.

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For example, as part of the review, on February 28, 2013, OED reported that the status of (b)(6), (b)(7)(C) the OCE economist whose paper gave rise to CME's concerns, was "not properly appointed."<sup>35</sup> The same paperwork noted that other OCE economists also had the status of "not properly appointed," including (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C).<sup>36</sup>

Indeed, the documentation available to OED revealed that other individuals mentioned in the Draft Report also had errors in their administrative paperwork. For example, (b)(6), (b)(7)(C) discussed on page 17 of the Draft Report, and the OIG notes that it initially appeared there were no records for (b)(6), (b)(7)(C) but he had already published a paper as a Commission employee. (b)(6), (b)(7)(C) came to OGC's attention on December 7, 2012, when OGC was asked to review a paper already publically available on the internet that stated (b)(6), (b)(7)(C) used Commission transaction level data.<sup>43</sup> Although the agency could not initially confirm his status, OIG later identified a CFTC Outlook email account for (b)(6), (b)(7)(C).<sup>44</sup> According to the information provided, (b)(6), (b)(7)(C) did not have any appointment paperwork, but he had completed a CFTC Form 719 which permitted him to access the CFTC building.<sup>45</sup> However, (b)(6), (b)(7)(C) CFTC Form 719 indicated that he did not require information technology (IT)<sup>46</sup> or system access, but he had a CFTC Outlook email account, an OCENet account and CFTC main network access.<sup>47</sup>

Additionally, on March 5, 2013, OED provided information reflecting additional administrative paperwork errors with respect to other OCE staff. For example, five individuals who, according to OED, had no official status with the agency were given badges, CFTC main network access, or both.<sup>48</sup> Some individuals had completed a CFTC Form 719 which afforded access to the CFTC building and CFTC main network access, but others had not.<sup>49</sup> Another seventeen individuals were identified by OED as having other serious errors including: incomplete or no appointment paperwork, CFTC main network access without appropriate paperwork, no valid

<sup>35</sup> E-mail from (b)(6), (b)(7)(C) OED, to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Mar. 1, 2013) (OceNetReportRevised 2-28-13.xlsx).  
<sup>36</sup> *Id.*  
<sup>43</sup> Draft Report, at 17. OIG notes that OED eventually located (b)(6), (b)(7)(C) security clearance, but was unable to locate an SF 521.  
<sup>44</sup> E-mail from (b)(6), (b)(7)(C) to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Dec. 7, 2012) (Re: OGC Paper Clearance); E-mail from (b)(6), (b)(7)(C) to (b)(6), (b)(7)(C) (Dec. 7, 2012) (Re: OGC Paper Clearance).  
<sup>45</sup> E-mail from (b)(6), (b)(7)(C) OED, to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Mar. 1, 2013) (OceNetReportRevised 2-28-13.xlsx).  
<sup>46</sup> Attachment to E-mail from (b)(6), (b)(7)(C) OED, to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Mar. 1, 2013) (OceNetReportRevised 2-28-13.xlsx).  
<sup>47</sup> Attachment to E-mail from (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Mar. 4, 2013) (Re: Copy of Account Number.xlsx); Attachment to E-mail from (b)(6), (b)(7)(C) (Mar. 1, 2013) (Re: Copy of Account Number.xlsx); E-mail from (b)(6), (b)(7)(C) OED, to (b)(6), (b)(7)(C) (Mar. 2, 2013) (Re: FW: (b)(6), (b)(7)(C)); Attachment to E-mail from (b)(6), (b)(7)(C) OED, to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Mar. 7, 2013) (Re: FW: Review of SAC Notice (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C)).  
<sup>48</sup> Attachment to E-mail from (b)(6), (b)(7)(C) OED, to (b)(6), (b)(7)(C) (Mar. 1, 2013) (OceNetReportRevised 2-28-13.xlsx), see also Chart from (b)(6), (b)(7)(C) OED, to (b)(6), (b)(7)(C) (Mar. 1, 2013); E-mail from (b)(6), (b)(7)(C) Human Resources, to (b)(6), (b)(7)(C) OED (Dec. 19, 2012) (Review of FTE).  
<sup>49</sup> *Id.*

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contract, badge access without complete paperwork, or retention of the badge or network access after expiration of the contract.<sup>47</sup>

**E. Temporary Suspension of Publication and Closure of OCENet**

OGC's initial review of OCE was conducted in coordination with OCE, OED, and ODT and identified deficiencies in the documentation related to the appointments of, and contracts for OCE economists. Based on this information, on December 7, 2012, the Chairman directed OGC to work with the Chief Economist to ensure that all OCE economists ceased sharing, publishing, distributing, or otherwise making available any papers or other products generated with CFTC trading data to any non-CFTC individuals or parties while the review of OCE was pending.<sup>48</sup> The Chief Economist promptly issued the instruction to OCE staff.<sup>49</sup>

On December 10, 2012, all Commissioners were informed of the questions raised by CME about OCE research publications.<sup>50</sup> On December 11, 2012, Eric Juzenas, then-CFTC Chief Operating Officer ("Chief Operating Officer"), informed the CFTC's Inspector General that CME had raised concerns about OCE and that OGC was looking into those concerns. Because the agency could not confirm the status of individuals with known access to data through OCENet, on December 11, 2012, the Chief Operating Officer instructed the CIO to terminate access to data to anyone in OCE other than full-time CFTC employees.<sup>51</sup> On December 12, 2012, the CIO confirmed that "[a]ll OCE non-FTE access to Commission technology has been disabled."<sup>52</sup>

The Chairman's directions to suspend publication pending review and to limit access to non-public data to full-time CFTC employees were targeted and reasonable measures designed to address the discovery of both paperwork irregularities with respect to OCE personnel and security concerns with respect to OCENet.

**F. Decision to Recommend that the Chairman Refer Matter to the OIG**

When the issues uncovered by the review of CME's concerns were brought to CFTC Management's attention, the respective managers in OED and ODT worked closely with OGC to assess issues and to identify potential corrective measures and programmatic improvements. CFTC Management identified systemic problems with how administrative paperwork was processed and handled in OCE. We believed the problems were of such importance and magnitude that we collectively recommended that the Chairman refer the matter to the OIG for a

<sup>47</sup> *Id.*  
<sup>48</sup> General Letter to OIG on OCE, E-mail from (b)(6), (b)(7)(C) to Andrei Kirilenko (Dec. 7, 2012) (Re: Follow Up on OCE Review Discussion).

<sup>49</sup> E-mail from Andrei Kirilenko to (b)(6), (b)(7)(C) (Dec. 7, 2012) (Re: RE: Follow Up on OCE Review Discussion).

<sup>50</sup> E-mail from Dan Berkovitz to Jill Summers, Bart Chilton, Scott O'Malley, Mark Wojan, and Gery Cleaver (Dec. 10, 2012) (Re: OCE Publication Issue).

<sup>51</sup> E-mail from Eric Juzenas to Anthony C. Thompson, (b)(6), (b)(7)(C), John L. Rogers, Dan M. Berkovitz, Catherine McCoy, and Andrei Kirilenko (Dec. 11, 2012) (Re: Access to Data).

<sup>52</sup> E-mail from John L. Rogers to Anthony C. Thompson, (b)(6), (b)(7)(C), Eric Juzenas, Dan M. Berkovitz, Catherine McCoy, and Andrei Kirilenko (Dec. 12, 2012) (Re: RE: Access to Data).

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formal investigation. The Chairman expressed his concern about these problems and errors, and he swiftly reported the errors to the OIG.<sup>33</sup>

**G. Ongoing CFTC Management Response and Actions**

After the issues were referred to the OIG by the Chairman and while the OIG review was pending, CFTC Management continued to address identified issues on a forward-looking basis. We limited our efforts to those action steps and items that could be taken without interfering with the review being conducted contemporaneously by the OIG. At the time of the January 2013 referral of this matter to the OIG, CFTC Management was unaware of the entire scope of issues surrounding the manner in which OCE economists were brought into the agency, their status with respect to the agency, their access to CFTC systems and information, and the adequacy of documentation related to their status. CFTC Management has at all times been committed to protecting confidential and non-public information and to the proper onboarding of its employees and contractors; we have taken swift and appropriate action to address identified internal control issues. CFTC Management's review included an examination of the roles played by OCE, ODT, OGC, and OED in staffing and providing support to the OCE economists.<sup>34</sup>

Since January 2013, CFTC Management has taken the following steps to address the issues raised by the review of OCE staffing and research:

- OED assessed the available documentation for every OCE economist including anyone with a badge, network access, an appointment via an SF-52, on detail from another federal agency or on a contract. OED reviewed the security clearance for every active OCE contractor and consultant.
- In coordination with OCE, OED (Logistics & Operations ("LO")) deactivated and collected the badges of any OCE staff member who was not appropriately appointed or whose appointment or contract was terminated.
- OED developed procedures to ensure that building and system access are established on the dates of appointment and contract execution and terminated on the date of appointment or contract expiration and developed a process for ensuring access is terminated for any employee departing the agency.
- OED (LO) strengthened and enforced policies to ensure that the on-boarding process will not begin without receiving a copy of an SF-52 or contract number. OED (LO) requires and retains copies of SF-52s to ensure a complete and auditable clearance file.

<sup>33</sup> Gensler Letter to OIG on OCE.

<sup>34</sup> For a complete discussion of the CFTC Management review, please see the draft of the CFTC Business Management Report Regarding Office of Chief Economist Research Program.

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- If an appointment or contract is extended, OED requires a new Form 719 and the accompanying documentation prior to an extension or renewal of an individual's badge expiration date. OED implemented procedures for new badges (PIV cards) to ensure that only individuals with a valid appointment or contract are provided access to CFTC property. PIV cards contain an expiration date corresponding to the end of an employee's appointment or contract expiration date.
- OED strengthened the manual processes used to process appointments.
- OED (Human Resources) developed a Standard Operating Procedure for approving, processing, and tracking requests for uncompensated staff to ensure appropriate oversight of the use of uncompensated staff in the future.
- OED and ODT require that all new staff, including contractors and consultants, complete privacy and security training within five days of starting at the CFTC.
- ODT initiated a review of how to create a reconstituted environment in OCE, if determined appropriate, based on explicitly defined requirements so that hardware, software, and security control design are appropriate for the requirements. The review will consider:
  - o Segregation of data by MOU and access controls at the MOU level;
  - o Logging of approval and concurrence on datasets entering and exiting the environment;
  - o Delegation of administrative privileges;
  - o Increased logging of activities in the environment;
  - o Logical Access Control via HSPD-12 PIV cards;
  - o (b)(7)(E)
  - o Potential separation of the environment from the CFTC network to allow greater flexibility for software use.

OGC has compiled a preliminary database of over 100 MOUs entered into by the CFTC to share information with Federal, state and international entities and is working to make the database available as an agency resource. After the confidential data review is complete, OGC will work with the divisions and ODT to ensure proper access and controls are implemented.

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- OCE drafted a proposed workflow for long-term research projects that communicates to staff OCE's research mandate and the general process by which research will be conducted.
- OGC reviewed the legal authority for research conducted by the Commission, including authority for publication of Commission or individual papers and proper use of Section 8 data by CFTC employees.

CFTC Management requests that the OIG revise the Draft Report to reflect that, once CFTC Management was made aware of issues surrounding the manner in which the OCE economists were brought into the agency, their status with respect to the agency, their access to CFTC systems and information, and the adequacy of documentation related to their status, we took immediate and appropriate actions to remedy the issues while the matter was pending OIG review.

**II. Established and Implemented New Review Process for Pending Papers**

In addition to the CFTC Management actions described above and while the OIG review was pending, OCE, OGC, and the Office of the Chairman worked to implement a review process for papers written by OCE economists that addressed concerns raised that the existing Section 8 review of papers was not as robust as required to assess and identify potential aggregation and reverse engineering concerns raised by data, charts, tables, algorithms, and other information contained in the papers produced by OCE economists.

Historically, either the Chief Economist determined that a paper could be released or, at the request of the Chief Economist, an OGC attorney conducted a review of research papers to determine whether the statistical data and information presented in the papers disclosed "business transactions or market positions of any person and trade secrets or names of customers" in violation of Section 8(a) of the CEA.<sup>25</sup> More specifically, the OGC attorney completed a limited review of the paper to determine whether the statistical data and information

<sup>25</sup> Memorandum from (b)(6), (b)(7)(C) (Feb. 8, 2013) (Re: Section 8 Review of OCE Papers); Interview with Andrei Kirilenko, *supra* note 13; E-mail from (b)(6), (b)(7)(C) (Jan. 29, 2014) (Re: RE: Memorandum re Section 8 Review of OCE Papers); (b)(6), (b)(7) stated being issues with reviewing papers from since time in 2006 until December 2012; (b)(6), (b)(7) could only locate records clearing six papers produced by OCE economists, but recalls clearing more. E-mail from (b)(6), (b)(7) (Jan. 29, 2014) (Re: RE: Memorandum re Section 8 Review of OCE Papers); see also E-mail from (b)(6), (b)(7) to Andrei Kirilenko (Sept. 23, 2011) (Re: RE: Paper for OGC clearance); E-mail from (b)(6), (b)(7) to Andrei Kirilenko and (b)(6), (b)(7) (Mar. 5, 2012) (Re: RE: Paper for OGC clearance); E-mail from (b)(6), (b)(7) (Apr. 17, 2012) (Re: Academic Paper Compliance Review); E-mail from (b)(6), (b)(7) (May 31, 2012) (Re: RE: Publication); E-mail from (b)(6), (b)(7) to Andrei Kirilenko (Sept. 27, 2012) (Re: Paper for OGC Review for Compliance with Section 8, and Request for Approval of Outside Employment); E-mail from (b)(6), (b)(7) to Andrei Kirilenko (Nov. 1, 2012) (Re: Paper draft for OGC clearance); (b)(6), (b)(7) As part of the newly implemented review process, OGC has implemented new recordkeeping requirements so that records of OGC legal review and clearance of papers will be kept in appropriate records systems as required by the Federal Record Act of 1950, as amended, 44 U.S.C. §§ 2901 et seq., 3301 et seq., 3301 et seq.

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presented in the paper either met, or exceeded, the level of aggregation for data and information that was contained in the Commission's Commitment of Traders ("COT") Reports.<sup>56</sup>

After the Chairman referred this matter to the OIG, the Office of the Chairman, OCE, and OGC began working through a new review process for papers that would enable the agency to assess and identify potential disclosure of Section 8 information in data, charts, tables, algorithms, and other information contained in the papers produced by OCE economists. As the Draft Report notes, reviewing the OCE economists' papers for information protected under Section 8 can be "complex, requiring an examination of context to determine whether aggregated trade data in an economic research paper may be reverse engineered. . . ."<sup>57</sup> This complex analysis is the very reason why the Chairman requested a review of the Commission's historical practices of reviewing papers. After the review, CFTC Management determined that it would be appropriate to expand the review of all papers to engage in a more complex, fact-intensive review in an effort to identify Section 8 data in papers.

On February 13, 2013, Scott Mixon, then-CFTC Acting Chief Economist, the Chief Operating Officer, and the Deputy General Counsel for (b)(6),(b)(7)(C) met to discuss how to move forward with paper review. They determined that additional information from the OCE economists was necessary to complete the review. On February 14, 2013, Mr. Mixon sent all OCE economists who had drafted papers for review a series of questions drafted by OGC with input from OCE and the Office of the Chairman.<sup>58</sup> On March 15, 2013, to move the review of papers forward, the Chief Operating Officer reached out to CFTC staff in DMQ, DSIO, ODT, and OCE with identified skill sets that would enable them to review papers for Section 8 information (hereinafter "Paper Review Committee").<sup>59</sup> On May 9, 2013, the then-Acting Chief Economist circulated a draft "checklist"/framework for paper review to the Chief Operating Officer and the Deputy General Counsel for (b)(6),(b)(7)(C) prior to the first meeting of the Paper Review Committee on May 20, 2013.<sup>60</sup> At the time of the May 20, 2013 meeting, OCE identified 23 papers for review.<sup>61</sup>

At the first meeting of the Paper Review Committee, individual papers were assigned to committee members for Section 8 review before discussion by the entire group.<sup>62</sup> The Paper Review Committee is tasked with reviewing each paper and assessing the type of data and

<sup>56</sup> Memorandum from (b)(6),(b)(7)(C) to (b)(6),(b)(7)(C) Feb. 8, 2013) (Re: Section 8 Review of OCE Papers).  
<sup>57</sup> DRAFT REPORT, at 15.  
<sup>58</sup> E-mail from Scott Mixon to OCE economists (Feb. 14, 2013) (Re: CFTC research review process for existing working papers).  
<sup>59</sup> E-mail from Eric Juzenas to CFTC staff (Mar. 15, 2013) (Re: Paper Review); E-mail from Eric Juzenas to (b)(6),(b)(7)(C) Thompson, (b)(6),(b)(7)(C) Scott Mixon, (b)(6),(b)(7)(C) Dan Berkowitz, (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) (May 15, 2013) (Re: Review of OCE research papers).  
<sup>60</sup> E-mail from Scott Mixon to Eric Juzenas and (b)(6),(b)(7)(C) May 9, 2013) (Re: Checklist for paper review); E-mail from Scott Mixon to Paper Review Committee (May 20, 2013) (Re: RE: OCE Paper Review).  
<sup>61</sup> Attachment to E-mail from Scott Mixon to Paper Review Committee (May 20, 2013) (Re: RE: OCE Paper Review).  
<sup>62</sup> E-mail from Scott Mixon to Paper Review Committee (May 20, 2013) (Re: RE: OCE Paper Review).

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information used, the data and information sources, and the number of traders/entities, among other factors. If issues or concerns are identified during this review, the Paper Review Committee will then engage in discussions with the author(s) so that the paper(s) can be reworked to address any concerns about the potential disclosure of Section 8, confidential, non-public, or other protected information and data. After the Paper Review Committee completes its review, it sends the paper with its recommendation to OGC.

On June 18, 2013, the Paper Review Committee provided OGC with three papers for legal review.<sup>63</sup> OGC attorneys next conduct a legal compliance review which includes a determination of the OCE economist's status, a review of whether there has been any disclosure of Section 8 data or other protected data or information, and a review for compliance with the ethics regulations, confidentiality regulations, the Privacy Act, and Section 14 of the CEA. In addition, if the paper was written pursuant to a contract, OGC reviews the paper for compliance with the terms of the individual contract and any applicable non-disclosure agreement. On September 17, 2013, the Paper Review Committee provided OGC with two papers for review.<sup>64</sup> On October 23, 2013, OGC completed the legal review of three papers.<sup>65</sup> On November 27, 2013, December 3, 2013, and December 20, 2013, the Paper Review Committee provided the OGC with a total of seven additional papers for review.<sup>66</sup>

OGC has devoted as many resources as possible, consistent with existing budget and staffing, to the legal review of papers. It is important to note that during the summer and fall of 2013 while the paper review process was pending, there were several major legal issues facing CFTC, including responding to a congressional inquiry, the October government shutdown, CFTC administrative furloughs, and other appropriations issues, including the agency's transfer authority. Regarding the time frame for OGC review and clearance, none of the papers which have been cleared by the Paper Review Committee have been awaiting OGC clearance for more than five months. Currently, OGC has nine papers under review and the Paper Review Committee has twelve additional papers which may be forwarded to OGC for review. In its

<sup>63</sup> E-mail from Scott Mixon to (b)(6), (b)(7)(C) June 18, 2013) (Re: Papers for potential clearance: theory or publicly available data only) (Paper #7, Paper #11, and Paper #14).

<sup>64</sup> E-mail from Scott Mixon to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Sept. 16, 2013) (Re: FW: Research Paper review) (Paper # 1 and Paper # 3). The OGC anticipates completing the legal review of these two papers in the next two weeks.

<sup>65</sup> E-mail from (b)(6), (b)(7)(C) to Scott Mixon (Oct. 23, 2013) (Re: Papers for Potential clearance: theory or publicly available data only); (Paper #7); E-mail from (b)(6), (b)(7)(C) to Scott Mixon (Oct. 23, 2013) (Re: Papers for Potential clearance: theory or publicly available data only) (Paper #12); E-mail from (b)(6), (b)(7)(C) to Scott Mixon (Oct. 23, 2013) (Re: Papers for Potential clearance: theory or publicly available data only) (Paper #14).

<sup>66</sup> E-mail from Scott Mixon to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Nov. 27, 2013) (Re: OCE Paper for clearance: Subject Matter Committee referral) (Paper # 10, Paper # 4); E-mail from Scott Mixon to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Nov. 27, 2013) (Re: RE: OCE Paper for clearance: Subject Matter Committee referral) (Paper # 10); E-mail from Scott Mixon to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Dec. 3, 2013) (Re: OCE Paper for clearance: Subject Matter Committee referral) (Paper # 3); E-mail from Scott Mixon to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Dec. 20, 2013) (Re: OCE Paper for clearance: Subject Matter Committee referral) (Paper # 8); and E-mail from Scott Mixon to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Dec. 20, 2013) (Re: OCE Paper for clearance: Subject Matter Committee referral) (Paper # 12).

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continuing effort to move the paper review forward. OGC has assigned paper review to four OGC attorneys. CFTC Management is confident that the paper review process will move more quickly going forward as all parties involved become familiar with the process and review required and has committed the resources in order to accomplish a quicker review.

**II. Use of CFTC Data in Economic Research Papers**

The Draft Report finds that the Chairman's decision to temporarily suspend publication potentially violated Section 18 of the CEA.<sup>67</sup> Further, the Draft Report discusses the use of data and information protected by Section 8 of the CEA ("Section 8 data") and mentions the Privacy Act, but makes no findings about the use of this data by OCE economists.<sup>68</sup> We have reviewed the Draft Report and disagree with the analysis regarding Section 18 and Section 8 of the CEA. Further, we believe the Draft Report does not fully address the issues concerning the use of information and data by OCE economists. Section A below analyzes the requirements of Section 18 and demonstrates that the Commission fully meets the Section 18 requirements and that the temporary ban on publication was not a potential violation of Section 18. Section B provides a brief history of Section 8 and analysis of access to Section 8 data. Section C provides the legal basis for sharing information covered by the Privacy Act. Sections D and E address the issues arising from access to and use of data and information that was received pursuant to a MOU or is non-public. CFTC Management believes that the issues identified in this section are significant and request that the Draft Report be revised as discussed below.

**A. Decision to Temporarily Suspend Publication of Economic Research Papers Did Not Potentially Violate Section 18 of the Commodity Exchange Act**

The CEA requires the Commission to maintain a research and information program, and Section 18 of the CEA provides the Commission with broad authority to conduct research for the "development of educational and other informational materials regarding futures trading for dissemination and use among producers, market users, and the general public . . . ."<sup>69</sup> In addition, the CEA permits the Commission to conduct research on other topics to carry out the general purposes of the CEA.<sup>70</sup> The Commission accomplishes this requirement through a variety of methods including: staff advisories, providing updated education materials (e.g., <http://www.cftc.gov/ConsumerProtection/EducationCenter/index.htm>), publishing reports about markets (e.g., the Commitment of Traders Reports), issuing press releases, facilitating speeches by individual Commissioners and staff, and publishing of papers prepared by OCE and other Commission staff.

<sup>67</sup> DRAFT REPORT, at iv, 15.

<sup>68</sup> *Id.* at 12-13.

<sup>69</sup> 7 U.S.C. § 22(a)(2).

<sup>70</sup> 7 U.S.C. § 22(a)(3) (authorizing research and information programs to "carry out the general purposes of this chapter").

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As noted in the Draft Report, there are four economic research papers posted on the Commission's public website, the most recent of which was published December 4, 2008.<sup>71</sup> In contrast to the small number of economic research papers, the Commission's public website contains hundreds of other reports and informational materials which the agency publishes each year to inform the public about commodity and futures trading, including hundreds published during the OIG's and OGC's reviews. OCE has continued to perform valuable economic research and recently developed and published the swaps report, which is based on Section 8 data, but has been aggregated in a manner that complies with the requirements of Section 6. On a weekly basis, it provides market participants and the public aggregated data on open swap positions and summarizes transaction activity. Therefore, the economic research papers are only one component of the Commission's efforts to educate and inform the public through the work of CFTC economists and the economic research supported by the CFTC. Furthermore, according to the Draft Report, most of the economic research papers prepared by OCE economists are published in private journals.<sup>72</sup> While publication of economic research in journals is important, several of the papers at issue are published for a very small and specific target academic audience rather than in media and outlets aimed broadly at "producers, market users, and the general public." 7 U.S.C. § 22(a). For example, (b)(6), (b)(7) paper, (b)(6), (b)(7)(C) was published on his webpage through (b)(6), (b)(7)(C) and he notes that the paper is a "Job Market Paper"<sup>73</sup> and his thesis for his Ph.D. in (b)(6), (b)(7)(C) is similarly identified as a "Job Market Paper" and is located on the (b)(6), (b)(7)(C) website.<sup>74</sup>

While the papers may reach the target audience listed in Section 18, the distribution to a primarily academic audience undercuts the Draft Report's contention that these economic research papers are designed specifically to inform the broader audiences listed in Section 18.<sup>75</sup> We believe that the Commission fulfills its Section 18 obligations by providing staff advisories, educational materials, speeches and reports, as well as by supporting economic research and the development of papers using CFTC resources, time and data. Indeed, nowhere does Section 18 require the Commission to publish economic research in academic journals. The Draft Report agrees that "section 18 does not specifically require the Commission to conduct economic research through the publication and presentation of juried economic research . . ."<sup>76</sup> This acknowledgment is not consistent with OIG's conclusion that the temporary suspension of

<sup>71</sup> The other papers posted were published on June 8, 2008, May 13, 2009, and April 3, 2005. See also DRAFT REPORT at 9.

<sup>72</sup> DRAFT REPORT at 9.

(b)(6), (b)(7)(C)

<sup>73</sup> DRAFT REPORT, at iv, 15, 31.

<sup>74</sup> *Id.* at 15.

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publication of economic research papers threatened to violate Section 18 of the CEA.<sup>78</sup> The temporary suspension of publication while paperwork irregularities and security concerns were investigated did not violate Section 18. These publications are only one component of many types of material that the agency produces, and continues to produce, to educate market participants and the public consistent with the requirements of Section 18.

As discussed in greater detail in Part I.H above and Part III.C.2 below, the agency has set up a thorough review process and is clearing papers on a case-by-case basis, consistent with the agency's statutory responsibility to protect Section 8 and other non-public data provided by market participants. For the duration of the OIG review into this matter and on a going-forward basis, the agency is committed to devoting available staff resources to the review of papers because it recognizes the importance of these papers to the individuals that have written them and the potential educational value they offer. But nothing in the Commission's review process threatens to violate, much less violates, Section 18 of the CEA. Therefore, CFTC Management disagrees with the conclusion that, by temporarily halting publication of the economic research papers during the pendency of a review, the agency has, in any way, "risk[ed] violating section 18 of the Act . . . ."<sup>79</sup>

CFTC Management respectfully requests that the OIG reconsider the Section 18 analysis in the Draft Report because, by the OIG's own conclusion, Section 18 does not require the publication of economic research in academic journals,<sup>80</sup> and therefore, the temporary actions that affected a non-statutorily required part of the agency's many efforts to disseminate information cannot risk violating Section 18. We request that the Draft Report be revised accordingly to reflect the requirements of Section 18 and to eliminate the suggestion that there may have been a violation or potential violation of that provision. In the alternative, because there is no violation or threatened violation of Section 18, that section of the Draft Report can be eliminated.

**B. Access to Information Protected under Section 8 of the Commodity Exchange Act**

As part of the Commission's efforts to educate and inform the public through the work of economists and the economic research supported by the agency, the Commission makes great efforts to ensure Section 8 data is protected and is not shared unless authorized. We agree with the Draft Report's summary of the general principles established by *Freeman v. Seligson*, which distinguished between a limited release of Section 8 material in a judicial proceeding and the general Congressional concern of "widespread dissemination of information not otherwise available to the public . . . ."<sup>81</sup>

<sup>78</sup> *Id.* at iv, 15.

<sup>79</sup> *Id.* at iv.

<sup>80</sup> *Id.* at 15.

<sup>81</sup> *Freeman v. Seligson*, 405 F.2d 1336, 1348-49 (D.C. Cir. 1968); DRAFT REPORT, at 12-13.

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The provision of the CEA that is currently Section 8 originated in the Futures Trading Act, and was shortly thereafter incorporated into the Grain Futures Act, the successor statute.<sup>82</sup> Congress substantially amended the Grain Futures Act as the Commodity Exchange Act; however, no substantial changes were made to the language of Section 8.<sup>83</sup> The Acts provided the Secretary of Agriculture with extensive powers of investigation to enable Federal supervision and regulation of commodity markets, particularly to prevent sudden fluctuations resulting from speculation, manipulation, and control.<sup>84</sup> However, Congress recognized that there was a benefit from some hedging and speculation, which would not be feasible if sensitive information regarding that activity were subject to competitive scrutiny.<sup>85</sup> Thus, Congress authorized the Secretary to collect data essential to overseeing the operation of commodity markets, without opening the data to the public eye.<sup>86</sup>

In the ensuing years, the Department of Agriculture cited Section 8 and its predecessors to consistently withhold all transactions of a person, and all trade secret and names of customers, except those found guilty of a violation, whereby the disclosure was made public in a public hearing as provided by law.<sup>87</sup> In addition, the Secretary consistently refused to provide data contained in reports when requested by Congress, citing the need to keep the business information confidential.<sup>88</sup> The most significant refusal to provide the requested information to Congress occurred in 1947 when the Senate Committee on Appropriations requested that the Secretary provide, in executive session, the names and amounts of speculators' purchases. The Secretary denied the request because "[t]he request calls for disclosure of the names and separate business transactions of persons trading in commodity futures whose trades and market positions are reported in confidence to the Department of Agriculture. These reports are obtained

<sup>82</sup> Futures Trading Act, § 9, Pub. L. 67-66, 42 Stat. 147 (1921); Grain Futures Act, § 3, Pub. L. No. 67-331, 42 Stat. 998 (1922), amended by Pub. L. No. 74-875, 49 Stat. 1491 (1936).

<sup>83</sup> Commodity Exchange Act, Pub. L. No. 74-675, 49 Stat. 1491 (1936).

<sup>84</sup> "... the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to an a business upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

Commodity Exchange Act, § 3, Pub. L. No. 74-675, 49 Stat. 1491 (1936) (current version at 7 U.S.C. § 5). Substantially the same provision appeared in the Grain Futures Act. Grain Futures Act, § 3, Pub. L. No. 67-331, 42 Stat. 998 (1922), amended by Pub. L. No. 74-875, 49 Stat. 1491 (1936).

<sup>85</sup> S. REP. NO. 67-212 (1921); S. REP. NO. 67-871 (1922); 61 CONG. REC. 1,321-22, 1,328, 4,762, 4,768 (1921); 62 CONG. REC. 9,447 (1922); 80 CONG. REC. 616, 8,012 (1925); *Regulation of Grain Exchanges: Hearing on H.R. 8829 Before the H. Comm. on Agric.*, 73rd Cong., at 2-3 (1914) [hereinafter *Hearing on H.R. 8829*].

<sup>86</sup> In *Dobson Presser Co. v. Hyde*, the Seventh Circuit ruled that Section 8 of the Act placed a seal of confidentiality upon information obtained in reports required under the Grain Futures Act. "[Section 8] forbids the revealing by the Secretary and his assistants of individual trades and of customers, and the findings here, predicated on the evidence, show that in the decade of experience since the act became operative no instances appear where any such confidence has been violated. . . ." 65 F.2d 350, 352 (7th Cir. 1933).

<sup>87</sup> *Hearing on H.R. 8829*, at 2-3; *Regulation of Commodity Exchanges. Hearing on H.R. 3009 Before the H. Comm. on Agric.*, 74th Cong. (1933).

<sup>88</sup> 61 CONG. REC. 1,321 (1921); *Hearing on H.R. 8829*, at 22-23; S. DOC. NO. 264 (1928), 70 CONG. REC. 4,982 (1928); S. DOC. NO. 63, 76 CONG. REC. 3,381 (1933).

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currently under authority of the Commodity Exchange Act.<sup>80</sup> Section 8 prohibited disclosure. Following this event, Congress passed a new provision that relaxed the Section 8 proscription in limited circumstances, which led to the currently enacted provisions.

Section 8 authorizes the Commission to make "investigations as it deems necessary to ascertain the facts regarding the operations of boards of trade and other persons subject to the provisions of this Act."<sup>81</sup> Further, it allows the Commission the discretion to "publish . . . the results of any such investigation and such general statistical information gathered therefrom as it deems of interest to the public . . ."<sup>81</sup> However, it specifically excludes certain information from publication: "except as otherwise specifically authorized in this Act, the Commission may not publish data and information that would separately disclose the business transactions of market positions of any person and trade secrets or names of customers."<sup>82</sup> Exceptions to the non-disclosure provision include disclosures (1) in connection with a congressional proceeding, administrative or judicial proceedings brought under the CEA, or certain bankruptcy proceedings; (2) in reports or orders related to the conduct of any registered entity or to the transactions of any person found guilty of violating the provision of the CEA or regulations, rules, or orders of the Commission; (3) to a Congressional committee acting within the scope of its jurisdiction; (4) to another department or agency of the United States acting within the scope of its jurisdiction;<sup>83</sup> (5) to another department or agency of any State acting within the scope of its jurisdiction;<sup>84</sup> (6) to another foreign futures authority or another department or agency of any foreign government or any political subdivision thereof acting within the scope of its jurisdiction;<sup>85</sup> and (7) to the Comptroller General for the purpose of conducting reviews and audits.<sup>86</sup>

The legislative history of Section 8 demonstrates Congress' clear understanding that this data is some of the most sensitive data the Commission possesses. Past administrations went to great lengths to maintain the confidentiality of Section 8 data, which ultimately led to the exceptions above. Within the limited exceptions to non-disclosure, Congress specified the only purposes for which further disclosure was permissible. The lengthy history and evolution of Section 8

<sup>80</sup> 93 CONG. REC. 3316 (1947).

<sup>81</sup> 7 U.S.C. § 12(b)(1).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> The Act restricts the entity's ability to further disseminate the information only in "any action or proceeding under the laws of the United States to which it, the Commission, or the United States is a party." 7 U.S.C. § 12(c).

<sup>85</sup> The Act restricts the entity's ability to further disseminate the information only in "connection with an adjudicatory action or proceeding brought under this Act or the laws of such State or political subdivision to which such state or political subdivision . . . is a party." *Id.*

<sup>86</sup> The Commission shall not furnish the information until it is satisfied that the information will not be disclosed except in connection with an "adjudicatory action or proceeding brought under the laws of such foreign government or political subdivision to which such foreign government or political subdivision . . . is a party." *Id.*

<sup>87</sup> The Act provides that in reports the Comptroller General "shall not include data and information that would separately disclose the business transaction of any person and trade secrets or names of customers. . . ." 7 U.S.C. § 12(g).

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illustrate Congressional intent to narrowly tailor any exceptions to the general prohibition on releasing Section 8 data. Congress recognized that, while the Commission needs Section 8 data to carry out its statutory purposes, this data warrants strong protections against public disclosure to avoid substantial injury to market participants.

Based on discussions with the OCE economists who downloaded the data onto OCENet, it is our understanding that many of the economists accessed and analyzed Section 8 data, which formed the basis for their publications.<sup>97</sup> The Draft Report states that “there is no basis to equate improper onboarding paperwork with improper access to CFTC Confidential data. . . . However, as described in greater detail in Part I.D above, as a result of the improper or missing paperwork, some OCE economists were not properly appointed or they retained access to the building and data after their term had expired; therefore, it was not appropriate to share Section 8 information with these individuals. In addition, many papers had co-authors and were juried papers submitted for peer review and we do not have sufficient facts to determine whether the data was disclosed to co-authors or jurors.”<sup>98</sup> Neither of these possibilities would be permissible disclosures of Section 8 data. However, the Draft Report contains no discussion of whether such disclosure occurred.

CFTC Management agrees with the OIG’s statement that “individuals employed by CFTC and physically present at the CFTC are granted access to information protected under Section 8 in the course of their work for the Commission.”<sup>99</sup> However, the Draft Report notes that there was an “absence of controls”<sup>100</sup> with respect to data available on OCENet<sup>101</sup> and problems with appointments; particularly in combination, these findings give cause for concern that access to protected data may not have been limited to individuals employed by the Commission and physically present here.

In addition, the Draft Report notes that some economists published papers “disregarding the Agency’s prohibition . . . [on publishing papers while the agency review was pending]” and

<sup>97</sup> Interview with (b)(6), (b)(7)(C) [redacted] dated 11/11/19. Additionally, in the paper that prompted the inquiry, the OCE economist stated that his analysis was based on (b)(6), (b)(7)(C) [redacted].

<sup>98</sup> Draft Report, at 19.

<sup>99</sup> *Id.* at 15.

<sup>100</sup> *Id.* at 43.

<sup>101</sup> *Id.* at 27, 31.

<sup>102</sup> CFTC Management believes that the finding in the Draft Report that there was an “absence of controls” is an overstatement. *Id.* While there was not segregated access to data within the OCENet environment and there were not automated controls, CFTC Management had implemented layers of controls on the access to and use of data through agency-wide policy, procedure and systems as well as training. CFTC Management acknowledges that these controls may not have been employed as successfully as intended in OCE, and may not have generally been sufficient, but CFTC Management is committed to ensuring that effective controls are implemented going forward. CFTC Management request that references in the Draft Report to an “absence of controls” be revised accordingly.

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specifically notes that (b)(6), (b)(7)(C) published a paper in (b)(6), (b)(7) on high-frequency trading — a subject similar to the initial paper he wrote using Commission data.<sup>103</sup> Additionally, the Draft Report notes that removable devices were attached to the computers assigned to OCENet.<sup>104</sup>

CFTC Management requests that the OIG share any forensic analysis and/or interview notes with respect to the OCK economists and their use of the data. CFTC Management is analyzing whether it will recommend additional action if data was improperly disclosed.

C. Access to Information Protected by the Privacy Act

In addition to complying with the requirements of Section 8 of the CEA, the Commission also endeavors to ensure information protected by the Privacy Act is not inappropriately accessed or disclosed as part of the Commission's efforts to educate and inform the public. The Draft Report observes that the Commission's Privacy Act notices permit a "number of non-public disclosures"<sup>105</sup> of data contained in the Commission's systems of records in addition to permissible disclosures under Section 8.<sup>106</sup> The Privacy Act was enacted to regulate the maintenance, use, and dissemination of information in identifiable form held in a "system of records" in federal agency files. Generally, the purpose of the Privacy Act is to balance the government's need to maintain information about individuals with the individuals' right to prevent unwarranted use and disclosure of their personal information. The Privacy Act's four main objectives are to (1) restrict disclosure of personally identifiable records; (2) grant individuals rights of access to records about themselves; (3) grant individuals the right to amend agency records about themselves in certain circumstances; and (4) establish practices to govern the collection, maintenance, and dissemination of records.<sup>107</sup>

The Privacy Act prohibits agencies from "disclos[ing] any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). There are twelve exceptions to this prohibition; however, with regard to OCK economists' papers, there are likely only two that apply. They are commonly referred to as the "need to know" and "routine use" exceptions. The "need to know" exception allows for disclosure "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C.

<sup>103</sup> DRAFT REPORT, at 33 n.124.

<sup>104</sup> *Id.* at 2.

<sup>105</sup> *Id.* at 13, 13 n.62.

<sup>106</sup> Section 8 data is maintained in the Enterprise Surveillance, Oversight & Risk Monitoring System. Privacy Act of 1974 System of Records Notice, 77 Fed. Reg. 58,814 (Sept. 24, 2012).

<sup>107</sup> U.S. DEPARTMENT OF JUSTICE OVERVIEW OF THE PRIVACY ACT OF 1974 (2012), at 4.

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§ 552a(b)(1). The “routine use” exception allows disclosure for a routine use as defined in the Privacy Act subsections (a)(7) and (e)(4)(D).<sup>108</sup>

Consistent with the Privacy Act, release of information in any system of records is proper only when the OCE economists have been properly employed and are “performing or working on a contract, service, grant, cooperative agreement, or job for the Federal government when necessary to accomplish an agency function.”<sup>109</sup> There are no routine use exceptions allowing the Commission to provide the information that may have been accessed by OCE economists working under expired contracts, who did not meet the proper hiring conditions or who had access to the information for purposes other than to accomplish an agency function.<sup>110</sup> Additionally, there are no routine use exceptions that would allow access to records in Privacy Act systems to private citizens. If as the Draft Report suggests, the OCE economists were preparing the papers as private citizens,<sup>111</sup> their access to the data would likely be a breach of the Privacy Act. Although the data from the OCENet server, the hard drives of each computer attached to the server, and the various external hard drives and thumb drives that were attached to the OCENet computers were captured forensically, CFTC Management has not been provided with the fact analysis of the data on OCENet to determine whether the Privacy Act was breached. If a breach has occurred, the Agency, through the Senior Agency Official for Privacy (the Executive Director), is required to report the breach and determine any necessary remediation. The Draft Report notes that some of the information on OCENet is protected by the Privacy Act,<sup>112</sup> but does not report any findings or conclusions with respect to whether any such information was improperly accessed.

CFTC Management requests that the OIG share any available data that may have been obtained by forensic review. We agree that the lack of segregated access to data within OCENet and the lack of automated controls may make forensic analysis difficult; however, as noted in the Draft Report, beginning in late 2011, ODI required individual user accounts and passwords.<sup>113</sup>

<sup>108</sup> 5 U.S.C. § 552a(b)(7) defines routine use as “the use of such record for a purpose which is compatible with the purpose for which it was collected.” Publication in the Federal Register is required for “each routine use of the records contained in the system, including the categories of users and the purpose of such use.” 5 U.S.C. § 552a(e)(4)(D). The Commission has nineteen routine uses that apply to the Commission’s system of records. Privacy Act of 1974, Notice, Publication of the Systems of Records Managed by the Commodity Futures Trading Commission, 76 Fed. Reg. 5,974, 5,974-76 (Feb. 2, 2011). The routine use at issue here is number 13, which states “The information may be disclosed to contractors, grantees, volunteers, experts, students, and others performing or working on a contract, service, grant, cooperative agreement, or job for the Federal government when necessary to accomplish an agency function.” *Id.* at 5,975.

<sup>109</sup> Privacy Act of 1974, Notice, Publication of the Systems of Records Managed by the Commodity Futures Trading Commission, 76 Fed. Reg. 5,974, 5,975 (Feb. 2, 2011).

<sup>110</sup> The Commission published nineteen routine uses applicable to Commission systems of records. Privacy Act of 1974, Notice, Publication of the Systems of Records Managed by the Commodity Futures Trading Commission, 76 Fed. Reg. 5,974, 5,974-76 (Feb. 2, 2011).

<sup>111</sup> DRAFT REPORT, at 20, 22.

<sup>112</sup> *Id.* at 13, 15 n.62.

<sup>113</sup> *Id.* at 10-11.

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**D. Access to Information That May Have Been Restricted by MOUs**

In addition to complying with the requirements of Section 8 of the CEA and the Privacy Act, the Commission is also responsible for complying with the terms of MOUs entered into with other Federal agencies and with foreign regulators to share data to facilitate the work of the Commission. Many of the MOUs have restrictions limiting data access to Commission staff that "need to know" to perform the tasks specified in the MOU. For example, the Commission entered into an MOU with member agencies of the Financial Stability Oversight Council ("FSOC").<sup>114</sup> The purpose of the MOU between CFTC and FSOC is to share data and information "in connection with or related to the functions and activities of the FSOC or the Office of Financial Research pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act . . . ."<sup>115</sup> Under the terms of the MOU between CFTC and FSOC, the non-public information shared between the parties:

may be shared only with (i) officials and employees of a Receiving Party who have a need to know the information in the performance of their official work duties consistent with applicable law or (ii) an individual under the supervision of a Receiving Party who has executed a confidentiality agreement with the FSOC that continues in effect. All officials, employees, or individuals under the supervision of a Receiving Party with whom the Non-Public information is shared must be advised of and, as a condition of receiving Non-Public Information, be bound by the terms of this MOU or the terms of the relevant confidentiality agreement, as applicable, and instructed to comply with all its terms.<sup>116</sup>

On the CFTC main network, the Commission aggregates access to position data, transaction data, financial risk data, and enforcement data, which may also include data received pursuant to an MOU. However, access to data within OCENet was not segregated and the data contained in OCENet may have included information that was received pursuant to an MOU.

CFTC Management requests that the OIG share any available data that may have been obtained by forensic review. We agree that the lack of segregated access to data within OCENet and the lack of automated controls may make forensic analysis difficult; however, as noted in the Draft Report, beginning in late 2011, ODT required individual user accounts and passwords.<sup>117</sup>

<sup>114</sup> The other member agencies include: Department of Treasury, Board of Governors of the Federal Reserve System; Office of the Comptroller of the Currency; Bureau of Consumer Financial Protection; Securities and Exchange Commission; Federal Deposit Insurance Corporation; Federal Housing Finance Agency; National Credit Union Administration; Office of Financial Research; and four independent members. Memorandum of Understanding Regarding the Treatment of Non-Public Information Shared Among Parties Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, effective date Apr. 13, 2011.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at art. 6.

<sup>117</sup> DRAFT REPORT, at 10-11.

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**E. Access to Non-Public Information**

In addition to the requirements to maintain the confidentiality of Section 8 material, all employees of the agency are subject to the Commission's regulations regarding confidentiality of investigations. In pertinent part, "[a]ll information and documents obtained during the course of an investigation . . . shall be treated as non-public by the Commission and its staff . . ." <sup>118</sup> The data reported to the Commission as required to regulate markets is investigative information and falls under these provisions. <sup>119</sup> Release of investigative information is only permissible if (1) the Commission directs or authorizes the public disclosure of the investigation; (2) the information or documents are made public during the course of an adjudicatory proceeding; or (3) disclosure is required by the Freedom of Information Act. <sup>120</sup>

Additionally, all Federal government employees are subject to the ethics regulations which require Federal employees to maintain the confidentiality of non-public information received during the course of their employment. <sup>121</sup> The Commission has also codified regulations regarding the disclosure of information that provide: "[s] Commission employee or former employee shall not divulge, or cause or allow to be divulged, confidential or non-public commercial, economic or official information to any unauthorized person, or release such information in advance of authorization for its release." <sup>122</sup>

Similar to the discussion above on Section 8, we agree that OCE economists employed at the Commission would properly have access to the non-public material; however, they have no authority to release non-public information to individuals outside the Commission. If the OCE economists' papers were written within the scope of their employment, the Commission would

<sup>118</sup> 17 C.F.R. § 113.

<sup>119</sup> In *Freeborn*, the court found that Section 8 empowered the Secretary of Agriculture to investigate the operation of contract markets by requiring, through regulations, the filing of daily reports of commodity market transactions. 485 F.2d at 1331, 1341. The court noted the affidavits provided by the Secretary of Agriculture showed that material supplied by market participants was supplied with an understanding that the information would be confidential, and it was important to the Secretary's investigative powers to get voluntary cooperation. 405 F.2d at 1339-40. See also *Barber Register Co.*, 65 F.2d at 351-52 (finding Fourth Amendment prohibition against unreasonable searches inapplicable to regulations requiring reports and disclosures with respect to businesses affecting the public so long as such reports and disclosures were reasonably necessary to protect the public).

<sup>120</sup> 17 C.F.R. § 113.

<sup>121</sup> "Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Anti-Racket Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profit, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment." 18 U.S.C. § 1905.

<sup>122</sup> 17 C.F.R. § 140.733-5.

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have to approve the release of any non-public material. However, until this approval has been granted, it may be a violation of these provisions to release non-public information in any form, including peer review or outside workshops and seminars. As noted in Part II.B, some papers were submitted to jurors for peer review and others were written with co-authors who had no relationship with the Commission. However, the Draft Report does not make findings concerning whether the data was also submitted to the jurors or shared with co-authors who are not affiliated with the CFTC.

CFTC Management requests that the OIG share any existing forensic analysis and/or interview notes with respect to the OCE economists and their use of the data. CFTC Management will consider recommending additional action if it can be determined that data was improperly accessed or disclosed.

**III. CFTC Review Process and Direction to Temporarily Suspend Publication Did Not Potentially Violate the First Amendment**

The Draft Report finds that the decision to temporarily suspend publication potentially resulted in a First Amendment violation and partly based this finding on a determination that the OCE economists wrote papers as private citizens and not as part of their official duties.<sup>123</sup> The Draft Report also incorrectly attributes the decision to temporarily suspend publication to the Deputy General Counsel for (b)(6),(b)(7)(C) rather than to the Chairman.<sup>124</sup> Additionally, the Draft Report asserts that the agency may have engaged in prior restraint by implementing a review process and by the length of time review has taken, which we believe is not correct.<sup>125</sup> As set forth in greater detail below, we have reviewed the OIG's findings and believe that certain factual statements, legal analysis, and conclusions should be modified. Specifically, (1) it was the Chairman, not the Deputy General Counsel for (b)(6),(b)(7)(C) who decided to suspend publication of the OCE research papers; (2) there are no potential First Amendment violations because the OCE economists who were employed by the CFTC were not private citizens; (3) the CFTC did not impose a prior restraint in implementing the review process, and the agency's process reflects the appropriate review standards; and (4) the OIG's application of the outside employment regulations is mistaken. CFTC Management requests that the Draft Report be revised accordingly.

**A. Draft Report's Attribution of the Direction to Temporarily Suspend Publication**

Page 16 of the Draft Report notes that the Chairman's January 24, 2013 letter stated "I [the Chairman] have directed the CFTC staff to suspend the external publication of research conducted or supported by OCE." In fact, the Chairman's direction to cease publication is reiterated throughout the Draft Report:

<sup>123</sup> DRAFT REPORT, at 20, 22.

<sup>124</sup> *Id.* at ii, iv, 1, 20, and 31.

<sup>125</sup> *Id.* at 24.

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- "The Chairman stated that he had directed the CFTC staff to suspend the external publication of research conducted or supported by OCE . . . ."<sup>126</sup>
- "the Commission . . . prevented dissemination to the public of completed research," and "the Agency has not approved most of the economic research papers it decided to review in December 2012, and continues to prohibit new research publications and presentations."<sup>127</sup>
- there is a section entitled "The Commission's Decision to Prohibit Publication of Completed Research . . . ."<sup>128</sup> and
- "the Office of the Chairman in consultation with the [OIG] indefinitely suspended OCE publication and presentation activities."<sup>129</sup>

CFTC Management agrees that the Chairman, acting for the Commission, suspended the publication of economic research papers during the pendency of the review, and he acted within the scope of his authority in doing so. However, the Draft Report elsewhere incorrectly attributes these actions to the Deputy General Counsel for (b)(6), (b)(7)(C).<sup>130</sup>

Section 2(a)(6) of the CEA enumerates the Chairman's powers and functions. The Chairman has the statutory authority to carry out the agency's executive and administrative functions, which include supervision of personnel employed by the Commission, distributing work among the units in the Commission, as well as the use and expenditures of funds according to budgets and priorities approved by the Commission.<sup>131</sup> Although the Chairman may delegate some of these functions, see CEA section 2(a)(6)(F), at no point did the Chairman delegate the functions to OGC, and all actions taken by OGC were taken under the Chairman's direction.

Because the Chairman clearly and repeatedly stated that he made the decision to suspend publication, and that subsequent actions were at his direction, and because the Deputy General Counsel for (b)(6), (b)(7)(C) does not have the authority to suspend publication of papers, CFTC Management requests that the Draft Report be changed to eliminate any suggestion that the Deputy General Counsel for (b)(6), (b)(7)(C) was the decision maker. Specifically, CFTC Management requests that the OIG correct the Draft Report as described below.

Page ii: "On December 7, 2012, the assigned Deputy General Counsel, in consultation with the Chairman's Office, instructed the Chief Economist . . ." should be corrected to state "The Deputy General Counsel, acting on instruction from the Chairman's Office . . . ."

<sup>126</sup> *Id.* at 4.  
<sup>127</sup> *Id.* at 15.  
<sup>128</sup> *Id.* at 20.  
<sup>129</sup> *Id.* at 11.  
<sup>130</sup> *Id.* at ii, iv, 1, 20, and 31.  
<sup>131</sup> 7 U.S.C. § 2(a)(6)(A).

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- Page iv: "However, the December 2012 instruction from the assigned Deputy General Counsel clearly prohibited all further publication and presentation . . ." should be changed to state: "However, the December 2012 instruction from the Chairman clearly prohibited all further publication and presentation . . ."
- Page 1: "At close of business on December 7, 2012, the assigned OGC Deputy General Counsel, in consultation with the Chairman's Office, directed the Chief Economist . . ." should be changed to state "At the close of business on December 7, 2012, the Deputy General Counsel, acting on instruction from the Chairman's Office, directed the Chief Economist . . ."
- Page 20: "As previously discussed, without regard to the content of the research papers prepared by OCE economists, the Deputy General Counsel for (b)(6)/(b)(7) determined to bar publication . . ." should be corrected to state "As previously discussed, without regard to the content of the research papers prepared by OCE economists, the Chairman determined to suspend publications . . ."
- Page 31: "[t]he Office of the Chairman in consultation with the Office of the General Counsel indefinitely suspended . . ." should be corrected to state "[t]he Office of the Chairman indefinitely suspended . . ."

**B. Draft Report First Amendment Analysis**

The Draft Report suggests that the First Amendment protects the rights of economists employed by OCE to publish certain academic papers and that those rights were possibly infringed by both the temporary suspension directed by the Chairman and the review process implemented by the agency.<sup>132</sup> However, the OIG also acknowledges that "[f]ederal employees do not enjoy the same First Amendment Rights as private citizens."<sup>133</sup> In particular, the OIG acknowledges that the "First Amendment does not shield from discipline the expressions public employees make pursuant to their professional duties . . ."<sup>134</sup> Pointing to language in a 2006 Supreme Court decision, however, the OIG suggests that "whether the fact of public employment similarly alters the First Amendment rights of public employees engaged in speech related to scholarship or teaching" remains an open question.<sup>135</sup> Analyzing the "context" of the employment of OCE economists, the OIG determines that the independence OCE economists enjoy suggests their academic writings should be considered the same as those of a private citizen.<sup>136</sup> Specifically, the Draft Report notes that the OCE economists wrote their papers as private citizens because: (1) the OCE economists, in addition to their official duties, were hired to perform "independent academic research," as allegedly reflected in their position descriptions; (2) the Commission

<sup>132</sup> DRAFT REPORT, at 20, 23.

<sup>133</sup> *Id.* at 20 (footnote omitted).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 20-21 (referring to *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

<sup>136</sup> *Id.* at 21-22.

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requires the economists to publish their research papers with a disclaimer that the views expressed do not represent the views of the Chairman, the Commission or staff; and (3) past OCE staff economic research has been published as official CFTC reports without disclaimers.<sup>137</sup> CFTC Management disagrees with these findings and conclusions. As explained in greater detail below, OCE economists appointed as either full-time employees or as either compensated or uncompensated consultants<sup>138</sup> wrote papers as part of their official duties; we disagree with the OIG's application of the above-referenced language in a 2006 Supreme Court decision to the First Amendment rights of government employees; and the inclusion of disclaimers does not reflect that the OCE economists wrote their papers as private citizens.

1. OCE Economists Are Federal Employees Who Wrote Papers as Part of their Official Duties

While the First Amendment provides a high degree of protection to publications by private citizens, the law is very different with respect to the writings of a government employee authored pursuant to and within the scope of his or her federal employment. Although "public employees do not surrender all of their First Amendment rights by reason of their employment," they are subject to significant constraints on their First Amendment rights not applicable to private citizens. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). In *Garcetti*, the Supreme Court concluded that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. While the Court did not "articulate a comprehensive framework for defining the scope of an employee's duties," *id.* at 424, it did note that the "[t]he proper inquiry is a practical one," and that "listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's . . . duties for First Amendment purposes." *Id.* at 424-25. Later courts have looked to an employee's job description, the duties they actually perform, and the subject matter of the speech to determine whether it falls in the scope of employment. See, e.g., *Dahlia v. Rodriguez*, 735 F.3d 1060, 1069, 1074 (9<sup>th</sup> Cir. 2013) (en banc).

In defining position descriptions of federal employees, the Office of Personnel Management ("OPM") has stated that:

<sup>137</sup> *Id.*

<sup>138</sup> CFTC Management notes that some OCE economists who drafted papers were not employees of the agency, but rather performed work under contracts. As contractors, they are not subject to the same limitations on their First Amendment rights as OCE economists appointed as either full-time employees or as either compensated or uncompensated consultants. This difference is reflected in the review process described above in Part I.H and below in Part III.C.2. While they are not subject to the same limitations on First Amendment rights as federal employees, their First Amendment rights are limited by choice in the terms of their contracts which may authorize review and agency pre-approval before publication.

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"[a] position description or 'PD' is a statement of the major duties, responsibilities, and supervisory relationships of a position. In its simplest form, a PD indicates the work to be performed by the position. The purpose of a PD is to document the major duties and responsibilities of a position, not to spell out in detail every possible activity during the work day." OFFICE OF PERSONNEL MGMT., *Frequently Asked Questions: Classification, What is a Position Description?*, <http://www.opm.gov/FAQS/QA.aspx?fid=423c8952-41ec-434a-ac7e-bc7b5ee8206ba&pid=c9df01f7-8580-4f87-88a4-3e26125f1205>.

However, OPM has also stated that "[i]n the event that a position changes, agencies must exercise original classification authority; that is, write a new position description which reflects new responsibilities, and classify accordingly." *Introduction to the Position Classification Standards* at 59 (Revised August 2009).

The position descriptions for CT-11, CT-13, and CT-14 research economists in OCE set forth the primary duties and responsibilities for each research economist position. Each of these position descriptions provide that "[t]he incumbent's responsibilities will include evaluating trading rules and practices for their competitive impacts on price discovery and immediacy. . . . Expert advice . . . will be used by the Commission's various divisions. Conduct research on topics within the scope of the Commission's policy agenda. . . . Apply econometric tools to market microstructure questions."<sup>137</sup>

Further, the position descriptions for CT-13 and CT-14 research economists provide that: "the incumbent also participates in the planning and execution of special projects . . . [and] is expected to be prepared to present and review papers at professional meetings and conferences and to contribute to the literature in the field and identify the effects associated with implementing proposed standards, regulations and policies."<sup>140</sup> Additionally, the position descriptions for CT-15 research economists provide that: "the incumbent is expected to be sought out to serve on panels and to present and review papers at professional meetings and conferences, to contribute to the literature in the field. . . ."<sup>141</sup>

Under the First Amendment tests discussed above in *Garcetti* and *Dahlia*, the papers written by the OCE economists fulfill the economists' duties to "contribute to the literature in the field" as set forth in the CT-13 through CT-15 position descriptions. Accordingly, they qualify as federal employee speech made pursuant to their official duties. While the Draft Report asserts that the OCE economists were hired in part to perform "independent academic research,"<sup>142</sup> that term appears nowhere in the position descriptions for the OCE economists, and none of the position descriptions authorized OCE economists to write "independent" academic papers as private

<sup>137</sup> CFTC Position Descriptions – Research Economist 600004, 600006, and 600009.

<sup>138</sup> CFTC Position Descriptions – Research Economist 600004 and 600008.

<sup>141</sup> DRAFT REPORT, at 21.

<sup>142</sup> *Id.*

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citizens on official government time.<sup>143</sup> Moreover, the papers were drafted using government time, resources, and data.<sup>144</sup> As noted in the Draft Report in a discussion of the development and use of OCENet by OCE economists:

Over time, inter-agency use appears to have dropped off, while internal use by OCE economists increased. As overall demand for OCENet grew, additional equipment was provided for its use. What began as approximately five desktops (and a server) grew to nearly twenty. The advantages of OCENet for research purposes were many: like any server, it stored data so that it did not need to be separately loaded onto the many desktops; it was faster, meaning that the manipulation and study of datasets could occur more quickly; and it contained unique programs for the manipulation of data. Additionally, it allowed OCE to bring on outside economists to do research while limiting access to the CFTC network.<sup>145</sup>

Significantly, Section 18 of the CEA does not call for “independent academic research.”<sup>146</sup> It directs the agency to establish and maintain research and information programs that further the CFTC’s mission and purposes of the CEA. OCE economists use government time, resources, and data to fulfill this statutory responsibility.<sup>147</sup> Additionally, consistent with the requirements of the Privacy Act, the Commission would only have been authorized to grant OCE economists access to records that might be Privacy Act protected for the performance of their official duties when necessary to accomplish an agency function.<sup>148</sup> As discussed in greater detail in Part II.C, there are no routine use exceptions to the Privacy Act that would allow the Commission to provide Privacy Act protected information to OCE economists acting in their capacity as private citizens.<sup>149</sup> Indeed, in accordance with the direction of Section 18 of the CEA, the subject matter of the papers – economics of commodity futures and related topics – falls squarely within the scope of the Commission’s activities.

<sup>143</sup> As set forth in CFTC Position Descriptions – Research Economist 600004, 600008, and 600009, OCE economists are tasked with conducting research on topics within the scope of the Commission’s policy agenda.

<sup>144</sup> *Id.* at 2 (noting that there was a dedicated server used by OCE to store trade data to facilitate its work and that the server was physically accessible by anyone with access to OCE offices, but could only be used with a valid CFTC username and password); *id.* at 18 (noting the use of OCENet, its ability to run complex programs needed to analyze economic data, and noting that the advantages of OCENet included storage of data so that it was not loaded onto many desktops, ability to quickly manipulate and study data, and its unique programs for manipulation of data).

<sup>145</sup> DRAFT REPORT, at 10.

<sup>146</sup> 17 U.S.C. § 21; cf. 7 U.S.C. § 22.

<sup>147</sup> As discussed in Part II.A., it is important to note that, while Section 18 requires the CFTC to conduct economic research and thus provides support that the OCE economists wrote papers as part of their official duties, Section 18 does not compel or require the CFTC to publish research in academic or professional journals.

<sup>148</sup> Privacy Act of 1974; Notice: Publication of the Systems of Records Managed by the Commodity Futures Trading Commission, 76 Fed. Reg. 5,974, 5,975 (Feb. 2, 2011).

<sup>149</sup> The Commission published nineteen routine uses applicable to Commission systems of records. Privacy Act of 1974; Notice: Publication of the Systems of Records Managed by the Commodity Futures Trading Commission, 76 Fed. Reg. 5,974, 5,974-76 (Feb. 2, 2011).

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Finally, it is CFTC Management's view that the OCE economists wrote papers as part of their official duties because they were subject to supervision by other CFTC employees. The Chairman has delegated supervisory authority over most agency staff to various heads of offices who also, in turn, have delegated supervisory authority to other CFTC employees.<sup>150</sup> The position descriptions for the OCE economists reflect these supervisory delegations. For example, the position descriptions for the CT-11, CT-12, and CT-14 OCE economists provide that the supervisor for these OCE economists was the Supervisory Economist.<sup>151</sup> The position description for the CT-11 research economist also states that "[t]he incumbent acts under the general supervision and policy guidance of the Chief Economist . . . keeps the supervisor informed of progress and potentially controversial problems concerns, and issues . . . The supervisor reviews completed work for soundness and overall approach, adherence to requirements, achievement of expected results, and the feasibility of recommendations."<sup>152</sup> That the OCE economists wrote the papers as part of their official duties is further supported by the fact noted in the Draft Report that "[t]he Chief Economist approved all topics for economic research papers written by OCE economists working as employees, contractors and consultants."<sup>153</sup>

The above facts foreclose any claim that the papers written by OCE economists are entitled to the First Amendment protections applicable to private speech. See *Dahlia*, 735 F.3d at 1074-75. Just like the plaintiff in *Garcetti*, OCE economists were expected to and did conduct research and draft papers as part of their official duties. See 547 U.S. at 416. Accordingly, under the "practical" scope of employment analysis laid out in *Garcetti*, these duties should be dispositive. OIG's contrary analysis is mistaken.

In light of the above, CFTC Management disagrees with the OIG's conclusion that the OCE economists wrote papers as private citizens.<sup>154</sup> CFTC Management requests that the OIG correct the Draft Report to reflect the actual status of the OCE economists, specifically that they were brought on to write papers as part of their official duties and therefore, did not write the papers as private citizens.

2. OCE Economists Not Afforded "Academic Freedom" Protection Under Dicta in *Garcetti*

As noted above, the OIG misapplies a statement in *Garcetti* to suggest that there is an open question as to whether OCE economists receive First Amendment protection based on concerns regarding academic freedom.<sup>155</sup> In that case, the Supreme Court held that the First Amendment did not protect a government employee from discipline based on a speech the employee made in the course of his official duties. 547 U.S. at 424. A dissenting opinion expressed concerns that

<sup>150</sup> 7 U.S.C. § 2(a)(6).

<sup>151</sup> CFTC Position Descriptions - Research Economist 600004, 600008, and 600009.

<sup>152</sup> CFTC Position Description - Research Economist 600009.

<sup>153</sup> DRAFT REPORT, at 11.

<sup>154</sup> *Id.* at 21-22.

<sup>155</sup> *Id.* at 21.

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the majority's ruling would undermine "academic freedom in public colleges and universities." *Id.* at 438 (Souter, J. dissenting). The majority responded by commenting that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests." *Id.* at 425. It specified, however, that it "need not, and for that reason d[id] not, decide whether [its] analysis would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* Some lower courts have agreed that an academic context requires additional protections, but they have extended basic First Amendment protections only in cases involving state-run colleges and universities. See *Demers v. Anshin*, 729 F.3d 1011, 1019-20 (9<sup>th</sup> Cir. 2013); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4<sup>th</sup> Cir. 2011) ("We are persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case.").

The context here is very different. OCE economists are hired to serve the needs of the Commission, an independent federal agency charged with regulating the futures and swaps markets. OCE economists have access to sensitive Commission data, which is protected by Section 8 of the CEA and the Privacy Act, among other laws. As Section 18 of the CEA makes clear and as the Draft Report acknowledges, this research is conducted to further the mission of the CFTC.<sup>156</sup> Based on these factors, CFTC Management concludes that papers produced by OCE economists to further the statutory mission of the CFTC differ materially for purposes of First Amendment analysis from that of research conducted at public colleges and universities.

Even if the Supreme Court were to follow the lower courts' view based on *Garcetti* that scholarship and teaching may be entitled to some First Amendment protection, it would likely not extend it to federal employees serving federal agencies charged with implementing federal law. However, even if the courts were to analogize OCE economists' research to that of academics at public universities for First Amendment purposes, their work would still be subject to considerable Commission regulation and oversight. In order for the First Amendment to protect these public employees from such oversight, their speech must be addressed to "matters of public concern," *Demers*, 729 F.3d at 1020 (citing *Pickering v. Bd. of Ed.*, 391 U.S. 562, 568 (1968)), and the gravity of that concern must outweigh "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; see also *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1048 (6<sup>th</sup> Cir. 2001). If this First Amendment protection were applicable here, the Commission's review process would strike the appropriate balance. This is because most of the research is developed through access to, and use of proprietary Commission resources, the research conducted must be to discharge Commission duties, and the Commission must ensure that its employees comply with applicable laws and regulations, such as Section 8. The Commission's review process as described in Part III.C.2. serves the public interest in promoting the efficiency and propriety of the public services

<sup>156</sup> *Id.* at 7-9 (economic research activities, generally under OCE, have been described in nearly every annual Commission report, the CFTC's public-facing website indicates OCE conducts economic research, and OCE lists accomplishments such as seven working, 25 presentations, and three publications).

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it performs by ensuring that its resources, including sensitive data, are being used only for Commission-authorized purposes. Thus, notwithstanding that the analogy to academics and public universities is inapt, the Commission's actions and review process would satisfy that standard as well.

In light of the above, CFTC Management requests that the Draft Report be changed to correctly reflect *Garcetti* and other relevant First Amendment case law, which do not confer First Amendment protection on economic research conducted by federal employees pursuant to their official duties.

3. Use of Disclaimers by OCE Economists Does Not Confer Private Citizen Status

In the Draft Report, the OIG stated that the use of disclaimers by OCE economists and the omission of disclaimers in economic research published by the Commission support the conclusion that OCE papers are written by OCE economists as private citizens.<sup>157</sup> Specifically, the OIG noted that Commission employees are required to include disclaimers in their papers providing that "their views do not represent those of the Chairman, the Commission or its employees."<sup>158</sup> Further, the OIG stated that the Commission is "fully aware . . . that economic research papers published under a disclaimer are done so because the author is publishing not as a Commission employee voicing official CFTC policy or opinion, but as a private citizen."<sup>159</sup> We disagree with the OIG's findings regarding the significance of disclaimers in papers written by OCE economists.

Federal agencies routinely require employees to use disclaimers both when an employee is acting in his or her private capacity and when he or she is acting in an official capacity. In the case of an employee who has written a paper in his or her personal capacity for publication in a scientific or professional journal, the ethics regulations on outside employment require the individual to include a disclaimer to indicate that the views expressed in the paper are personal and not attributable to the employing agency. *Standards of Ethical Conduct for Employees of the Executive Branch* ("Standards of Conduct"), 5 C.F.R. § 2635.807. Specifically, the Office of Government Ethics ("OGE") has said that when an employee is acting in a private capacity, "[t]o the extent that it enhances the employee's opportunities or furthers the interests of the employer, sponsor or publisher, use of the employee's official title or position creates at least an appearance of use of public office for private gain and may inappropriately suggest Federal endorsement or sanction of the activity." 56 Fed. Reg. 33,778, 33,791 (July 23, 1991); see also 5 C.F.R. § 2635.701 *et seq.*

It is also common practice for federal agencies to require that an employee use a disclaimer when he or she is acting in his or her official capacity so that his or her views do not act to bind an

<sup>157</sup> *Id.* at 22.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

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agency regarding a particular issue or matter. The disclaimer also ensures that agency employees do not inadvertently misrepresent an agency's official position on a particular issue or matter. For example, the U.S. Securities and Exchange Commission ("SEC") requires its employees to include a disclaimer when speaking publicly in their official capacity. See *CFTC Global Markets Advisory Committee Transcript*, at 34 (Nov. 7, 2012).<sup>160</sup> Similarly, the U.S. Department of Defense ("DoD") asks staff to include disclaimers when they speak in their official capacity. *Speaking in your Official Capacity*, U.S. DEP'T OF DEF., at 1 (Jan. 13, 2010).<sup>161</sup> Further, a number of federal agencies and departments use disclaimers on their websites. For example, the Department of Veterans Affairs' website disclaimer reads as follows: "The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government, and shall not be used for advertising or product endorsement purposes." *Website Policies and Other Important Links*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.va.gov/disclaim.htm>.

It is, moreover, the Commission's consistent practice to require similar disclaimers. For example, Commission issuances, including no-action letters, staff advisories, and frequently asked questions contain a disclaimer to the same effect.<sup>162</sup> This disclaimer could never be construed to support an argument that those documents are outside the scope of the signatories' duties or were written by Commission employees acting as private citizens. Without a disclaimer, it is possible that a research paper could be viewed as binding on the Commission. While the Commission may wish to adopt a particular article as the view of the Commission and direct that it be published in an official Commission publication,<sup>163</sup> that does not mean that in the absence of such a decision that OCE economists are acting as private citizens rather than Commission employees when the Commission declines to do so and requests that they use a

<sup>160</sup> At the October 2012 CFTC Global Markets Advisory Committee, an SEC employee who was invited to speak in his/her official capacity on the SEC's activities related to cross border rulemakings and guidance stated the following: "Before I go any further, I need to state that as a matter of policy the SEC disclaims responsibility for statements like this by SEC employees. So, the views I express today are my own and do not necessarily reflect the views of the SEC, the Commissioners or my colleagues on the Commission staff." Transcript of Record at 34, *CFTC Global Mkt. Advisory Comm.*

<sup>161</sup> DoD employees are advised to proceed as follows when speaking in their official capacity: "Even if you are properly authorized to speak or make a presentation at an event sponsored by a non-Federal entity, you should begin your remarks with a disclaimer to the effect that 'the views I am about to express are my own and do not necessarily represent the views of the Army or the DoD.' . . . The only occasion on which you need not make such a disclaimer is if the head of the DoD Component command or organization authorizes you to present information as the 'Army's position.' Presenting information as the 'Army's position' is not necessarily the same thing as speaking in your official capacity. The Army has not established a 'position' on each and every issue or issue about which you may be invited to speak. Unless you are absolutely certain that the views you intend to espouse in your speech or presentation accurately reflect the formally established position of the U.S. Army, and you have been specifically authorized to relate that formally established position in a public forum, you should begin your remarks with the disclaimer set forth above. Again, please be mindful of the fact that one may be authorized to speak in an official capacity even though not authorized to represent the Army's official position on a matter." *Speaking in your Official Capacity*, U.S. DEP'T OF DEF., at 1 (Jan. 13, 2010).

<sup>162</sup> See e.g. Inv. Co. Inst. & Sec. Indus. and Fin. Mkt. Ass'n, CFTC No-Action Letter No. 13-51 (Sept. 5, 2013), available at <http://www.cftc.gov/ucm/groups/public/@information/documents/letter/13-51.pdf>.

<sup>163</sup> DRAFT REPORT, at 22.

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disclaimer when publishing a paper written as part of their official duties. Accordingly, CFTC Management disagrees with the OIG's finding that disclaimers mean that OCE economists' papers are written by them as private citizens.<sup>164</sup>

In light of the above, CFTC Management requests that the Draft Report be changed to reflect that use of a disclaimer does not mean that the OCE economists write the papers as private citizens.

C. **Prior Restraint Analysis**

I. CFTC Review of Papers Does Not Constitute a Prior Restraint

The OIG has also raised concerns that the paper review process may violate the First Amendment's prohibition on prior restraint of publication.<sup>165</sup> After reviewing the law of prior restraint as it applies outside the employment context, the Draft Report suggests that even pre-publication review is problematic under the First Amendment.<sup>166</sup> The Draft Report proceeds from the assumption that "[t]he government clearly may require prior submission of a public employee's speech as a private citizen if the government can demonstrate sufficient interest in staying informed of public employees' public statements about matters of concern to the workplace."<sup>167</sup> However, for the reasons given above, CFTC Management disagrees with the OIG's conclusion that OCE economists are speaking as private citizens rather than government employees speaking pursuant to their official duties.<sup>168</sup> As explained above, because OCE economists used Commission time, resources, and confidential data, and because they were expected to produce research on matters pertinent to the Commission and its statutory mission, any research they authored was pursuant to their official duties. As such, it is not protected by the First Amendment, and regulating or reviewing that speech is not a prior restraint. *Samuelson v. LaPorte Community School Corp.*, 526 F.3d 1046, 1051-52 (7th Cir. 2008); *Moonin v. Nevada*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 1628389 at \*5 (D. Nev. Apr. 15, 2013); *Hawkins v. Dist. of Columbia*, 928 F. Supp. 2d 428, 135-36 (D.D.C. 2013).

Even assuming some First Amendment protection would apply to work performed by OCE economists pursuant to their official duties, the prior restraint analysis still favors the government because the OCE economists are government employees. As the Supreme Court has recognized, the government "may impose restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *U.S. v. Nat. Treasury Emps. Union*, 513 U.S. 454, 465 (1995) ("*NTEU*"). To determine whether a restriction on the speech of government employees is a prior restraint that violates the First Amendment, courts "arrive at a

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 22-23.

<sup>166</sup> *Id.* at 22-26.

<sup>167</sup> *Id.* at 25 (emphasis added).

<sup>168</sup> We believe the OIG's statement that the Commission has a clear interest in being apprised of OCE economic scholarship before it is presented or published is correct. *Id.* at 23.

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balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>149</sup> *Harman v. City of New York*, 140 F.3d 111, 117 (2<sup>nd</sup> Cir. 1998) (quoting *Pickering v. Bd of Educ. of Twp High Sch. Dist.*, 391 U.S. 563, 568 (1968)). In conducting this inquiry, as the OIG correctly notes, courts must ensure that a regulation's sweep is "reasonably necessary to protect the efficiency of the public service."<sup>150</sup> *Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1439 (D.C. Cir. 1996) (quoting *NTEU*, 513 U.S. at 474); see also *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 172 (2d Cir. 1999).

Using this analysis, courts have upheld regulatory schemes that involve pre-publication review of government employees' personal writings. In *Weaver*, the U.S. Information Agency required pre-publication review of "[a]ll speaking, writing, and teaching materials which may reasonably be interpreted as relating to the current responsibilities, programs, or operations of any employee's agency or to current U.S. foreign policies, or which reasonably may be expected to affect the foreign relations of the United States." 87 F.3d at 1435 (quoting FAM § 628.2).<sup>149</sup> Because the regulation did not forbid speech, the court found that it "clearly passes muster." *Id.* at 1440. The court noted that the primary burden on a speaker was the delay associated with submitting to the review process, *id.* at 1441, but explained that because government employees enjoy lesser First Amendment protections, the pre-publication review was constitutional even though there was "no specific limit on the duration of the review process." *Id.* at 1443. In approving this prepublication review, the court noted that the government's interest in taking corrective action before the unauthorized disclosure of "sensitive material" is an important factor supporting pre-publication review. *Id.* at 1443. On the whole, the court concluded that the pre-publication review program "restrict[ed] no more speech than is reasonably necessary to achieve the government's interests." *Id.* at 1443 (quotation marks and citation omitted).<sup>150</sup>

*Weaver* is hardly an outlier. The Second Circuit similarly upheld a New York Police Department policy requiring all employees to give notice before testifying or making a statement before a private organization that includes: (1) written notification of the appearance; and (2) a summary of the testimony or statement. *Latino Officers Ass'n*, 170 F.3d at 168-69, 172. Noting the City's "strong interest" in "staying informed of police officers' public statements about the Department[]," the court found that the notice and reporting procedure "strikes a reasonable balance." *Id.* at 172. Similarly, a court upheld a Metropolitan Police Department Regulation: (1) prohibiting officers from discussing Department "policies, procedures, rules, personnel issues and direction"; and (2) requiring approval from a supervisor before providing "basic facts" to the

<sup>149</sup> During the course of the litigation, the agency construed the regulation as not "author[iz]ing any form of punishment for publication of material disapproved by the agency, so long as it was submitted for review beforehand." 87 F.3d at 1435. The agency was free to discipline employees for publishing materials in violation of the law or other agency policies. *Id.* at 1436, 1442 n.5.

<sup>150</sup> As the OIG notes, the CIA has a robust pre-publication review procedure that the Supreme Court has upheld. *Snapp v. U.S.*, 444 U.S. 307 (1980). The Court noted the importance of protecting classified information, but explained that the government may protect other "substantial government interests" by restricting the free speech rights of government employees. *Id.* at 310 n.3. See DRAFT REPORT, at 24, 24 n.100-102.

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public. *Hawkins*, 923 F. Supp. 2d at 135-36. Finding that these restrictions went to speech made pursuant to official duties, the court found that they passed constitutional muster. *Id.* at 136.<sup>171</sup>

When compared to and analyzed under these cases, the Commission's review program is consistent with the First Amendment and does not act as a prior restraint. As in *Weaver*, the review program is not intended to, nor has it operated to, prevent speech. Rather, as the OIG notes, the review is used to review papers "for information protected under Section 8 [of the CEA], and for other confidential or sensitive information."<sup>172</sup> This purpose is broadly similar to the prepublication review program upheld in *Weaver* and significantly less restrictive than the review program at issue in *Hawkins*, among other things, because economists are not limited in their ability to comment on Commission policy.<sup>173</sup> Thus, any potential chilling effect the review program has on speech is more than outweighed by the Commission's interest in preventing the publication of information protected under Section 8 and/or other confidential or sensitive information. *Cf. Weaver*, 87 F.3d at 1442-43 (reaching a similar conclusion with State Department prepublication review).

We also do not agree with the OIG's concern that the length of the review process may infringe the OCE economists' First Amendment rights.<sup>174</sup> The D.C. Circuit upheld a prepublication review program that had "no specific limit on the duration of the review process." *Weaver*, 87 F.3d at 1443. The court explained that although this could be a fatal flaw outside the employment context, less demanding standards apply to regulating the speech of government employees. *Id.* Accordingly, the court reject[ed] the idea that prior review in the employment context must proceed under a pre-set time limit. *Id.* The delay in the review of papers is not a prior restraint because the December 7, 2012 email was never intended to be a permanent prohibition on paper clearance; it was intended only to temporarily halt the process pending CFTC Management and OIG review. Importantly, this initial delay was the result of standing up the paper review process in light of the significant issues identified by the agency's review of the concerns expressed by CME. Moreover, the ongoing review of papers involves analysis of sensitive and complex data,<sup>175</sup> staffing has been difficult in light of other pressing Commission business, see Part I.H., and CFTC Management had to determine how the review process should coexist with the OIG's ongoing investigation, before any findings about the problems identified

<sup>171</sup> In addition, the court concluded that the Department's more limited regulation of personal speech was also permissible, the Department could require that personal views be expressed "off-duty and off-site" and be prefaced with "a clear statement" that all views were personal. *Hawkins*, 923 F. Supp. 2d at 136. Similarly, the Department was permitted to require that officers expressing personal views not wear "a uniform or police insignia" and that they not endorse any products or services. *Id.*

<sup>172</sup> DRAFT REPORT, at III.

<sup>173</sup> While prior restraint is not an issue with regard to OCE economists who were employed by the agency, it is possible that prior restraint concerns would arise with regard to individuals who may have had de-facto appointment paperwork. Even those OCE economists who were not properly appointed, however, may have signed a non-disclosure agreement under which they agreed to pre-publication review.

<sup>174</sup> DRAFT REPORT, at v ("The length of time Agency management has taken to review and approve economic research papers is not acceptable.")

<sup>175</sup> See Part I.H, Part III.2, and Part IV.E, for further discussion of the paper review process.

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had been made.<sup>176</sup> Thus, the Commission's review program passes constitutional muster on the timeliness front as well, even assuming papers written by OCE economists in an official capacity would receive First Amendment protection.<sup>177</sup>

In light of the above, CFTC Management requests that the Draft Report be changed to correctly reflect relevant case law on prior restraint and to note that the Commission's review program is consistent with the First Amendment and does not act as a prior restraint.

2. CFTC Review of Papers Reflects Appropriate Standards of Review

As briefly discussed in Part I.H above, the Commission has discretion to determine the review process for papers written by the OCE economists, and the review standard turns on the author's status as a full-time or limited-term employee; contractor; or individual with no official status with the agency.<sup>178</sup> For an employee who wrote the paper as part of his or her official duties, the discretion derives from the following: (1) the papers were produced using government time, resources, and information and by OCE economists who were subject to CFTC supervision; (2) as government work product, the papers are not eligible for protection under U.S. Copyright law,<sup>179</sup> and (3) except in limited circumstances, government employees voluntarily restrict their ability to exercise free speech when they accept public employment.

It is important to note, however, while the review process is within the Commission's discretion, this discretion must be exercised consistently with Federal laws and regulations restricting the release of government information. As part of the review process, before a paper is cleared, the Commission must confirm whether the OCE economist received any supplementation of salary

<sup>176</sup> See Part I.H. for a discussion of the paper review process established and implemented by the agency; cf. DRAFT REPORT, at v (noting OIG was encouraging prepublication review during its investigation).

<sup>177</sup> Additionally, OGC has assigned additional attorneys to the review of papers and these additional reviewers will speed legal review and clearance of the papers. See Part I.H. Nine papers are currently under active review in the OGC and the OGC anticipates that 3-5 papers will be cleared in the next two weeks.

<sup>178</sup> Some of the individuals in the OCE research program who wrote OCE research papers were employed pursuant to agreements under the Inter-Governmental Personnel Act (IPA) of 1970, 5 U.S.C. §§ 3371-3375 *et seq.* The IPA provides for the temporary assignment of personnel between the Federal Government and state or local governments, institutions of higher education, and other eligible organizations. Individuals serving under IPA agreements are treated as federal employees under statutory authority pursuant to the IPA and they are bound by the ethics regulations of 5 U.S.C. § 3374(c)(2). Consistent with this, those individuals serving under IPA agreements who also wrote papers are subject to the review standards for Commission employees set forth in Part I.H of this memorandum. Additionally, the Commission should review an individual's IPA agreement to confirm compliance with any additional terms and conditions prior to publication of his or her paper. The individual's employing agency or institution also may wish to review the paper or have input into any disclaimer before final clearance and publication.

<sup>179</sup> The Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et seq.*, defines government work product as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." 17 U.S.C. § 101. The Act further states that "copyright protection is not available for any work of the United States Government." 17 U.S.C. § 105. Based on the language in these sections, it is clear that when a work is prepared by a government employee, including experts or consultants, using government time, resources, and/or information, the employee cannot claim copyright in the work product. Accordingly, the Commission has control over the work product as well as discretion regarding the review standard required to permit disseminating the papers outside the agency.

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prohibited by 18 U.S.C. § 2059, whether the research falls under one of the Commission's statutory research purposes in Section 18 of the CEA, and whether the disclosure is consistent with the Privacy Act of 1974, 5 U.S.C. § 552a. Additionally, the Commission must review the papers for compliance with (1) Section 8 of the CEA; (2) 18 U.S.C. § 1905, which prohibits agency officers or employees from disclosing various forms of confidential government information, including trade secrets, processes, operations, statistical data, etc.;<sup>180</sup> and (3) Commission regulations that prohibit current and former Commission employees from disclosing or causing or allowing the disclosure of "confidential or non-public commercial, economic or official information to any unauthorized person, or release such information in advance of authorization for its release." 17 C.F.R. § 140.735-5.

While most, if not all, of the papers written by OCE economists are written pursuant to their official duties, if an OCE economist writes an economic research paper on their own time and without using CFTC data or resources, then the paper would be written in their personal capacity. The authority and the standard for the review of papers written by employees, consultants, or experts in their personal capacity is based on the *Standards of Conduct*, 5 C.F.R. § 2635, the Commission's supplemental regulations on outside activities which include uncompensated writing, 5 C.F.R. § 5101.103, and the regulations on the "Conduct of Members and Employees and Former Members and Employees of the Commission," 17 C.F.R. § 140.735-1-§.181 Finally, before the paper is cleared for publication, the Commission would also need to review the papers for compliance with Section 8 of the CEA, the Privacy Act and Commission regulations on the disclosure of information.

For papers written by contract OCE economists, the authority and standard for Commission review is derived from the terms of individual contracts and agreements and the CEA restrictions

<sup>180</sup> See *supra* note 120. The *Standards of Conduct*, 5 C.F.R. § 2635, also prohibit an employee from improperly using "nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowingly unauthorized disclosure." 5 C.F.R. § 2635.703(a).

<sup>181</sup> In the case of Commission employees, or experts or consultants who wrote papers in their personal capacity, OIG, as the office that runs the agency's ethics program, would need to determine the following:

- i. Whether the individual received compensation for the paper, 5 C.F.R. § 2635.807(a);
- ii. Whether an individual used official time and resources to write the paper, 5 C.F.R. § 2635.807(a)(2)(i)(A);
- iii. Whether the invitation to write the paper was extended to the author primarily because of his official position rather than his expertise on the particular subject matter, 5 C.F.R. § 2635.807(a)(2)(i)(B);  
Whether the invitation to write the paper was extended to the individual by an individual or entity who has interests that may be substantially affected by the performance or nonperformance of the individual's official duties, 5 C.F.R. § 2635.807(a)(2)(i)(C);
- v. Whether the individual or entity providing any compensation has interests currently pending before the CFTC, 5 C.F.R. § 2635.101(b)(2);
- vi. Whether the paper draws substantially on ideas or official data that are CFTC nonpublic information as defined in 5 C.F.R. § 2635.703(b) and 5 C.F.R. § 2635.807(d)(2)(i)(D); and
- vii. Whether the paper relates to any ongoing CFTC program, policy or operation of the CFTC. 5 C.F.R. § 2635.807(d)(2)(i)(E)(2).

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on the release of Section 8 information.<sup>181</sup> Pursuant to the requirements of the Federal Acquisition Regulations ("FAR") as implemented in the contracts for economic research, the agency has the authority to review the contractor's performance under a contract and to ensure each specific paper written under a contract complies with the contract's terms. The responsibility to inspect and accept contract deliverables (in this case the research paper) under the contract is often reserved to the agency's Contracting Officer's Representative. Since most contracts include provisions regarding access to, handling of, and disclosure of sensitive, confidential, non-public, or otherwise protected information,<sup>182</sup> the paper review process will ensure that the contractor did not disclose protected information during the performance of the contract and through the publication of the paper.<sup>183</sup> In addition, as noted earlier, all papers must be reviewed for compliance with Section 8 of the CEA and the Privacy Act.

<sup>181</sup> The OIG contends that some OCE economists who performed work on validly executed contracts had authority to perform independent research on topics that were not specified under contract. DRAFT REPORT, at 11, 21-22. Specifically, the Draft Report states that "[s]ome contract employees in OCE did have authority to perform independent research on topics approved by the Chief Economist." *Id.* at 11, n.90. Therefore, according to the OIG, certain OCE economists working under contract had authority to perform research on topics of their own choosing even where those topics were not identified under the contract in question. *Id.* at iv, 15, 21, 32.

CFTC Management submits that this assertion is flawed because there is no authority under the FAR for contractors to perform work of any kind which is not specifically identified within the contract. More specifically, there is no authority under the FAR or case law for the OCE contract economists to perform independent research on topics that are not specifically outlined in the statement of work for the respective contract. It is a fundamental tenet of government contracts law that contractors are to perform the tasks that are specifically described in a statement of work. A statement of work must specify in clear, understandable terms the work to be done in developing or producing the goods to be delivered or services to be performed by a contractor. Contractors, such as OCE economists, would have no right or authority to independently research random topics of interest because they only have authority to research and write on topics that were specifically identified in the statement of work in the contract. Likewise, the CFTC could not direct the OCE economists to perform work that is not specifically identified in the contract. Consequently, there is no case law or FAR provision to support the OIG's assertion that the OCE contract economists could perform independent economic research on topics that were not identified under contract.

CFTC Management requests that the Draft Report be changed to correctly reflect the requirements of the FAR in any discussion of OCE economists under contract.

<sup>182</sup> In addition to the confidentiality provisions contained in the OCE research contracts, many economists working for OCE signed additional NDAs. As part of the review process, the Commission must review compliance with the NDA as well as the terms of the contract.

<sup>183</sup> Most of the contracts for economic research reviewed by OGC contained a section titled "Non-Disclosure of Confidential Information." For example, the "Non-Disclosure of Confidential Information" section of CFTC contract (b)(6), (b)(7)(C) for economic research, specifically states that:

"...the Contractor agrees to use confidential information only for the purposes of performing work under this task order, and to otherwise hold such information confidential. The Contractor shall not directly or indirectly use or allow the use of or access to confidential information for any purpose other than that directly associated with officially assigned duties, and shall not, either by direction, action or by counsel, discussion, recommendation or suggestion to any third party, reveal the nature or content of any confidential information.

(d) If disclosure of confidential information to a third party is determined to be necessary by the Commission, the Contractor shall first obtain written authorization from the Contracting Officer prior to disclosing the confidential information. The Contractor shall continue to comply with this clause after expiration of the task order."

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For individuals who have no status with the agency because they either did not have the appropriate appointment paperwork or a valid contract, the scope of the agency's ability to require a review of the research paper is dependent on whether the individual with no status signed a non-disclosure agreement ("NDA"). If the individual signed an NDA, the Commission would have authority to review any papers written by that individual that used CFTC data and information, and the review would be conducted consistent with the terms of the NDA, which includes review for Section 8, confidential, and Privacy Act information.<sup>182</sup> On the other hand, if the individual with no official status did *not* sign an NDA, the Commission would have limited authority to request the right to review any papers and would only be able to review the papers for compliance with Section 8 and the Privacy Act.

In light of the above, CFTC Management requests that the Draft Report include a discussion of different standards of review appropriate for employees acting in their official capacity, employees acting in their personal capacity, contractors, and individuals with no status. CFTC Management requests that the Draft Report reflect that the agency appropriately takes into account the status of an individual in the paper review process.

**D. Draft Report Analysis of OGE Ethics Regulations and CFTC Outside Employment Regulations**

The Draft Report states that the OGE has recognized that an agency's prior review and approval of a Federal employee's publication "risks violating the First Amendment."<sup>186</sup> Specifically, the OIG notes that OGE proposed a regulation requiring agency review and approval of "the content of any speech, book, article, or similar product."<sup>187</sup> However, after receiving comments about this rule potentially violating the First Amendment, OGE revised the rule to include a note stating that some agencies may require advance review or approval of certain books, speeches, etc. to determine whether they disclose nonpublic information, contain an appropriate disclaimer, or otherwise comply with the ethics regulations on outside employment.<sup>188</sup> The Draft Report does not consider, however, that OGE's proposed regulation applied to all writing performed by an employee regardless of whether it was completed in the employee's personal or official capacity. Nothing in OGE's regulations suggests that there is any First Amendment concern with reviewing employee writing completed in an official capacity.

We also do not agree with the Draft Report's reliance on OGE and CFTC regulations on outside employment. The Draft Report contrasts the treatment of publications and outside employment, noting that CFTC's supplemental ethics regulations do not require employees to submit and

<sup>182</sup> It is a common and longstanding practice for the Commission to require non-CFTC affiliated individuals who are present at briefings and presentations that contain Section 8 information to sign NDAs that limit their ability to remove and use the information. See, e.g., Request for Information Confidentiality and Non-Disclosure Agreement Between California Air Resources Board and the CFTC (Jan. 2013).

<sup>186</sup> DRAFT REPORT, at 25.

<sup>187</sup> *Id.* (footnote omitted).

<sup>188</sup> *Id.*

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receive approvals of publications, but that they do require prior approval for outside employment.<sup>197</sup>

We believe, however, that the Draft Report's application of OGE's and the Commission's outside employment regulations is incorrect. Both of these sets of regulations apply when an employee performs work in his or her personal capacity; these regulations do not apply when the individual is performing work as part of his or her official duties.<sup>198</sup> See OGE's Outside Employment Regulations, 5 C.F.R. § 2635.801(a) ("This subpart contains provisions relating to outside employment, outside activities . . .") and § 2635.807; CFTC's outside employment regulations, 5 C.F.R. § 5101.103(e)(1) ("Before engaging in any outside employment, whether without compensation, an employee of the Commission, other than a special Government employee, must obtain written approval from his or her division or office head and the Executive Director, who may seek the concurrence of the General Counsel.")

CFTC Management requests that the OIG revise the Draft Report's discussion of the outside employment regulations by removing it from the Prior Restraint section of the Draft Report.

#### IV. Errors in Administrative Paperwork

The Draft Report notes in several places that "errors" were identified in the administrative paperwork for many of the OCE economists.<sup>199</sup> The discovery by CFTC Management of these errors, together with other concerns, led to the Chairman's referral of this matter to the OIG, and CFTC Management agrees with the OIG's conclusion that the "onboarding problems were in a volume that indicated a more than trivial problem in recordkeeping . . ."<sup>200</sup> The Draft Report finds that there were administrative errors in employment records for OCE economists; incomplete paperwork amounted to an "onboarding failure," onboarding errors were voluminous and indicated a more than trivial recordkeeping problem; and there was no simple explanation for the administrative errors.<sup>201</sup> However, the Draft Report also states that, because the

<sup>197</sup> *Id.* at 26.

<sup>198</sup> In several cases in 2012, OGC attorneys incorrectly required OCE economists who drafted papers in their official capacities to comply with CFTC supplemental regulations applicable to writing completed in an employee's personal capacity. E-mail from (b)(6), (b)(7)(C) to Andrei Kirilenko (Sept. 27, 2012) (Re: Paper for OGC Review for Compliance with Section 4, and requests for Approval of Outside Employment); and E-mail from (b)(6), (b)(7)(C) to Andrei Kirilenko (Nov. 1, 2012) (Re: Paper draft for OGC clearance: (b)(6), (b)(7)(C)). OGC has corrected this mistake in the new review process, which includes a fact review of the status of each subject to confirm the correct review standards are applied.

<sup>199</sup> Draft REPORT, at ii, iv, 16-17, 19 n.82.

<sup>200</sup> *Id.* at 17. The OIG correctly notes that "[b]y December 7, 2012, the assigned OGC deputy was unable to obtain detailed information on staffing in OCE," and that "[m]ultiple flaws in administrative record-keeping for OCE economists were eventually revealed." *Id.* at 1 n.16, 4. However, flaws in administrative recordkeeping were immediately evident as the agency could provide very little data about who was properly appointed in OCE by December 7, 2012. After several months, OED was able to provide additional information about most OCE economists by gathering data from human resources files (when available), security files (when available), and procurement files, and comparing that information to the directory of users in OCENet and information maintained by the Office of Data and Technology.

<sup>201</sup> *Id.* at iv, 16-17.

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explanation for the failures was complex, there was no appearance of fraud or bad faith on the part of OCE, the appointments by the Chief Economist were authorized, and the "nature of the administrative errors appeared to us to be somewhat trivial . . . ."<sup>194</sup>

CFTC Management continues to maintain that it has the authority to share Section 8 data only with properly appointed employees, experts, consultants and contractors. Without proper appointment paperwork, there is no authority for employees, experts, consultants or contractors to access CFTC data protected under Section 8. Accordingly, when CFTC determined that there was a high risk that certain individuals were improperly accessing non-public data, the agency cut-off access to this data, temporarily suspended OCE publication of papers pending an agency review and then OIG investigation, and established a review process to include determining the status of individuals who wrote OCE papers. CFTC's decision to take steps to determine the scope of the problem, to prevent any further improper access to data protected under Section 8, and to ensure that OCE papers written by employees, experts or consultants with deficient appointments did not contain Section 8 and other nonpublic data was prudent and correct.<sup>195</sup>

CFTC Management requests that the Draft Report address its contradictions in describing the administrative errors as "trivial"<sup>196</sup> in some sections of the Draft Report and as "more than a trivial problem in recordkeeping"<sup>197</sup> in other sections. We also request that the Draft Report reflect that CFTC Management takes any errors in administrative paperwork seriously and, as described in greater detail in Part I.G above, has taken steps to implement effective internal controls to prevent such errors from recurring.

A. Draft Report Determination that Appointment Paperwork Can be "Easily Fixed"

The Draft Report states that many of the deficiencies in the administrative onboarding paperwork for the OCE economists are "somewhat trivial" and concluded that they can be "easily fixed."<sup>198</sup> As examples, the OIG reported that (b)(6), (b)(7)(C) SF-52 was mostly but not fully completed" and that his SF-52, like those of "a number of" other OCE economists, did not have all of the requisite signatures.<sup>199</sup> The Draft Report also noted that another OCE economist, (b)(6) (b)(6) initial," had no records at all . . . .<sup>200</sup> Nevertheless, the Draft Report concludes that these errors can be "easily fixed."<sup>201</sup>

<sup>194</sup> *Id.* at 17.  
<sup>195</sup> It is important to note that if an OCE economist without the proper appointment paperwork wrote a paper that does not disclose Section 8 or other nonpublic information, the CFTC would not seek to block publication of the paper. However, as discussed above, the CFTC has an obligation to determine whether Section 8 or other non-public information was accessed and shared.  
<sup>196</sup> DRAFT REPORT, at 16-17.  
<sup>197</sup> *Id.* at 17.  
<sup>198</sup> *Id.*  
<sup>199</sup> *Id.* at 16.  
<sup>200</sup> *Id.* at 17.  
<sup>201</sup> *Id.*

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Based on the facts known to CFTC Management and set forth in the Draft Report, CFTC Management disagrees with the Draft Report's conclusion that certain errors in appointment paperwork can be "easily fixed"<sup>202</sup> on a retroactive basis. There are limited circumstances under which agencies are permitted to retroactively correct personnel actions, including appointments. Specifically, the Comptroller General has ruled that:

"[P]ersonnel actions, including appointments, cannot be made retroactively effective unless clerical or administrative errors occurred that 1) prevented a personnel action from taking effect as originally intended, 2) deprived an employee of a right granted by statute or regulation, or 3) would result in failure to carry out a nondiscretionary administrative regulation, or policy if not adjusted retroactively." *Matter of William A. Keel, Jr. and Richard Hernandez - Small Business Administration - de facto employees*, B-188424, March 22, 1977 (*Matter of Keel*) citing 54 Comp Gen. 888 (1975); See also *Matter of Sophie R. Smarts - De Facto Employee*, B-188574, Dec. 29, 1977 (*Matter of Smarts*).

The Comptroller General, however, has not found that the failure to complete appointment paperwork is an administrative or clerical error. For example, in *Matter of Keel*, two members of then President Carter's transition team, William A. Keel, Jr., and Richard Hernandez, were assigned to work at the Small Business Administration (SBA). *Matter of Keel* at 1. The White House did not instruct SBA on the personnel actions for these employees until a couple weeks after these employees started working at the agency; therefore, the appointments for Keel and Hernandez did not occur until a later date. *Id.* SBA asked the Comptroller General whether the agency could make the appointments for these individuals retroactive. The Comptroller General ruled that the factual situation regarding the two employees did not meet any of the criteria for retroactive personnel actions. *Id.* at 2.

Similarly, the Comptroller General ruled that there was no administrative or clerical error when an employee was not properly appointed in *Matter of Smarts*, B-188574. In this decision, an Army employee had worked for forty hours prior to the Army's discovery that she "had not been properly processed in." *Id.* at 2. Relying on *Matter of Keel*, the Comptroller General ruled that the facts regarding Smarts' appointment did not satisfy any of the criteria set forth above regarding an administrative or clerical error. *Id.* at 3. See also *Richard M. Wair*, B-196620, March 19, 1980 (Department of Health, Education, and Welfare Office intern who worked without proper appointment and whose appointment paperwork was never completed by agency due to intern's failure to submit certain documentation cannot be considered a *de facto* employee and the intern could not be retroactively appointed because facts do not satisfy any of the criteria for an administrative or clerical error.)

Pursuant to Comptroller General decisions, incomplete paperwork or the complete lack of paperwork appears not to satisfy any of the criteria that permits agencies to correct administrative or clerical errors, especially where the errors appear significant and not isolated.

<sup>202</sup> *Id.*

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Applying the holdings of these Comptroller General decisions to the OCE economists, and based on the current information available to CFTC Management, we conclude that the Commission may not be authorized under law to retroactively correct certain deficiencies in the appointment paperwork. We disagree, therefore, with the Draft Report's conclusions that they can be "easily fixed."<sup>203</sup>

CFTC Management requests that the Draft Report be revised to reflect that the circumstances under which agencies are permitted to retroactively correct certain personnel actions, including appointments, is limited. Additionally, CFTC Management requests that the OIG share all paperwork that it has obtained and identified which the OIG believes contains administrative or clerical errors. Once CFTC Management receives the documentation, we will review it and will correct any administrative or clerical errors to the extent permitted by law.

**B. Draft Report Application of Comptroller General Decisions Regarding *De Facto* Employees**

In addition to asserting that identified errors in administrative paperwork can be "easily fixed,"<sup>204</sup> the Draft Report also states that errors in the appointment paperwork or other appointment deficiencies of OCE economists could be easily remedied by categorizing the improperly appointed individuals as *de facto* employees.<sup>205</sup> Specifically, the Draft Report states that "[b]ecause there was no indication of fraud or bad faith by the economists, or evidence that the appointments by the Chief Economist were unauthorized, the nature of the administrative errors appeared to us to be somewhat trivial and easily fixed."<sup>206</sup> According to the Draft Report, if the OCE economists are retroactively categorized as *de facto* employees, then any acts of these employees performed despite deficient paperwork, could be subsequently ratified.<sup>207</sup> This is given as support for the conclusion in the Draft Report that "there appears to be no basis to invalidate or indefinitely delay work product by OCE economists who suffer administrative irregularities in their onboarding paperwork."<sup>208</sup> As explained below, we do not find the cases recognizing *de facto* employees apposite on the facts as we currently understand them. In any event, the review process that has been established by CFTC is not designed to "invalidate or indefinitely delay work product by OCE economists."<sup>209</sup> Rather, it is designed to ensure that papers cleared for publication do not contain Section 8 or other non-public data or protected information, and to determine the employment status of the author seeking publication, which

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 17.

<sup>205</sup> *Id.* at 18-19 (the OIG explains the Comptroller General opinions about *de facto* employees and found that such employees' work was not invalidated by paperwork errors); *id.* at 32 (the OIG recommends being mindful that acts performed while a person is serving as a *de facto* employee are valid, and the agency should ratify their good faith acts).

<sup>206</sup> *Id.* at 17.

<sup>207</sup> *Id.* at 19, 32.

<sup>208</sup> *Id.* at 19.

<sup>209</sup> *Id.*

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could affect, among other things, the nature and content of the disclaimer used and the appropriate standard and scope of review to be applied to the paper.

GAO has long recognized that a *de facto* employee is one who performs the duties of a Federal office or position with apparent right and under color of an appointment and claim of title to such office or position. *Matter of Martin Mendelsohn Payments for Services Performed Before and After Appointment*, B-20804, May 3, 1983 (a consultant who received overpayments of salary during his 2-month appointment sought to have work performed before and after his appointment credited against his indebtedness; the consultant was not a *de facto* employee and thus was not entitled to payment since he did not act under color of authority and had no reasonable expectation of payment); *John F. Donnelly: De Facto Employee*, B-193605, January 8, 1979 (*Matter of Donnelly*) (consultant who claimed compensation for personal services rendered to the Army Corps of Engineers could be categorized as a *de facto* employee); *Matter of Cynthia S. Browning and Charlie L. Cranford - Expired Appointments - Status as De Facto Employees*, B-260534, November 29, 1995 (*Matter of Browning and Cranford*) (FAA employees who were not properly appointed were permitted to be paid as *de facto* employees for the time when they were not properly appointed); *Blackwell*, B-257669 (ambassador who was appointed by the President but travelled to his new post three weeks early was not entitled to compensation as a *de facto* employee because he could not provide evidence and proof that he was serving under color of authority); and *Matter of Acting Federal Insurance Administrator*, B-183012 (improperly appointed insurance administrator who served for 19 days under an improper appointment with the full knowledge and approval of the Secretary of Housing and Urban Development and the President was a *de facto* employee entitled to be paid for the reasonable value of his services, but appointment was not valid).

There are distinguishing facts between *Matter of Donnelly* and *Matter of Browning and Cranford* on the one hand and the situation involving OCE economists appointed as uncompensated consultants on the other. First, the individuals in these GAO cases had an expectation at the outset that they would be paid for their work. With regard to the OCE economists appointed or intended to be appointed as uncompensated consultants, CFTC never had any intention of paying them for their services and there was also no expectation on the OCE economists' behalf that they would be paid for their services.<sup>210</sup> Second, all of the cases cited above focus on how to justify some sort of payment to the individual serving under an imperfect appointment for the value of the services rendered; these cases would only be relevant to the present situation if the issue were how to pay the OCE economists serving as uncompensated consultants for the

<sup>210</sup> The Draft Report notes that the cases relied upon by the OIG focus upon whether individuals can be paid for their services notwithstanding improper appointments. *Id.* at 12 n. 78. However, the Draft Report does not provide analysis of title authority which would extend the holdings of the cited cases to situations in which the individuals involved were never intended to receive payment.

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services they provided.<sup>211</sup> The cases cited above do not provide CFTC the authority to retroactively cure appointment or paperwork deficiencies for consultants who were not intended to be compensated and who were not serving under a proper appointment.<sup>212</sup> Additionally, the cited cases do not provide the CFTC with authority to convert individuals brought in under contract into *de facto* employees.

The Draft Report relies on *Matter of the Acting Federal Insurance Administrator's Status and Authority (Matter of Acting Federal Insurance Administrator)* B-183012, 1977 U.S. Comp. Gen. LEXIS 100 (June 29, 1977)<sup>213</sup> as additional support for the proposition that CFTC can retroactively cure improper appointments and ratify acts committed by individuals serving as *de facto* employees.<sup>214</sup> In this decision, an acting insurance administrator signed decision letters, issued reports and testified before Congress despite an improper appointment. 1977 U.S. Comp. Gen. LEXIS 100 at \*\*9-10. The Comptroller General held that the Department of Housing and Urban Development could not automatically cure the improper appointment and noted that there were questions concerning the legality of the acts committed by the insurance administrator under the improper appointment. *Id.* at \*\* 10-11. CFTC Management disagrees with the OIG's reliance on this case, because OCE economists whose appointments as consultants were deficient do not qualify as *de facto* employees for the reasons discussed above.

Therefore, the proposition cited in the Draft Report that acts engaged in by an individual with *de facto* status have the same weight as if the individual was an officer *de jure*<sup>215</sup> is inapplicable to the OCE economists whose appointments were deficient. We further disagree with the Draft Report's reliance on *Matter of Acting Federal Insurance Administrator* as a basis of authority for the Commission to ratify the actions of and papers written by OCE economists whose appointments were deficient. The implications of the ratification of OCE research papers written by multiple authors and non-affiliated co-authors would be distinctly different from the ratification of an agency directive, policy or order. In the case of an agency directive, policy or order, these documents could be simply reissued with a new effective date by an individual who was properly authorized.<sup>216</sup>

<sup>211</sup> If, however, there are facts that establish that some of the unpaid consultants expected payment at the outset, that CFTC intended to pay these individuals, and the criteria of *de facto* employees are met, it could be determined that the consultants are *de facto* employees.

<sup>212</sup> It is important to note that retroactive correction of appointment paperwork and the finding of an individual as a *de facto* employee are separate issues. Specifically, in *Matter of Smart* the Comptroller General opined that when an individual is determined to be a *de facto* employee, it "should not be misunderstood as meaning he has been retroactively appointed in the position in which he worked. Rather, the rule is that even though an employee may not be retroactively appointed, he may yet receive compensation for his services if he is found to be a *de facto* employee." *Matter of Smart*, B-188574 at 2.

<sup>213</sup> DRAFT REPORT at 18 B.72.

<sup>214</sup> *Id.* at 18-19.

<sup>215</sup> *Id.* at 18.

<sup>216</sup> *Matter of Acting Federal Insurance Administrator*, 1977 U.S. Comp. Gen. LEXIS 100 at \*\* 10-11.

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CFTC Management requests that the OIG provide its proposed guidance for ratifying previously authored economic research papers. In CFTC Management's view, any ratification of previously authored economic research papers, if appropriate, may have to be made by the Commission. This would insert an additional step to the paper review process described in Part I.H above as the Commission would have to determine whether ratification was appropriate for each specific paper prior to its release. We note that, if CFTC is unable to either retroactively correct administrative errors or apply the *de facto* line of cases to a particular individual, then the individual has no official status with the agency. However, as discussed in Part III.E, any papers produced by that individual would be reviewed for compliance with Section 8 and any signed NDA. Therefore, ratification would not necessarily be required in order for papers written by OCE economists whose appointments were deficient to be published.

Accordingly, CFTC Management disagrees with the Draft Report's conclusions regarding *de facto* employees.<sup>227</sup> CFTC Management requests that the Draft Report be changed to correctly reflect the current state of the law with regard to *de facto* employees. More specifically, the Draft Report should be changed to reflect that CFTC Management cannot cure all paperwork deficiencies by designating individuals with improper paperwork as retroactive *de facto* employees.

C. Authority of the Chief Economist

CFTC Management disagrees with the analysis in the Draft Report concerning the Chief Economist's authority to appoint contractors. Specifically, the Draft Report states that one individual (b)(6), (b)(7) a contract OCE economist, was appointed by the Chief Economist "under contract."<sup>228</sup> The Chief Economist, however, has no power or authority to bind the Commission to a contract. Under the FAR, the authority for a federal agency to enter into contractual relationships and commit the Government to the expenditure of funds is a delegated authority, which must be delegated in writing to a contracting officer. FAR 1.601. Contracting officers with delegated authority are the only individuals legally authorized to bind the Government by executing contracts and signing determinations and findings required by the FAR. FAR 1.604. Consequently, the Chief Economist has no authority on his own to bind the agency in a contract with an OCE economist.

Moreover, the Chief Economist also does not have authority to appoint an individual to federal employment on his own. CFTC's Office of Human Resources ("OHR") administers CFTC's personnel policies in accordance with Title 5 of the U.S. Code and OPM's statutes and regulations. At present, CFTC's OHR is the only authorized office in this agency that has

<sup>227</sup> DRAFT REPORT, at 18-19 (concluding that prior work completed by employee with inadequate security clearances, even if employee could not be retained after the security clearance is corrected, should not be discarded because employee was a *de facto* employee); *id.* at 32 (the agency should ratify the good faith work of any person serving as a *de facto* employee).  
<sup>228</sup> *Id.* at 16.

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received OPM approval to administer the requirements of Title 5 of the U.S. Code. The Chief Economist has no authority to appoint anyone to the position of employee, expert, or consultant. The suggestion in the Draft Report that the Chief Economist has power to bind the agency by contract or to appoint individuals to positions as contractors or employees is in conflict with these authorities.<sup>219</sup>

CFTC Management requests that the Draft Report be corrected to reflect that the Chief Economist has no authority to appoint employees under Title 5 of the U.S. Code. In addition, CFTC Management requests that the Draft Report be corrected to reflect that the Chief Economist does not have the authority to enter into government contracts with economists on behalf of the Commission.

**D. Waiver of Compensation**

As noted above, the Draft Report concludes that paperwork deficiencies can be "easily fixed."<sup>220</sup> The discussion leading to this conclusion focuses on incomplete or unsigned hiring forms. A number of the OCE economists performed the work without compensation. The Comptroller General has defined "voluntary services" as those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous. *Necess Appointment of Sam Fox*, 2007 US Comp. Gen. LEXIS 97, at \* 9 and *Army's Authority to Accept Servs. from the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc. (Army's Authority)*, 1982 US Comp. Gen. LEXIS 667, at \*3. An agency does not violate the Antideficiency Act if an agency accepts "gratuitous services"<sup>221</sup> or if an agency accepts services where it is authorized by law. 31 U.S.C. §§ 1341(a), 1342, *Principles of Federal Appropriations Law Volume II (Redbook)*, at 6-110 (Feb. 2006).

There are two ways an agency can accept gratuitous services. First, an agency can accept gratuitous services "pursuant to a valid, binding no-cost contract" prior to the time performance has begun.<sup>222</sup> *No-Cost Contracts for Event Planning Services*, 2007 U.S. Comp. Gen. LEXIS 220, at \*9. Second, an agency can accept gratuitous services from an expert or consultant employed under the authority of 5 U.S.C. § 3109<sup>223</sup> provided that "it is clearly understood and agreed that no compensation is expected." *Redbook*, at 6-99; *See also Comptroller General Warren to the Director, Bureau of Budget*, 1947 U.S. Comp. Gen. LEXIS 242 (*Bureau of Budget*); The Office of Legal Counsel ("OLC") and U.S. Government Accountability Office

<sup>219</sup> *Id.* at 17 (the OIG notes there was no evidence that the appointments made by the Chief Economist were unauthorized).

<sup>220</sup> *Id.*

<sup>221</sup> Authorities interpreting section 31 U.S.C. § 1342 have drawn a distinction between prohibited "voluntary services" and "gratuitous services." *See Redbook*, at 6-106.

<sup>222</sup> In general, to be enforceable, a contract with the United States Government requires an offer, acceptance of the offer, and consideration. *No-Cost Contracts for Event Planning Services*, B-308968, 2007 U.S. Comp. Gen. LEXIS 220 at \*4 n.2 (citing *Rick's Mushroom Service, Inc. v. United States*, 76 Fed. Cl. 250, 259 (2007); *Total Medical Management, Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir.1997)).

<sup>223</sup> This authority permits agencies to procure expert and consultant services.

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("GAO") decisions have interpreted an agreement to serve without compensation as meaning that there should<sup>224</sup> be written documentation of the agreement. However, recent GAO decisions and guidance, as well as other agency regulations and practices regarding consultants and experts, require that there be written documentation of the agreement.<sup>225</sup> In *Matter of Department of the Treasury—Acceptance of Voluntary Services*, B-324234 (Jan. 27, 2014), the Comptroller General found that:

"Treasury violated the voluntary services prohibition of the Antideficiency Act, 31 U.S.C. § 1342, when it accepted the unpaid services of four individuals. An agency may accept unpaid services when someone offering such services executes an advance written agreement that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government. Treasury obtained no such written agreements in this case. Treasury should report a violation of the Antideficiency Act as required by 31 U.S.C. § 1351."

CFTC Management is aware that the agency has an obligation to report any violations of the Antideficiency Act to the President, Congress, and GAO.<sup>226</sup> At the time of referral, CFTC

<sup>224</sup> The word "should" is a lower standard than words like "must" or "shall." Merriam-Webster's online dictionary includes the following definition of "should": "to express obligation, propriety, or expediency." *Should Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/should> (last visited Jan. 31, 2014). Garner's Dictionary of Legal Usage defines the word "should" as follows: "Oddly, *should*, like *may*, is sometimes used to create mandatory standards, as in the ABA Code of Judicial Conduct. In that code, in which "the canons . . . establish mandatory standards unless otherwise indicated," six of the seven canons begin, "A Judge *should* . . ." BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE (3d ed. 2011).

<sup>225</sup> See *In Matter of Department of the Treasury—Acceptance of Voluntary Services*, B-324234 (Jan. 27, 2014). This decision is consistent with earlier GAO decisions. Specifically, "[several] . . . [GAO] decisions note the requirement of a written record of the agreement to serve without compensation." *Redbook*, at 6-100. For example, in *Bureau of Budget*, the Comptroller General ruled that the Bureau could hire the experts or consultants without compensation because "there is no provision of law which purports to prevent the acceptance of gratuitous services, if otherwise lawful, where the services are requested by one who, upon being appointed as a Government employee without compensation, agrees in writing and in advance that he waives any and all claims against the Government on account of such service." [emphasis added]. *Bureau of Budget* at \*2-3. See also *Army's Authority* at \*4, (Voluntary services are not prohibited "[p]rovided that each volunteer formally agrees in advance to serve gratuitously, and that the agreement is properly documented."); *Matter of Community Work Experience Program—State General Assistance Requirements at Federal Work Sites (Community Work Experience Program)*, 1987 U.S. Comp. Gen. LEXIS 1615, at \*5 ("The GAO has frequently distinguished the acceptance of voluntary services from the acceptance of gratuitous services 'where it is clearly established by written agreement or by statute that no compensation is due or expected.'" [emphasis added].

Similarly, OLC has opined that gratuitous services agreements should be executed in writing. In *Employment Status of "Volunteers" with Federal Advisory Committees*, 1982 OLC LEXIS 47, OLC concluded that the Department could employ consultants as volunteers provided that "[t]he Commerce Department . . . is require[ing] each 'consultant volunteer' to execute a written waiver of compensation, which should be sufficient to protect the government from subsequent salary claims." *Id.* at \*8. In *Authority to Employ the Services of White House Office Employees during an Appropriations Lapse*, 1993 OLC LEXIS 75, OLC concluded that "any employee who voluntarily waives his or her salary or compensation should do so in writing." *Id.* at \*6.

<sup>226</sup> 31 U.S.C. § 1351. Additionally, the Office of Management and Budget has published requirements for executive agencies for reporting violations of the Antideficiency Act. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE

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Management could not locate documentation of agreements to waive compensation for those OCE economists who were not compensated by the Commission for their work.<sup>227</sup> CFTC Management requests that the OIG provide any information collected during their review regarding waivers of compensation.

**V. Additional Factual Issues**

In addition to the issues and concerns set forth above, CFTC Management has identified the following issues that we believe appropriate for the OIG to review and address in the Draft Report.

**A. Statements that Temporary Publication Suspension Was a Ban on Economic Research**

On page 15, the Draft Report states that the Commission halted *all* economic research in December 2012. This assertion is not accurate. As the Draft Report states, OCE "conducts research on major policy issues facing the Commission; assesses the economic impact of regulatory changes on the futures markets and other sectors of the economy . . . provides expert economic support and advice to other CFTC offices; [and] conducts special studies and evaluations . . ." <sup>228</sup> While the December 2012 suspension temporarily halted publication of outside economic research papers, OCE continued to employ economists, who spent the past year conducting economic research to fulfill the mission of the OCE, the Commission, and the CEA.

By asserting that the Commission halted *all* economic research, the Draft Report overstates the Chairman's decision, which was limited to suspending external publication of individual research papers and to restricting access to non-public data to full-time CFTC employees. The statement also does not account for the important work performed by OCE during this past year. Therefore, we ask that this statement be corrected to indicate that only outside publication of individual research papers was suspended in December 2012 during the pendency of the review into the issues outlined in the Chairman's letter to the OIG. Additionally, the Draft Report does not explain that the Chairman's direction was limited to the pendency of the review and was never contemplated or implemented as a permanent publication suspension. As discussed in Part I.H above, soon after the OCE matter was referred to the OIG, the Office of the Chairman, OCE and OGE developed a procedure for reviewing and clearing research papers on a case-by-case basis, and three papers have been cleared through both the Paper Review Committee and OGC at this point.

PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET, at 4, §§ 145, 145.B (2013).

<sup>227</sup> E-mail from (b)(6), (b)(7)(C) Office of Human Resources, to (b)(6), (b)(7)(C) (Mar. 1, 2013) (Re: Waivers of compensation).

<sup>228</sup> DRAFT REPORT, at 8.

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CFTC Management requests that the Draft Report be revised to reflect that the publication suspension was not permanent and that OCE full-time employees and certain OCE economist consultants and contractors had access to Section 8 and other CFTC non-public data for economic research and other Commission-related purposes.

**B. Statement that OCE Was Not Permitted to Hire New Economists**

Page iii of the Draft Report states that “[f]or a year, OCE was not permitted to bring on new economists.” CFTC Management was not provided context or support for this statement, and therefore, it is difficult to respond to this conclusion. We note, however, that the Chairman only specifically addressed the cessation of publication during the review to determine the status of OCE employees.<sup>229</sup> To our knowledge, the review did not affect OCE’s ability to request additional staff or contractors to meet their needs and fulfill the Commission’s mission. We note that Fiscal Year 2013 was a difficult time financially for the agency, culminating in both a government shutdown and mandatory furlough days for all agency employees. We believe these extreme budget constraints which included the termination of a number of agency contracts in addition to limited hiring may have affected OCE’s ability to hire additional staff – as they did all offices in the agency. While CFTC Management agrees with the OIG’s statement that the Commission’s posting of four economist positions in December 2013 is a positive development,<sup>230</sup> we do not believe that there is any evidence that OCE was barred from hiring in 2013 on account of the concerns that prompted the Chairman’s decision to seek an OIG investigation.

CFTC Management requests that the OIG provide the basis for the assertion that OCE was not permitted to bring on new economists. If the basis for OCE being unable to hire new economists is not tied to the current review of OCE, but rather is tied to the broader budget constraints affecting the entire agency, we request that the OIG remove these statements from the Draft Report.

**C. Importance of Proper Onboarding**

The Draft Report notes “with approval that it appears the OGC’s proposed policy [to block publication of papers written by economists without proper paperwork] has not been officially adopted by the Chairman or the Commission.”<sup>231</sup> It states that there is “potential unfairness inherent in the proposed policy.”<sup>232</sup> However, OGC has not proposed any final policy with respect to OCE, but rather has raised a series of concerns related to the onboarding issues.<sup>233</sup>

<sup>229</sup> Gensler Letter to OIG on OCE.

<sup>230</sup> DRAFT REPORT, at 28.

<sup>231</sup> *Id.* at 19.

<sup>232</sup> *Id.*

<sup>233</sup> The concerns raised by OGC include, but are not limited to, the following: (1) if an individual is not properly onboarded, then access to Section 8 and other nonpublic information is improper, therefore the agency needs to be able to quickly verify the status of those who are onboarded at the agency and who have been granted access to data; (2) if an individual did not sign a waiver of compensation then potential Antideficiency Act issues as discussed

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The Draft Report may be equating the ongoing legal review of the onboarding issues with a formal OGC policy. The Draft Report also appears to suggest that there was some policy indicating that the OGC sought to focus on and penalize only OCE economists for not being properly hired.<sup>234</sup> For example, the Draft Report notes that “no one in OCE or OGC was aware of the administrative errors in OCE economists’ onboarding paperwork until December 2012. [N]obody documented or brought to the attention of management the fact that (b)(6), (b)(7)(C) initial request for network access was made by the Chief Economist and in process with ODI for more than two weeks before his contract was signed.”<sup>235</sup> The Draft Report further states that OGC is “at a loss to understand why accuracy was never emphasized before December 2012” and why the policy “is not being implemented Agency-wide.”<sup>236</sup> Further, the Draft Report appears to be suggesting that only OGC considers following proper hiring procedures to be important.<sup>237</sup>

It is true, to our knowledge, that no one in OGC was aware of the administrative errors with OCE economists’ onboarding paperwork until December 2012 and that the problems with (b)(6), (b)(7)(C) documentation were not brought to the attention of CFTC Management. Because of OGC’s function as legal advisor to the Commission, OGC only became aware of this issue when it was informed in December 2012. CFTC Management understands as well that neither OHR nor the Procurement Offices were aware of the breadth of these onboarding paperwork issues in OCE prior to December 2012. The Draft Report recognizes that “the discovery of dual hiring processes for new OCE economists were not documented or brought to the attention of management . . . .”<sup>238</sup>

As the Draft Report makes clear, the Chief Economist was “very aggressive”<sup>239</sup> in pushing to get OCE economists hired by using multiple channels simultaneously. Indeed, the Draft Report further notes that the Chief Economist would “submit the same individual to be hired as both contractor and consultant at the same time, apparently intent on getting the person onboarded as quickly as possible.”<sup>240</sup> This was not brought to CFTC Management’s attention until December 2012, at which point management in OGC, ODI, and OED worked together to determine the scope of the problem and ultimately advised the Chairman to have the OIG, an independent investigator, review the issues.<sup>241</sup> The CFTC Management decision to recommend an OIG investigation demonstrates the Commission’s strong commitment to accurately onboarding employees across the agency.

and (3) if the agency does not properly onboard individuals then the agency cannot determine the standard of review and appropriate disclaimer will depend on the status of the individual OCE economist which must be documented through proper onboarding.

<sup>234</sup> DRAFT REPORT, at 15.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* (“Given the importance OGC now gives to onboarding paperwork – at least for some OCE staff . . . .” (6-phrase omitted)).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 17.

<sup>241</sup> Denster Letter to OIG re OCE.

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Further, we do not believe that OCE is being subjected to unfair treatment.<sup>242</sup> To our knowledge, and we have not been provided with facts proving otherwise, the problems with onboarding were widespread in OCE, which the Draft Report acknowledges: "the errors were in a volume that indicated a more than trivial problem."<sup>243</sup> The volume was more than trivial and the scope of error was unique to OCE because of the "very aggressive"<sup>244</sup> manner in which the Chief Economist was operating. While the Draft Report characterizes this as an "annoyance,"<sup>245</sup> the aggressive tactics used by the Chief Economist resulted in the serious problems described in this memorandum. OED and ODT have worked extensively with the new Chief Economist, and CFTC Management believes that these problems have been fully addressed and that new procedures are in place to ensure that the problems do not recur.<sup>246</sup> On the other hand, we are not aware of any facts to suggest that other Commission Divisions and Offices operated in this manner to create onboarding issues, and we believe that proper onboarding has been, and continues to be, emphasized agency-wide.

CFTC Management requests that the OIG revise this section of the Draft Report to reflect that (1) OGC did not propose or adopt any new policy regarding publication of papers by economists who were not onboarded properly; (2) given OGC's specific role in the agency, it reasonably was not aware of the onboarding paperwork problems until such problems were brought to OGC's attention in December 2012, and which time it took immediate action; (3) the CFTC Management response to the problems was focused on OCE because CFTC Management had no reason, and discovered no basis, to believe that the onboarding problems extended beyond OCE; and (4) onboarding accuracy is viewed as important and is emphasized agency-wide. If there is evidence to suggest that onboarding paperwork accuracy is a problem with respect to other Divisions and Offices, CFTC Management requests that OIG provide it. Otherwise, we request the Draft Report be modified accordingly.

**D. Draft Report Direction to Reinstate OCENet**

We note the OIG's recommendation that OCENet should be restarted as soon as possible.<sup>247</sup> CFTC Management takes seriously the OIG's concern that physical and information security concerns are "substantial" and the "absence of controls" is significant.<sup>248</sup> We believe protecting data and information in the possession and control of the Commission from unauthorized disclosure consistent with Section 6, the Privacy Act, MOUs, and all other statutory requirements is of paramount importance.

<sup>242</sup> DRAFT REPORT, at 19.

<sup>243</sup> *Id.* at 17.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Please see discussion of CFTC Management action in Part I.G. above.

<sup>247</sup> DRAFT REPORT, at 33.

<sup>248</sup> *Id.* at 31; see *supra* note 102.

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The Draft Report details the advantages of OCENet: “it stored data so that it did not need to be separately loaded onto the many desktops; it was faster, meaning that the manipulation and study of datasets could occur more quickly; and it contained unique programs for the manipulation of data.”<sup>249</sup> The OIG characterizes OCENet’s ability to run the “complex programs necessary to analyze economic data” as a benefit.<sup>250</sup> These analytical programs were in many cases coded using software or programming language compilers provided by the Commission and were in some cases open source software not available on the CFTC main network. However, there was not strict control over software installed in the environment, and it is possible that personally owned software was loaded onto OCENet by the OCE economists.<sup>251</sup> This potential, along with other considerations including the Commission’s IT policy,<sup>252</sup> which prohibits individuals from installing personally owned software, warrants a review by CFTC Management of research program requirements, architecture, and controls before a determination is made whether OCENet should be restarted.

The Draft Report identifies another benefit of OCENet as the ability to hire or contract with outside economists to do research while limiting access to the CFTC main network.<sup>253</sup> While this was the historical practice of the agency, if OCE economists are properly appointed to do the work of the Commission or are properly brought in under contract, then they are authorized to have access to the data on the CFTC main network depending on their need for access to the data. Based on this, it does not follow that a separate network is necessarily required. Staff in several Commission divisions, including DMO, DSIO, and OCE, currently have access to the data on the CFTC main network and perform complex surveillance and analytics using the main server. CFTC Management believes that a review of research program requirements, current analytics platform capabilities on the CFTC main network, and the cost of maintaining a separate OCENet should be conducted before a determination is made whether OCENet should be restarted.

There are a variety of information technology solutions that would allow the CFTC to achieve its economic research objectives. CFTC Management has not yet determined its preferred solution. While CFTC Management is sensitive to the idea that manipulating data can “occur more quickly”<sup>254</sup> on a network than on a desktop, we are unaware of a specific requirement to create a separate network, in lieu of using the existing CFTC main network. We also are unaware of any reasons why standard administrative controls used for all other Commission employees are insufficient for the economic research conducted in OCE. Nevertheless, CFTC Management has committed that OCE, ODT, OED, OGC, and other offices will review the business need for a

<sup>249</sup> *Id.* at 10.

<sup>250</sup> *Id.*

<sup>251</sup> Interview with Andrei Kirilenko, *supra* note 13.

<sup>252</sup> COMMODITY FUTURES TRADING COMM’N, OFFICE OF THE EXEC. DIR., CFTC POLICY: IT RULES OF BEHAVIOR (2012).

<sup>253</sup> DRAFT REPORT, at 10.

<sup>254</sup> *Id.*

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stand-alone network for OCE, and we would appreciate any other information OIG may be able to provide on this subject.

The Draft Report further notes the concerns about the physical and information technology security are "substantial" and are being addressed "at least in part in connection with an OIG audit" of the Commission's Fiscal Year 2013 Federal Information Security Management Act (FISMA) report.<sup>255</sup> However,

(b)(7)(E) (b)(7)(E)

As described in Part I.G, ODT has begun to assess the controls needed in the event CFTC Management's review determines there is a need for a separate network to support OCE.

CFTC Management is sensitive to information security concerns and (b)(7)(E) and is also in the process of acquiring a tool to support automated data loss prevention. However, we cannot at this time accept the recommendation to immediately restart OCENet without completing an internal review and assessment of the business need for a separate system and the potential security risks created by such a system. To make an informed decision, CFTC Management requests that the OIG provide the factual details OIG relied upon to conclude that the absence of controls for OCENet was substantial. If we find that the security concerns cannot sufficiently be addressed to protect the data in accordance with all legal requirements, CFTC Management requests that the Draft Report be revised to omit the recommendation that OCENet be immediately restarted until the need is justified and all security concerns are addressed.

#### E. Draft Report Criticism of OGC for Lack of Commission Aggregation Standards

The Draft Report concludes that the lack of "narrow, objective, and definite standards" for reviewing OCE economists' papers is "disturbing."<sup>256</sup> The OIG is correct that, although aggregation standards for information protected under Section 8 have been created for various market publications, there is not a similar formula for aggregation for research papers written by

<sup>254</sup> *Id.* at 31.

<sup>255</sup> BROWN & COMPANY CPAS, PLLC, DRAFT, COMMODITY FUTURES TRADING COMMISSION COMPLIANCE WITH PROVISIONS OF THE FEDERAL INFORMATION SECURITY MANAGEMENT ACT OF 2002, FISCAL YEAR 2013, at 36 (2013).

<sup>256</sup> *Id.* at 31.

<sup>257</sup> *Id.* at 32.

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OCE economists.<sup>259</sup> While CFTC Management acknowledges that the lack of a single “one size fits all” standard to identify Section 8 data in the economic research papers is not ideal, we agree with the OIG’s assessment that reviewing the economists’ papers for information protected under Section 8 can be “complex, requiring an examination of context to determine whether aggregated trade data in an economic research paper may be reverse engineered . . . .”<sup>260</sup> This complex factual and legal review is the reason why it may not be possible for the Commission to provide a standard aggregation policy for widely disparate topics, and for different techniques and methods for using the data, such as those covered in the economic research papers. Indeed, the complex, fact-intensive review is currently being undertaken by the Paper Review Committee established by OCE and draws on expertise throughout the agency to address the complexities involved in assessing aggregation and Section 8 data in papers.

The Draft Report appears to fault OGC for not providing written guidance on the standards to be applied with regard to the identification of information protected under Section 8 (including acceptable aggregations policies).<sup>261</sup> We do not believe this criticism of OGC is warranted because, as noted, the review is factually and legally complex and there is not a “one size fits all” approach. The Paper Review Committee has developed a process to review papers and engage with the authors to reach a factual conclusion that there is no Section 8 information disclosed by the papers. The Paper Review Committee then provides its recommendation to OGC as part of the new review process. OGC applies the legal standard for disclosure to the analysis provided by OCE. Additionally, as noted in Part I.H., OGC worked collaboratively with OCE and the Office of the Chairman to help identify information needed to review papers for Section 8 information. This collaboration is critical to ensure the Agency only discloses information properly, and we appreciate the OIG’s recognition of the complexity of this case-specific, fact-intensive undertaking.

While recognizing the complexity of reviewing the economic research papers, the Draft Report finds fault with the delay in approving publication of the papers.<sup>262</sup> CFTC Management does not believe this finding of fault is consistent with the facts as set forth in the Draft Report and in this memorandum. Because of the “more than trivial”<sup>263</sup> errors in hiring, onboarding, and recordkeeping, as well as the “substantial”<sup>264</sup> information security concerns, it is imperative to have a thorough and careful review process. As described in Part I.H. above, CFTC Management has developed a review process that addresses these concerns.

CFTC Management requests that the OIG remove the Draft Report’s criticism of OGC for not providing written guidance on aggregation standards when the Draft Report acknowledges the

<sup>259</sup> *Id.* at 15.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 29 (the Paper Review Committee has not received written guidance from OGC on the standards to be applied with regard to Section 8).

<sup>262</sup> *Id.* at 19, 23-24.

<sup>263</sup> *Id.* at 17.

<sup>264</sup> *Id.* at 31.

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inquiry is "complex, requiring an examination of context to determine whether aggregated trade data in an economic research paper may be reverse engineered. . . ." <sup>265</sup> CFTC Management requests that the OIG reflect in the Draft Report that determining whether data is sufficiently aggregated to avoid disclosures prohibited by Section 8 is a fact-intensive inquiry that requires case-by-case review of complex statistical and analytical techniques by individuals with data expertise, and the CEA provides the legal standard that guides such review.

**F. CFTC Action With Regard to Papers on the Internet**

On page 111, the Draft Report states "[t]here is no indication that the Agency sought to regulate any OCE research papers from the Internet." We do not agree with this finding because it is our understanding that, prior to the questions raised by the CME about potential Section 8 disclosures in (b)(6), (b)(7)(C) another paper published through the (b)(6), (b)(7) (b)(6), (b)(7) website was brought to the attention of Commission staff. That paper initially appeared to contain Section 8 data. The agency conducted a review and determined that the data in the paper was simulated data, <sup>267</sup> but the Chief Economist directed (b) (6) to remove the paper from the website. <sup>268</sup> Additionally, the significance of this fact is unclear to CFTC Management. By including this fact, the Draft Report seems to be suggesting that the Commission should have attempted to "unpublish" the materials previously published without CFTC Management knowledge. However, we do not agree that the agency staff should be "patrolling" the internet to determine if anyone has violated agency policy and procedures. In both the (b)(6) paper and (b)(6), (b)(7)(C) paper (b)(6), (b)(7)(C) when the Commission became aware that a paper has been published without undergoing proper review, the agency has conducted a review to ensure no Section 8 or other confidential or non-public information was released. CFTC Management requests that the OIG amend the Draft Report to reflect the efforts made by the agency as well as indicate whether the OIG believes the agency has any additional obligations as is currently implied.

**G. Previous OGC Review of (b)(6), (b)(7)(C) Paper**

Page 5 of the Draft Report states that OGC's December 2012 review revealed that (b)(6), (b)(6) paper (b)(6), (b)(7)(C) was reviewed by the Chief Economist, OGC attorney (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) in DMO. This conclusion is not attributed to any individual, and we believe it is not true. The OGC December 2012 review found that the paper

<sup>265</sup> *Id.* at 15.  
<sup>266</sup> E-mail from (b)(6), (b)(6), (b)(7)(C) and Andrei Kirilenko (Oct. 23, 2012) (Re: (b)(6) website content appears to include non-public information. Please make sure removed. RE: Order Data question).  
<sup>267</sup> E-mail from Andrei Kirilenko to (b)(6), (b)(7)(C) (Oct. 23, 2012) (Re: (b)(6), (b)(7)(C)).  
<sup>268</sup> E-mail from Andrei Kirilenko to (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) (Oct. 23, 2012) (Re: (b)(6), (b)(7)(C) website content appears to include non-public information. Please make sure removed. RE: Order Data question). E-mail from Andrei Kirilenko to (b)(6), (b)(7)(C) (Oct. 23, 2012) (Re: (b)(6), (b)(7)(C)).

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was reviewed by the Chief Economist and (b)(6), (b)(7) <sup>265</sup> The Draft Report is the first time that the OGC attorneys conducting the December 2012 review were informed that an economist in DMO also reviewed (b)(6), (b)(7)(C) paper. <sup>270</sup> Therefore, this information was not disclosed as part of the OGC review as asserted in the Draft Report. <sup>271</sup> Additionally, we note that (b)(6), (b)(7) had previously publicly presented his name on at least three occasions prior to the review completed in November 1, 2012, by (b)(6), (b)(7) <sup>272</sup>

CFTC Management requests that the OIG change the Draft Report to reflect that the OGC December 2012 review revealed that the paper was publicly presented prior to (b)(6), (b)(7)(C) November 1, 2012, review. We further request that the Draft Report be changed to reflect that the OGC December 2012 review did not reveal that (b)(6), (b) had reviewed (b)(6), (b)(6), paper, or any other paper.

II. Statements and Knowledge Attributed to CFTC Employee Not Interviewed by OIG

The section of the Draft Report entitled "Further OGC Review Reveals Information Security Concerns and Prompts Further OCE Restrictions" <sup>273</sup> describes actions allegedly taken by an OGC attorney, discusses what that OGC attorney allegedly "learned," and suggests that the OGC attorney made allegations investigated by the OIG <sup>274</sup> The only OGC staff attorney involved in the review is (b)(6), (C) CFTC (b)(6), (b)(7) Counsel, and we assume this is the attorney referred to in the Draft Report. (b)(6), (C) as informed CFTC Management that she was not interviewed by the OIG regarding any of these issues. <sup>275</sup>

CFTC Management requests that the OIG interview the attorney regarding the information in the Draft Report or, in the alternative, provide the source for the information attributed to this attorney so we can fully respond to these allegations.

<sup>269</sup> Interview with Andrei Kirilenko, supra note 13; Memorandum from (b)(6), (b)(7) to (b)(6), (b)(7)(C) Deputy General Counsel (Feb. 8, 2013) (Re: Section 8 Review of OGC); Andrei Kirilenko (Nov. 1, 2012) (Re: Paper draft for OGC attorney) (b)(6), (b)(7)(C)  
<sup>270</sup> Memorandum from (b)(6), (b)(7) to (b)(6), (b)(7) Deputy General Counsel (Feb. 1, 2013) (Re: Section 8 Review of OGC); Email from (b)(6), (b)(7) to Andrei Kirilenko (Nov. 1, 2012) (Re: Paper draft for OGC attorney) (b)(6), (b)(7)(C)  
<sup>271</sup> DRAFT REPORT, at 5.  
<sup>272</sup> Telephone interview with (b)(6), (b)(7) supra note 20; (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

<sup>273</sup> DRAFT REPORT, at 2.  
<sup>274</sup> (b)(6) informed CFTC Management that (b)(6), (C) an investigator with the OIG, stopped by her office one day during the investigation and asked for the legal basis for OGC's proposition that some of the OCE economists were not de facto employees. At no point during that conversation did (b)(6), (C) ask (b)(6) any questions about OGC's review to which the OIG now attributes to her.

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#### I. Discussion of Contracts and Responsibilities of the Procurement Office

The Draft Report notes that “deficiencies . . . included unsigned contracts”<sup>276</sup> and “for one OCE contractor, OED staff determined that the contract was not signed at all.”<sup>277</sup> CFTC Management respectfully requests that the OIG provide the documents and information relied upon to support these statements so that CFTC Management can review and fully respond to the statements in the Draft Report.

Additionally, the Draft Report notes that the Procurement Office is “responsible for administrative onboarding for contractors.”<sup>278</sup> As noted on CFTCNet, the Procurement Office is responsible for overseeing all CFTC procurement activities.<sup>279</sup> Specifically, the Procurement Office is responsible for: (1) drafting and implementing procurement policy for the Commission; (2) serving as business manager with regard to agency contracting activities; (3) awarding and administering the Commission’s contracts in accordance with sound business practices, federal laws and regulations, and agency policies; and (4) managing the Commission’s commercial leasehold portfolio for headquarters and regional offices.<sup>280</sup>

According to the April 2011 “CFTC Guidelines: Staff Additions, Transfers, Moves or Changes,” the requesting office, in this case OCE, is responsible for the administrative onboarding of contractors.<sup>281</sup> Per the April 2011 Guidelines, the Contracting Officer’s Technical Representative (“COTR”) is responsible for taking the lead for onboarding contractor staff. Specifically, the April 2011 Guidelines state:

##### “Contracting Officer Technical Representative (COTR) (for new contractors)

- Contacts Logistics and Operations (LO) to coordinate workspace.
- Completes CFTC Form 718: New Contractor Profile for the selection of a new contractor, and submits it to [staffchanges@cftc.gov](mailto:staffchanges@cftc.gov). This starts the personnel security process.
- Completes CFTC Form 719: New Staff Requirements for a new employee of contractor and submits it to [staffchanges@cftc.gov](mailto:staffchanges@cftc.gov) via email. This form provides basic information to allow OED staff to set up the new contractor.

<sup>276</sup> DRAFT REPORT, *at* 11.

<sup>277</sup> *Id.* *at* 16.

<sup>278</sup> *Id.* *at* 17.

<sup>279</sup> See CFTCNet, *Operators, Financial Management, Procurement*, U.S. COMMODITY FUTURES TRADING COMM’N, <http://www.cftc.gov/online/Operations/Financial-Management/Pages/Procurement.aspx>.

<sup>280</sup> *Id.*

<sup>281</sup> See COMMODITY FUTURES TRADING COMM’N, OFFICE OF THE EXEC. DIR., HUMAN RES., CFTC GUIDELINES: STAFF ADDITIONS, TRANSFERS, MOVES OR CHANGES (2011).

<sup>282</sup> *Id.*

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(b)(6),(b)(7) former OCE Economist, and (b)(6), (b)(7)(C) former (b)(6),(b)(7)(C) Economist, served as COJRs for OCE and were responsible for the administrative onboarding of OCE economists working under contract.

CFTC Management requests that the Draft Report be revised to reflect that the Procurement Office is not responsible for the administrative onboarding of contractors. Additionally, CFTC Management requests that the OIG interview (b)(6),(b)(7)(C) and (b)(6),(b)(7)(C) to obtain any historical information needed for the Draft Report about the administrative onboarding of contractors in OCE.

#### VI. Conclusion

As set forth above, CFTC Management has identified certain statements in the Draft Report that we believe should be revised. Additionally, CFTC Management disagrees with the Draft Report's legal analysis about the requirements of Section 18 of the CEA, the applicability of the First Amendment to research and writing conducted by OCE economists and the Commission's paper review process, the appointment authority of the Chief Economist, the appropriateness and legality of retroactive corrections to administrative paperwork, and the applicability of outside employment ethics regulations to OCE economists.

CFTC Management has exercised its best efforts to respond to the Draft Report in this memorandum. We appreciated the opportunity to review and respond to the Draft Report, and we welcome the opportunity to discuss the issues identified and our recommendations with the OIG further.

