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TO:	Meghan Tente, Acting General Counsel, Commodity Futures Trading Commission
FROM:	Debra L. Roth, Conor D. Dirks Shaw Bransford & Roth P.C.
DATE:	July 1, 2025
RE:	Independent Evaluation of Use of Anti-Harassment Policy to Investigate Commissioner

I. SUMMARY.

In late 2023, a dispute arose between the Human Resources department at The Commodity Futures Trading Commission ("CFTC") and CFTC's Office of General Counsel ("OGC") over the applicability of CFTC's Anti-Harassment Policy ("the Policy") to its Presidentially-appointed, Senate-confirmed ("PAS") Commissioners. Despite OGC's position that the Policy could not apply to Commissioners, CFTC's HR department used Commission funding to contract with a private investigator for an evaluation of whether a Commissioner's conduct during two closed meetings violated the Policy. That investigation was conducted in 2024. The investigator produced a draft report of her investigation, which was not finalized.

You requested that we review the record and provide an independent legal analysis as to whether the Policy, including its investigative procedures, could be applied to a Commissioner.[1] We conclude that the Policy and its procedures cannot apply to a Commissioner, and explain that conclusion below. The ultimate determination rests with the General Counsel. 7 U.S.C. § 2(a)(4).

We reviewed a number of documents in reaching our conclusion. Namely: (1) transcripts of two 2023 closed meetings where CFTC Enforcement Division employees presented enforcement actions for a Commission vote; (2) OGC's written opinion on whether the Policy applied to Commissioners, as well as an e-mail to HR explaining OGC's intent to render such an opinion; (3) a May 9, 2025 memorandum to file by Acting General Counsel Meghan Tente affirming

[1] This request for review was made in part because of concerns that the investigation proceeded after CFTC OGC determined that the Policy did not apply to Commissioners.

OGC's prior opinion and expressing concerns about why the investigation continued and the draft report was created after OGC had rendered its prior opinion; (4) CFTC's Anti-Harassment Policy, approved on July 24, 2023; and (5) the draft report, finding a limited violation of the Policy by a CFTC Commissioner.[2]

II. COMMISSIONERS ARE NOT "EMPLOYEES" SUBJECT TO THE POLICY.

Because the Policy applies only to "employees"[3] of the CFTC, this evaluation starts with the threshold issue of whether PAS Commissioners fall under the definition of an "employee" for purposes of the Policy's investigative and disciplinary procedures. Our analysis of the definition of "employee" flows from the statutes governing the federal workforce and misconduct proceedings therein, the language of the Policy, and the constitutional structure of the Executive Branch. It is our conclusion that Commissioners are not mere "employees" under the law or the Policy and cannot be treated as such for legal and practical reasons.

A. CFTC Commissioners are Defined by Statute as "Officers," Excluded from Disciplinary Proceedings.

Personnel management of the federal civil service is governed by Title 5 of the U.S. Code. Indeed, "[m]ost federal civil service employees are employed by way of either the 'competitive service' or the 'excepted service,'" services that are explicitly governed by Title 5, including its disciplinary procedures. *Gingery v. Department of Defense*, 550 F.3d 1347. *See also* 5 U.S.C. §§ 2102(a)(1), 2103(a). CFTC Commissioners fall under neither of those broad umbrellas.

Under Title 5 of the U.S. Code, there are various definitions of an "employee," dependent on the purpose of various statutory sections. While all those appointed into the civil service are "employees," 5 U.S.C. § 2105, those who *must*, by law, be appointed by the President are further defined as "officers." 5 U.S.C. § 2104(a)(1)(A). Commissioners at the CFTC must, by law, be appointed by the President and confirmed by the Senate. 7 U.S.C. § 2(a)(2)(A); *see also* 17 C.F.R. § 140.10. As such, CFTC Commissioners are "officers," rather than mere "employees," of the civil service.

Congress's definition of an employee in Chapter 75 of Title 5, the chapter that authorizes action to address employee misconduct, specifically *excludes* those "whose appointment is made by and with the advice and consent of the Senate," like CFTC Commissioners. *See, e.g.*, 5 U.S.C.

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[2] While the draft report did not find that the Commissioner engaged in unlawful harassment, it found that her questioning of high-level Commission attorneys in closed meetings on August 11, 2023 and October 20, 2023 about errors and legal deficiencies in their work product was "offensive" to those attorneys, even though her concerns were "legitimate." The Policy purports to bar "offensive conduct."

[3] Anti-Harassment Policy, Sec. II, Application (stating policy applies to "all CFTC employees"). *See also* Policy, Sec. III (providing list of covered individuals, without mention of Commissioners).

§ 7511(b)(1). It also excludes from its definition of "employee" any official "whose appointment is made by the President," like CFTC Commissioners. 5 U.S.C. § 7511(b)(3). As such, misconduct proceedings under Title 5, like those contemplated by the Policy against offenders, are inapplicable to Commissioners. *See* Policy, Sec. III ("The CFTC will take prompt and proportionate corrective action if misconduct or harassment is determined to have occurred.")

In sum, CFTC Commissioners are not employees subject to Agency disciplinary proceedings under Chapter 75 of Title 5 of the U.S. Code, or other "prompt and proportionate corrective action" contemplated by the Policy, Instead, they are "officers," 5 U.S.C. § 2104(a)(1)(A), who because of the nature of their appointment are exempt from Agency disciplinary proceedings. 5 U.S.C. § 7511(b)(1). This statutory scheme informs our view that the Policy's purported application to "all CFTC employees" does not include application to Commissioners.

B. The Language of the Policy Makes it Inapplicable to Commissioners

The language of the Policy itself makes it applicable only to CFTC employees, not Commissioners. We note that in 2023, OGC's opinion cited the Policy's language as dispositive ("the Anti-Harassment Policy and Procedure do not apply to the Commission as currently drafted."). We agree.

Initially, the Policy states that it applies to "all CFTC employees, whether the alleged harassment or offensive conduct involves other CFTC employees or contractors." Policy, Sec. II. As stated above, by referring only to "employees" and not inclusive of "officers" or "Commissioners," the policy limits its application to non-Commissioner employees of the civil service subject to adverse action by CFTC, rather than Commissioners, who are officers appointed by the President and confirmed by the Senate.

The Policy elaborates further. In defining the scope of the Policy, it states that it seeks to prevent harassment by or against "senior leaders, managers, employees, contractors, visitors, or applicants." Policy, Sec. III. This list begins with the highest-ranking officials subject to or protected by the Policy, and ends with the lowest degree of organizational power subject to or protected by the Policy ("contractors, visitors, or applicants").

The list does not include reference to Commissioners or the Chair. As noted above, the Policy contemplates the ability of CFTC to take action against any offending harasser subject to the Policy. *See* Policy, Sec. III. But Commissioners cannot be sanctioned by the CFTC itself; only the President can sanction a Commissioner. Thus, the language in the Policy, taken together, appears to apply only to non-Commissioner "employees" subject to the disciplinary provisions of Chapter 75 of Title 5, or other internal disciplinary procedures.

C. Commissioners Are Accountable to the President, not CFTC HR.

Because Commissioners are not supervised by any officer of the United States, and instead report directly to the President, Commissioners are principal officers of the United States. *Edmond v. U.S.*, 520 U.S. 651, 663 (1997). *See also* U.S. Const. Art. II, § 2, cl. 1-2. *See also NLRB v. SW Gen*., *Inc.*, 580 U.S. 288, 312, (Thomas, J., concurring), quoting *United States v.*

Germaine, 99 U.S. 508, 510 (1879) ("'[F]or purposes of appointment,' the Clause divides all officers into two classes – 'inferior officers' and noninferior officers, which we have long denominated 'principal' officers.'").

As such, Commissioners are accountable to the President. Because the President is responsible for nominating and removing such officers, he is also accountable to the public for their work and conduct in office. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010) ("Without [the power to remove principal officers], the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.")

In 2023, CFTC's OGC identified language in the Policy that, if applied to Commissioners, could be construed to impose a reporting requirement on the President of the United States. According to CFTC OGC, because the Policy required supervisors who observe "alleged harassment" or "offensive conduct" by CFTC employees to report the incident to CFTC's Human Resources Branch, the Policy could not possibly be interpreted as applying to Commissioners, given CFTC's inability to bind the Commissioners' supervisor (the President of the United States) to report the conduct to CFTC HR if he observed or learned a Commissioner engaged in conduct violative of the Policy. We understand OGC's analysis to accord with our understanding that Commissioners are accountable to the President alone, and that the President is not bound by CFTC HR or CFTC policies.

The Policy and its procedures are internal in nature, leading to action *by* CFTC against its offending employees, with the input of CFTC HR. In the case of Commissioners, no employee of CFTC has the authority to impose discipline against them, and HR does not have a basis to recommend such discipline.[4]

For the reasons explained above, we conclude the Policy and its investigative procedures do not apply to Commissioners. But even if it did, the conduct at issue does not rise to the level of unlawful harassment under federal anti-discrimination laws, or to the level of objectively offensive conduct.

[4] While the Policy does not apply to Commissioners, claims of unlawful harassment (meaning harassment based on someone's characteristics protected by federal anti-discrimination laws) must be promptly investigated to preserve an affirmative defense and avoid liability. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-808 (1998); *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998). It need not be investigated through the procedures described in the Policy. But where no tangible and adverse employment action has been taken, prompt investigations and corrective actions are defenses against liability for an employer if the employee files suit and prevails on a claim of unlawful harassment. That said, given their elevated rank, Commissioners may well qualify as a "proxy" or "alter-ego" of the CFTC, eliminating the availability of this affirmative defense entirely. *Faragher*, 524 U.S. at 789.

III. "IMPOLITE BEHAVIOR" AND SUPERVISORY OVERSIGHT ARE EXCLUDED FROM THE POLICY.

Congress directed the President, in appointing Commissioners, to "select persons who shall each have demonstrated knowledge in futures trading or its regulation, or the production, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights, and interests covered by [commodity exchange law]." 7 U.S.C. § (a)(2)(A)(i). As such, a Commissioner's expertise, as much as their conduct, is a subject of Presidential accountability. Commissioners are expected to bring their expertise to bear on matters under their supervision. We note this to provide context to the Commission meetings at issue.

The Policy forbids unlawful harassment (meaning harassment based on someone's protected class) and offensive conduct. It is undisputed that the Commissioner did not engage in unlawful harassment. Report at 11. But the draft report found that the Commissioner's conduct during one of the two meetings was nonetheless "offensive…and in turn, violates the Agency's Anti-Harassment Policy" prohibition against offensive conduct. Report at 11. Thus, the investigation concluded that Commissioner Pham violated the Policy during a meeting by engaging in "offensive conduct" in her questioning of a Chief Trial Attorney. We disagree. The investigator failed to consider that as in any harassment investigation, objectivity "should be judged from the perspective of a reasonable person in the [complainant's] position," after consideration of "all the circumstances." *Harris* v. *Forklift Systems, Inc., 510* U. S. 17, 23 (1993).

A. The Policy's Definition of "Offensive Conduct" Does not Include "Impolite" Scrutiny of Work Product.

The Policy states "[O]ffensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, unwanted physical contact, or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures." This definition is in accord with the EEOC's definition of conduct that can create an objectively hostile work environment if it is sufficiently severe or pervasive.[5]

Of course, in order to violate the Policy, conduct must be objectively, rather than subjectively, offensive. Conduct is objectively offensive when it "alter[s] the 'conditions' of the victim's employment." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (finding that to clear the necessary bar, the terms of someone's employment must be changed in a

[5] According to the EEOC's most recent guidance, a "wide variety of conduct by supervisors, coworkers, or non-employees that affects the workplace can contribute to a hostile work environment, including physical or sexual assaults or threats; offensive jokes, slurs, epithets, or name calling; intimidation, bullying, ridicule, or mockery; insults or put-downs; ostracism; offensive objects or pictures; and interference with work performance." *"Enforcement Guidance on Harassment in the Workplace,"* EEOC Notice No. 915.064. April 29, 2024. The record we reviewed does not reflect that the Commissioner engaged in conduct implicated by this guidance.

way that disadvantages the complainant with respect to the terms of their employment). Here, the Commissioner's conduct was not objectively offensive, for the reasons described below.

In this matter, the investigation under the Policy proceeded to examine whether then-Commissioner Pham violated the Policy when she questioned attorneys from the Division of Enforcement in two closed meetings held to discuss and vote on potential enforcement actions. The Policy plainly excludes this conduct from sanction. "Generally, allegations concerning performance issues, impolite behavior, or personality conflicts will not fall under this policy…In most cases, harassment does not include ordinary supervisory actions (e.g., telling an employee that they are not performing a job adequately or addressing time and attendance)." Policy, Sec. III. Thus, the Policy explicitly excludes the kind of conduct the Commissioner engaged in: allegedly impolite scrutiny of an employee's job performance.

B. The Investigation Failed to Judge the Conduct from an Objective Standard.

The investigator concluded that during the August 11, 2023 meeting, the Commissioner "expressed valid concerns about the quality of the work" that caused her to believe the meeting should not "have taken place when the Division of Enforcement was not fully prepared" and that the Commission should not "vote on a deficient administrative record," as well as "legitimate frustration and concerns that the work submitted contained typographical errors and mis-citations which should have been caught at various levels before being sent to the Commissioners" that was shared by her colleagues, the investigator found that the Commissioner's "tone and questioning" of the individuals responsible for the errors nevertheless "exceeded ordinary supervisory actions" and was intended to "belittle and embarrass" senior officials. Nevertheless, the investigator found that because the officials being questioned were senior officials who regularly communicated with the Commissioner, the questioning did not violate the Policy. As such, we need not address it further.

For the October 20, 2023, meeting, the investigator found that Commissioner's "tone and behavior" was "jarring" because of the power imbalance between her and CFTC's "Chief Trial Attorney." This finding came despite the investigator's conclusion that the Commissioner's concern over the Division of Enforcement's position was "legitimate," and shared by at least one of her colleagues. The investigator criticized her for cross-examining the Chief Trial Attorney and stated that although the Chief Trial Attorney had not filed a complaint, she had later testified during her interview that she found the Commissioner's questioning to be "inappropriate and abusive."

Under the circumstances presented here and given the statutory backdrop, we reviewed the transcripts of those meetings as well as the witness testimony from the investigator's draft report. After this review, and applying the language of the Policy, we conclude that the Commissioner's conduct was not objectively offensive in either meeting. Commissioners at the CFTC are accountable for the enforcement actions brought by the Commission. 7 U.S.C. § 6b-1. It is undisputed that the proposed enforcement actions were rife with typographical errors,

incorrect legal citations, and in the October 20, 2023 meeting, prompted a legitimate question as to whether the case should be brought at all given a controversial legal posture.[6]

The various accounts of the October 20, 2023 meeting are summarized like this: the Commissioner could have been more polite in addressing deficiencies in the work product. But "impolite behavior" is not covered by the Policy. Policy, Sec. III. And although the Commissioner's style of questioning was pointed, alleged to resemble a cross-examination of the subject's work experience and product, the Policy also explicitly excludes criticism of job performance from coverage. *Id.* The Policy is consistent with the Merit Systems Protection Board's holdings that "indelicate statements made within an officer's area of responsibility that

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[6] With regard to the enforcement action at issue in the August 2023 meeting, it was ultimately brought by CFTC against a regulated entity in *CFTC v. Traders Global Group Inc., et al*, 1:23-cv-11808-ESK-EAP (D. N.J. 2025). That action was dismissed with prejudice in May 2025 after a federal district court judge entered sanctions against CFTC for negligence and willful bad faith in failing to timely and appropriately correct a material error in their complaint that severely disadvantaged Defendants. *Id.*, Doc. 260 (court adopting findings). The Court found that on August 17, 2023, six days after Commissioner Pham's questioning of DOE leadership about the errors in the draft complaint but before the complaint was filed, DOE received an e-mail from the Ontario Securities Commission ("OSC") "clearly stating" that a bank transfer at the center of CFTC's forthcoming enforcement action was in fact the transfer at issue was a tax payment to the Canadian government. *Id.*, ECF 258 at p. 13. OSC was flagging a material error in the forthcoming complaint. The court found that despite this e-mail, DOE prepared and signed a declaration falsely stating that the bank transfer was to an unidentified account belonging to the CEO of the defendant trading group. *Id.*, ECF 258 at 33. Despite multiple opportunities to correct the error, DOE instead engaged in lengthy internal debates on whether, and eventually how, to disclose the error and the existence of an e-mail alerting them to it. *Id.*, ECF 258 at 10, 17-18, 20, 34-35, 37. In the meantime, even after Enforcement internally recognized there was an error in the declaration, they relied on it without correcting the error. *Id.*, ECF 258 at p. 8. We address this case because it involves the same enforcement action at issue in the August 11, 2023 meeting, as well as the same type of conduct Commissioner Pham was addressing with the DOE attorneys. That is, Commissioner Pham was addressing the errors in the attorney work product proposed by DOE to bring the enforcement action, and her perception that the DOE attorneys were obfuscating and/or diminishing the significance of those errors. In doing so, she was holding the responsible attorneys accountable for their professional performance on the eve of an enforcement action being taken. Two years later, a federal district court also held these attorneys accountable through a sanctions proceeding on a public docket. There, the court characterized DOE's conduct as "deliberate steps down a path of obfuscation and avoidance[,]" "over the course of a year" that "involved numerous instances of sanctionable behavior" which was "willful and undertaken in bad faith[,]" as well as "undertaken for the purpose of gaining a tactical advantage…." ECF 258 at 40. Reasonable government attorneys who act as primary prudential regulators in the United States should expect their work to be scrutinized by the agency heads. That scrutiny was not objectively offensive during the 2023 meetings, and it is not objectively offensive now, viewed in the aftermath of the litigation at issue in the August 11, 2023 meeting, where uncorrected errors resulted in sanctions that were fatal to the enforcement action.

are offered in good faith cannot be misconduct." *Ray v. Dep't of Army,* 97 M.S.P.R. 101, ¶ 54 (2004).

The circumstances of the Commissioner's challenged comments are as follows, plainly falling into the Policy's exclusions: The Commissioner was questioning the Chief Trial Attorney during a presentation by the Division of Enforcement for the Commission to vote on an enforcement action. It was also an enforcement action that the Division of Enforcement (according to its Director, Ian McGinley) knew would raise opposition from the Commissioner and provoke debate, ahead of a potential vote on moving forward with the action. Report at 7, Report at McGinley Decl. 1-2. In these circumstances, the Commissioner was exercising supervisory rigor to ensure the enforcement action, if brought, was free from legal error. She was also engaged in advocacy for her position ahead of that vote. And "ordinary supervisory actions" like "telling an employee that they are not performing a job adequately" are not covered by the Policy. Policy, Sec. III. While the Chief Trial Attorney may have been subjectively offended, her perspective was not reasonable. And the Merit Systems Protection Board, the reviewing forum for employee appeals of disciplinary actions, has held that direct, indelicate language by a higher-level official to address an employee's job performance is not misconduct. *Glass v. Dep't of Treasury,* 2023 WL 5280582, ¶ 9 (August 16, 2023).

For several other reasons, cross-examination of the Chief Trial Attorney is not objectively offensive, even if the Chief Trial Attorney was subjectively offended. First, the Chief Trial Attorney's title suggests they are an experienced attorney, and a trial attorney at that. Trial attorneys are used to aggressive questioning, and employ it regularly. They do so in advocacy for a position or client. Here, the Commissioner (also an attorney with experience in commodity exchange law) leveraged her experience to cross-examine the advocate for bringing an enforcement action in this case, a position she opposed.

The investigator used the purported "power imbalance" between the Commissioner and the Chief Trial Attorney to justify her finding. And although the Chief Trial Attorney is no doubt separated by several layers of supervision from the Commissioner, the investigator's limited analysis was flawed and incomplete, relying overmuch on the appointment hierarchy. Here, the Chief Trial Attorney's title and duties reflect a heightened degree of skill, experience, and responsibility. Because CFTC has independent civil litigating authority, the nature of the Chief Trial Attorney's work also includes confrontation, debate, or cross-examination. They also must have known that their presentation was being made to court the Commissioner's vote, which would become a matter of public record and accountability, requiring rigorous vetting of the action. Perhaps most importantly, the Commissioner had no power to take disciplinary or other adverse action against the Chief Trial Attorney, given that those duties rest with the Chair, 7 U.S.C. § 2(a)(6)(A), removing the possibility of an objective fear of job-related consequence from the back-and-forth.

IV. CONCLUSION

As stated above, the Policy does not apply to Commissioners. But even if it could be applied to Commissioners generally, it would not apply to the Commissioner's conduct during the October 20, 2023 meeting.

The Commissioner's conduct at the meeting was within her authority and not objectively offensive, given her statutory oversight responsibility, her experience, and the entirely work-related nature of the questioning. The Commissioner leveraged her expertise with the laws of the country at issue in her questioning, which made the Chief Trial Attorney feel unfairly criticized. But that expertise is why the Commissioner was nominated by the President to oversee the work of the Chief Trial Attorney.

The Policy is not meant to police allegations of "impolite behavior" or criticism of work performance. Policy, Sec. III. As such, the Policy would not apply to the conduct during the October 20, 2023 meeting.