In the Matter of

COMMODITY FUTURES TRADING COMMISSION

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 16 FSIP 120

ARBITRATOR'S OPINION AND DECISION

The National Treasury Employees Union (NTEU or Union) filed this request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse arising under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Commodity Futures Trading Commission (CFTC or Agency).

The Agency's mission is to administer and enforce the Commodity Exchange Act (the Act or the CEA). Thus, it is responsible for protecting financial market participants from fraud, manipulation and abusive practices within the derivatives market, and to protect the public and the U.S. economy from systemic risk. Section 2(a)(7) of the Act states that the Agency must "consult with, and seek to maintain [compensation and benefits] comparability with" certain federal financial regulatory agencies identified under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)[1/]. Based on this foregoing statutory framework, the Act authorizes the Agency to negotiate over compensation and benefits with its exclusive representative (*i.e.*, NTEU).

Following investigation of the request for assistance arising from negotiations over compensation, the Panel

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1/ These agencies are: the Federal Deposition Insurance Corporation (FDIC); the Comptroller of the Currency; the National Credit Union Administration Board; the Federal Housing Finance Agency; the Office of Financial Research; the Bureau of Consumer Financial Protection; and the Farm Credit Administration. See 12 U.S.C. §1833(b).

determined that the dispute should be resolved through mediation-arbitration with the undersigned, Panel Member Donald S. Wasserman. The parties were informed that if a complete settlement of the issues at impasse was not reached during mediation, a binding decision would be issued to resolve them.

Consistent with the Panel's procedural determination, on January 18, 2017, I conducted a mediation-arbitration (med-arb) proceeding with representatives of the parties at the Panel's headquarters in Washington, D.C. During the arbitration segment of the proceeding, the parties had ample opportunity to present all material, testimony, and other evidence to support their positions and to counter each other's presentation. The parties were also informed that in the absence of a voluntary agreement, I was not obligated to make a decision based exclusively on the party's last best offers.

The parties were unable to reach agreement over the main issue in dispute. I am, therefore, now required to issue a final decision imposing terms for the disputed proposal, in accordance with the Statute and 5 C.F.R. § 2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record, including the parties' pre-hearing submissions, those made during the hearing, as well as their post-hearing briefs submitted on February 3, 2017. The parties also submitted additional exhibits during and after the submission of their post-hearing briefs. I have decided to accept and consider these late-filed exhibits, hopefully to be better informed by the parties' additional evidence. The record is hereby officially closed.

ISSUE IN DISPUTE AND BACKGROUND

There is one remaining disputed issue presented by the parties' respective last best offers: should bargaining-unit employees receive a merit-based pay increase and, if so, what should that increase be?

NTEU was certified as the exclusive representative in 2014 and it represents approximately four hundred employees in Washington, D.C., Chicago, Illinois, and Kansas City, Missouri. The unit is comprised of several positions, including attorneys, administrative assistants, and examiners. Attorneys make up approximately 40% of the bargaining unit. When they begin their employment with the Agency, attorneys are placed into one of several pay-band ranges. Moving up to the higher end of the pay band, or a new pay band altogether, is accomplished through

increases resulting from meritorious performance (i.e., merit-pay increases and/or promotions).

In 2015, the parties executed an initial memorandum of understanding covering pay and compensation for the year 2015 (2015 MOU or the MOU). As relevant, the MOU authorized: (1) an "across-the-board" pay increase of 2%; (2) student-loan reimbursement of $800,000; and (3) a 3.0% merit-pay increase. The Union sought to negotiate a similar MOU for 2016 but the parties failed to reach agreement. They engaged in several bilateral negotiation sessions, both face-to-face and electronically; in 2016 they also received mediation assistance from the Federal Mediation and Conciliation Services (FMCS) on August 8, 2016. During the mediation session, the Agency provided a power-point presentation explaining the alleged challenges it would face trying to fund the Union's proposal. Failing agreement, the mediator released the parties and referred them to the Panel.

Following the mediator's referral, on August 10, 2016, the Agency's Chair issued an Agency-wide communication announcing that it was providing a one-time bonus of $1,400 to *every* Agency employee who received a "3" or higher annual performance rating. The Agency did not provide the Union with any prior notice or opportunity for negotiations or even discussion prior to this announcement.

Thus, the Union filed its request for Panel assistance on August 17, 2016. Initially, the Union sought compensation for another across-the-board salary increase, greater student-loan reimbursements, transportation subsidies, and a 3.0% merit-pay increase. At the med-arb hearing, however, the Union withdrew all remaining proposals except for the 3.0% merit pay increase. The Agency, nevertheless, remained opposed to any increases, on any date, in any form. The parties accordingly were unable to come to an agreement during the hearing.

THE PARTIES' PROPOSALS AND POSITIONS

I. Union's Proposal and Supporting Argument

The Union's sole proposal is as follows:

> The CFTC will also provide funding for merit pay for bargaining unit employees for the 2015-16 cycle at 3.0%.

The Union charges the Agency with failing to fulfill its statutory obligation to "seek to maintain comparability with" compensation of other FIRREA agencies. In addition to maintaining comparability with several specifically identified FIRREA agencies, the Union contends that the Agency must achieve comparability with the Securities and Exchange Commission (SEC). The Union's argument is that the SEC and CFTC are legally obligated to maintain pay comparability with the same set of FIREAA agencies. As such, it logically follows that these two agencies must then also strive for comparability with *each other*. Furthermore, this approach makes sense because the work employees perform at these two agencies is similar in nature.

Applying the above approach, the Union submits that the pay of CFTC employees -- specifically attorneys -- lags well behind that of their SEC equivalents. In this regard, the Union's own data shows that:

- CFTC attorneys, on average, make $15,594 less than SEC attorneys;
- They also make $39,815 less than FDIC attorneys; and
- CFTC attorneys average $7,796 less than OCC attorneys.

Exacerbating problems further is the fact that all of the above agencies actually agreed to a merit-pay increase for its employees for 2016. Therefore, existing pay disparities will only continue to grow.

The pay gap has created serious morale problems for bargaining unit employees. The Union is aware of some employees who have left the Agency for higher-paying jobs at other agencies, such as the SEC. Moreover, in the 2016 Employee Viewpoint Survey (EVS) administered by the Office of Personnel Management, only 43% of Agency employees stated that they are satisfied with their pay. By contrast, around 70% of employees at other FIRREA agencies are satisfied with their pay.

The Union dismisses the Agency's counter-arguments as specious. To begin with, the Agency's argument that the SEC cannot be a valid comparable is misplaced. Both governing

statutes mandate that SEC and the CFTC must maintain comparability with the same set of agencies, so it is only logical that they must maintain comparability with each other. Moreover, even the Agency's own witnesses acknowledged at the hearing that they consider information prepared by the SEC, even including a Towers Watson study concerning FIRREA agencies' compensation. Indeed, the Union presented an Agency-published document at the hearing in which the Agency compared the salary of its employees to several other FIRREA agencies, also including the SEC.

The Agency's approach of comparing the average pay of *every* employee in the Agency against the average pay of every employee at other agencies should also be rejected. This approach ignores various factors that could lead to pay discrepancies, such as different positions, a different mix of higher skilled, higher paid (or lower skilled, lower paid) employees, and different locality pay. The Agency also errs by relying upon pay-band comparability. A broad pay band is not equivalent to an individual's salary. Moreover, pay bands at CFTC lag behind other FIRREA agencies.

Finally, the Agency's plea of poverty caused by flat line budgets and mandates of how large proportions of its budget must be allotted simply rings hollow. Although the Agency complains that it will be flat-funded for the next several years, the Union points out that other FIRREA agencies are experiencing similar challenges but nevertheless continue to increase merit pay. Additionally, the Union's proposal would account for only about $1.58 million of the Agency's $250 million budget, hardly a budget buster. The Union also believes that it is difficult to trust the Agency's figures given that it failed to disclose, until the hearing, that it had unilaterally budgeted $1.4 million for bonuses in 2016. "Hiding" this money only serves to demonstrate the Agency's untrustworthiness.

In summary, the Union's proposal ensures that the CFTC satisfies its statutory obligations and also boosts employee morale. A failure to adopt it would create more harm than good.

II. Agency's Proposal and Supporting Argument

The Agency offers no counter proposal. Instead, it reiterates that it has already provided employees with: (1) a general 1% salary increase; and (2) a bonus of $1,400 for

employees that received an annual rating of 3 or higher for the 2015-16 performance cycle. Thus, it cannot now offer anything more for merit-pay increases.

The Agency acknowledges that it has a statutory duty concerning pay, but notes that the unambiguous language of the Act states only that it must "seek to maintain comparability" with seven FIRREA agencies. In the Agency's view, this language references an obligation to strive towards comparability, but it does not create an absolute mandate that must be satisfied under all circumstances. Moreover, the Act requires comparability with seven specific federal agencies, none of which are the SEC. The Union's attempt to rely upon the SEC is, therefore, improper and inconsistent with the plain language of the Act.

Although the Agency maintains that its only obligation is to "seek" comparability, it also most emphatically argues its position that it has actually *achieved* comparability. A review of financial data of the CFTC versus other relevant federal agencies shows that the average employee salary for Agency employees is in the "top tier" of data. In particular, pay-band data for employees in the CT-12-CT-15 range (which is the pay band for most Agency bargaining-unit attorneys) is close to similar pay-band data at other agencies. Additionally, the Agency granted all of its employees a one-time raise in 2016 and also provided a bonus of $1,400 to most of them as well. So the Agency did actually make efforts to maintain comparability.

The CFTC is also constrained by various external factors that the Union refuses to consider. Both Senate and House oversight committees have admonished the Agency from expanding its expenditures on salaries through collective-bargaining efforts. Moreover, for FY 2016, Congress set the Agency's budget at $250 million. It further required the Agency to set aside $50 million of this money for informational technology (IT). The Agency was also legally required to oblige $2.6 million for its Inspector General, and then the Agency had to devote $15.3 million for office rent. After the foregoing expenditures, CFTC had only $182.1 million remaining for FY 2016. It spent $153.3 million on salaries and benefits and the remaining $28.8 million on Agency-operating costs. This represented an 18% decrease in operating costs from FY 2015. Hence, the Agency had very little in the way of discretionary funds to support the Union's proposal.

Moreover, the Agency would have problems using funds from FY 2017. The House has already proposed legislation to "flat fund" the Agency at $250 million for the next 5 years. As operating costs and rent will continue to increase, the Agency will have even less money to fund salaries and benefits. And, unlike other FIRREA agencies, CFTC cannot rely upon fines or other external financial efforts to increase its coffers. Thus, the only foreseeable option CFTC has for funding the Union's proposal would be to rely upon Agency-wide furloughs that would last several days. This approach is obviously inappropriate for the Agency and its employees.

The Agency rejects the evidence presented by the Union in support of its proposal. As argued earlier, it maintains that the SEC is not a valid comparable, so the Union's attempt to rely upon SEC data should be ignored. The Agency also charges that the Union's financial data is incomplete because it focuses solely on attorneys, thereby ignoring 60% of the remaining work force. The Union's data also focuses on employees in New York, even though the Union does not officially represent these employees[2]. Moreover, the Union's data also ignores several FIRREA agencies altogether. The Agency further submits that the Union's survey data about employee dissatisfaction should be dismissed because those feelings arise out of the Union's efforts to "stir the pot" and sow discord among bargaining-unit employees. In other words, the Agency maintains that the Union has essentially attempted to create a self-fulfilling prophecy over compensation.

In summary, the Union's position has no basis in law or fact. The Agency made every effort to satisfy its statutory responsibilities and any conclusion to the contrary is disingenuous. Adopting the Union's proposal would create grave consequences for the Agency and its employees.

CONCLUSION

The Arbitrator will order a significantly modified version of the Union's final offer.

2/ The CFTC's New York office voted to be represented by NTEU on December 13, 2016. While no information was introduced into the record alleging any challenges to those election results, NTEU has informed the Arbitrator that the FLRA has yet to officially certify those results.

At the outset, the Agency vigorously declared that they were participating in litigation rather than a negotiation. As if to prove this approach, the Agency team did not include a labor relation specialist. Given this atmosphere, and as an initial matter, I further note that the parties approached the concept of comparable with a mindset that left a lot to be desired. Instead of attempting to inform the record and each other, the parties chose to emphasize data that not-so-coincidentally lined up with their respective positions. The Agency largely ignored the SEC (more on this below) and then lumped in all positions to focus on "big-picture" averages. The Union took a more granular approach that sliced financial information based upon a litany of factors, such as bargaining-unit status, position, and location. And then the parties essentially asked the Arbitrator to decide that their approach is the "right" one. Unsurprisingly, neither side presented particularly compelling rationale to suggest that either method of examination should be considered definitive.

Misgivings aside, I found the Union's evidence to be more persuasive than that offered by the Agency. I reject the Agency's notion that the SEC cannot serve as an appropriate comparable. Although the Act does indeed state that CFTC should look at several FIRREA agencies, there is nothing in the language of this Statute that states it is limited to looking *only* at these agencies. Indeed, the Agency itself has ignored this approach. In a 2015 document made available to Agency employees entitled, "2015 Performance Management Summary Results," the Agency compared employee salary to several other agencies, one of which was *the SEC*. Moreover, evidence came out during the hearing that Agency officials regularly review salary-related information from the SEC (among other agencies). It is, therefore, contradictory for the Agency to insist that the Union should not compare CFTC compensation to the SEC considering that it does so. It appears that the Agency's selective analysis is disingenuous and designed for argument and is simply not credible.

In juxtaposition, I find the Union's argument and comparable, particularly those discussed in Union Exhibit 28, to be informative and credible. This exhibit compares minimum and maximum salaries at the CFTC and other (FIRREA) agencies - and including the SEC - within the CT-12-CT-15 pay bands. Most CFTC attorneys, and 86% of the CFTC's work force, are in these bands. Significantly, 45% of the CFTC work force is part of the CT-14 band. Analyzing equivalent pay bands at other agencies shows that three agencies have a higher minimum salary than CFTC

employees (higher than $105,752) and six agencies have a higher maximum salary (greater than CFTC's $155,338). The next highest concentration of CFTC employees - pay band CT-15, which has 19.5% of the work force - demonstrates a similar situation. Although CFTC's minimum is comparatively high, with only one agency having a higher minimum salary than its $124,398. In contrast, five other agencies have a greater maximum salary than CFTC's ceiling of $182,715. Based on the CT-14 and -15 bands alone, it is clear that a majority of CFTC employees face an existing pay gap. This remains a fact even if SEC is removed as a comparable.

I also find the Agency's attempt to discredit the above data is not persuasive. In Agency Post-Hearing Exhibit 34, the CFTC compares maximum and minimum pay band salaries for FIRREA agencies (excluding the SEC) in the District of Columbia (D.C.). Rather than damaging the Union's case, however, this data bolsters it. For example, in the CT-14 and -15 pay bands, the Agency's data establishes that at least 4 other agencies have *higher* maximum pay band salaries than CFTC employees. Even under the Agency's exhibits, a pay gap does exist. Moreover, these salaries are limited to the D.C. region, as noted above, despite NTEU's representation of FIRREA agency employees in several cities.

One other comment concerning the Agency's approach deserves mention. CFTC emphasizes a comparison of average salaries of the FIRREA agencies. Agency Exhibit 35 also focuses on D.C. pay band averages. The Agency acknowledges that averages necessarily include non-bargaining unit employees. NTEU correctly notes that it does not represent employees outside of its bargaining unit. It is not responsible for the compensation of non-bargaining unit employees. Therefore, NTEU's right and its responsibility to negotiate compensation for unit employees must not be diminished as a result of its members' salaries being compared to a mix of employees, a significant portion of which are unrepresented, and do not enjoy the benefits of working under a CBA or MOU. Bargaining unit to bargaining unit comparisons are far more credible and informative than Agency Exhibit 35.

My responsibility extends, however, beyond writing that NTEU's comparables are far more on target than CFTC's presentation and, therefore, are more persuasive. I cannot ignore the unique financial constraints facing the Agency. As discussed above, for FY 2016 the Agency received $250 million in funding. Unfortunately, it is likely this budget will repeat

for FY 2017 (and perhaps several years to follow). Almost $53 million is taken off the board immediately because of IT and IG costs. Then the Agency loses an additional $15.2 million for office rent in FY 2016, which is likely to increase to $22.9 million in FY 2017. CFTC also has no mechanism to accrue additional funds. Although it can levy fines against entities under its purview, those fines must be turned over to the United States Treasury.

Based on the totality of the circumstances discussed above, I will grant the Union additional compensation but not the full 3% merit-pay increase sought. Rather, I will grant a 1% merit-pay increase of salaries for bargaining-unit employees whose last rating of record was "3" or higher retroactive to the first pay period of Fiscal Year 2017. Additionally, I grant NTEU bargaining unit employees a one-time bonus of 1% of their annual salary. This bonus shall be distributed no later than the first pay period of April 2017. Granting this bonus will meet the employees' interest of additional compensation while avoiding financial future obligations that generally accompany a general wage increase, such as in the above described 1% salary increases.

I provide the above award fully aware that the parties' budgetary reality places them in a precarious position. The Commodity Act charges the Agency with ensuring financial comparability with other agencies in order to recruit and retain highly qualified employees. However, the Agency faces budget challenges that make it difficult for the CFTC to completely fulfill that charge. Nevertheless, equity and fairness demands that employees must not be required to bear the full burden of underfunding. And the CFTC's mandate to strive for comparability is not waived. This award meets this dual challenge.

Finally, I cannot permit the Agency's actions during these negotiations pass without comment. The following is specifically intended without reference to statutory or contractual obligations.

Certainly, the CFTC hierarchy could foresee that springing a surprise unilateral $1,400 bonus for bargaining unit employees in the midst of bilateral negotiations would create immediate resentment and lasting distrust. This Agency action was a scant two days following mediation with FMCS in August 2016, during which Agency finances were discussed. At mediation, the Agency diligently withheld information from the Union about the

impending bonus. As if to pour salt on the Union's wound, during our mediation efforts in January 2017, the Agency acknowledged that it had set aside money for this bonus as early as January 2016, roughly seven months prior to its surprise announcement. Is a bargaining obligation meaningless? Is it any wonder the Union believes it was intentionally sand bagged?

Equally troubling is the Agency's approach to information requests by the Union concerning the CFTC's finances. I understand the Agency's concerns that the Union sought the information in an attempt to offer its opinion on the Agency's finances as a de facto financial officer. However, such fears are not a sufficient basis to reject an information request. Nor am I impressed with Agency claims during the hearing that management's statutory right to determine its budget serves as bar to such requests. Indeed, the Agency made no attempt to explain how its argument fell within FLRA's test for the right to determine budget.[3/] Instead of attempting problem solving, the Agency exerted its energy into a litigation-first strategy.

This strategy was clearly on display at the mediation-arbitration hearing itself. Although the parties were aware that the main focus of the hearing would be to achieve a voluntary settlement, the Agency's primary representative declared in his opening statement that the Agency was there to litigate. More troubling, and in support of his statement, the Agency did not bring its labor relations specialist who worked with the parties during negotiations. Consistent with its approach to the negotiations, the Agency surprised both NTEU and the Arbitrator with previously undisclosed information. Whether designed as strategy or used as last minute tactics, such actions are not ideal for finding amicable solutions. Surprise is not a welcome visitor during negotiations.

It is my hope that, moving forward, the Agency will reevaluate its overall strategy and process in relating to NTEU and its members. Hopefully, it wants a more trusting institutional relationship with its Union. It is obvious to me

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3/ A *proposal* (and not information requests) fails under the right to determine budget if: (1) prescribes either the particular programs to be included in the agency's budget, or the amount to be allocated in the budget; or (2) an agency "makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits." See, e.g., U.S. DHS, U.S. CBP, 61 FLRA 113, 116 (2005).

that the Agency values its work force. It must also understand that their employees are the Union. Similarly, a changed Union-Management relationship may also lead to the employees seeing value in the Employer, as well as its mission. While the Agency faces unique external constraints, those constraints could be less onerous with a willing partner, specifically the NTEU, *i.e.*, CFTC employees.

ORDER

The Union's last best offer will be adopted with the following modification. The Union's language concerning a 3% merit-pay increase will be stricken and replaced with the following wording:

> The CFTC will also provide funding for merit pay for bargaining-unit employees whose last annual rating of record was "3" or higher, retroactive to the first pay period of Fiscal Year 2017 at 1.0%. CFTC will further provide all bargaining-unit employees with a one-time bonus equivalent to 1% of their annual salary, effective no later than the first pay period of April 2017.

Donald S. Wasserman
Arbitrator

March 1, 2017
Washington, D.C.