



Via email to oigcomplaint@cftc.gov and first-class mail

December 8, 2022

Office of the Inspector General
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Ethics Complaint Regarding CFTC Commissioner Caroline Pham's Apparent Public Disclosure of Highly Confidential, Nonpublic, Internal, Factual and Legal Discussions Regarding the Pending Application of KalshiEx, LLC

Dear Office of the Inspector General:

Due to the extraordinary, if not unprecedented, conduct and statements of Caroline Pham, a Commissioner of the Commodity Futures Trading Commission ("CFTC" or "Commission"), concerning an application ("Application") from a firm known as KalshiEx, LLC ("Kalshi") currently pending before the CFTC, Better Markets¹ hereby (1) submits the following complaint in accordance with the policies and procedures of the CFTC's Office of the Inspector General² as well as the Inspector General Act of 1978,³ and (2) requests that the Inspector General's Office investigate Commissioner Pham for possible ethics violations and misuse of her position.

Better Markets has never filed such a request before. We do not make this request lightly and are only doing so given the gravity of the apparent abuse, breach of trust, and violation of the public interest by one of the most senior leaders of the CFTC, each of whom should conduct themselves in a manner that meets or exceeds the highest ethical and legal standards applicable to public officials.

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

² COMMODITY FUTURES TRADING COMMISSION, OFFICE OF THE INSPECTOR GENERAL, *Reporting CFTC Employee or Contractor Misconduct or Retaliation*, <https://www.cftc.gov/About/OfficeoftheInspectorGeneral/reportmisconduct>.

³ Pub. L. No. 95-452 (Oct. 12, 1978), 5 U.S.C. app. 3.

OVERVIEW

The Commission is currently reviewing the Application from Kalshi, which seeks approval to list an event contract that would allow investors to gamble on the political party that takes control of Congress. Although the CFTC has taken no action on Kalshi's Application or, to our knowledge, made any public statements regarding the current status of the Application, Commissioner Pham has reportedly spoken to the media expressing her views on Kalshi, its Application, the CFTC's nonpublic internal discussions, and the nonpublic positions that the Commissioners and the Chair have or have not taken regarding Kalshi and its Application.

Those public statements by Commissioner Pham revealed, among other things, private and nonpublic, if not privileged, internal CFTC information and discussions. Indeed, published reports indicate that Commissioner Pham supports Kalshi's Application, is dismayed by the prospect that the Commission will deny it, objects to the process she reportedly claims is being used by the Commission to consider the Application, and, perhaps most astonishingly, has provided public advice to Kalshi regarding its Application, including a recommendation that Kalshi withdraw its Application and thus deprive the CFTC of jurisdiction over it. Those reports indicate that Commissioner Pham apparently has:

- publicly revealed sensitive and confidential nonpublic information on the Commission's discussions, including her fear or expectation that the Commission will not only deny the Application but also rest its decision on what she regards as an ill-advised legal definition of "gaming";
- publicly given advice for the benefit of Kalshi, an entity under the CFTC's regulatory oversight, by counseling the firm to withdraw its Application; and
- possibly even intentionally delayed the internal CFTC review of the Application specifically to afford Kalshi time to consider her advice and act on it by withdrawing its Application.

To the extent these reports are well-founded, it appears Commissioner Pham may have abused her position and violated the CFTC's code of conduct, which prohibits any employee from divulging confidential or nonpublic information prior to its authorization for release. In addition, Commissioner Pham's behavior may also violate other laws or regulations designed to protect sensitive, confidential, and nonpublic information in the possession of public officials. We set forth the surrounding facts in greater detail below.

The overarching mission of the Inspector General is in part "to conduct and supervise audits and investigations relating to the programs and operations" of federal agencies.⁴ Its mission also encompasses efforts to recommend policies for activities designed "to prevent and detect fraud and abuse" in the programs and operations of federal agencies.⁵ And the CFTC's Office of the Inspector General "has the authority to investigate violations of laws, rules, regulations, and other

⁴ 5 U.S.C. app. 3 § 2(1).

⁵ *Id.* at § 2(2)(B).

misconduct by CFTC staff, contractors, consultants, or any person or entity involved in alleged wrongdoing affecting the CFTC's programs and operations. Employees, contractors, and members of the public may report any instance of fraud, waste, and abuse at CFTC.”⁶

In light of these mandates and authorities, along with the facts set forth in this letter, it is necessary and appropriate for the Office of the Inspector General to investigate this matter and determine whether Commissioner Pham has abused her position as a high-level official of the CFTC and whether she has violated any applicable laws, rules, or policies.

RECENT PUBLIC REPORTING OF COMMISSIONER PHAM'S DISCLOSURE OF NONPUBLIC AND CONFIDENTIAL CFTC INFORMATION SUGGESTS IMPROPER, IF NOT ILLEGAL, CONDUCT RELATING TO KALSHI'S APPLICATION

On August 26, 2022, the CFTC announced it was reviewing the Application, which is a submission by Kalshi requesting approval to offer a new political event contract on its trading platform. That contract would allow users to bet on the partisan control of Congress in amounts of up to \$25,000.⁷ Better Markets submitted a public comment letter to the Commission on September 25, 2022, urging the Commission to reject Kalshi's proposal on a host of legal and policy grounds.⁸

Although the CFTC was widely expected to announce a decision by October 28, 2022,⁹ as of the date of this writing, the Commission has yet to do so. On October 28, however, Bloomberg reported that CFTC staff had issued a formal “staff recommendation” that the Commission should

⁶ COMMODITY FUTURES TRADING COMMISSION, OFFICE OF THE INSPECTOR GENERAL, *Reporting CFTC Employee or Contractor Misconduct or Retaliation*, <https://www.cftc.gov/About/OfficeoftheInspectorGeneral/reportmisconduct>.

⁷ U.S. COMMODITY FUTURES TRADING COMMISSION, *CFTC Announces Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11* (Aug. 26, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8578-22>.

⁸ See *Better Markets Comment to CFTC Regarding KalshiEx, LLC's Proposed Political Event Contract*, (Sep. 25, 2022), https://bettermarkets.org/wp-content/uploads/2022/09/Better_Markets_Comment_Letter_KalshiEX.pdf. Better Markets argued that the contract (1) would constitute “gaming” in violation of numerous states’ laws; (2) would be contrary to the public interest; (3) would defy the historical underpinnings and purposes of the futures markets — namely, to hedge risk and aid price discovery; (4) would endanger retail traders; and (5) would undermine public faith in our elections.

⁹ See U.S. COMMODITY FUTURES TRADING COMMISSION, *CFTC Announces Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11* (Aug. 26, 2022) (“The Commission will endeavor to complete its review and issue an order with respect to this matter by October 28, 2022 or as expeditiously as is practicable while ensuring an adequate time for public notice and comment and Commission and staff review of the submission as well as Commission review of public comments received.”), <https://www.cftc.gov/PressRoom/PressReleases/8578-22>.

reject Kalshi's bid.¹⁰ Although staff recommendations are not public or binding and no one from the CFTC is quoted in the article, Bloomberg's reporting noted that Commissioners "don't typically override such recommendations."¹¹

However, on November 8, 2022, Politico published a story describing an interview conducted with Commissioner Pham, which was titled "*CFTC's Pham: Kalshi Should Withdraw Election Betting Bid.*"¹²

Throughout the article, Commissioner Pham reveals what clearly appears to be confidential, nonpublic, internal, discussions of factual and legal information. According to Commissioner Pham as set forth in the article, it appears the Commission was in fact preparing to rule against the Application, a decision with which she stated she strongly disagrees. In her interview with Politico, Commissioner Pham expressed her dismay at the Commission's expected decision and the rationale on which the Commission apparently will rely, revealing numerous non-public and confidential details about an ongoing matter before the Commission:

If the CFTC does rule on the Kalshi plan, the agency staff appears likely to try and define "gaming" in its order, according to Pham. Contracts linked to gaming are currently prohibited under CFTC rules, but the agency has never outright defined what that means. The definition could impact the regulation of event contracts, which are financial products typically structured as yes-or-no questions. **Pham said she is worried that CFTC staff's draft definition of "gaming" included in the pending Kalshi order may be so broad that it could implicate other pieces of the derivatives markets beyond event contracts. . . .** "We are rushing this," Pham said. **"We have a definition here that could be so broad that it could have unintended consequences, such as banning all of the derivatives markets.** We should measure twice, cut once."¹³

In addition to revealing confidential, internal, nonpublic, and factual and legal analyses or discussions regarding the Application, Commissioner Pham (according to the article) went so far as to publicly advise Kalshi to withdraw its Application to prevent the CFTC from ruling on it at all. As Politico reporter Declan Harty notes, Commissioner Pham was explicitly calling for Kalshi to withdraw its Application from the CFTC:

A top Wall Street regulator is urging a startup to withdraw its proposal to launch election betting in the U.S., warning that her agency is poised to reject the plan based on "flawed" reasoning. GOP CFTC Commissioner Caroline Pham said in an

¹⁰ Lydia Beyoud, *CFTC Poised to Deny US Political Gambling Before November Polls*, BLOOMBERG (Oct. 28, 2022), <https://www.bloomberg.com/news/articles/2022-10-28/cftc-poised-to-deny-us-political-gambling-before-november-polls?sref=mQvUqJZj>.

¹¹ *Id.*

¹² Declan Harty, *CFTC's Pham: Kalshi should withdraw election betting bid*, POLITICOPRO (Nov. 08, 2022), <https://subscriber.politicopro.com/article/2022/11/cftc-commissioner-kalshi-should-withdraw-election-betting-bid-00065579>.

¹³ *See id.* (Emphasis added)

interview that New York-based Kalshi should drop its bid to open up wagering on whether Republicans or Democrats will control Congress in the new year because the agency is looking at the wrong rules in determining whether it is legal or not.¹⁴

The reporting also disclosed why the Commission had not issued its decision on the Application prior to that time: Although the CFTC Commissioners had been “privately voting on the plan one at a time,” Kalshi’s bid had apparently been purposely held up with Commissioner Pham’s office, who had yet to vote on the proposal. This highly sensitive and confidential information appears to have also been disclosed by Commissioner Pham.

Further reporting elsewhere corroborates this account.¹⁵ Reporters with the political blog Capital Account DC, for example, have noted Commissioner Pham’s responsibility for the delay:

[I]t turns out the delay is at least partly due to Republican Commissioner Caroline Pham, who has gummed things up a bit by not yet weighing in on the proposal Under CFTC rules, a matter to be voted on is sent to one commissioner’s office, then to the next and so on. Pham has to vote, so the process is essentially stalled.¹⁶

Commissioner Pham de facto confirmed and validated this reporting when, on November 7th, the same day the article was posted, she published the following tweet from her twitter account, directed at one of the reporters from Capital Account DC who had just published the article about her role in delaying the Kalshi vote:

. @jwestbrook4022 I won’t be rushed in my sworn duty to make sure @CFTC is complying with the law—no matter how much others trample on due process. I won’t be complicit in violating the Administrative Procedure Act. It’s my job to do things the right way.

Rather than casting a dissenting vote (and publicly releasing a dissenting statement) and allowing the Commission’s decision to proceed, it appears Commissioner Pham has instead chosen to purposely delay the proposal by withholding her vote entirely.¹⁷ While delaying or withholding

¹⁴ *Id.*

¹⁵ CAPITOL ACCOUNT, *Republican Congressional Takeover May Spur Biden's Regulators to Move Even Faster: Also, Republican CFTC Commissioner Holds Up Political-Betting Vote; New SEC Chief of Staff* (Nov. 7, 2022), <https://www.capitolaccountdc.com/p/republican-congressional-takeover>.

¹⁶ *Id.*

¹⁷ As noted by reporters from Capitol Account DC, *see* CAPITOL ACCOUNT, *supra* note 15, it appears Commissioner Pham has recently been on international travel:

Pham has been abroad at conferences in Morocco and Singapore, prompting some inside the agency to wonder if her travel schedule has been a factor in why she hasn’t voted. (The commissioner has chronicled the visits on her Twitter feed – which some CFTC workers have been avidly viewing each day.)

a Commission vote in and of itself does not necessarily constitute improper behavior, in this context and under these unique circumstances it raises concerns and warrants investigation to the extent it is done for the purpose of benefiting a Commission registrant with an application undergoing Commission review and is accompanied by the public airing of confidential information.

THIS REPORTED DISCLOSURE OF CONFIDENTIAL INFORMATION AND PUBLIC RENDERING OF ADVICE TO A PRIVATE COMPANY ADVERSE TO THE CFTC RAISES SERIOUS LEGAL AND POLICY CONCERNS

Although a thorough formal investigation is necessary to determine the full nature and scope of Commissioner Pham's conduct, it appears on its face to be decidedly improper, particularly for a leader of an agency who is supposed to model appropriate behavior and uphold the highest ethical and legal standards. Yet, it appears that a sitting Commissioner, unhappy with the Commission's likely decision, has used and disclosed highly sensitive, confidential, non-public CFTC information—including information about internal Commission discussions and legal analyses—to publicly alert a private company as to the substance of those confidential discussions and analyses as well as possible or likely impending actions in a matter that is actively under Commission review.

It further appears that Commissioner Pham may be purposefully withholding her vote on the Kalshi petition for the purpose of delaying a final Commission decision and affording Kalshi an opportunity to withdraw its Application. In fact, Commissioner Pham publicly advised Kalshi via an interview with Politico to withdraw its Application pending before the Commission for the express purpose of depriving the CFTC of jurisdiction over the Application and thereby thwarting the CFTC's ruling on that Application—all apparently because she does not agree with the Commission's expected rejection of the Application.¹⁸ Rather than cast a dissenting vote—as is the norm and as countless minority Commissioners of both parties have done over many years—it appears that Commissioner Pham is attempting to protect Kalshi and the broader industry from an adverse ruling and that she is further seeking to prevent the Commission from issuing what she views as a flawed definition of “gaming,” a concept that lies at the heart of the Application.¹⁹

This striking and seemingly inappropriate behavior at a minimum betrays an apparent disregard for the ethical duties incumbent upon a Commissioner of the Commodities Futures Trading Commissioner.²⁰ For example, the CFTC Employee Code of Conduct, codified at 17

It would seem that Commissioner Pham could have voted on Kalshi's Application even while out of the country. To the extent her travel schedule was in fact an obstacle to her ability to vote, the IG should determine whether Commissioner Pham may have intentionally absented herself from the Capitol to delay the Commission decision and/or to enable Kalshi to act on her improper disclosure of confidential information and her advice that Kalshi withdraw its Application.

¹⁸ Declan Harty, *CFTC's Pham: Kalshi should withdraw election betting bid*, *supra* note 12.

¹⁹ *See id.*; CAPITOL ACCOUNT, *supra* note 15.

²⁰ *See CFTC Employee Code of Conduct*, 17 CFR § 140.735-5, *Disclosure of information* (“A Commission employee or former employee shall not divulge, or cause or allow to be divulged, confidential or non-

C.F.R. § 140.735 *et seq.*, which governs the standard of conduct required of Commission members,²¹ prohibits the disclosure of non-public information, a duty Commissioner Pham appears to have blatantly disregarded:

A 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.²²

The reports reviewed and cited above indicate that Commissioner Pham may well have violated these standards and prohibitions.

Commissioner Pham may also have violated other provisions of the law and rules governing confidential information. For example, it appears Commissioner Pham's conduct may have violated the Standards of Ethical Conduct for Employees of the Executive Branch ("Standards"),²³ to which CFTC Commissioners are subject. For example, Section 2635.703 of the Standards concerns the "use of nonpublic information"²⁴ and includes the following prohibition:

An employee shall not . . . allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.²⁵

Under this provision, "nonpublic information" is defined as follows:

information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public.²⁶

public commercial, economic or official information to any unauthorized person, or release such information in advance of authorization for its release."). *See also* 5 CFR § 2635.703, *Use of nonpublic information*.

²¹ The CFTC Employee Code of Conduct expressly clarifies that its prohibitions apply not only to Commission career staff but also to the Commissioners themselves. 17 CFR § 140.735-1, *Authority and purpose* ("This subpart sets forth specific standards of conduct required of *Commission members*, employees of the Commission, and special government employees as well as regulations concerning former Commissioners, employees, and special government employees of the Commodity Futures Trading Commission.") (emphasis added).

²² *CFTC Employee Code of Conduct*, 17 CFR § 140.735-5, *Disclosure of information*.

²³ 5 CFR § 2635 *et seq.*

²⁴ 5 CFR § 2635.703, *Use of nonpublic information*.

²⁵ *Id.*

²⁶ 5 CFR § 2635.703(b).

According to the Standards of Ethical Conduct, this includes information that the employee “knows or reasonably should know” has been designated as “confidential” by the agency.²⁷

Moreover, even if a piece of nonpublic information has not been formally designated as confidential, its disclosure may still be prohibited under the Standards of Ethical Conduct if the information “[h]as not actually been disseminated to the general public and is not authorized to be made available to the public on request.”²⁸

This same Section of the Standards of Ethical Conduct provides five examples clarifying this prohibition against the misuse of nonpublic information. In Example 5, the Standards provide the following illustration:

An employee of the Army Corps of Engineers is actively involved in the activities of an organization whose goals relate to protection of the environment. The employee may not, other than as permitted by agency procedures, give the organization or a newspaper reporter nonpublic information about long-range plans to build a particular dam.²⁹

Commissioner Pham’s course of conduct, in which she disclosed nonpublic information to a reporter to specifically benefit a private organization, appears to directly conflict with the aforementioned provisions, thereby warranting an investigation into possible abuse of her position. When considered in conjunction with what may have been her purposeful attempt to delay and ultimately prevent a final Commission decision on the matter, Commissioner Pham’s unauthorized disclosure of nonpublic information concerning Kalshi’s Application is all the more concerning.

CONCLUSION

As a basic policy matter, such behavior from a sitting Commissioner cannot be allowed to serve as an acceptable precedent if the Commission is to preserve its credibility as a reliable regulator and overseer of the U.S. derivatives and commodities markets. Indeed, the CFTC could not function or fulfill its many statutory responsibilities if people and organizations legitimately feared that at any time anyone from a Commissioner on down could disclose highly confidential information merely because they wanted to or, worse, because they sought to benefit a particular private party or industry.

And where would such disclosure stop? Many companies registered, supervised, and regulated by the CFTC are required to submit highly confidential business and market information to the agency. If a Commissioner or anyone else were allowed to disclose highly confidential, internal information regarding factual and legal analyses, then on what principled basis could one prevent the disclosure of any and all confidential information either created by or submitted to the CFTC? As important, is the legal and policy morass that such a precedent would inevitably create

²⁷ 5 CFR § 2635.703(b)(2).

²⁸ 5 CFR § 2635.703(b)(3).

²⁹ 5 CFR § 2635.703, *Use of nonpublic information, Example 5.*

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something the CFTC should countenance, particularly when currently applicable policies, ethical standards, and rules clearly prohibit such disclosure for sound legal and policy reasons?

Surely, CFTC Commissioners cannot have the unilateral right to publicly disclose whatever internal, confidential, and non-public information they see fit to divulge—especially when it relates to ongoing discussions as well as factual and legal analyses of a pending application. Such disclosure is even less tenable if it is done as a deliberate attempt to thwart the Commission’s jurisdiction by preventing a vote on a matter. Such a precedent, were it allowed to stand without repercussions, would almost certainly have a devastating effect on the Commission’s internal discussions and analyses, chilling communications within the agency and harming the public interest as sensitive matters are prematurely, inappropriately, and one-sidedly revealed.

Think of the chilling and demoralizing impact on all of the Commissioners and the entire staff of the agency if they must worry that their nonpublic, confidential, and internal statements, discussions, and analyses could be publicly disclosed at any time by anyone who might disagree with the Commission’s apparent or possible course of action on a matter. The corrosive effect could only be worse if the potential disclosures were motivated by a desire to benefit a private company or give it an advantage in a proceeding before the Commission or in any subsequent litigation adverse to the CFTC. Moreover, if allowed, such a public disclosure would inevitably lead to additional disclosures of confidential information, as others at the agency would feel no compunction about publicly airing their views, whether ostensibly to set the record straight or for other reasons. This is why such an apparently egregious and unprecedented breach of trust by a leader of an agency must be investigated and, if confirmed, appropriately sanctioned. Otherwise, everyone who works at the CFTC (and many others similarly situated watching from elsewhere in government) will conclude they have the unilateral right to engage in such inappropriate conduct to the detriment of the public interest.

Thank for your attention to this matter. We request an acknowledgement that you have received this letter, a response confirming whether your office will undertake the requested investigation, and if you decline to pursue an investigation, an explanation of the grounds for that decision. Assuming you do conduct the investigation, we request that you share the detailed results with us and with the public to the fullest extent permitted under all applicable laws and rules governing the release of reports of such investigations.

Sincerely,



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Commodity Futures Trading Commission
Office of the Inspector General
December 7, 2022

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