



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

December 12, 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:

Better Markets hereby supplements its letter to you dated December 8, 2022, in response to public comments made by Commodity Futures Trading Commission ("CFTC") Commissioner Caroline Pham, regarding our request for an investigation by your office into apparent breaches of applicable ethical standards ("Dec. 8th Letter"). A copy of the Dec. 8th Letter is attached hereto for convenience.

We submit this supplement to the Dec. 8th Letter because of Commissioner Pham's public statements mischaracterizing and minimizing a matter of considerable public importance: the apparent disclosure by a senior government official of highly confidential, nonpublic information, including internal CFTC factual and legal analysis, to the detriment of the CFTC and to the benefit of a private company with a pending matter before the CFTC. Such inappropriate and apparently impermissible statements having nothing to do with a commissioner's right to "speak [her] mind" on any and all matters without disclosing such confidential information. Additionally, her claim that the complaint is "partisan" is baseless and a clear attempt to distract from the substantive facts detailed by an independent nonprofit public interest organization that has participated in dozens of CFTC rulemakings for more than a decade and whose leader was recently personally recruited by Commissioner Pham to join the CFTC's Global Markets Advisory Committee (GMAC). Moreover, Better Markets' recent high-profile criticism of the CFTC Chair refutes beyond doubt any claim that it acts selectively for partisan purposes.

We will not repeat the background facts relating to the Application of KalshiEx, LLC ("Kalshi") seeking approval to list an event contract, the prior reported statements of Commissioner Pham apparently disclosing highly confidential information, or the other reasons for requesting the investigation, all of which are detailed in the attached Dec. 8th Letter.

Commissioner Pham's Most Recent Statements Are Unfounded and Misleading if Not Dangerous

Commissioner Pham's most recent statements in response to the Dec. 8th Letter include those reported in Politico on December 9th which were also repeated in part in Politico on December 12th as follows:¹

In the statement issued following Better Markets' complaint, Pham said she was "pleased to speak to POLITICO in response to false news reports and leaks about the Kalshi application. Everyone knows that Commissioners are allowed to speak their mind, and this has been upheld in recent court decisions. I'm also proud to demand a meeting that is open to the public to vote on this, and I won't be bullied by unfounded and obviously partisan attacks."

First, the Dec. 8th Letter sets forth a highly credible set of facts and circumstances suggesting that Commissioner Pham has violated important confidentiality restrictions applicable to government officials. The letter cites at least two regulations that Commissioner Pham has apparently violated, including the CFTC Employee Code of Conduct² and the Standards of Ethical Conduct for Employees of the Executive Branch ("Standards"), promulgated by the Office of Government Ethics ("OGE").³ Those regulations are on their face applicable to Commissioner Pham's conduct. As noted in our Dec. 8th Letter, the Standards,⁴ which limit the use of non-public information, apply to any "employee,"⁵ and they further define the term "employee" to include "any *officer or employee* of an agency"⁶ Commissioner Pham clearly fits that description.

Moreover, the CFTC's own Supplemental Standards of Ethical Conduct reflect a similar view, as they provide that "[m]embers and other employees are required to comply with" the OGE's Standards.⁷ Clearly, the CFTC thought members of the Commission were "employees" for purposes of conduct rules, hence the reference to "other" employees. Thus, far from creating exemptions or carveouts for senior level officers such as the Commissioners of an agency, these provisions broadly apply to agency employees at all ranks—including members of the Commission.

¹ Declan Harty, *CFTC Official Faces Ethics Complaint Over Political-Betting Proposal*, Politico Pro (Dec. 9, 2022); Sam Sutton, *Morning Money* (Dec. 12, 2022).

² 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-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*.

³ 5 CFR § 2635 *et seq.*

⁴ See 5 C.F.R. Part 2635.

⁵ See 5 C.F.R. § 2635.703(a).

⁶ 5 C.F.R. § 2635.102(h) (emphasis added).

⁷ 5 C.F.R. § 5101.101.

Second, the Commissioner's claim that the rules and laws apply to everyone at the CFTC except individual Commissioners acting alone, if somehow true, would establish an indefensible double standard, in effect placing the most senior officials at the agency above the law. There is simply no persuasive rationale for the prohibitions on the disclosure of confidential information to apply to everyone at the CFTC except commissioners. In fact, the opposite is true: it is especially important for the leadership of the CFTC to be subject to those standards given that leadership is expected to adhere to the highest ethical standards and model the behavior that the entire staff should follow. This is all the more important given commissioners' role in setting policy; their broad involvement with and access to privileged and confidential information; and their ability to attract the widespread attention of the media and the public.

Third, the policy implications of such a tortured reading of the law are also profoundly troubling, indeed unacceptable. The claimed legal interpretation amounts to the startling assertion that each commissioner of the CFTC has *carte blanche* to unilaterally publicly disclose any and all information she or he wants to reveal, without limitation and no matter how confidential or sensitive the information may be or how detrimental such disclosure would be to the CFTC, its staff, and its statutory mission. Indeed, the logical conclusion of Commissioner Pham's position would be that nothing at the CFTC is in fact confidential because it would all be subject to disclosure at any time on the whim of any commissioner. This is an untenable reading of the law, one that, as we explain in our Dec. 8th Letter, would have an unacceptable and chilling effect on many facets of the CFTC's operations and ability to protect the public.

Fourth, any claim that Commissioner Pham's conduct in this matter is permitted under a claimed right to "speak one's mind" or in the supposed interest of promoting transparency is simply without basis. As is obvious, there is an enormous difference between the right of commissioners to responsibly and appropriately speak publicly on the one hand, and the obligation to respect legal limits on the ability to divulge highly confidential, internal, and sensitive information (including nonpublic factual and legal analysis of a pending matter and the supposed positions that the staff, commissioners, Chair, or others may or may not be taking on that pending matter), on the other hand. Unsurprisingly, the law reflects this distinction, and in this case, Commissioner Pham appears to have ventured away from speaking one's mind appropriately and into the realm of inappropriate if not unlawful disclosure of confidential and sensitive information, including for the apparent purpose of advising a CFTC registered entity to take action to the detriment of the CFTC. As one of the five most senior officials at the CFTC, this cannot be proper conduct under the rules and law.

Finally, we reiterate that, at a minimum, the facts warrant an investigation by your office to determine if and to what extent Commissioner Pham may have violated her obligations under the applicable rules and law. Such an investigation and determination are even more imperative given her recent public claims that such conduct—presumably including her right to disclose any and all CFTC information however confidential—is her unilateral and unrestricted right. Given the nature and breadth of Commissioner Pham's claim to an unfettered right to divulge confidential information, the resolution of these issues will affect not only the appropriate response to her prior statements but also her future conduct and, indeed, the potential conduct of all CFTC commissioners.

Conclusion

We appreciate your consideration of this additional information as a supplement to our Dec. 8th Letter.

Sincerely,



Dennis M. Kelleher
Co-founder, President, and CEO

Better Markets, Inc.
1825 K Street, NW
Suite 1080
Washington, DC 20006
(202) 618-6464
dkelleher@bettermarkets.org
www.bettermarkets.org

cc: Chairman Rostin Behnam
Commissioner Caroline D. Pham