

Commissioner Pham Questions from Commission Meeting August 11, 2023 (in chronological order)

COMMISSIONER PHAM: Thanks, Chairman. Ian, as I sent to the Division last night, and again, it's summer and people are on vacation, including myself, so I was not, unfortunately, able to drop everything to work on this. But it appears to me, one of the things that I pointed out was that there were edits that the Division had made in the first redline to this matter that were then omitted in the second redline. And so, part of what I did is I compared the two redlines and I put back in the edits that the Division, I believe, had inadvertently omitted from the second redline. Is that true? Were those edits inadvertently omitted?

COMMISSIONER PHAM: And as you may have seen from my edits, it also appears that there were some significant typos and missed citations in the memo as well. And so, could you please describe to me what is the process that the Division of Enforcement goes through before it sends matters to the Commission to vote on that become part of the administrative record?

COMMISSIONER PHAM: And the entire paragraph in the sub-heading.

COMMISSIONER PHAM: Does the Division think that it's appropriate for the Commission to vote on a record that is not accurate?

COMMISSIONER PHAM: It's statements of the law.

COMMISSIONER PHAM: Ian, what's the process at DOJ to review papers that are sent up to the highest level in DOJ, maybe in the Southern District?

COMMISSIONER PHAM: And would those papers be clean and accurate before they were sent all the way up?

COMMISSIONER PHAM: But I'm assuming that there would not be significant or substantive typos or missed citations at DOJ?

COMMISSIONER PHAM: And what's the process at a law firm before you send something to the client?

COMMISSIONER PHAM: Okay. And would you send a client something that had inaccuracies, significant typos, or missed citations?

COMMISSIONER PHAM: Thank you, Ian. I appreciate that. Certainly, in my experience in all the places that I've worked, you would

not send something to the top of house or to the client if it had errors or issues in it, particularly if it was something being used, for example, a governance meeting or some kind of decision-making, something that would -- you would base your information on. And in fact, you would probably get an exam finding, maybe even an enforcement action for basing your governance decisions on something that was inaccurate or that had misstatements or typos or inaccuracies or missed citations in it. Rob, does OGC feel comfortable sending materials to the commission that are not complete and accurate for the commission to vote on?

COMMISSIONER PHAM: Thank you. I appreciate that. Is there some reason why the commission, when we vote, which is exercising, of course, Agency action and creating an administrative record, is there some reason when we vote that we should not have complete and accurate papers?

COMMISSIONER PHAM: This is an open question for anybody, I suppose. I don't understand why we are having to vote on a deficient administrative record.

COMMISSIONER PHAM: Okay.

COMMISSIONER PHAM: This is something that I take seriously when I vote because it's on the record. And when you look at what I vote on, when you look at how I exercise that authority that has been vested in me by the President and confirmed by the Senate, and I think you can see this from the amount of time and energy that I put into engaging with the Division to make sure that our cases are in the best shape possible, when I vote on them, that I take this seriously, when I exercise my vote.

COMMISSIONER PHAM: Yeah, [Name]. If you don't mind, [Name], I kind of would like to raise my own concerns and my issues myself during this time.

COMMISSIONER PHAM: No, and I appreciate - I appreciate --

COMMISSIONER PHAM: Yeah. I appreciate the engagement from the Division, as always. We have a lot of engagement and I appreciate it. I also want to point out that I am very proud of the Division of Enforcement and I am proud to support the work of the Division of Enforcement. But that's why I find today all the more disappointing, because I don't know why we have a gun to our head, that we don't take the time to get it right and to make sure that the papers are complete and accurate before the Commission is called to vote on, you know, what I see as a

deficient administrative record. So, if you don't mind, [Name], before we come back to the substantive issues, and I will take each of them in turn and ask questions about each of the issues for the benefit of everybody here since we've called this meeting so everybody can hear me talk to you guys, apparently. Rob, what is OGC's process to ensure that the seriatim packages, whether they're from Enforcement or from some other division, are complete and accurate when they're sent to the Commission?

COMMISSIONER PHAM: It included a reference to and a quote from a version of Rule 5.1(h) that was indeed about 10 years old and was inaccurate in the current version of the CFR.

COMMISSIONER PHAM: Because -- I'm surprised because what the Division and what OGC have each described sounds like a robust process, and yet I'm surprised at the output that has come to us at the Commission where I myself am the one who is identifying and flagging these issues, issues that should be caught actually at a very junior level, or that would be how it would be in my previous places of employment, actually including the previous iteration of the Commission, I suppose. So, I'm surprised that with all of that review, all those layers and levels of review, and yet that it comes to the Commission in this state. And so, big picture, my concern is that I do not want these different levels of review to essentially become rubber stamps, particularly the Commission. The Commission should not -- and I don't think that it does, but the Commission should not be a rubber stamp. OGC should not be a rubber stamp, and these levels of review should not be sort of pushing things through. I'd actually be interested in knowing what's the review process before the Secretariat circulates something to the Commission, because a very quick page turn would have demonstrated that the seriatim memo had significant issues, including that a whole paragraph was in the subheading. I mean, that's not even substantive. It's sloppy. It's not substantive. But a quick page turn would have revealed that.

COMMISSIONER PHAM: Does somebody proof read it? And understood. Does somebody proofread it before the Secretariat puts it into circulation?

COMMISSIONER PHAM: Is that something that sits within OGC, or is that that sit within the Division?

COMMISSIONER PHAM: Thank you, [Name]. Thank you, [Name]. I really do appreciate that. So, since we are in fact voting right now, I don't know how we fix these papers before we vote.

COMMISSIONER PHAM: Okay. Chairman, I thank you. I will move to my substantive questions. Thank you, Chairman. So, just to confirm, [Name], in the discussion, so let's be clear that the statute, section 2(c)(2)(D)(I) does not define the term retail commodity transactions. In fact, retail commodity transactions is a subheading in the statute the same way that prohibition is a subheading, and applicability is a subheading, and enforcement is a subheading, and requirements for rules and regulations is a subheading. So, I just want to be clear because -- and I do appreciate you attempting or the Division attempting to revise this and to address this. But just to be absolutely clear for the record, because this meeting is the administrative record which I'm trying to correct through a meeting since the papers are not correct, this statute does not define the term "retail commodity transactions."

COMMISSIONER PHAM: Okay. And so, in fact -- and again, just to be clear for the record, and I think everybody on this call knows this, but we don't have jurisdiction over all (inaudible) retail commodity transactions. It's only the ones that are leveraged or margined or financed that are, you know, with non-ECs and non-eligible commercial entities.

COMMISSIONER PHAM: Thank you. I appreciate that. Let me scroll down in my red line. And again, you know, I appreciate that this was sent last night. I am on vacation and not as prompt as I normally would be. But you know, since we're having this meeting this morning, we're having to do it here.

COMMISSIONER PHAM: Okay. Is the Division familiar with the Treasury Amendment to the Commodity Futures Trading Commission Act of 1974?

COMMISSIONER PHAM: Particularly with respect to foreign currency transactions?

COMMISSIONER PHAM: Does the Division disagree with my edit to the seriatim memo to make clear how section 2(c) operates, where I state that further consistent with concerns originally raised by the Department of the Treasury in connection with the Commodity Futures Trading Commission Act of 1974, "the Treasury Amendment." The Act excludes certain off exchange foreign currency transactions involving sophisticated financial institutions regulated by, among others, the bank regulatory agencies or the Securities and Exchange Commission. This was discussed extensively in the preamble to be proposed rule in, I think,

2010, that the Commission did on off-exchange foreign currency transactions, which -- where it proposed the promulgation of Part 5 to create a comprehensive regulation and oversight regime for retail foreign exchange dealers.

COMMISSIONER PHAM: No, I think it made it more clear, I would not say --

COMMISSIONER PHAM: One of the other issues that I thought was important to identify in the litigation risk section is that the Division had stated that the applicable provision in the instant case was section 2(c)(2)(C)(i)(I), where it sets forth the circumstances in which certain retail commodity transactions are subject to the -- sorry, certain retail forex transactions are subject to the Commission's jurisdiction. But what the memo omitted was actually the other applicable provision in the instant case, which is Section 2(c)(2)(C)(II) which provides for the authority of the Commission -- the authority of certain provisions of the Act. So, for example, sections 4(b), 4b, 4c(b), 4o, 6(c) and 6(d), with the exception to the extent that section 6(c) and 6(d) prohibit manipulation of the market price of any commodity in interstate commerce for future delivery on or subject to the rules of any market. Also subjects these transactions to sections 6c, 6d, 8(a), 13(a), and 13(b). But importantly, the following clause, Subclause (II) says that the preceding section with all of those different parts of the Act that would not apply -- all the different parts of the Act that would apply to these transactions. It says that it shall not apply to any person described in any of item (aa), (bb), (ee), or (ff) of subparagraph (B)(i)(II). And so, that's the scrivener's error that we have been referring to that's discussed in the litigation risk section. Since, importantly, this Subclause (II) is where it says that all of these parts of the Act would not apply to these enumerated entities, and that includes that scrivener's error of RFEDs, I actually think that that is one of the most significant litigation risks, because those are the sections of the Act that give us the enforcement authority over these transactions. And so, I thought it was very important that that provision was included in the litigation risks section. That's the one that actually could potentially call into question if we could, in fact, enforce fraud and manipulation in connection with these transactions, among many other provisions of the Act in that big string site. So, does the Division object to including section 2C-2C(II) in the litigation risks section of the seriatim memo for a complete discussion of the litigation risks? Ian, I'm assuming the Division does not --

would not object to completely citing the applicable provisions in the instant case.

COMMISSIONER PHAM: I think that your - I think that it's important to be complete since not --since -- I'm assuming that the Commission is not as intimately familiar with the provisions of 2(c) as I most unfortunately am, since I previously worked on trying to fix these scrivener's errors with House Ag in the past. But -- so I appreciate that.

COMMISSIONER PHAM: The other thing that I wanted to point out is --

COMMISSIONER PHAM: Correct. But since that enforcement authority involves the scrivener's error, it would be important to point out that it's not just the elements of what certain -- of which retail commodity transactions are subject to the Act and the Commission's jurisdiction. It would be important to note that the enforcement authority also suffers from that same -- and I agree with you that it is a minimal litigation risk, but the clause that gives us the enforcement authority also suffers from that same litigation risk, and that was not there. Just moving forward to another point that I had was that, in -- the memo asserts that if read literally in certain provisions of the Act, it explicitly applies to RFEDs, but by the end of the provision RFEDs are removed from the Commission's authority. And so, if this sentence is referring to Section 2C-2B(iii), the provision applies to registered FCMs or RFEDs or an AP of an FCM where the AP is not also a, basically a financial institution, a broker-dealer, the deleted insurance company and the deleted investment bank company. And so, if you were reading this literally, it doesn't back out RFEDs. It says that it -- it basically would say that it applies to registered FCMs, registered RFEDs, and APs, APs of FCMs if such AP is not an RFED. So, this particular one does not remove RFEDs from the Commission's authority, and so I thought that was important to point it out. I'm not sure what the Division was referring to, but if it was referring to that specific provision when you read it, it's not that aspect of it. The other thing that I noticed that I also wanted to flag for the Division and for the Commission is the litigation risks section - - and I appreciate, again the edits that you had made in response to my call with you flagging this issue. And I would say that going forward, the Division should feel free at any point in time to engage with me directly for a more efficient process or to include me in discussions because I think that also could have streamlined this. But it is not exactly that in section 2(c) (2) (C) (iii) (I) (aa), that requires registration in such

capacity as the Commission determines once (inaudible) are accepting orders in connection with retail forex transactions. That means involving a person who is not described in (aa), (bb), (ee), or (ff). It's the same scrivener's error. So, I don't actually think that this sentence highlights or makes clear that there is de minimis litigation risk because it also has the same drafting error. So, it's not like that is a clean provision. So, I thought that that sentence really overstated. While at the end of the day, I agree with you, it's a minimal litigation risk. It's just that if you're going to raise the litigation risk, I think it ought to be done so completely and accurately. But that sentence says that you have to require in such capacity as the Commission determines unless you are one of the persons described in (aa), (bb), (ee), or (ff). So, it suffers from the same scrivener's error. Just moving forward off of the intricacies of Section 2(c), and Mr. Chairman, I am almost done with my session of discussion. Thank you for calling the meeting so I could say this to everybody all at once. In the complaint, as I mentioned, I have some issues with the complaint. I think that the complaint would be stronger and more clear if it connected the dots for the core. And while it has a lot of internal cross-references, it never comes out very clearly. And just given the great deal of attention that all of the Commission's actions involving cryptocurrency receive, particularly the armchair lawyering that so many people engage in when they read our complaints, I think it is particularly important that we are crystal clear so that we don't, you know, spawn dozens of articles, you know, hypothesizing this, that, or the other. And so, I think to wrap up my section, I will just read a draft public statement that I am prepared to release in conjunction with the filing of the complaint. And then I will turn it over to my fellow commissioners.

So, I am seriously concerned about the Commission's rush to the wrong side of history because we are failing to put in the bare minimum amount of work necessary to get it right. It is my job to uphold the Commodity Exchange Act and the Commission's jurisdiction so that we can faithfully execute our mission to protect the American people from fraud, manipulation, and abusive trading practices in our markets. And for that reason, I cannot stay silent. The alleged fraud in this case is reprehensible, and it is my hope that justice will be served and that the victims are made whole. Once again, the Commission is taking a ready-shoot-aim approach to its enforcement actions without allowing for a process that ensures appropriate legal review and a robust administrative record to enable reasoned decision-making by the Commission. It is no surprise that the Commission keeps missing

the target and has been on a losing streak of high-profile decisions in our litigation cases all over the country. I will note that the U.S. Courts of Appeals for the Second Circuit, Seventh Circuit, and Fifth Circuit have all established negative precedents that are critically undermining the Commission's jurisdiction and our ability to aggressively enforce violations of the Commodity Exchange Act, and all because of our self-inflicted wounds. This complaint fails to get the law right and consequently clearly plead facts necessary to support the alleged charge of Count V, off-exchange retail commodity transactions in violation of Section 4a of the Commodity Exchange Act, 7 U.S.C. 6a. The Commission is engaging in an unprecedented overreach of its limited authority over spot commodity transactions by purposefully neglecting to state to the court in Count V that section 2(c)(2)(D)(i) grants authority to the Commission over only leveraged, margined, or financed retail commodity transactions, not all retail commodity transactions.

The silence in Count V on this crucial limitation seems to be a brazen land grab in an ongoing turf war, or at worst, designed to obfuscate the very real constraints that the Congress imposed on the Commission's otherwise unchecked ability to go where it should not. The complaint should be clear in connecting the dots for the court, not cutting corners for convenience. Quality matters and so does doing things right. I cannot be complicit in the Commission taking shortcuts in its enforcement actions that ultimately result in our losing cases and losing jurisdiction. I am disappointed that the Commission has been forced into this position. Bad process begets bad outcomes. Thank you. I have no further questions at this time.

COMMISSIONER PHAM: Actually, I have one more thing. Again -- sorry. Again, I just want to -- I want be clear. Actually, I just want to be very clear. I support the merits of this case. I support the Division's work. I think this is a terrible fraud that needs to be addressed. I just don't understand why we don't have a couple of days to fix the papers, and have a complete and accurate record for the Commission to vote on. So, thank you.