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Via Portal

Christopher Skinner
Office of the Inspector General
U.S. Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street NW
Washington, DC 20581

Commodity Futures Trading Commission v. Gemini Trust Company, LLC,
Case No. 1:22-cv-4563-AKH (S.D.N.Y.)

Dear Inspector General Skinner:

We write on behalf of our client, Gemini Trust Company, LLC ("Gemini Trust"), to raise a number of serious concerns and complaints about the conduct of the Division of Enforcement ("DOE") lawyers who represented the Commission in the above-captioned case and related investigation ("DOE Staff").[1] As detailed below, the DOE Staff selectively and unfairly weaponized the Commodity Exchange Act ("CEA") Section 6(c)(2), 7 U.S.C. § 9(2), to bring dubious false statements charges against Gemini Trust. The DOE Staff then compounded this wrongdoing by taking a series of legal positions that are contrary to basic principles of due process and good governance—and that substantially prejudiced Gemini Trust.

The DOE Staff's conduct over the past seven years demonstrates that it was not motivated by a principled application of the law or desire to protect the commodities markets. Rather, these lawyers were driven by a selfish desire to advance their careers by misusing their offices to obtain a high-profile "win" against Gemini Trust, a major cryptocurrency exchange co-founded and operated by two prominent individuals: Cameron and Tyler Winklevoss. It did not matter that Gemini Trust was, in fact, the *victim* of fraudulent activity by multiple bad actors or that the claims against it originated with a lie-riddled whistleblower submission by a discredited former employee. The DOE Staff was willing to burn millions of dollars of taxpayer money to sue an innocent party—all because "victory" would serve their personal interests and agendas.

Unfortunately, public statements and remarks by Acting Chairman Pham titled "The CFTC Needs to Get Serious: A Strategic Plan for Reform," quoted below, make clear that Gemini Trust's experience is the rule, not the exception. Together, Gemini Trust's experience and Acting Chairman Pham's statements show how the DOE has lost its way. Its employees consistently abuse their office and waste taxpayer dollars to promote their careers and the division's parochial

[1] Specifically, the DOE Staff lawyers include Manal Sultan, K. Brent Tomer, David Oakland, Alejandra de Urioste, Andrew Rodgers, Diana Wang, Katherine Rasor, Peter Janowski, and Gates Hurand.

interests. In so doing, the DOE's staff has strayed far from its stated true mission: to "faithfully serve the public interest, and treat market participants fairly."[2]

I. The Relevant Background

To understand why the DOE Staff's actions with respect to Gemini Trust are so outrageous, it is necessary to explain how we got here. In the summer of 2017, Gemini Trust was the victim of a multi-million dollar rebate fraud perpetrated by two Gemini Trust customers that coordinated their trading in order to abuse special fee structures and improperly earn substantial rebates. These fee structures were approved by Gemini Trust's then-Chief Operating Officer, Benjamin Small. While Mr. Small was aware of these mounting losses, he took no steps to stop the collusive trading and instead tried to hide these losses from Cameron and Tyler Winklevoss. But Mr. Small's deception could not last. Eventually, the Winklevosses discovered the losses and, after an investigation, fired the employees responsible—including Mr. Small—for cause.

Gemini Trust sued the two Gemini Trust customers that committed the rebate fraud: Hashtech LLC, along with its principals Alex Ruthizer and Jonathan David (collectively, "Hashtech"), and Cardano Singapore PTE Ltd., along with its principal Satoshi Kobayashi (collectively, "Cardano"). Neither Hashtech nor Cardano ever seriously disputed that their trading was fraudulent. Indeed, within months of Gemini Trust filing suit, both Hashtech and Cardano agreed to give back every penny and satoshi of improperly earned rebates—388 bitcoin and $1.7 million dollars in cash, which amounted to $7.45 million in notional USD value at the time.

Mr. Small, however, did not show any contrition or take any responsibility for his actions. In fact, he did the total opposite. In the months and years following his dismissal, Mr. Small embarked on a vindictive campaign to, in his own words, "destroy" Gemini Trust. As part of this malicious campaign, Mr. Small filed a false whistleblower report with the CFTC in the fall of 2017. In this report, he alleged that during the summer of 2017 Gemini Trust omitted material information from a number of statements made to the CFTC's Division of Market Oversight ("DMO") about the Gemini auction price (the "Gemini Auction") and whether it was readily susceptible to manipulation (more on this below). These statements were made in connection with a self-certification that was ultimately filed in December 2017 by the Cboe Futures Exchange ("Cboe") for a bitcoin-denominated futures contract (the "Bitcoin Futures Contract") that was to settle to the Gemini Auction. Mr. Small later filed a supplemental submission that contained yet more demonstrably false allegations.

Mr. Small's retaliatory reports had their intended effect. The DOE Staff immediately and unquestioningly embraced Mr. Small's false claims and, in early 2018, initiated an investigation into Gemini Trust. This investigation's results were determined before it began: the DOE Staff would contrive to find some pretense to sue Gemini Trust, no matter what the facts revealed.

Subsequent events did not shake the DOE Staff's devotion to this predetermined outcome. In the 2021, the United States Attorney's Office for the Southern District of New York ("SDNY"), which had been conducting a parallel investigation based on Mr. Small's whistleblower report, cut

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[2] Statement of Comm. Caroline D. Pham, "The CFTC Needs to Get Serious: A Strategic Plan for Reform" (May 10, 2024), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement051024.

bait, declining to bring charges. Then, in January 2022, a JAMS arbitrator rendered a $5 million judgement against Mr. Small in favor of a Gemini Trust affiliate.[3] In a scathing decision, the arbitrator held that Mr. Small fraudulently procured his employment, was terminated for gross negligence, never blew a whistle as he had claimed, and lied in his whistleblower reports. Additionally, the arbitrator made the following observations and findings:

- Mr. Small "did not tell the truth concerning many important items that [were] relevant to this case";
- Mr. Small "fraudulently induced [the affiliate] into entering the Employment Agreement in the first place";
- During the employment application process, Mr. Small "lied repeatedly about his experience," and those lies were so "elaborate as to make detection all but impossible";
- Mr. Small's resume contained "misrepresentations concerning the degrees he obtained and the dates of his employment with various financial institutions";
- "[E]vidence adduced during the hearing [] suggested that certain of the assertions made in [Mr. Small's whistleblower filings] were not true."

Remarkably, these were not the only findings that reveal Mr. Small to be utterly unreliable. Among other things, the arbitrator also noted that Columbia University had sued Mr. Small for not paying his tuition and the IRS had filed a tax lien against him for not paying taxes on more than $41,000 in income. All of these findings were promptly provided to the DOE Staff and are a matter of public record.[4]

These findings should have ended the CFTC's investigation. Before this ruling, the DOE Staff could, perhaps, have found some solace in the old prosecutorial adage that even bad people can sometimes provide good information. Such comfort was no longer possible after the arbitrator's ruling. It was plain as day that Mr. Small was bad—and that the information he provided was, too. At this point—three and a half years into their investigation—when faced with the undisputed facts that their star witness was a pathological liar, tax evader, and serial false whistleblower and that the entire basis of their investigation was predicated on a sham whistleblower report, the only ethical choice left for the DOE Staff was to drop its investigation of Gemini Trust and shift gears towards prosecuting both Mr. Small and the bad actors who perpetrated the multi-million dollar rebate fraud against Gemini Trust.

The DOE Staff did neither. In June 2022—four years into what can only be described as trophy-hunting lawfare—the DOE Staff filed a complaint against Gemini Trust alleging false or misleading statements in connection with the Bitcoin Futures Contract. The DOE Staff never

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[3] Technically, Mr. Small was hired by a Gemini Trust affiliate and seconded to Gemini Trust.

[4] Gemini is happy to provide documentary support for all of the factual statements in this letter if it would be helpful.

provided Gemini Trust with any evidence showing that the CFTC had ever asked for the information that was allegedly omitted, that the alleged omissions were made knowingly, or that any of the statements were material to the CFTC's decision with respect to Cboe's self-certification of the Bitcoin Futures Contract.

In fact, perhaps the most astonishing part of all of this was that by the time the DOE chose to file its lawsuit against Gemini Trust, so much time had elapsed that the DOE Staff had the benefit of hindsight and knew whether any of the alleged statements or omissions had any *material* bearing on the actual operation of the Bitcoin Futures Contract. They did not. The Bitcoin Futures Contract operated orderly for 19 months (until Cboe pulled it due to the DOE Staff's investigation). This cannot be overstated. ***There were no issues with the contract, no harm to any market participant, no loss of any money, no allegation of contract manipulation, and no victim the DOE Staff could identify during the lifetime of the contract.*** The contract worked as intended and settled monthly to the Gemini Auction in an orderly manner and without incident.

And yet despite this, the DOE Staff continued to use government resources to pursue fabricated and manufactured claims against Gemini Trust. These claims had no basis and served no public good. In fact, they did the opposite. For starters, they deprived the public of access to a working, novel futures contract based on bitcoin, one of the best-performing assets of the last decade. To bad actors, the DOE Staff made clear that the Commission would overlook (and even reward) intentional wrongdoing so long as the perpetrator could help prosecute a bigger target. To good actors, the DOE Staff showed that an innocent mind and best efforts will not save you: the CFTC expects you to answer questions it does not ask, and they will sue you if you do not. This approach inverts basic logic and makes Kafka's nightmares look like the stuff of a children's book.

In the following years, Gemini Trust vigorously defended itself against these spurious claims. Yet, the DOE Staff worked at every turn to weaponize and tilt the scales of justice in its favor. As detailed below, DOE Staff adopted legal positions that twist Section 6(c)(2) into a strict-liability statute, took a series of unethical positions that denied Gemini Trust potential exculpatory evidence, and behaved in a manner that was utterly at odds with the presumption of innocence and the DOE Staff's duties and obligations as public servants. DOE leadership did not merely endorse these efforts; it aided in them, going so far as to interfere with a Gemini Trust affiliate's application to become a designated contract market ("DCM") in hopes of bullying Gemini Trust into accepting a settlement for wrongdoing it did not commit.

II. DOE Staff's Unreasonable and Improper Conduct

A. DOE Staff Abused the CEA's False Statements Provision to Bring A Claim Against Gemini Trust Without Any Evidence of Scienter

The DOE Staff should not have recommended this claim to the Commission. It is well known that statutes barring false statements are ripe for abuse by overzealous prosecutors. Indeed, in October 2023 then-Commissioner Pham noted the "disturbing trend" involving the "dubious increased use of alleged charges of making false statements to the CFTC" and aptly explained the problem with them:

It is all too easy for the "truth" to become subjective as determined by the staff,

> instead of a fact-finding exercise. The criteria for establishing scienter may be so diminished as to be rendered meaningless. . . . Make no mistake: this is presumed guilty with no way to prove innocence. It is an abomination of the right to be presumed innocent until proven guilty.[5]

Commissioner Pham's warning precisely describes Gemini Trust's experience. In nearly 7 years, the DOE Staff uncovered *no evidence* of conscious or intentional wrongdoing—not during its investigation, and not during years of discovery. Nevertheless, in this case, the DOE Staff emphasized to a federal judge that it did not believe it was necessary to point to any type of culpability. All that mattered was that a statement it attributed to Gemini Trust could, in some way, be *perceived* to be "false" or "misleading." The DOE Staff was also undeterred by evidence demonstrating that the allegedly undisclosed information was, by turns, (i) not required by the applicable regulatory guidance, (ii) never requested by DMO, (iii) provided to Cboe—and, in some instances, contained in materials Cboe submitted to DMO—before Cboe filed the self-certification, (iv) posted on Gemini Trust's public website, and (v) provided to federal law enforcement and made available to the CFTC before Cboe filed its self-certification. The DOE Staff simply decided—years after-the-fact and arbitrarily and capriciously—that these disclosures were insufficient and that stray bits of qualifying information *might* have been relevant to DMO's review of the Bitcoin Futures Contract and the daily Gemini Auction that the contract settled to each month. That is not a basis for a federal enforcement action.

B. The DOE Staff Unreasonably and Unfairly Singled Out Gemini Trust

The DOE Staff's decision to pursue charges against Gemini Trust, even without any evidence of scienter, was particularly vexing because those same lawyers chose *not* to take any action against Cboe, the DCM that filed the self-certification for the Bitcoin Futures Contract; Hashtech and Cardano, the fraudsters that bilked Gemini Trust out of millions of dollars; or Mr. Small, the former employee who made false statements in his whistleblower submission. Gemini Trust addresses each of these decisions in turn below.

The CFTC Did Not Sue Cboe, the DCM that Filed the Self-Certification and Submitted the Documents that Contained the At-Issue Statements: The purported false statements were made in documents that *Cboe* submitted to DMO in connection with a product certification that *Cboe* filed for a product that was to be traded on *Cboe*.[6] Moreover, DMO staff and Cboe's in-house lawyers agreed that Cboe, as the DCM, exercised ultimate authority over what those submissions would say. The evidence also showed that Gemini Trust gave Cboe nearly all of the allegedly omitted information before Cboe filed the self-certification—meaning it was Cboe, not Gemini Trust, that chose not to include that information in its submissions to DMO. Against this record, there is no legitimate basis for the DOE Staff's decision to charge Gemini Trust but not Cboe. And while Gemini Trust repeatedly sought an explanation for this decision, the DOE Staff rebuffed these requests at every turn. The CFTC has never explained why it only charged Gemini

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[5] Statement of Comm. Pham, "The Deliberative Process Privilege" (Oct. 23, 2023), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement102323.

[6] In fact, 16 of the alleged 31 written at-issue statements were made either in Cboe's final product certification or in draft certifications that Cboe submitted to DMO.

Trust. Against this background, the only explanation for DOE Staff's decision is that it believed a "win" over Gemini Trust would generate more headlines—and, thus, better help their careers—and not suing Cboe would ensure that its employees "played ball" to help the DOE Staff pursue its case.[7]

The CFTC Did Not Sue Bad Actors that Defrauded Gemini Trust: More galling is the DOE's Staff's decision to embrace, rather than take action against, the companies and individuals that defrauded Gemini Trust. The context of this decision is critical. The DOE Staff alleged that one of the facts Gemini Trust did not disclose was that it lost millions of dollars to fraudsters who engaged in rebate fraud. Putting aside the veracity of this claim,[8] ***there was no dispute that these customers victimized Gemini Trust by engaging in prohibited commodities trading***. Records produced in the case confirm that fact. For example, during a 2019 interview of Hashtech's Jonathan David, which DOE Staff attorneys Alejandra de Urioste and David Oakland attended, Mr. David confirmed that Hashtech colluded with Cardano, with the help of a former Gemini employee named Danny Kim, to defraud Gemini. Mr. Kim admitted his role in this fraud during the investigation and his deposition. Yet the DOE Staff took *no action* against Hashtech, no action against Cardano, no action against Mr. David, and no action against Mr. Kim. To the contrary, the DOE Staff planned to introduce portions of Mr. Kim's deposition testimony at trial as *part of its case against Gemini Trust*. The DOE Staff's decision to embrace someone who facilitated improper—indeed, illegal—trading in order to pursue this false statement claim underscores their warped priorities and bad-faith behavior.

The CFTC Took No Action Against Mr. Small for Making False Statements in His Whistleblower Submission: Remarkably, the improperly coordinated trading was not the only wrongdoing the DOE Staff overlooked in pursuit of "winning" its case against Gemini Trust. This case began with Mr. Small's false whistleblower report. Putting aside his obvious bias, it is an adjudicated fact that Mr. Small is a serial liar who fraudulently obtained his employment with Gemini Trust and *made false statements in his whistleblower submission*. The DOE Staff knew this—but took no action whatsoever against Mr. Small. This point bears emphasis: the CFTC sued Gemini for *allegedly making false statements in a submission to the CFTC*. Yet the DOE Staff took no action against Mr. Small, who *actually made false statements to the CFTC*, simply because his lies fit the story the DOE Staff wanted to tell. Gallingly, Mr. Small is now poised to receive a whistleblower award worth, potentially, some $1.5 million. It is outrageous that the DOE Staff harassed Gemini Trust for seven years and extracted a $5 million settlement for purported *unintentional* wrongdoing while Mr. Small stands to receive a seven-figure reward for telling

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[7] The actions of the lead DOE lawyer on this case, Andrew Rodgers, well illustrate the DOE Staff's motivation and taxpayer-funded endgame in plain sight. Shortly after this case settled, Mr. Rodgers left the CFTC to join the partnership at a private law firm. The first case featured on Mr. Rodgers' law firm bio page is the CFTC's case against Gemini Trust, which he describes as one of "the agency's *most high-profile matters*" and goes on to brag about how he obtained "a precedent setting summary judgment decision" that "resulted in the largest civil monetary penalty under the CFTC's false statement statute." This is wildly misleading. The decision Mr. Roger's references was not precedent-setting in any way, was limited to the unique facts of the case, and played no role in Gemini Trust's decision to settle. *See* https://www.csvllp.com/person/andrew-rodgers/. The irony of Mr. Rodgers making false statements on his resume about a case he prosecuted concerning alleged false statements is rich to say the least.

[8] Among other things, and as explained below, Gemini Trust contends that it *did* disclose this trading. And, in any event, this trading was not material to DMO's review of the Bitcoin Futures Contract.

intentional lies. The DOE Staff's decision to overlook Mr. Small's conscious lies to pursue its claim against Gemini Trust reinforces that the DOE Staff's desire to create a headline overwhelmed any notion of common sense, ethics, duty, or true justice.

C. The DOE Staff Took Litigation Positions that Do Not Serve the Public Interest

The DOE Staff took litigation positions throughout this case that cannot be reconciled with basic principles of due process, the presumption of innocence, and good governance that ought to guide a public agency charged with promoting the public interest.

The DOE Staff Embraced An Untenably Broad View of the Deliberative Process Privilege: One sharply litigated issue was the scope of the so-called deliberative process privilege, which allows the government to withhold "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formed." *SEC v. Ripple Labs, Inc.*, 2022 WL 123590, at *1 (S.D.N.Y. Jan. 13, 2022). The risk that government agencies may abuse this privilege to obtain an unfair litigation advantage, and that such an advantage can deprive a defendant of due process, is neither novel nor unknown to the Commission. Indeed, then-Commissioner Pham specifically addressed this troubling possibility in her October 2023 statement:

> There is a disturbing trend among federal agencies that involves overbroad use of the deliberative process privilege against defendants in enforcement actions, so that relevant facts or final policy or final determinations cannot be used to support a defense against the alleged charges. I am seriously concerned that such attempts to shield the truth from greater scrutiny deprives defendants of due process and a fair hearing. Such basic human rights are the essence of a free and democratic society, and are embodied in the United States Constitution and Bill of Rights. These protections of life, liberty, and property are why the United States of America is a beacon of freedom across the world, and a stalwart defender of the rule of law against authoritarianism and autocracy.[9]

Here again, Acting Chairman Pham's warning proved prescient. In its litigation with Gemini Trust, the DOE Staff embraced an extraordinarily broad view of the deliberative process privilege. Indeed, while DOE Staff produced trivial materials like calendar invitations and public documents that were forwarded around the Commission, it refused to provide *any discovery* about *any substantive* work by *any DMO or other Commission employee* in connection with the self-certification. To support this position, the DOE Staff asserted that all work that any Commission employee did in connection with the self-certification—no matter how trivial the work or junior the employee—constituted protected policymaking. If adopted, these positions would create a *de*

[9] Statement of Comm. Pham, "The Deliberative Process Privilege" (Oct. 23, 2023), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement102323.

facto absolute privilege over substantive internal deliberations.[10] "Such secrecy of the operations of the government is against the public interest . . . ."[11]

The DOE Staff's position was not just bad policy. It was also highly prejudicial to Gemini Trust. One of the key issues in the case was whether the statements at-issue could have affected a decision made by the CFTC, and were thereby material. The DOE Staff's overbroad invocation of the deliberative process privilege made it all-but impossible for Gemini Trust to disprove this claim. The DOE Staff's privilege assertions denied Gemini Trust *any* discovery into this critical issue—and, thus, any direct evidence that could be used to contradict this allegation. For example, the DOE Staff asserted privilege to prevent Gemini Trust from gaining any information about what analysis DMO staff did to assess the Bitcoin Futures Contract and the Gemini Auction, what information and factors DMO actually considered to be important as part of that analysis, and what decisions (if any) DMO actually made in connection with the Cboe self-certification. Without this critical information, Gemini Trust was left in an impossible situation—"presumed guilty with no way to prove innocence."[12] Such a situation "is an abomination of the right to be presumed innocent until proven guilty."[13]

The DOE Staff Weaponized Other Privileges to Deny Gemini Trust Access to Potential Exculpatory Evidence: The DOE Staff did not merely invoke privilege to deny Gemini Trust potential exculpatory evidence, it wielded privilege as a weapon against Gemini Trust in other ways, too. As explained above, the DOE Staff alleged that Gemini Trust did not disclose the rebate fraud to the CFTC before the Cboe self-certification. One defense Gemini Trust sought to offer was that it *did* disclose that trading by filing a confidential report with federal law enforcement (the "Fraud Report"). It is undisputed that under applicable regulations the Fraud Report was available to the CFTC before Cboe filed the self-certification. For that reason, Gemini Trust repeatedly sought discovery on whether and when the CFTC obtained a copy of the Fraud Report. The DOE Staff would not produce this information on the grounds that it was absolutely privileged. In fact, it would not discuss the Fraud Report with Gemini Trust's counsel at all.

Of course, the DOE Staff did not believe that this assertion of privilege should affect its own case. It argued that, even though Gemini Trust was being denied potentially exculpatory evidence on the disclosure of the rebate fraud by way of the Fraud Report, the DOE should still be able to argue that Gemini Trust did not disclose the rebate fraud. Here again, DOE Staff's self-serving approach was utterly at odds with principles of fairness, due process, and good governance. There is no policy justification for asserting that discovery concerning the Fraud Report (which

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10 This position is particularly pernicious in the context of a self-certification. The deliberative process privilege applies until the government agency makes a decision or ends its decision-making process. *See Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (privilege only applies to "predecisional" documents). The DOE Staff argued that, because Cboe filed a self-certification (and not an application for approval), the Commission never made any decision—and, thus, that the privilege never stopped applying.

11 Statement of Comm. Caroline D. Pham, "Rule 11 Sanctions Motion in CFTC v. Traders Global Group" (July 3, 2024, *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement070324b

12 Statement of Comm. Pham, "The Deliberative Process Privilege" (Oct. 23, 2023), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement102323.

13 *Id.*

Gemini Trust wrote and filed) is privileged while simultaneously manipulating the record to exclude that evidence to prejudice Gemini Trust and gain an advantage. The government should be put to a choice: bring its case and allow disclosure, or maintain confidentiality at the expense of its litigation claims. In no world should the tack that the DOE Staff took here be acceptable to the CFTC, and in no way can it be said that such behavior furthers the agency's mission or serves the interest of the public.

The DOE Staff Argued that DMO Cannot Be Expected to Review the Materials that Were Submitted before the Self-Certification: One of Gemini Trust's main defenses to the CFTC's claim was that much of the allegedly omitted information was, in fact, included in submissions Cboe made to DMO before filing its self-certification. The DOE Staff's response to these facts were troubling, to say the least. The DOE Staff did not—because it could not—dispute that DMO received this information long before Cboe filed its self-certification. Rather, the DOE Staff argued that Cboe's submissions did not count because they were too long or voluminous. This position is untenable and, frankly, absurd: Gemini Trust's liability should not turn on what DMO does and does not choose to read—particularly when, as noted above, the DOE Staff abused the deliberative process privilege to withhold all evidence about what DMO actually reviewed, learned, or considered. False statement liability should not turn on the DOE Staff's unprincipled, evidence-free, and self-interested judgments about what disclosures are, and are not, sufficient.

The DOE Staff Sought to Hold Gemini Trust to A Higher Standard than DOE Holds Itself: The DOE Staff's vigorous prosecution of its claim against Gemini Trust for purported false statements also stands in stark contrast to the DOE's position when confronted with its own false statements. As you are no doubt aware, in July 2024 it was publicly revealed that the DOE had made a series of false statements to a judge in the case captioned *CFTC v. Traders Global Group, Inc.*, Case No. 1:23-cv-11808-ESK-WAP (D.N.J.) ("Traders Global"). The DOE's response when confronted with these false statements reflect a very different attitude than the hardline approach the DOE Staff took in its case against Gemini Trust. Among other things, it has been revealed that in Traders Global:

- The DOE first made a false statement on August 24, 2023, when a DOE investigator falsely characterized a wire transfer to obtain an *ex parte* restraining order against the defendant.
- The DOE relied on those false statements again on September 20, 2023 in support of an order to show cause seeking to hold defendants in contempt.
- On September 22, 2023, DOE *again* cited the false statement, this time in opposition to defendants' request to modify the *ex parte* restraining order.
- It was not until a November 6, 2023 hearing that the DOE lawyer representing the Commission first informed the court of the false statement. *That lawyer did not, however, disclose that it had received the information rendering this statement false* ***before*** *the DOE's initial filings in August*.[14]

[14] Remarkably, that same lawyer, Ashley Burden, was—at the very same time—overseeing an investigation of a separate company that is beneficially owned, in part, by Cameron and Tyler Winklevoss. While the DOE has,

- When the court confronted the responsible DOE lawyer about the false statement during the November 6, 2023 hearing, he downplayed the severity of the situation, arguing that the "mischaracterization" was "not material."

- In February 29, 2024, a Deputy Director in the DOE also downplayed the severity of this misconduct, asserting that he "disagree[d] with any suggestion . . . that the error in the declaration regarding certain payments . . . had a material effect on the need for a statutory restraining order."

Remarkably, it appears that the DOE also tried to downplay its wrongdoing to the Commission. A statement by then-Commissioner Pham reported that it "took six months for the Commission to be notified for the first time."[15] This was, apparently, part of a pattern. Commissioner Pham said that she was "not surprised" and had previously "raised multiple instances . . . where the CFTC's Division of Enforcement has not been candid" with the Commission.[16]

The double standard is striking. In Traders Global, the DOE tried to brush off false statements that it made *knowingly and willfully*. But, when it came to Gemini Trust—where the DOE Staff has never provided any evidence of Gemini Trust knowingly or willfully making any of the statements at-issue—the DOE Staff went to extraordinary lengths to manufacture a case. This is completely backwards and a glaring display of rules for thee but not for me.

In any event, Gemini Trust was gratified to learn that the CFTC is no longer trying to sweep this misconduct under the rug. It was particularly encouraged to read Acting Chairman Pham's quotes excoriating the DOE for permitting—and then attempting to hide—this grave misconduct.[17] Nevertheless, Gemini Trust is aghast that the DOE Staff was ever allowed to argue that it is not bound by the same standards it seeks to apply to others. The DOE Staff specifically argued to the judge in this case that Gemini should be held to a different, higher standard. That is outrageous and indeed, if anything, the opposite should be true: The DOE Staff "must be held to the highest standard to preserve faith in government."[18] The Commission should not tolerate the DOE Staff's attempts to skirt responsibility for its actions or countenance its attempts to impose on others standards that the DOE Staff cannot meet and does not believe in meeting itself.

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rightly, dropped that investigation, the double standard here is obvious—and deeply troubling.

15 *See* Statement of Comm. Caroline D. Pham, "Rule 11 Sanctions Motion in CFTC v. Traders Global Group" (July 3, 2024, *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement070324b.

16 *Id.*

17 *See id.*; Statement of Acting Chairman Pham, "Court Sanctions Against CFTC" (May 13, 2025), *available at* https://www.cftc.gov/PressRoom/PressReleases/9074-25.

18 *See* Statement of Comm. Caroline D. Pham, "Rule 11 Sanctions Motion in CFTC v. Traders Global Group" (July 3, 2024, *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement070324b.

D. Senior DOE Leadership Interfered with Other Aspects of Gemini Trust's Business to Gain Litigation Leverage

The DOE's misconduct was not limited to the DOE Staff. Indeed, Gemini Trust has received information indicating that it went to the very top of the Division. In May 2020, a Gemini Trust affiliate submitted an application to become a DCM. The CEA sets a strict 180-day deadline for the CFTC to approve or deny this application and specifies the limited circumstances under which the deadline could be extended a single time. 7 U.S.C. § 8(a). But the CFTC blew through these deadlines, concocting an ever-evolving set of additional demands and other excuses not to rule on the affiliate's application. Indeed, 750 days after the Gemini Trust affiliate submitted its application, the CFTC had *still* refused to hand down its decision.

There is good reason to believe that the reason the CFTC refused to act on this application is that senior DOE officials interfered in order to gain leverage in the Gemini Trust litigation. This is not mere conjecture. Before the DOE Staff sued Gemini Trust, a senior person at the CFTC specifically told Gemini Trust's principals that senior DOE employees were holding up the application and that the CFTC would not approve it unless and until Gemini Trust agreed to settle on the DOE Staff's terms.

III. The Settlement

In January 2025, Gemini Trust agreed to pay a civil monetary fine as part of a no-admit/no-deny settlement that ended the false statements case. The DOE Staff will, no doubt, point to this fine and settlement as justification for its actions. It was not.

Gemini Trust did not settle because it did anything wrong. It settled because it had no other choice. For nearly seven years, the DOE Staff subjected Gemini Trust to abusive investigation and litigation. As detailed above, the DOE Staff took extraordinarily aggressive legal positions and abused special governmental privileges in order to substantially hinder Gemini Trust's ability to defend itself. That alone was wrong and incompatible with the DOE Staff's role as public servants. But the DOE did more than that. It reached its tentacles into other parts of the CFTC and used the false statements claims as a basis to interfere with unrelated applications by Gemini Trust affiliates.

The fact that the DOE Staff was finally able to exert the government's considerable power long enough, and aggressively enough, to leave Gemini Trust with no reasonable option but to settle so it could move on with its business does not prove the righteousness of its cause. It simply shows the damage that government lawyers can inflict on growing companies when they place personal interests over the public good. Faced with a vindictive DOE that was willing and able to use its claim as a pretext to impose a de facto ban on Gemini Trust affiliates' applications with the Commission, settlement was a practical necessity. That should not be cause for celebration. It should be cause for introspection and shame.

IV. Concluding Thoughts

For seven years, Gemini Trust was in the crosshairs of the DOE Staff that had pre-determined the result it wanted from day one—a "win" against a high-profile company with high-profile founders in the high-profile crypto space that it could place in its trophy case. From the moment Mr. Small's false whistleblower report landed on their desks, the DOE Staff was dedicated

to backing into that pre-determined result at any cost, even if it meant destroying a startup, collaborating with a proven liar, ignoring criminal behavior by Gemini Trust's customers, and abandoning any sense of fairness, justice, or common good.

Time and again, the DOE Staff put their personal interests over what was right and just. Indeed, there was no obstacle the DOE Staff's ambition could not overcome. Gemini Trust did *not* act with scienter; so the DOE Staff took positions that rendered this requirement meaningless. Gemini Trust disclosed information that the DOE Staff claimed was omitted; so the DOE Staff decided those disclosures were insufficient and invoked the deliberative process privilege to hide any exculpatory evidence. Gemini Trust was victimized by customers that engaged in a rebate fraud; so the DOE Staff not only deliberately overlooked this but added insult to injury by deciding that Gemini Trust's disclosure of the fraud to federal law enforcement was not sufficient. Mr. Small made proven false statements in his whistleblower submission; so the DOE Staff ignored them because those false statements served their personal interests.

Gemini Trust and its founders took the path less traveled by crypto startups 10 years ago when they launched. Instead of shirking regulation by setting up offshore, they decided to build and innovate right here in the United States of America and embrace regulation, licensing, and compliance. They have always strived to do the right thing. And they have worked with regulators around the world over the last decade, including the Commission and the CFTC, to educate them on this new, world-changing technology and help inform thoughtful policy that fosters both innovation and consumer protection.

There is something deeply wrong with the DOE and its culture when it not only condones but encourages its staff to treat any market participant the way they have treated Gemini Trust for seven years, especially when that market participant has a proven track record of repeated, good faith behavior and acting within the letter and spirit of the law. And there is something deeply wrong with the overall culture and operations of an agency that would let this behavior continue time and time again and against multiple, unrelated market participants.

It is well known inside and outside of the CFTC that the DOE is out of control and that its culture is toxic. Indeed, current and former CFTC personnel have made this observation to us repeatedly. Its actions are also counterproductive to the CFTC's mission and Congressional mandate. The economic damage the DOE has caused, the innovation it has destroyed, and the American taxpayer money it has incinerated is significant. That the CFTC knew this for years but did little to stop, rein in, or reform this wayward division is deeply disappointing. Gemini Trust was gratified to learn that, at long last, Acting Chairman Pham is taking proactive steps to fix the DOE. But this transformation will require serious introspection and long-term commitment from the agency as a whole to ensure that this bad-faith behavior never happens again.

This is a critical time for the world's financial markets. The burgeoning cryptocurrency industry has created a new frontier for innovation that will rebuild and reshape the world's markets—indeed, its entire financial system. Gemini Trust and its principals want the United States to be at the forefront of these efforts. While Congress is currently working on legislation that will bring further regulatory clarity to help usher in this exciting future here, at home, in America, Gemini Trust's experience these past seven years shows how unprincipled and self-interested regulators can harm companies, stifle innovation, and hurt America's ability to become the leader

in this world-changing technology and space. It is imperative that the Commission follow-through on Acting Chairman Pham's important reforms so that it can rebuild the DOE into what it is supposed to be so, a division of the CFTC that serves the Commission's mission and statutory mandate set forth in the CEA: to be a principled agency that "faithfully serve[s] the public interest, and treat[s] market participants fairly."[19]

Gemini Trust stands by ready, willing, and able to assist the Commission and Inspector General in whatever capacity they would deem helpful.

Respectfully submitted,

/s/ *John F. Baughman*

cc: Caroline D. Pham, Acting Chairman (via email)
Kristin N. Johnson, Commissioner (via email)
Paul Hayeck, Acting Director – Division of Enforcement (via email)
Meghan Tente, Acting General Counsel (via email)

[19] Statement of Comm. Caroline D. Pham, "The CFTC Needs to Get Serious: A Strategic Plan for Reform" (May 10, 2024), *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement051024.