

>|< DRAGONFLY

August 8, 2024

BY ELECTRONIC SUBMISSION

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comments on the Proposed Amendments to Event Contract Rules, CFTC Regulation 40.11 (RIN 3038-AD54) (the “Proposed Rule”)

Dear Secretary Kirkpatrick,

Dragonfly Digital Management, LLC (“Dragonfly”) respectfully requests the opportunity to comment on the Commodity Futures Trading Commission’s (“CFTC” or the “Commission”) proposed amendments to regulation 40.11, which aim to further specify the types of event contracts that are contrary to the public interest. Respectfully, we offer the following comments on the Proposed Rule.

We commend the CFTC’s efforts to provide clarity regarding event contracts under the Commodity Exchange Act (“CEA”) Section 5c(c)(5)(C). However, we urge the Commission to reconsider the extent of its interpretive authority in light of the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo*¹, which overturned the Chevron Doctrine.

IMPACT OF CHEVRON OVERTURN ON GOVERNMENT AGENCIES

The Supreme Court’s ruling in *Loper Bright* fundamentally alters the legal landscape in which the CFTC operates. The Court held that matters of statutory interpretation are to be resolved *de novo* by the judiciary, thereby eliminating the presumption of deference that agencies like the CFTC previously enjoyed under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*² Courts must now use “traditional tools of statutory construction” to determine the “best reading” of a statute and ensure the agency’s action aligns with it. While an agency’s opinion can still be considered if found to be persuasive, any ambiguities in statutes must now be addressed by Congress rather than agency interpretations. This shift necessitates that an agency’s interpretations

¹ *Loper Bright Enterprises et. al. v. Raimondo, Secretary of Commerce, et. al.*, No. 22-451 603 U.S. ___, (June 28, 2024).

² *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. et al.*, 467 U.S. 837 (1984).

align closely with the statutory text and legislative intent of the relevant statute. This is what is required of the CFTC in relation to the CEA vis-à-vis the Proposed Rule.

THE PROPOSED RULE EXCEEDS THE AGENCY'S STATUTORY AUTHORITY AND REQUIRES JUDICIAL REVIEW

In this context, the Proposed Rule's categorical rejection of event contracts betting on election results as "contrary to the public interest" (equating them with illicit contracts on war, terrorism, and assassination) demands a thorough review by the courts. Specifically, our concerns are the following:

1. **Definition of "Gaming":** The Proposed Rule seeks to define "gaming" under CEA Section 5c(c)(5)(C) as "the staking or risking by any person of something of value upon: (i) the outcome of a contest of others, (ii) the outcome of a game involving skill or chance, (iii) the performance of one or more competitors in one or more contests or games, or (iv) any other occurrence or non-occurrence in connection with one or more contests or games."³ The Commission has made clear this definition would include political contests, and in its view, an election-related event contract would be contrary to the public interest.

We disagree with that perspective. Political event contracts should not be equated with gambling on games of chance like the Super Bowl. Rather, elections have significant economic implications. These contracts were designed to serve crucial risk hedging functions, aligning with the requirements of the CEA, and offer valuable predictive data to the public. For these reasons, they should not be considered contrary to the public interest. Furthermore, the Proposed Rule exceeds the CFTC's purview by partially regulating election-related issues in violation of the Administrative Procedure Act (the "APA").⁴

2. **Public Interest Determination:** The CFTC's categorical determination that election event contracts are contrary to the public interest must be re-evaluated in light of the Supreme Court's ruling in *Loper*. The statutory language of the CEA does not explicitly preclude all such contracts, and thus, each category should be examined with a nuanced understanding of its potential benefits and risks. Instead of responsibly regulating these new markets, the Commission plans to ban a broad range of them. A blanket ban on certain event contracts misinterprets the CEA, which requires a two-step process: first, determining if a contract involves an enumerated activity, and second, assessing whether it is contrary to the public interest. The Proposed Rule bypasses this two-step process. Financial regulation should rely on data and law, not uninformed preconceptions.⁵

Such sweeping prohibitions create uncertainty and drive individuals needing risk management tools to offshore, unregulated venues, exposing consumers to harm. Moreover, the United States risks falling behind other countries. The Proposed Rule bans most event contracts without (i) reviewing their specific terms, (ii) understanding their

³ Event Contracts, 89 Fed. Reg. 48968 (June 10, 2024) at 48974.

⁴ 5 U.S.C. § 706(2)(A), (C).

⁵ 7 U.S.C. § 7a-2(c)(5)(C).

hedging utility, or (iii) evaluating the merits of prediction markets as innovative platforms that promote democratic values.

3. **Judicial Interpretation:** Given that the courts are now the final arbiters of statutory interpretation with the overturning of the Chevron Doctrine, the CFTC must ensure that its regulations are defensible under judicial scrutiny. This includes providing clear, evidence-based justifications for why certain event contracts should be prohibited and demonstrating how such prohibitions align with the CEA's intent and objectives. The CFTC is neither a gambling nor an election regulator and is not equipped to regulate this market; whether the CFTC has jurisdiction over election events contracts requires a court's determination. As such, we recommend that the Commission wait for the conclusion of the lawsuit with Kalshi⁶ so that a judge can properly rule on statutory interpretation.

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Thank you for your attention in considering our perspectives on the Proposed Rule. We welcome discussing our comments with the CFTC and its staff.

Yours sincerely,

Jessica Furr

Jessica Furr
Associate General Counsel

Bryan Edelman

Bryan Edelman
Associate General Counsel

⁶ *KalshiEX LLC v. Commodity Futures Trading Commission*, No.1:23-cv-03257 (D.D.C.).