



By Electronic Submission

August 8, 2024

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Event Contracts (RIN 3038-AF14)

Dear Mr. Kirkpatrick:

Better Markets¹ appreciates the opportunity to comment on the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) proposed rulemaking² (“Proposed Rulemaking”), which aims to provide amendments to its rules concerning event contracts in certain excluded commodities. The CFTC is proposing amendments to further specify types of event contracts that fall within the scope of section 5c(c)(5)(C) of the Commodity Exchange Act (CEA or the Act) and are contrary to the public interest, such that they may not be listed for trading or accepted for clearing on or through a CFTC-registered entity.

BACKGROUND

In 2011, the CFTC published final rules under part 40 of its regulations, introducing new §40.11.³ This regulation was promulgated under the authority granted by section 5c(c)(5)(C) of the CEA,⁴ which was added by section 745(b) of the Dodd-Frank Wall Street Reform and

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 that protects and promotes Americans’ jobs, savings, retirements, and more.

² Event Contracts; 89 Fed. Reg. 48968 (June 10, 2024) (Proposed Rulemaking).

³ Provisions Common to Registered Entities, 76 Fed. Reg. 44776 (July 27, 2011).

⁴ 7 U.S.C. § 7a-2(c)(5)(C). The Commodities Exchange Act is codified at 7 U.S.C. § 1 *et seq.*

Consumer Protection Act (Dodd-Frank Act).⁵ Section 5c(c)(5)(C) authorizes the CFTC to prohibit certain "event contracts" from being listed or made available for clearing or trading on or through a registered entity, if such contracts involve an activity enumerated in section 5c(c)(5)(C) or other similar activities as determined by the CFTC and if the CFTC determines that such contracts are contrary to the public interest.

Event contracts, though not defined in the CEA or CFTC regulations, are generally understood to be derivative contracts with a binary payoff structure based on the outcome of an underlying occurrence or event.⁶ Registered entities seeking to list event contracts for trading or make them available for clearing must comply with the substantive and procedural requirements generally applicable to derivative contracts. CFTC-registered exchanges, including Designated Contract Markets (DCMs) and Swap Execution Facilities (SEFs), are required to list or permit trading only in derivative contracts that are not readily susceptible to manipulation, enforce compliance with contract terms, and monitor trading to prevent manipulation, price distortion, and settlement disruption through market surveillance, compliance, and enforcement practices.

In addition to these general requirements, section 5c(c)(5)(C) of the CEA grants the CFTC the authority to prohibit registered entities from listing or making available certain types of event contracts for clearing or trading if they are deemed contrary to the public interest.⁷

Since 2021, the CFTC has observed a significant increase in the number of event contracts listed for trading by registered exchanges and in the diversity of events underlying these contracts. There has also been a notable rise in applications and expressions of interest for exchange registration from entities focused primarily or exclusively on listing event contracts. Historically, CFTC-registered exchanges have listed various event contracts for several decades. The first contract market dedicated to trading event contracts was designated on February 18, 2004.⁸ In 2008, the CFTC published a concept release seeking input on the appropriate regulatory treatment of event contract markets, prompted by numerous requests for guidance on applying the CEA to these markets. Although the CFTC received 31 comments in response, no further action was taken at that time.⁹ In 2010, section 745(b) of the Dodd-Frank Act clarified the CFTC's regulatory authority over certain event contracts, leading to the adoption of §40.11 in 2011.¹⁰

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

⁶ See Proposed Rulemaking at 48969.

⁷ 7 U.S.C. § 7a-2(c)(5)(C).

⁸ See CFTC Order of Designation for HedgeStreet, Inc. (Feb. 20, 2004), available at <https://www.cftc.gov/sites/default/files/opa/press04/opa4894-04.htm>.

⁹ See Proposed Rulemaking at 48969.

¹⁰ See 76 Fed. Reg. 44776 (July 27, 2011).

STATUTORY AUTHORITY

Section 5c(c)(5)(C) was added to the CEA by section 745(b) of the Dodd-Frank Act, which broadly amended the contract and rule submission requirements outlined in CEA section 5c(c). During a brief discussion on the Senate floor about the proposed Dodd-Frank Act provision that became CEA section 5c(c)(5)(C), the late Senator Dianne Feinstein and Senator Blanche Lincoln, then-Chair of the Senate Committee on Agriculture, Nutrition, and Forestry and one of the provision's authors, highlighted its purpose. Senator Lincoln stated that this provision ensures the CFTC has the authority to prevent the creation of futures and swaps markets that enable citizens to profit from catastrophic events and to curb gambling through futures markets.¹¹

Under CEA section 5c(c)(5)(C)(i), the CFTC may determine that certain agreements, contracts, or transactions in excluded commodities, based on occurrences or contingencies (excluding changes in price, rate, value, or levels of a commodity described in section 1a(2)(i)), are contrary to the public interest. This determination can be made if the contracts involve: (I) unlawful activity under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; (V) gaming; or (VI) any other similar activity deemed contrary to the public interest by the CFTC through rule or regulation.¹²

CEA section 5c(c)(5)(C)(ii) states that any agreement, contract, or transaction found by the CFTC to be contrary to the public interest under section 5c(c)(5)(C)(i) cannot be listed or made available for clearing or trading through a registered entity.¹³ The CFTC believes this section requires a two-step inquiry.¹⁴ First, the CFTC must determine if a contract in an excluded commodity involves an activity listed in CEA section 5c(c)(5)(C)(i)(I)–(V) (an "Enumerated Activity") or a similar activity prescribed by rule or regulation. If such activity is found, the CFTC must then assess whether the contract is contrary to the public interest. If both conditions are met, the contract cannot be listed or made available for clearing or trading by a registered entity.¹⁵

CFTC Regulation 40.11

In 2011, the CFTC adopted Regulation §40.11 to implement CEA section 5c(c)(5)(C) as part of broader changes to the CFTC's Part 40 regulations. CFTC Regulation 40.11(a)(1) stipulates that a registered entity shall not list for trading or accept for clearing any agreement, contract,

¹¹ 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln), available at www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf.

¹² 7 U.S.C. § 7a-2(c)(5)(C)(i).

¹³ 7 U.S.C. § 7a-2(c)(5)(C)(ii).

¹⁴ See Proposed Rulemaking at 48970.

¹⁵ See Proposed Rulemaking at 48971.

transaction, or swap based on an excluded commodity if it involves, relates to, or references terrorism, assassination, war, gaming, or any activity that is unlawful under State or Federal law.¹⁶ While the order of activities listed in §40.11(a)(1) differs slightly, they correspond to the activities enumerated in CEA sections 5c(c)(5)(C)(i)(I)–(V), collectively referred to as the Enumerated Activities.

In alignment with CEA section 5c(c)(5)(C)(i)(VI), §40.11(a)(2) mandates that a registered entity shall not list for trading or accept for clearing any agreement, contract, transaction, or swap based on an excluded commodity that involves, relates to, or references an activity similar to those enumerated in §40.11(a)(1), which the CFTC determines, by rule or regulation, to be contrary to the public interest.¹⁷ To date, the CFTC has not made any such determinations.

According to §40.11(c), if a contract submitted by a registered entity under §40.2 or §40.3 may involve, relate to, or reference an activity enumerated in §§40.11(a)(1) or (2), the CFTC is authorized to commence a 90-day review of the contract.¹⁸ The CFTC must issue an order approving or disapproving the contract by the end of the 90-day review period or any extended period agreed to or requested by the registered entity.¹⁹ During this review period, §40.11(c)(1) requires the CFTC to request the registered entity suspend the listing or trading of the contract. Additionally, the CFTC must post a notification of the intent to conduct a 90-day review on its website.

In the 2011 adopting release for the rule, the CFTC did not define any of the Enumerated Activities. It acknowledged a comment on the rule proposal that the term "gaming" should be further defined to enhance clarity regarding the scope of the prohibition set forth in §40.11(a)(1).²⁰ The CFTC agreed with interest in defining "gaming" for this prohibition and indicated that it might issue a future event contracts rulemaking to address the appropriate treatment of event contracts involving gaming.²¹ Meanwhile, the CFTC determined to adopt the prohibition set forth in §40.11(a)(1) concerning the Enumerated Activities and to consider individual product submissions on a case-by-case basis under §40.2 or §40.3.²²

¹⁶ 17 C.F.R. 40.11(a)(1).

¹⁷ 17 C.F.R. 40.11(a)(2).

¹⁸ 17 C.F.R. 40.11(c).

¹⁹ 17 CFR 40.11(c)(2).

²⁰ See 76 Fed. Reg. 44776, 454785 (July 27, 2011).

²¹ *Id.*

²² *Id.*

PRIOR CFTC APPROACHES

Historically, the CFTC has permitted binary event contracts only under limited and tightly controlled conditions. In 1993, CFTC staff issued a no-action letter to the Iowa Electronic Markets (“IEM”), an academic prediction market run by the University of Iowa’s Tippie College of Business in conjunction with several other universities.²³ Among the event contracts available for trading on the IEM are political event contracts regarding partisan control of the United States Congress. The CFTC’s staff no-action letter allowed the IEM to continue offering its political event contracts, but with several restrictions. First, the no-action was premised on the IEM’s academic purpose and operation as a non-profit entity. Second, neither the IEM nor the University of Iowa charges any commissions or receives a return in connection with its operation, and IEM does not realize a financial profit or suffer loss as a result of the transactions.

In December 2011, the North American Derivatives Exchange (“NADEX”) submitted a proposal to the CFTC seeking approval of five new political event contracts relating to the political control of the United States Congress and the Presidency.²⁴ On April 2, 2012, the CFTC issued an order (“Nadex Order”) prohibiting NADEX from listing its proposed political event contracts.²⁵ In its order, the CFTC found that the contracts, which would have paid out based upon the outcome of US federal elections, “involved[] gaming” and were contrary to the public interest under CEA Section 5c(c)(5)(C)(i).

In 2014, the CFTC staff issued a no-action letter to PredictIt, operated by researchers at the Victoria University of Wellington, allowing its political event contracts to operate in the United States provided that it met certain conditions. In August 2022, however, the CFTC staff informed PredictIt that it had violated the no-action letter, that it was withdrawing the no-action letter, and instructed the company to wind down its operation of the political event contracts by February 2023.²⁶

On December 23, 2020, the CFTC began a 90-day review of specific event contracts self-certified by Eris Exchange, LLC (ErisX). These contracts were based on the moneyline, point

²³ CFTC No-Action Letter, CFTCLTR No. 93-66, 1993 WL 595741 (June 18, 1993), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/93-66.pdf>.

²⁴ U.S. COMMODITIES FUTURES COMMISSION, *CFTC Commences 90-day Review of NADEX’s Proposed Political Event Derivatives Contracts* (Jan. 5, 2012), <https://www.cftc.gov/PressRoom/PressReleases/6163-12>.

²⁵ U.S. COMMODITIES FUTURES COMMISSION, *Order Prohibiting the Listing or Trading of Political Event Contracts*, <https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf>.

²⁶ U.S. COMMODITIES FUTURES COMMISSION, *CFTC Staff Withdraws No-Action Letter to Victoria University of Wellington, New Zealand Regarding a Not-For-Profit Market for Certain Event Contracts* (Aug. 4, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8567-22>.

spread, and total points for individual NFL games.²⁷ On August 26, 2022, the CFTC initiated another 90-day review, this time for certain Congressional control event contracts submitted by KalshiEX LLC (Kalshi) for approval.²⁸ In both instances, the submitting parties withdrew their respective contracts from consideration before the CFTC could issue a final determination pursuant to §40.11.

Finally, on June 23, 2023, the CFTC commenced a 90-day review under §40.11(c) of certain event contracts self-certified by Kalshi that were based on which political party controlled each chamber of Congress.²⁹ On September 22, 2023, the CFTC issued an order (“Kalshi Order”) prohibiting these contracts from being listed or made available for clearing or trading. The CFTC found that the contracts involved the Enumerated Activities of gaming, and an activity unlawful under State law, and that the contracts were contrary to the public interest.³⁰ This order is currently under judicial review in the District Court for the District of Columbia.³¹

COMMENTS

I. The Proposed Rulemaking Correctly Aligns with CEA Section 5c(c)(5)(C) by Removing the Terms "Relate To" and "Reference" and Referring Only to Event Contracts that "Involve" an Enumerated Activity.

The proposed amendments to §40.11 properly aim to align the regulation’s language more closely with the statutory text of CEA section 5c(c)(5)(C).³² The CFTC’s proposal to remove the terms “relate to” and “reference” and focus solely on event contracts that “involve” an Enumerated Activity or prescribed similar activity is appropriate. CEA section 5c(c)(5)(C) applies to event contracts in certain excluded commodities that “involve” one of the Enumerated Activities or a prescribed similar activity. By focusing on contracts that “involve” an Enumerated Activity, the proposed amendments will enhance regulatory precision and ensure that the CFTC’s prohibition authority is the same as the statutory language.

²⁷ See CFTC Release No. 8345–20, CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC (Dec. 23, 2020), available at <https://www.cftc.gov/PressRoom/PressReleases/8345-20>

²⁸ See CFTC Release No. 8578–22, CFTC Announces Review and Public Comment Period of KalshiEX Proposed Congressional Control Contracts Under CFTC Regulation 40.11, available at <https://www.cftc.gov/PressRoom/PressReleases/8578-22>.

²⁹ See CFTC Release No. 8728–23, CFTC Announces Review of Kalshi Congressional Control Contracts and Public Comment Period (June 23, 2023), available at <https://www.cftc.gov/PressRoom/PressReleases/8728-23>.

³⁰ See CFTC Release No. 8780–23, CFTC Disapproves KalshiEX LLC’s Congressional Control Contracts (Sept. 22, 2023), available at <https://www.cftc.gov/PressRoom/PressReleases/8780-23>.

³¹ *KalshiEx LLC v. Commodity Futures Trading Commission*, 1:23-cv-03257 (filed Nov. 1, 2023) (D.D.C.).

³² See Proposed Rulemaking at 48973.

The proposed amendments reaffirm the CFTC's prohibition authority and the standard of review applicable to event contracts under §40.11.³³ This alignment with the statutory text of CEA section 5c(c)(5)(C) is also consistent with the determinations made by the CFTC in the Kalshi Order and the Nadex Order, which evaluated whether the event contracts in question "involved" an Enumerated Activity.³⁴ The proposed changes are not intended to alter the scope of the CFTC's prohibition authority or the nature of its analysis in determining whether a particular event contract falls within the ambit of CEA section 5c(c)(5)(C) and §40.11.

The term "involve" is not defined in the CEA, so the CFTC applies its ordinary meaning. Definitions of "involve" include "to relate to or affect," "to relate closely," "to entail," or "to have as an essential feature or consequence."³⁵ This interpretation ensures that the regulation can effectively address contracts that, while not directly based on an Enumerated Activity, still bear a significant connection to such activities.

The full text of CEA section 5c(c)(5)(C)(i) clarifies that a contract "involves" more than just its underlying event. Where the CEA specifies a contract's underlying, it uses the term "underlying" or refers to what the contract is "based on" or "based upon."³⁶ CEA section 5c(c)(5)(C)(i) section uses both "based upon" and "involve," showing a distinction between the two. This section applies to agreements, contracts, transactions, or swaps in excluded commodities based upon the occurrence, extent of an occurrence, or contingency, meaning the contract's underlying must be an event. It then states that "such agreements, contracts, or transactions" must "involve" an Enumerated Activity or prescribed similar activity. In this context, "based upon" refers to the underlying, requiring only that it be an event, while "involve" retains its broader ordinary meaning and refers to the agreements, contracts, or transactions as a whole.

Thus, Congress's use of the term "involve" in section 5c(c)(5)(C) indicates that the law covers event contracts not only when their underlying is an Enumerated Activity but also when they have a significant connection to such activities.

The legislative history of CEA section 5c(c)(5)(C) supports the plain meaning of the statutory text. Senator Lincoln stated that CEA section 5c(c)(5)(C) was intended to "prevent gambling through futures markets" and to restrict derivatives exchanges from constructing event contracts around sporting events such as the Super Bowl, the Kentucky Derby, and the Masters Golf Tournament.³⁷ None of these events are, themselves, "gaming." Rather, Senator Lincoln's

³³ *Id.*

³⁴ See Kalshi Order at 5–7; Nadex Order at 2.

³⁵ See Proposed Rulemaking at 48973.

³⁶ *Id.*

³⁷ See 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln).

statement, who is identified as one of the authors of CEA section 5c(c)(5)(C), focuses on the overall characteristics of the contract. As noted in the Nadex Order and the Kalshi Order, this legislative history supports the plain meaning of the term "involve" and indicates that the question for the CFTC in evaluating whether a contract "involves" an Enumerated Activity or prescribed similar activity is whether the contract, considered as a whole, involves one of those activities.³⁸

II. The Proposed Rulemaking Definition of Gaming, which includes, among other things, the Staking or Risking by any Person of Something of Value Upon the Outcome of a Political Contest, Is Correct.

The Proposed Rulemaking's definition of "gaming" is within §40.11, and is aligned with the statutory text of CEA section 5c(c)(5)(C).³⁹

Although "gaming" is not defined in either the CEA or CFTC regulation, the proposed definition is consistent with the CFTC's interpretation of the term "gaming" in the Nadex Order and the Kalshi Order.⁴⁰ The Proposed Rulemaking recognizes that the terms "gaming" and "gambling" are used interchangeably in common usage and dictionary definitions.⁴¹ The Proposed Rulemaking also recognizes that under several state statutes, "gambling," "betting," or "wagering" is recognized to include a person staking or risking something of value upon a game or contest, or the performance of competitors in a game or contest.⁴² Moreover, the Unlawful Internet Gambling Enforcement Act defines the terms "bet or wager" as:

"the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome."⁴³

Therefore, the Proposed Rulemaking appropriately defines "gaming" within §40.11 by focusing on the staking or risking of something valuable on a contest or game, including the outcomes, competitor performances, or related events. This approach aligns with state and federal definitions of "gambling," "betting," and "wagering." This definition is also consistent with the

³⁸ See Nadex Order at 2; Kalshi Order at 7.

³⁹ See Proposed Rulemaking 48974.

⁴⁰ See Nadex Order at 2–3; Kalshi Order at 8–10.

⁴¹ See Proposed Rulemaking 48975.

⁴² *Id.*

⁴³ 31 U.S.C. § 5362(1)(A) (emphasis added); see also Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling and the Speculation Paradox*, 86 B.U. L. REV. 371 (2006); Dave Aron & Matt Jones, *States' Big Gamble on Sports Betting*, 12 UNLV GAMING L. J. 53, 67–86, 71 (2021) (discussing the CEA's application to event contracts).

intent of the drafters of CEA section 5c(c)(5)(C). Senator Lincoln emphasized that the provision aimed to ensure the CFTC could "prevent gambling through futures markets."⁴⁴

Thus, the Proposed Rulemaking is proposing to define "gaming" to include the staking or risking of something of value on a contingent event in connection with a game or contest.⁴⁵ This would be considered just as much a wager or bet as staking or risking something on the outcome of the game or contest itself.

The Proposed Rulemaking also includes a non-exclusive list of examples of activities that constitute "gaming." This list is crucial for providing additional guidance to registered entities and market participants. It includes staking or risking something of value upon: (i) the outcome of a political contest, including an election or elections; (ii) the outcome of an awards contest; (iii) the outcome of a game in which one or more athletes compete; or (iv) an occurrence or non-occurrence in connection with such a contest or game, regardless of whether it directly affects the outcome.⁴⁶ This illustrative list ensures that the scope of the definition remains clear and comprehensive.

The Proposed Rulemaking makes it clear that its proposed definition of "gaming" would not have applicability beyond the CFTC's administration of CEA section 5c(c)(5)(C) and §40.11.⁴⁷

A. Political Event Contracts Fall Within the Definition of Gaming

As Better Markets has detailed in its previous comment letter to the CFTC regarding Kalshi's proposed political event contract⁴⁸ and Better Markets' amicus brief,⁴⁹ the facts, law, and policy fully support the inclusion of political contests, such as elections, in the definition of gaming.⁵⁰ Political event contracts are gaming and involve gaming within the meaning of the CEA. They fall squarely under the Proposed Rulemaking's regulatory prohibition, as authorized under the CEA. A political event contract is a binary (all-or-nothing) event contract whose payoff is

⁴⁴ See 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010) (statement of Sen. Blanche Lincoln).

⁴⁵ See Proposed Rulemaking at 48975.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Better Markets, Comment Letter to CFTC re KalshiEx, LLC's Proposed Political Event Contract (July 24, 2023) available at https://bettermarkets.org/wp-content/uploads/2023/07/Better_Markets_Comment_Letter_CFTC_Kalshi_Congressional_Control_Contracts.pdf.

⁴⁹ Better Markets, *Amicus Brief in KalshiEx LLC v. CFTC* (March 4, 2024), available at https://bettermarkets.org/wp-content/uploads/2024/03/Better_Markets_Amicus_Brief_CFTC_Kalshi-3.4.24.pdf.

⁵⁰ See Proposed Rulemaking at 48975.

contingent upon an election. Participants in such political prediction markets place a sum of money at risk, with the payout based on the market's assessment of the probability of each outcome. If a participant "predicts" correctly, they are rewarded monetarily. Conversely, if they predict incorrectly, their position will lose monetary value.

While some may contend that political event contracts cannot be or involve "gaming" because prediction markets contain an element of skill as opposed to mere chance, the statutory definition of "bet or wager" lists "a game subject to chance" as one of several examples, not a necessary element. That political prediction markets may contain an element of skill — i.e., informational or predictive superiority — makes them no more distinct from gaming than does a professional poker player's expertise make their profession distinct from gambling. Both at the blackjack table and in a prediction market, skill may aid participants. But in both cases, significant elements of uncertainty and chance, which are beyond the control of the participants, dominate the endeavor, rendering that activity one that involves "gaming" under the CEA⁵¹

The CFTC's recognition that the terms "gaming" and "gambling" are used interchangeably in common usage and statutory definitions is critical and correct. This approach ensures that the definition remains practical and applicable across different contexts and jurisdictions. Furthermore, by defining "gaming" to focus on the staking or risking of something of value upon a contest or game, the CFTC provides a clear and precise framework for enforcement. This framework will help prevent event contracts that could undermine market integrity and public confidence.

III. The Proposed Rulemaking Inclusion of Hedging and Price-Basing Utility as Essential Factors in Evaluating Contracts Aligns with CEA Section 5c(c)(5)(C), Enhancing the CFTC's Ability to Make Categorical Public Interest Determinations.

While CEA section 5c(c)(5)(C) requires the CFTC to determine whether a contract that involves an Enumerated Activity is contrary to the public interest in order for that contract to be prohibited from being listed or made available for clearing or trading, the statute does not require this public interest determination to be made on a contract-specific basis.⁵² The CFTC is fully authorized to make broader, category-wide decisions if it finds that all contracts involving a particular activity are against the public interest.⁵³ The Proposed Rulemaking would change §40.11(a)(1) to state that all event contracts involving activities like "gaming" are, as a group, against the public interest and therefore cannot be listed for trading or clearing.⁵⁴ In the past, the

⁵¹ See Ryan P. McCarthy, *Information Markets as Games of Chance*, 155 U. PA. L. REV. 749, 770 (2007); Thomas Lee Hazen, *Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance*, 24 ANN. REV. BANKING & FIN. L. 375, 401-12, 416-18 (2005) (comparing investing, hedging, insurance, and gambling as risk-taking activities).

⁵² 7 U.S.C. § 7a-2(c)(5)(C).

⁵³ See Proposed Rulemaking 48978.

⁵⁴ *Id.*

CFTC has reviewed each contract individually to determine its impact on public interest. If the Proposed Rulemaking is approved, the CFTC would no longer need to review each contract individually but would simply check if it falls into one of the banned categories. This approach provides much-needed consistency and clarity. It will also significantly reduce the need for individual contract reviews thereby enhancing the efficiency and effectiveness of regulatory oversight.

Additionally, the factors considered by the Proposed Rulemaking in evaluating whether a contract or category of contracts is contrary to the public interest are appropriate.⁵⁵ Specifically, the focus on hedging and price-basing utility, threats to national security, and the potential for contracts to involve manipulative activity or profit from harm to persons or groups are pertinent and necessary considerations.

The legislative history underscores the importance of these factors.⁵⁶ The intent to broadly define “public interest” to include the predominant use of contracts by speculators rather than for commercial producers or purchasers or commercial hedging purposes is a crucial guideline. The recognition that certain contracts may threaten national security or the public good further justifies the need for a categorical approach in prohibiting such contracts.

Moreover, the CFTC will consider all relevant factors in evaluating whether a contract, or category of contracts, is contrary to the public interest, and no single factor will be determinative in the CFTC’s evaluation. This comprehensive approach is appropriate because it ensures a thorough and balanced assessment. In addition to hedging utility, price-basing utility, and threats to national security or other threats to the public good, the CFTC will also consider: (i) the extent to which the contract, or category of contracts, would draw the into areas outside its primary regulatory remit; (ii) whether characteristics of the contract or category of contracts, may increase the risk of manipulative activity relating to the trading or pricing of the contract; and (iii) whether the contract or category of contracts could result in market participants profiting from harm to any person or group of persons.⁵⁷ It’s clear that these additional factors are important public interest factors. The factors informing a public interest determination, and the weight given to each, will vary depending on the specific characteristics of the contract, or category of contracts, under evaluation. This flexible approach allows for nuanced decision-making that appropriately addresses the complexities of different contracts.

A. Event Contracts that Involve “Gaming” Are Contrary to the Public Interest

The CFTC’s proposal amends §40.11(a)(1) to include a determination that any contract that involves “gaming,” as defined in the Proposed Rulemaking, is contrary to the public

⁵⁵ See Proposed Rulemaking 48980.

⁵⁶ 156 Cong. Rec. S5906 (daily ed. July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln).

⁵⁷ See Proposed Rulemaking 48980.

interest.⁵⁸ The Proposed Rulemaking states that the economic impact of events related to contests or games of skill or chance—including their outcomes—is generally too diffuse and unpredictable to result in direct and quantifiable changes in the prices of commodities or financial assets.⁵⁹ This limits if not eliminates entirely the hedging and price-basing utility of event contracts involving such occurrences. This is appropriate because it highlights the speculative nature of these contracts, which are more likely to be used for gambling rather than for legitimate hedging or price discovery purposes.

The CFTC's view that these contracts are traded primarily for entertainment, with participants staking something of value on the outcome of a contest or game, is clearly correct. Such contracts are likely to be used predominantly by speculators without a commercial or hedging interest and cannot be reasonably expected to serve as effective hedging tools.

Even though some individuals or entities might experience more direct economic consequences from specific occurrences in contests or games, the CFTC believes that this group is small compared to the broader universe of market participants, including retail traders, who are most likely to engage in these contracts for entertainment.⁶⁰ This distinction is crucial for maintaining market integrity. Moreover, individuals or entities with a direct economic stake in these events might have access to inside information or influence, raising concerns about market manipulation.⁶¹ For example, a professional athlete or coach could use privileged information about their team to trade event contracts or manipulate the market. The CFTC's efforts to address these manipulation risks are necessary and appropriate.

Also, contracts classified as "gaming" typically lack an underlying cash market with bona fide economic transactions to provide reliable price information. Instead, they rely on unregulated and opaque sources, increasing the risk of manipulation and decreasing the ability of exchanges and the CFTC to detect such activity. This lack of transparency and regulation is a significant concern. Allowing such contracts on CFTC-regulated markets could also blur the lines between gambling and financial instruments, potentially misleading retail investors about the nature of these contracts. This could improperly suggest that these contracts are suitable for investment purposes or that derivative markets are appropriate venues for gambling.

Furthermore, gambling in the United States is overseen by state regulators with specific expertise and legal frameworks designed to address gambling-related risks and concerns. The CFTC is not a gaming regulator and does not have the mandate, experience, or expertise to regulate, oversee, and police gambling activities. The CFTC should not expend its very limited resources on regulating gambling, as this is beyond its statutory authority.

⁵⁸ See Proposed Rulemaking 48981.

⁵⁹ *Id.*

⁶⁰ See Proposed Rulemaking 48982.

⁶¹ *Id.*

B. Political Event Contracts Are Contrary to the Public Interest

The Proposed Rulemaking highlights the unique public interest concerns related to event contracts involving political contests⁶². Allowing such contracts could create incentives to manipulate election outcomes or perceptions, undermining election integrity. The CFTC's proposal to amend §40.11(a)(1) properly recognizes that contracts involving gaming and political events pose significant risks to public interest, market integrity, and investor protection. The Proposed Rulemaking aligns with the CFTC's mandate to regulate financial markets effectively while preventing the misuse of derivatives for speculative or manipulative purposes.

Political event contracts are contrary to the public interest in multiple ways. First, they cannot consistently or reliably serve either of the core public interest functions of the derivatives markets, namely hedging against price risk and enabling price discovery (or price basing). Second, political event contracts threaten affirmative harm to the public interest by undermining the integrity of congressional elections, fostering market manipulation, and inappropriately casting the CFTC in the role of election regulator.⁶³

1. Political Event Contracts do not serve a meaningful hedging or price discovery function.

The legislative history of CEA Section 5c(c)(5)(C) makes clear Congress's intent to restore the economic purpose test that was used by the CFTC to determine whether a contract was contrary to the public interest pursuant to CEA Section 5(g) prior to its deletion by the Commodity Futures Modernization Act of 2000. The restored economic purpose test calls for an evaluation of an event contract's utility for hedging and price discovery purposes. The unpredictability of the specific, concrete economic consequences of an election (or change in partisan control of Congress) means that the political event contracts cannot reasonably be expected to be used for hedging purposes. The political event contracts' prices could not form the basis for the pricing of a commercial transaction involving a physical commodity, financial asset or service, which demonstrates that the political event contracts have no price-basing utility.

A political party's control of the chambers of Congress does not have sufficiently "direct, predictable, or quantifiable economic consequences" for political event contracts "to serve as an effective hedging mechanism."⁶⁴ Control of a chamber of Congress may ultimately have economic effects, but those eventual impacts are "both diffuse and unpredictable."⁶⁵ Too many events and variables intervene between a political party's control of Congress and the implementation of a

⁶² See Proposed Rulemaking 48983.

⁶³ See Better Markets, *Amicus Brief in KalshiEx LLC v. CFTC* (March 4, 2024)

⁶⁴ See Kalshi Order at 15.

⁶⁵ See Kalshi Order at 16.

given policy with economic repercussions. History is littered with innumerable examples of campaign promises, however genuine, being utterly meaningless once a person or party is elected or in control of one or both houses of Congress. As the old saying goes, “too many in this town mistake majority for control.” Partisan majorities do not mean control and neither majorities nor control mean that some specific legislative item or agenda will pass even one, never mind both Houses of Congress, much less be signed by a President and become law.

Opponents of the Proposed Rulemaking may attempt to prove the hedging capabilities of political event contracts by citing examples of what they may contend are the economic consequences of elections, including, for example, changes in stock prices experienced by renewable energy companies, tobacco stocks, and others that appear to have been correlated with election outcomes. But such anecdotal “evidence,” in a realm so fraught with complexity and an abundance of possible causes, is undeserving of any weight. Moreover, political event contracts are not valid hedging tools as an analysis in the New York Times demonstrated.⁶⁶ The performance of stocks like private prisons and gun companies demonstrates that politically motivated bets are at best misguided and at worse just plain wrong. For example, despite expectations, private prison stocks did not perform consistently under the Trump administration and showed unexpected gains during Biden’s term.⁶⁷ Similarly, energy and gun stocks did not align with anticipated political outcomes, indicating that presidential policies have less influence on specific market sectors than commonly believed.⁶⁸ This unpredictability provides yet more evidence that political event contracts are unreliable and inappropriate for hedging purposes.

From a regulatory perspective, the CFTC’s mandate is to oversee commodity and derivatives markets, making sure they function effectively for hedging and price discovery. That ensures that vitally important commodities are available to the American people when they want them, in the amounts they want, and at prices that reasonably reflect supply and demand. Whether the CFTC does that job well or poorly impacts everything from cereal and coffee at breakfast, bread and peanut butter in lunch sandwiches, gas for cars and trucks, cotton for shirts and skirts, and sugar in almost everything. In contrast, political event contracts offer no such significant hedging benefits and do not contribute to price discovery. Instead, they represent speculative gambling that falls outside the CFTC’s regulatory expertise, experience, and purview, and will detract the CFTC from its primary mission. By focusing on commodities that impact everyday life, such as agricultural products and energy resources, the CFTC can continue to serve and protect the American people.

Additionally, the CFTC is already underfunded and struggling to fulfill its current statutory mandates. Introducing significant new and unrelated duties, such as overseeing political event

⁶⁶ Jeff Sommer, *Let the Pros Play With the ‘Trump (or Harris) Trade’*, NEW YORK TIMES (July 26, 2024), available at <https://www.nytimes.com/2024/07/26/business/trump-trade-stock-market-election-harris.html?smid=nytcore-ios-share&referringSource=articleShare>.

⁶⁷ *Id.*

⁶⁸ *Id.*

contracts, would further strain its limited resources. This shift in focus goes against Congressional intent and undermines the agency's ability to regulate essential commodity and derivatives markets effectively. The CFTC should prioritize its existing responsibilities to ensure the stability and integrity of markets that directly affect the daily lives of Americans, rather than diverting attention and resources to speculative markets outside its core mission.

2. Political Event Contracts would threaten election integrity.

The Proposed Rulemaking correctly categorized political event contracts as event contracts contrary to the public interest because election gambling fundamentally cheapens the sanctity of our democratic process. Political bets change the motivations behind each vote, replacing political convictions with financial calculations. Allowing billionaires to wager extraordinary bets while simultaneously contributing to a specific candidate or party, and political insiders to bet on elections using non-public information, will further degrade public trust in the electoral process.

Elected officials rely not only on free and fair elections to engender faith in the outcomes of elections, but elections are the foundation of American democracy. Gambling on elections would create very powerful incentives for bad actors, or even those just looking to make a quick buck, to interfere with our elections and try to sway voters outside of the democratic process. For example, it is easy to imagine how AI or social media might be manipulated to quickly circulate false and misleading information within hours or days of an election that could move enough votes to change the election's results.

As Bloomberg News reported on July 12, 2023, “AI is making politics easier, cheaper and more dangerous,” including:

“AI holds the potential to supercharge the dissemination of misinformation in political campaigns. The technology is capable of quickly creating ‘deepfakes,’ fake pictures and videos that some political operatives predict will soon be indistinguishable from real ones, enabling miscreants to literally put words in their opponents’ mouths. Deepfakes have plagued politics for years, but with AI, savvy editing skills are no longer required to create them.”⁶⁹

As a result, deepfake videos are already being deployed to impact voters, as Bloomberg pointed out:

“In March [2023], an anonymous Twitter user posted an altered video that went viral, purporting to show Biden verbally attacking transgender people. Another

⁶⁹ Emily Birnbaum and Laura Davison, AI Is Making Politics Easier, Cheaper and More Dangerous, Voters are already seeing AI-generated campaign materials — and likely don’t know it, (July 11, 2023), <https://www.bloomberg.com/news/features/2023-07-11/chatgpt-ai-boom-makes-political-dirty-tricks-easier-and-cheaper?srnd=premium&sref=mQvUqJZj>

one, circulate widely by a right-wing US pundit, appeared to show Biden ordering a nuclear attack on Russia and sending troops to Ukraine.”⁷⁰

Allowing gambling on elections will make the dangers of AI and interference in elections much worse, more likely, and gravely consequential. Given the current environment where many Americans already question the integrity of U.S. elections, this would be adding fuel to the fire at the worst possible time.

Whether through mere perception or other means, there is little doubt that the mass commodification of our democratic process would raise widespread concerns about the integrity of our electoral process. Putting aside the significant issues of whether such markets could inspire vote-switching, intensify the widespread deployment of misinformation using state-of-the-art AI, and other nefarious conduct, the mere impact on the public’s perception of our democracy is cause enough to conclude that it is decidedly not in the public interest. Elections are supposed and must reflect the will and votes of the voters, not risk being influenced by those who only care about winning a bet, voters be damned.

The 2024 UK election scandal should serve as a cautionary tale about the risks of allowing election gambling.⁷¹ In this case, several individuals close to Prime Minister Rishi Sunak, including political aides and police officers, are being investigated for placing bets on the election date just before the Prime Minister publicly announced it. This raised serious concerns about the use of insider information for financial gain.

The allegations suggested that those with privileged knowledge of the election timing might have used this information to profit from bets placed on the election date. Such actions not only distorted the betting market but also undermined the integrity of the electoral process itself. The scandal highlights how election gambling can incentivize individuals to exploit insider information or even attempt to influence the election outcome for personal financial gain.

Another cautionary tale that hits closer to home is the case of Sean McElwee, a political data analyst and pollster who co-founded Data for Progress. McElwee faced scrutiny after it was revealed that he allegedly used inside information to place bets on political outcomes.⁷² This controversy surfaced following the 2022 midterm elections, raising alarms about the potential for individuals with privileged access to election data to manipulate betting markets for personal gain.

⁷⁰ *Id.*

⁷¹ Max Colchester, *British Politicians Are Betting—On Their Own Elections*, The Wall Street Journal (July 1, 2024) available at https://www.wsj.com/world/uk/gambling-flutters-scandal-british-election-114373bb?st=cj7drbrvcqd9t9k&reflink=desktopwebshare_permalink.

⁷² Ben Terris, *The Washington Gambler*, The New York Times (April 26, 2023) available at <https://www.washingtonpost.com/lifestyle/2023/04/26/sean-mcelwee-washington-gambler/>.

Unfortunately, this incident also contributes to the growing sentiment among Americans that the U.S. used to be a good example of democracy.⁷³

3. *Political Event Contracts would pose serious threats to investors.*

The CFTC's Proposed Rulemaking banning all political election contracts is appropriate and necessary. Political election contracts would fundamentally distort the primary purposes of the futures markets — aiding hedging and price discovery for commercial enterprises — by opening the door to a surge of retail traders entering an inherently speculative market, thereby increasing the risk of substantial losses.⁷⁴ Political election contracts would further contribute to the trend toward the “gamification” and “retailization” of finance. In this increasingly common pattern, everyday consumers and investors are lured into new financial products and services, justified by claims that the offerings represent beneficial “democratization” and “innovation.” Yet as we have seen again and again—with the “digital engagement practices” that fueled the meme stock frenzy, and even more so in the market for cryptocurrencies—the result is typically massive wealth accumulation for a few sponsors and issuers and massive losses suffered by the majority of investors.⁷⁵

Widespread gambling on our elections through the simple click of a button is far removed from the purpose, function, and importance of the electoral processes. Such activities undermine the sanctity and democratic value of elections, turning them into speculative spectator sports. Chair Behnam statements regarding the new and entirely different role the CFTC would have to assume if political contracts were allowed are entirely accurate and a cautionary warning.⁷⁶

⁷³ Janell Fetterolf, Sofia Hernandez Ramones, *72% of Americans say the U.S. used to be a good example of democracy, but isn't anymore*, Pew Research Center (July 10, 2024) available at <https://www.pewresearch.org/short-reads/2024/07/10/72-of-americans-say-the-us-used-to-be-a-good-example-of-democracy-but-isnt-anymore/>.

⁷⁴ See *supra* notes Error! Bookmark not defined.–Error! Bookmark not defined., Error! Bookmark not defined. and accompanying text.

⁷⁵ See generally Dennis M. Kelleher, Jason Grimes, and Andres Chovil, *Securities—Democratizing Equity Markets With And Without Exploitation: Robinhood, Gamestop, Hedge Funds, Gamification, High Frequency Trading, And More*, 44 W. NEW ENG. L. REV. 51 (2022).

⁷⁶ Tracey Alloway and Joe Weisenthal, Transcript: CFTC Chair Rostin Behnam on the Fight to Regulate Crypto, A live Odd Lots interview from the ISDA annual meeting, (May 18, 2023), <https://www.bloomberg.com/news/articles/2023-05-18/transcript-cftc-chair-rostин-behnam-on-the-fight-to-regulate-crypto?sref=mQvUqJZj> stating, “Imagine a situation where we have alleged fraud or alleged manipulation of an election and someone coming to the CFTC and say, “You know, you have a contract listed on an election in, you know, X district in Y state, and we believe there was fraud, because of hardware, software, news, you name it.” Right? “You need to police that fraud.” So without being too indirect, what I’m trying to say is the CFTC could end up being an election cop, and I don’t think that’s what Congress meant or intended for us to do. And I think that raises for me personally, and I can’t speak for the commission or my colleagues, a lot of legal questions and policy questions about whether or not you would want a financial regulator that’s very interesting policing elections.”

The futures markets were not established as a new type of casino but to facilitate the provision of essential goods to Americans by enabling commercial entities to manage the price risk associated with their productive commercial activities.⁷⁷ Given what is at stake, we urge the CFTC to finalize the Proposed Rulemaking without delay.

CONCLUSION

We hope these comments are helpful as the CFTC finalizes the Proposed Rulemaking.

Sincerely,



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⁷⁷ See generally Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling and the Speculation Paradox*, 86 B.U. L. REV. 371 (2006).