



COMPETITIVE ENTERPRISE INSTITUTE

August 8, 2024

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

Re: RIN 3038-AF14 - 17 CFR Part 40 Event Contracts

Dear Mr. Kirkpatrick:

On behalf of the Competitive Enterprise Institute (CEI), I appreciate the opportunity to submit comments on RIN 3038-AF14, which concerns the types of “event contracts” that fall within the scope of Commodity Exchange Act (CEA) section 5c(c)(5)(C) as amended by the Dodd-Frank Act of 2010.¹ Under the proposed rule, the Commodity Futures Trading Commission (CFTC) would – among other sweeping actions – ban event contracts that allow Americans to wager on the outcome of elections and other political events. CEI believes that such an action put forth by this rule would be contrary to the interests of entrepreneurs, investors and an informed electorate of voters – collectively, the public interest -- and that the CFTC furthermore lacks authority from Congress to implement such a rule. Accordingly, the rule should be withdrawn.

¹ 89 Fed. Reg. 48,968. I would like to acknowledge the invaluable assistance in preparing these comments of CEI Research Associate Ari Patinkin

About CEI:

The Competitive Enterprise Institute (CEI) is a non-profit public interest organization committed to advancing the principles of free markets and limited government. CEI has a longstanding interest in applying these principles to the rulemaking process and has frequently commented on issues related to oversight of rulemaking and the regulatory process. Our mission is to advance the freedom to prosper for American consumers, entrepreneurs, and investors striving for a better life for themselves and their families. We also believe American adults should be allowed to make choices in the marketplace -- weighing the costs and benefits of these choices -- without overreaching government bureaucracies limiting their options, even if justified as ostensibly “for their own good.”

CEI also pursues public-interest litigation on behalf of consumers and small businesses to ensure that federal agencies follow the requirements of the underlying laws and, when applicable, the Administrative Procedure Act, and to ensure that agencies act within the constraints of the U.S. Constitution. We are particularly concerned with what we call “regulation without representation” – the process of laws effectively being made by unelected regulatory agencies instead of the people’s representatives in Congress in contravention of the intent of the Founders in writing the U.S. Constitution.²

Rule is undemocratic, as it exceeds authority from elected representatives in Congress.

In voting to advance this proposed rule, CFTC leaders invoked the preservation of democracy as a justification for banning election prediction contracts. CFTC Chair Rostin Benham proclaimed that “contracts involving political events ultimately commoditize and degrade the integrity of the uniquely American experience of participating in the democratic electoral process.”³ Similarly, CFTC Commissioner Christy Goldsmith Romero expressed the sentiment ahead of the vote that “the CFTC should not allow products in our markets with an unacceptable risk of unchecked abuse and manipulation that could threaten the sanctity of elections, thereby threatening democracy.”⁴

Yet as my colleague Ari Patinkin and I recently wrote in *National Review*:

In issuing this rule, it is [the] CFTC that has revealed itself to be the true threat to the democratic process, as it is exceeding the authority it has been given by the nation’s

² John Berlau, “George Washington’s Fight (and Ours) against Regulation without Representation,” Competitive Enterprise Institute blog, June 29, 2020, <https://cei.org/blog/george-washingtons-fight-and-ours-against-regulation-without-representation/>

³ Statement of CFTC Chair Rostin Benham On Proposed Events Contract Rulemaking, May 10, 2024, <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamsstatement051024>

⁴ Alexander Osipovich, “CFTC Wants to Ban Trades Tied to Elections, Sports and Awards Contests,” *Wall Street Journal*, May 10, 2024, <https://www.wsj.com/finance/regulation/cftc-wants-to-ban-trades-tied-to-elections-sports-and-awards-contests-3d6fb3c6>.

elected representatives. In the proposed rule, the CFTC cites no directive from Congress allowing it to categorically ban election wagering — because there is none.⁵

In formulating this rule, CFTC interprets broadly a provision of the 2010 Dodd-Frank Act that permits the regulator to ban contracts related to “gaming.” In the text of the proposed rule, the CFTC makes the three-step argument that elections are “contests,” all contests are “games,” and therefore contracts on election outcomes involve “gaming” and may be banned under the statute. In other words, to justify giving itself this new authority to ban event contracts related to elections, the CFTC classifies elections – which Chair Benham and Commissioner Goldsmith Romero had said were sacrosanct in supporting this rule – as simply a bunch of “games” under the law.

CFTC commissioner Caroline Pham blasts this tortured reasoning as “stunning overreach” in her statement preceding her dissenting vote on the rule. She adds that rule would also harm federalism in that it “bigfoots into gaming regulation” that has traditionally been the “prerogatives of states.”⁶

Chair Benham and Commissioner Goldsmith Romero may have sincere convictions against betting markets. But without the explicit authorization of Congress, the CFTC cannot simply implement a rule based on the conviction – no matter how sincerely held – that a private sector activity is immoral or even corrupting. To do so – bypassing the voters’ elected representatives in Congress – would be fundamentally undemocratic.

The CFTC should also note that since it proposed this rule in May, the Supreme Court has changed significantly the legal landscapes for agencies offering novel interpretations statutes to justify new authority. In *Loper Bright v. Raimondo*, the Court jettisoned the “*Chevron* deference” precedent that largely defers to regulatory agencies’ interpretation of the powers granted to them by law. And it admonished lower courts to be skeptical of agencies’ interpretations of authority not expressly given to by Congress. To borrow the terminology of the wagering industries that this rule concerns, any banking the CFTC made on judicial deference in formulating this rule may have been a bad bet.

Prediction markets – including on elections – have received bipartisan scholarly praise

Beyond the issues of regulation without representation, CEI believes this rule is fundamentally flawed because it curtails Americans’ access to an innovation that scholars of markets and politics across ideological lines say is beneficial to entrepreneurs, investors, policymakers, and an informed citizenry. Election wagering venues – often referred to as “prediction markets” – play essential roles in providing information to businesses and policymakers about the likelihood of election results and related effects on public policy, many scholars say.

This is particularly true with this election’s breakneck pace of events. Election forecasting expert Nate Silver – who recently became an adviser to the prediction market Polymarket – writes that during this election

⁵ John Berlau and Ari Patinkin, “Biden-Harris CFTC Bets It Can Ban Election Wagering,” *National Review*, August 1, 2024, <https://www.nationalreview.com/2024/08/biden-harris-cftc-bets-it-can-ban-election-wagering/>

⁶ Statement of CFTC Commissioner Caroline Pham On Proposed Events Contract Rulemaking, May 10, 2024, <https://mondovisione.com/media-and-resources/news/dissenting-statement-of-cftc-commissioner-caroline-d-pham-on-event-contracts-pr-1/>

season, “prediction markets are probably the more useful tool,” because “political events have been unfolding faster than polls or models have time to catch up with them.”⁷

Prediction markets also democratize information about elections and level the playing field to allow everyone to hedge the risk of election outcomes. Wealthy Americans have long had the ability to put money on political races – and hedge the business risks of election outcomes -- through complex financial instruments like derivatives. Election wagering venues allow the public to utilize these strategies as well. Jason Furman, Harvard economist and chair of the Council of Economic Advisors in the Obama administration, writes in comments to the CFTC that “election-focused prediction markets combine the economic significance of a powerful risk reduction tool for small businesses with the social significance of a powerful forecasting tool for researchers and policymakers.”⁸

Finally, it’s important to note that wagering on political races is legal with widespread public participation in many countries. In the United Kingdom, bookmaking firms have for decades taken bets on British elections.⁹ Sweden, Ireland, Canada, New Zealand, Germany and Italy all let their people wager on election outcomes under a regulated system. None of these countries has seen their democracies threatened by such wagers. It’s time for the CFTC to stop its misguided and likely illegal overreach with this rule, and let Americans join citizens of these countries in participating in prediction markets for elections and other events.

Thank you for this opportunity to present our views. If you have any questions, please feel free to contact me at John.Berlau@cei.org.

Sincerely,

John Berlau

Director of Finance Policy & Senior Fellow
Competitive Enterprise Institute

⁷ Nate Silver, “Betting markets think Biden should quit,” *Silver Bulletin*, <https://www.natesilver.net/p/betting-markets-think-biden-should>

⁸ Comment of Jason Furman to the CFTC for Industry Filing 22-002, September 18, 2022 <https://comments.cftc.gov/PublicComments/ViewComment.aspx?ID=69708&GUID=264324ac-75cb-4c97-9d45-62baa1877335>

⁹ Paul W. Rhode and Koleman Strumpf, “The Long History of Political Betting Markets: An International Perspective,” *The Oxford Handbook of the Economics of Gambling* (Oxford, U.K.: Oxford University Press, 2022.), pp. 1-31, <https://gwern.net/doc/statistics/prediction/election/2013-rhode.pdf>