Kalshi

SUBMITTED VIA CFTC PORTAL
Secretary of the Commission
Office of the Secretariat
U.S. Commodity Futures Trading Commission
Three Lafayette Centre 1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments Responding to the Commission's Specific Questions Related to KalshiEX, LLC's Proposed Congressional Control Contracts

To Whom It May Concern:

KalshiEX, LLC ("Kalshi" or "Exchange") is grateful to the Commission for its consideration of Kalshi's proposed contracts. The Exchange welcomes the opportunity to address the Commission's questions in full.

Public comment is a critical tool for the Commission to engage with market participants and gauge the public's stance on issues regarding contract utility, surveillance, and viability. In this case, it was very fruitful. More than 800 comments were submitted, from retail investors, small or medium-sized enterprises, futures market participants and practitioners, registered Designated Contract Markets, former CFTC Commissioners and officials, former government officials and White House staff, academics, and many others). Some described personal hedging use cases, while others gave detailed legal analyses. Opportunities for these sorts of organized and highly informed discourse are rare, but are also rewarding.

The Commission is unique among financial regulators for its commitments to, and success fostering, innovative new products. As Chairman Behnam testified recently in front of the Senate Agriculture Committee,

> On September 21, 1922, nearly 100 years ago to the day, the Grain Futures Act of 1922 was signed into law, which led to the near immediate establishment of the then CFTC. With that legislative accomplishment, this Committee and the Congress swiftly responded to a policy need that arose on the heels of emerging risks to American consumers because of new financial markets and products, technological innovation, and the promise of economic development. With the CFTC's rich history overseeing commodity markets, coupled with its expertise and track record, which rests on a firm

> foundation as a forceful and disciplined cop on the beat, the Agency stands ready to tackle these new risks and opportunities one century later.[1]

The continued efforts by the Commission to regulate digital asset markets, and the CFTC's notable efforts in regard to carbon credit markets, and its focus on climate related risk, reminds us of the agency's commitment to responsible innovation. Responsible innovation is in the public interest and provides market participants with hedging and price basing opportunities they would not otherwise have.

Event contracts, that are the subject of this proposed rulemaking, are yet another iteration of this endeavor. Event contracts have broad hedging and price-basing utility and social value, as detailed by the scores and scores of public comments from retail customers, small businesses, and leading members of industry that informed the Commission of how they would use event contracts such as our congressional control contract that the Commission prohibited. The Commission's decision should consider the full weight of evidence that it has been provided with on event contracts, including both of Kalshi's election contracts (CONGRESS and CONTROL), and the public comments that the CFTC voluntarily solicited. There are reams of evidence from academic research, market testimony, and the actual data and experience of other event contracts markets running in the United States and abroad. After considering all of this evidence, there is only one reasonable determination the Commission can make: that the event contracts that are the subject of this proposal are allowed under the Commodity Exchange Act ("CEA") and affirmatively advance, as the CEA's mission reminds us, the "national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities."

The CFTC's interpretation of the scope of inquiry under the statute and the proposed definition of gaming.

We begin with the statutory text of Section 5c(c)(5)(C) of the CEA, which is the statute that the CFTC is proposing rules under. That section of the CEA states:

> In connection with the **listing** of agreements, contracts, transactions, or swaps in excluded commodities that are based upon **the occurrence, extent of an occurrence, or contingency** (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i) [2] of this title), by a designated contract market or swap execution facility, the Commission **may determine** that such agreements, contracts, or transactions are contrary to the public interest **if** the agreements, contracts, or transactions **involve**—

[1] Testimony of Chairman Rostin Behnam Regarding the Legislative Hearing to Review S.4760, the Digital Commodities Consumer Protection Act at the U.S. Senate Committee on Agriculture, Nutrition, and Forestry. September 15, 2022. Available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam26.

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(I) **activity** that is unlawful under any Federal or State law;
(II) terrorism;
(III) assassination;
(IV) war;
(V) gaming; or
(VI) **other similar activity** determined by the Commission, by rule or regulation, to be contrary to the public interest.[2]

Section 5c(c)(5)(C)(ii) further specifies that "[n]o agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity."

Thus, the CEA, through this provision, establishes a clear framework under which the Commission can – but is not obligated to – review an event contract that is based upon an "occurrence, extent of an occurrence, or contingency" that involves one of the enumerated underlying activities in order to determine if those contracts would be contrary to the public interest. A Commission determination that the contract is contrary to the public interest would render its listing prohibited.

In short, through Section 5c(c)(5)(C), Congress granted the Commission the discretion to determine that a given event contract is contrary to the public interest, and thereby prohibited, only when the event underlying that contract involves one of the statute's specifically enumerated activities. Congress did not grant the Commission the authority to prohibit a contract on an event that involves an unenumerated activity on the grounds that it would be contrary to the public interest.[3]

The key question here requires understanding the limitations on the scope of Section 5c(c)(5)(C) and Rule 40.11. Is the scope (1) limited to contracts when the activity underlying the event contract involves one of the enumerated activities or do they (2) include the act of participating in the contract is itself?

Applying the principles of statutory and regulatory construction shows that Section 5c(c)(5)(C) and Rule 40.11 are limited to only the underlying activity (not participating in the contract itself)

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[2] 7 U.S.C § 7a-2(c)(5)(C)(i)(I)-(VI) (emphases added). If the Commission determines that such an agreement, contract, or transaction is contrary to the public interest, such agreement, contract, or transaction may not "be listed or made available for clearing or trading on or through a registered entity." *Id.* § 7a-2(c)(5)(C)(ii).

[3] This lack of authority includes the sixth enumerated activity ("other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest"), as that provision requires the Commission to conduct a rulemaking to determine that another activity is contrary to the public interest and then only if it is similar to one of the other specified underlying activities (crimes, terrorism, assassination, war, or gaming). *See* Commission Rulemaking Explained, available at: https://www.cftc.gov/LawRegulation/CommissionRulemakingExplained/index.htm#_ftn1.

and, because Kalshi's political control contracts do not match any of the enumerated activities which the statute is expressly limited to, those contracts are not subject to the statute and implementing regulation.

The Correct Interpretation of the Statute

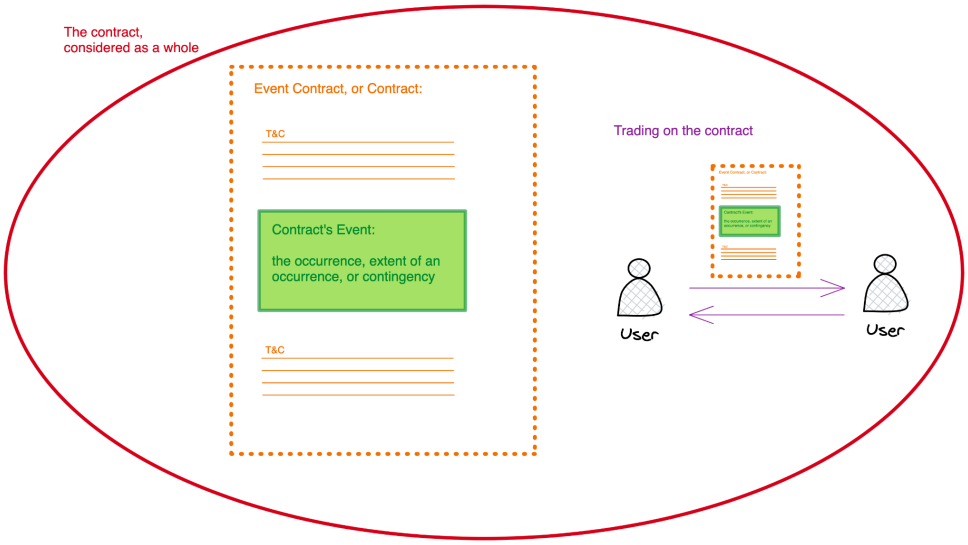
There are several terms that are key to understanding the framework that Congress created for the Special Rule that appear throughout this comment and are helpful to define here:

- Event contracts
- The event contract's "Event"
- "The contract, considered as a whole"

An "event contract" is a contract that is based on an occurrence, extent of an occurrence, or a contingency. For example, a contract whose terms and conditions specify that the holder of the contract will receive payment based on the occurrence of a hurricane is an event contract because it is based on an occurrence, a hurricane. An elections contract is an event contract because it is based on an occurrence, the election.

A contract's "event" refers to the specific occurrence, extent of an occurrence, or contingency on which the contract is based. A hurricane contract's event is the hurricane.

The phrase "contract, considered as a whole", which is what the CFTC has proposed to be the sphere of its inquiry, refers to a broad view of a contract and all factors that surround the contract. For example, this could include the market activity of buying and selling the contract, the information embedded in the contract's pricing, and in the case of an event contract, the contract's event.



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General background on the CEA's Special Rule

Under the CEA, contract listing is not a "permission" regime. Contracts do not need Commission approval to be listed, and although the CEA provides a mechanism that exchanges may utilize to put a contract before the Commission for approval, whether or not to utilize that method is solely in an exchange's discretion.[4] Indeed, the overwhelmingly vast majority of contracts are never presented to the Commission for approval under this mechanism. Even in those rare instances when the Commission is formally presented with a contract for approval, the Commission's discretion over whether to grant or withhold approval is limited; under the statute and the regulations, the Commission must approve every contract that does not violate the CEA or the regulations.[5] The Commission was not granted authority to conduct a "is this a contract that I am comfortable with" analysis and the Commission was not granted authority to disapprove a contract because it does not like it.[6]

The Commission was also not granted the authority to prohibit any contract on the grounds that it violates the public interest. There is one exception to this rule, where Congress did give the Commission the authority to prohibit a contract that the Commission determines is contrary to the public interest.[7] This exception is the Special Rule in 5c(c)(5)(C) of the Commodity Exchange Act.[8] This Special Rule gives the Commission discretion to consider, for very specific types of contracts, whether a contract is contrary to the public interest.[9]

There are two aspects to the Special Rule. The first are the Special Rule's eligibility requirements; the Special Rule does not apply to all contracts. It only applies to a specifically defined subset of contracts that are eligible for the Special Rule. Once a contract is eligible for the Special Rule, it is not automatically prohibited. The Special Rule only prohibits contracts if the Commission determines that the contract is contrary to the public interest. The second second aspect of the Special Rule is determining whether the contract is contrary to the public interest. Congress laid out the process for the Special Rule in three steps.

The four steps of the Special Rule

There are four steps for the Special Rule.

Step one of the Special Rule ("Step One") is to determine whether there is a **listing** of

[4] This process is set forth in 17 C.F.R. 40.3, which the Commission titled "*Voluntary* submission of new products for Commission review and approval."
[5] 7 U.S.C. 7a-2(c)(5)(B); 17 C.F.R. 40.3(b).
[6] *Id.*
[7] To be clear, even if, *argunedo*, the Special Rule applied to the Contract (which it does not), the Special Rule would still not prohibit the Contract because it is *in* the public interest, and therefore certainly not contrary to the public interest.
[8] 7 U.S.C. 7a-2(c)(5)(C).
[9] *Id.*

agreements, contracts, transactions, or swaps. Without the agreements, contracts, transactions, or swaps being listed, there is nothing further to do.

Step two of the Special Rule ("Step Two") is to determine if the contract is eligible for the Special Rule. The statute limits the scope of the Special Rule to contracts that are "based upon [an] occurrence, extent of an occurrence, or contingency" (collectively "Event"). In other words, to be eligible for the Special Rule, a contract must be based on an Event, *i.e.*, an event contract. If a contract is not an event contract, it is not eligible for the Special Rule and the contract fails Step Two. The analysis then terminates and the Special Rule does not apply to that contract. If the contract is an event contract, the analysis proceeds to step two.

Step three of the Special Rule ("Step Three") is to determine if the event contract's Event involves certain activities that were listed by Congress in the Special Rule. These activities are:

1. an activity that is unlawful under any Federal or State law;
2. terrorism;
3. assassination;
4. war;
5. gaming;

In addition to these five specific activities, Congress included a sixth activity of "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."[10] This sixth activity gives the Commission discretion to identify other similar activities that are contrary to the public interest. If the event contract's Event does not involve any of the six activities that were listed in the Special Rule, the event contract is not eligible for the Special Rule. The analysis terminates and the Special Rule does not apply to prohibit the contract. If the event contract's Event does involve at least one of these activities, the analysis continues to step three.

Step four of the Special Rule ("Step Four") is for the Commission to determine whether the contract itself, considered as a whole, is contrary to the public interest.[11] If the Commission does not determine that the contract is contrary to the public interest, the contract is not prohibited under the Special Rule. If the Commission determines that the contract is contrary to the public interest, the Special Rule applies and the contract is prohibited.[12]

The three steps that the Commission follows in applying the Special Rule are therefore:

Step 1: Is there a listing of an agreement, contract, transaction, or swap? If no, stop. If yes,

[10] 7 U.S.C. 7a-2(c)(5)(C)(i)(VI).

[11] The phrase "contrary to the public interest" is used three times in the Special Rule. It is used in clause (i) in reference to the sixth activity in the list of activities Congress included in step two of the Special Rule. In this context, it is *the activity* that is contrary to the public interest, not the *contract itself*. It is also used in clause (i) in step three and in the prohibition in clause (ii) in reference to the contract itself.

[12] 7 U.S.C. 7a-2(c)(5)(C)(ii). ("No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity.")

continue to step 2.

Step 2: Is the contract an event contract? If no, stop. If yes, continue to step 3.

Step 3: Does the event contract's Event involve an activity that was included by Congress in the Special Rule? If no, stop. If yes, continue to step 4.

Step 4: Is the event contract itself, considered as a whole, contrary to the public interest? If no, the contract is not prohibited. If yes, the contract is prohibited.

Step Two and Step Three limit the scope of contracts to which the Special Rule applies. Step Two limits the Special Rule only to event contracts. Step Three limits this scope further. Step Three provides that the Special Rule does not apply to *all* event contracts, but only to those contracts whose Events involve one of the activities Congress listed in the statute. Step Four provides that even a contract that passes Steps Two and Three is not prohibited unless the Commission determines that the event contract, considered as a whole, is contrary to the public interest. The following graphic illustrates how each step of the Special Rule functions to narrow the scope of the contracts that are prohibited under the Special Rule.

To further explain the role of Step Four, Congress did not prohibit an event contract whose Event

involves an activity listed in the Special Rule. An event contract whose Event involves an activity listed in the Special Rule is only prohibited if the Commission determines that the event contract, considered as a whole, is contrary to the public interest. It is possible that an event contract's Event involves an activity listed in the Special Rule but the Commission does not determine that the contract, considered as a whole, is contrary to the public interest. That contract would not be prohibited under the Special Rule. For example, an event contract on the invasion of Ukraine would satisfy Steps Two and Three because it is an event contract (Step Two) and the event contract's Event involves war, one of the activities that is listed in the Special Rule (Step Three). That does not mean that the contract is prohibited; it moves now to Step Four for the Commission to determine if the event contract is contrary to the public interest. The Commission may determine that it is contrary to the public interest, in which case the event contract would be prohibited by the Special Rule.[13] And the Commission may determine that it is not contrary to the public interest. As Commissioner Johnson recently noted, "Geopolitical events in Europe, specifically, the invasion of Ukraine has led to remarkable disruptions in energy and agriculture markets."[14] Accordingly, the Commission may determine that the event contract has hedging utility and/or other economic utility or benefits and would not be contrary to the public interest. This point, that a contract can involve an activity listed in the statute and still be allowed because the contract itself is not contrary to the public interest was made by then-Commissioner Berkovitz in his statement on ErisX's RSBIX contracts.[15]

Once an event contract passes Step Two, the analysis moves to Step Three of the Special Rule. Step Three is to determine if the event contract involves an activity that was listed by Congress in the Special Rule. For the purposes of step two of the Special Rule, an event contract only involves an activity if the event contract's Event involves that activity.[16] For example, an event contract can only involve war if the event contract's Event involves war. Conversely, if the event contract's Event does not involve war, then the event contract does not involve war. Similarly, an event contract will involve gaming only if the event contract's Event involves gaming. For the purposes of Step Three, it is irrelevant if something else surrounding the event contract, such as the market activity of trading the contract, involves a listed activity. The only relevant factor for Step Three is whether the event contract's Event involves the listed activity, not whether the event contract, considered as a whole, involves the listed activity.

Step Three of the Statute Applies Only if the Contract's *Event* is an Enumerated Activity

There are many reasons why the analysis of whether an event contract involves a listed activity

[13] 7 U.S.C. 7a-2(c)(5)(C)(ii).
[14] Opening Statement of Commissioner Kristin N. Johnson before the Energy and Environmental Markets Advisory Committee | CFTC, September 20, 2022.
[15] Commissioner Berkovitz's statement is available here: https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement04072.
[16] The analysis of the event contract in Step Four is different from Step Three. The analysis in Step Four considers the event contract as a whole, and is not limited to the event contract's Event. Conversely, the analysis in Step Three is limited to what activities the event contract's Event involves.

in Step Three is limited to the event contract's Event, and does not include the consideration of the event contract as a whole. Many of these reasons are stated in the letters in Part II of this comment, as well as by other commenters.[17] The Exchange provides two reasons here. (For convenience, this comment refers to the reading that the analysis under Step Three includes the event contract, considered as a whole, and is not limited to only the event contract's Event, as the "Contract as a Whole view of Step Three".)

The Contract as a Whole view of Step Three is wrong. An event contract cannot be considered to involve a listed activity based on the event contract considered as a whole, and not only the event contract's Event. If step two were so broad, it would (1) not provide Congress' intended narrowing function, and (2) it would render the statute internally inconsistent.

The sixth activity illustrates the flaw in applying Step Three broadly. Congress included as the sixth activity a "similar activity [to the first five activities, that is] determined by the Commission, by rule or regulation, to be contrary to the public interest." Under the Contract as a Whole view of Step Three, the sixth activity means that the Commission can determine that any factor that is part of an event contract is contrary to the public.[18] For example, the Commission can determine that *trading* contracts on a certain event is a "similar activity" to the listed activities and is contrary to the public interest. These contracts would satisfy Step Three even though the Event contracts are based on Events that are *not* contrary to the public interest because the *trading* on the contract *is* contrary to the public interest per the Commission's determination, and trading on the contract is part of the contract when considered as a whole.

The analysis would then move to Step Four. But Step Four calls for a public interest analysis of the event contract, considered as a whole, where it has already been determined under Step Three that the *trading itself* is contrary to the public interest. This illustrates the fundamental flaw in the Contract as a Whole view of Step Three. What Congress clearly designed is a statute that allows the Commission to apply special scrutiny to contracts based on particular events that Congress identified as problematic. Congress did not shut the door to such contracts, but recognized that trading on an Even Contract based on a problematic activity that involves, say, assassination or terrorism might nevertheless have redeeming features (such as hedging utility) that would justify the conclusion that the event contract is not contrary to the public interest. In this way, Congress clearly differentiated the event contract's Event (which may be disfavored), and trading in the event contract (permitted where trading on the disfavored activity offers economic and other societal benefits). When trading in the event contract *itself* is included in the analysis at Step Three, the distinction Congress sought to draw between the underlying event and

[17] *See e.g.* the comments of Josh Sterling, Timothy McDermott, Daniel Gorfine, Lewis Cohen, Jeremy Weinstein, and Railbird Technologies.

[18] This is because under the Contract as a Whole view of Step Three, Step Three is not limited only to looking at the event contract's Event. The analysis in Step Three looks at the event contract as a whole. Accordingly, the activities included in the list in Step Three are not confined to the event contracts' Events, and can include anything relevant to the event contract.

trading in the contract is obliterated.[19]

Additionally, the Contract as a Whole view of Step Three actually renders all of the first five activities in step two superfluous. Once a contract passes Step Three, no matter which activity the contract involves, it must pass Step three to be prohibited by the Special Rule. The analysis in Step Four is for the Commission to determine whether the event contract, considered as a whole, is contrary to the public interest. *Any* event contract that the Commission determines is contrary to the public interest in step three *necessarily* would also satisfy the sixth activity in Step Three. For example, an event contract that involves war will pass Step Three. The analysis of the event contract will then move to Step Four, and assume that the Commission finds that the contract is contrary to the public interest. At that point, the event contract actually involves *two* of the listed activities: (i) it involves the activity of war, and (ii) it *also* involves an activity that the Commission has determined is contrary to the public interest. It is impossible for an event contract to pass Step Four and not involve the sixth activity in Step Three. Accordingly, there is no point in the first five activities listed in Step Three, only the sixth activity. In fact, there would be no point in Step Three at all. As noted, the sixth activity in Step Three and Step Four are identical. Accordingly, if the Contract as a Whole view of Step Three is correct, Congress would have just skipped Step Three altogether. The Special Rule would have been a simple six line statute that said only:

> In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i) of this title), by a designated contract market or swap execution facility, the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest.

The inevitable collapse of all of the Step Three activities into the sixth activity and the collapse of the sixth activity into Step Four under this expansive interpretation of Step Three shows that the Contract as a Whole view of Step Three is wrong. The correct view of Step Three is that it, like Step Two, simply describes what the contract is based on, and the analysis in Step Three is limited to the event contract's Event. Accordingly, there is a big difference between Step Three, including the sixth activity, and Step Four. Step Three is focused only on the event contract's Event. If an event contract passes Step Three because the event contract's Event involves any of the listed activities, even the sixth activity, the analysis under Step Three will always be different from the analysis under Step Four. The analysis under Step Three will be whether the event

[19] This defect in the statute that emerges from the contract as a whole view of step two is from the sixth activity. The fact that the defect stems from the sixth activity does not mean that defect is limited to the sixth activity and that the contract as a whole view is fine with regard to activities one through five. That would misapprehend the way that statutes work. Once it is demonstrated that step two cannot be about the contract, considered as a whole, for even one activity, that view is proven wrong. Therefore, the Contract as a Whole view of Step Three is an incorrect reading of the statute regardless of the activity.

contract's Event involves the activity. The analysis under Step Four is very different. Step Four does not only consider the event contract's Event alone, it considers the event contract as a whole. Thus, all of the anomalies that directly stem from the Contract as a Whole view of Step Three disappear under the view that the analysis in Step Three (like Step Two) considers only the event contract's Event.

The correct reading of the statute is that the analysis in Step Three, like Step Two, is limited to the event contract's Event. Steps Two and Three work in concert to create the eligibility requirements for the *type* of contract that the Special Rule applies to (*i.e.*, an event contract whose Event involves a listed activity), and Step Four serves as an independent step whose analysis considers the event contract as a whole. Together, all three steps form a coherent and cohesive statutory rule that implements Congress's intent to have the Commission review a narrow subset of event contracts whose underlying events involve activities (such as terrorism and assasination) Congress did not want to automatically legitimize via futures and swaps trading on them. Congress nevertheless gave the Commission discretion to allow such contracts to be listed if trading them would not be contrary to the public interest.

Further Discussion Regarding Section 5c(c)(5)(C), and by Extension Rule 40.11, Apply Only To event contracts Where The Activity Underlying the Event Contract Is One of the Enumerated Activities.

The plain text of Section 5c(c)(5)(C) demonstrates that Congress limited the statute's scope to instances where the underlying activity of an event contract is one of the enumerated events. If the activity underlying the event contract does not involve one of the enumerated activities, the listing is outside the scope of the Statute and Rule 40.11, regardless of how the act of *participating* in the event contract itself is classified. An interpretation of the statute that extends the applicable scope to also include contracts where the underlying activity is not one of the enumerated events is overbroad and incorrect.

First, Section 5c(c)(5)(C) limits the scope of the Commission's authority to "activities" and activities only. The Commission only has discretion to take action on (1) an "activity" this is unlawful under federal state law; (2) one of four specifically listed "activities" (terrorism, assassination, war, or gaming); or (3) other similar "activity" determined by the Commission to be contrary to the public interest. The Commission itself has previously acknowledged that Section 5c(c)(5)(C)'s textual focus is on "activities," *i.e.*, the underlying conduct. In describing Section 5c(c)(5)(C), the Commission stated that the rule applied to contracts that "involve one or

more *activities* enumerated in the Dodd-Frank Act."[20] These "activities" are not the contracts themselves. They are the events that create the basis for the relevant contract.

To give but one straightforward example, in the statute events two through four are terrorism, assassination, and war. The inclusion of these activities clearly demonstrates that the scope of Section 5c(c)(5)(C) and Rule 40.11 includes contracts when the activity underlying the event contract involves one of the enumerated activities. The act of participating in a contract is not itself an act of terrorism, assassination, or war.[21]

Second, Section 5c(c)(5)(C) and Rule 40.11 allow the Commission to prohibit the listing of an event contract only "if the agreements, contracts, or transactions **involve**" any of the enumerated activities that are against the public interest. Event contracts that do not involve any of the enumerated activities may be listed for trading because the special rule would not prohibit the listing of those contracts by a DCM.

The plain language and structure of Section 5c(c)(5)(C)(i) make clear that the scope of the Commission's discretionary review is narrowly focused on the nature of the contract's underlying event, not of trading in the contract itself. Section 5c(c)(5)(C)(i) begins with the clause: "[i]n connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities *that are based upon the occurrence, extent of an occurrence, or contingency*[.]" (emphasis added). Thus, at the outset of the controlling provision, the statute establishes that the distinguishing feature of the contract is the nature of the occurrence or contingency. The final clause of Section 5c(c)(5)(C)(i), immediately prior to the provision's enumeration of the covered activities, refers back to the first clause of the provision when it says: "the Commission may determine that *such* agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve" the enumerated activities. (emphasis added). When the clauses are read together, Section 5c(c)(5)(C)(i) grants the Commission only limited authority to review a contract that is "based upon [an] occurrence, extent of an occurrence, or contingency" that "involve[s]" one of the enumerated activities.

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[20] *Provisions Common to Registered Entities: Proposed Rule*, 75 Fed. Reg. 67,282, 67,283 (Nov. 2, 2010) ("Section 745 of the Dodd-Frank Act also authorizes the Commission to prohibit the listing of event contracts based on certain excluded commodities if such contracts involve one or more **activities** enumerated in the Dodd-Frank Act.") (emphasis added) ("40.11 Proposed Rule"); *see id.* at 67,289 ("If [] the Commission determines that such product may involve an **activity** that is enumerated in 40.11 . . . .") (emphasis added).

[21] To illustrate this point, consider hypothetical contracts on whether a foreign leader will be assassinated, how many Russian planes will be shot down by Ukrainian forces, or how many murders will occur in a given city over a certain time period. Section 5c(c)(5)(C) and Rule 40.11 would apply to these hypothetical contracts because the activities underlying the contracts in these hypothetical examples are the enumerated activities of "assassination," "war," and "an activity that is unlawful under Federal or State law." The purchasing of the contract itself, however, is not "an activity" of "assassination," "war," or "an activity that is unlawful under Federal or State law."

The plain language of the enumerated events themselves bolsters this interpretation. As Kalshi has pointed out in previous submissions, Section 5c(c)(5)(C)(i)'s first and sixth categories are defined respectively as an "*activity* that is unlawful under any Federal or State law" and "other similar *activity* determined by the Commission, by rule or regulation, to be contrary to the public interest." (emphasis added). The inclusion of the noun "activity" (and the reference in the sixth category to all five preceding "similar activit[ies]") makes clear that Congress intended the underlying activity, not the contract itself, to be the subject of review and scrutiny and it must be assumed that decision was intentional.[22]

The sixth enumerated activity ("other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest"), further highlights that Congress's intention was for the Commission to analyze the activity underlying the contract rather than trading in the contract itself. This final enumerated activity provides the Commission a sort of catchall to determine whether the event involves "similar activity" to the preceding categories and thus might be inappropriate for listing. Since terrorism, assassination, war and activity unlawful under state or federal law unquestionably refer to the occurrence or contingency underlying the contract, the sixth catch-all category must be read consistently with the rest of the enumerated list (apples must be compared to apples).[23]

Another reason that Section 5c(c)(5)(C) must be read as focusing on the underlying activity is that such focus is congruent with the nature of event contracts themselves. If Congress was concerned about trading in the contract itself, there is no indication why it would have limited the provision to event contracts rather than establishing a general rule that would have authorized the Commission to prohibit any derivatives contract that the trading in is, for example, unlawful under state law.

Other principles of statutory construction also undercut the application of the Proposal's erroneous construing of the statute.. Under the Commission's interpretation, a person trading an election contract, for example, is engaged in gaming – "staking something of value upon a contest of others."[24] By parallel reasoning, a person trading a terrorism contract is engaged in terrorism and a person trading a war contract is engaged in war. That is not a tenable interpretation of the statute. If Congress intended the Commission to focus on the underlying event for some of the enumerated categories, but to focus on trading in the contract itself for

[22] The scant legislative history – a colloquy between Senators Diane Feinstein and Blanche Lincoln during the Senate's consideration of Dodd-Frank's regulation of event contracts – does not change the analysis. The colloquy did not address whether the underlying event rather than trading in the contract itself is the proper subject of analysis; instead, the Senators discussed the distinction in economic purpose between contracts that serve hedging utility and contracts that are designed predominantly for speculation. *See* 56 Cong. Rec. S5906-07 (July 15, 2010) (statements of Sen. Diane Feinstein and Sen. Blanche Lincoln), available at: https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf. In any event, the language and structure of the statute are clear so resort to legislative history is unnecessary.

[23] We explain below why, notwithstanding the Commission's Nadex Order, the gaming provision must also refer to the underlying activity and not trading in the contract itself.

[24] *Id.*

others, it would have said so. It certainly cannot be presumed or inferred from silence that Congress intended the Commission to apply disparate analytical approaches to the single list of enumerated activities. When the correct interpretation of Section 5c(c)5(C) is applied to the Contracts, the result is clear. Elections are not illegal under state or federal law, are not gaming, and are not similar to any of the enumerated activities – federal or state crimes, terrorism, assassination, war, and gaming – all of which are activities that Congress did not want to legitimize or encourage via event contracts without careful consideration by the Commission. The Commission should therefore not impede Kalshi from self-certifying the Contracts and lacks a legal basis to invoke Section 5c(c)(5)(C) to do so.

Additionally, the Proposal not only contravenes the language and structure of Section 5c(c)(5)(C), but also threatens to upend the CEA itself. Virtually every futures or swaps contract can be described as staking something of value on the outcome of some future event.[25] Yet the CFTC's exclusive jurisdiction over derivatives markets means that the CEA preempts any state law that would attempt to regulate derivatives markets.[26] Therefore, regulated futures and swaps contracts *cannot be* illegal gambling under state law. And the enumerated activity is not "an activity that *would otherwise be illegal*".

In fact, and as discussed in greater detail below, many states ban "gambling" not just on elections, but more generally on the outcomes of future events. These laws would prohibit the entire category of event contracts (at a minimum), which both Congress and the CFTC have expressly permitted to be listed on DCMs. Some of these states provide carve-outs for CFTC-regulated products, or otherwise for activities like commodities and securities trading. However, not all do. New Hampshire, for example, bans gambling and defines it as, "to risk something of value upon a future contingent event not under one's control or influence."[27] Alaska also bans gambling and defines it similarly as when:

> …a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that that person or someone else will receive something of value in the event of a certain outcome.[28]

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[25] This overly broad interpretation of the term "gaming" would threaten to render 5c(c)(5)(C)'s other enumerated provisions superfluous, given that, as explained above, virtually all event contracts could potentially qualify for that categorization. As the Supreme Court has repeatedly observed, there is a "canon against interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski v. Kappos*, 561 U.S. 593, 607-8 (2010).

[26] *See Am. Agric. Movement v. Bd. of Trade*, 977 F.2d 1147, 1156-57 (7th Cir. 1992) (holding that "When application of state law would directly affect trading on or the operation of a futures market, it would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' and hence is preempted." (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

[27] NH Rev Stat § 647:2(II)(d), available at: https://www.gencourt.state.nh.us/rsa/html/lxii/647/647-2.htm/.

[28] AK Stat § 11.66.280(2).

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Finally, various federal laws that address – and largely prohibit – gambling, specifically carve out regulated derivatives products from their definitions of "bet or wager," highlighting that Congress views the two types of transactions as fundamentally distinct. For example, the Unlawful Internet Gambling Enforcement Act of 2006's ("UIGEA") definition of "bet or wager," specifically "does not include [as relevant here:]"

> (ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act;
>
> (iii) any over-the-counter derivative instrument;
>
> (iv) any other transaction that—
>
> (I) is excluded or exempt from regulation under the Commodity Exchange Act; or
>
> (II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934.

The Bank Secrecy Act's definition of "bet or wager," which the Commission relied upon in its Nadex Order, has a carve-out for derivatives products identical to UIGEA's.[29]

All of these various provisions illustrate the flaw in evaluating whether *trading* a futures or swaps contract constitutes gaming or gambling activity or whether *trading* a futures or swaps contract is unlawful under federal or state law. Instead, to maintain the structural integrity of Section 5c(c)(5)(C) and the CEA itself, the Commission must evaluate whether a contract involves an underlying activity that is one of the enumerated categories of activities in Section 5c(c)(5)(C).

It is important here to note that the above facts are clear from the plain language of the statute. Even without *Chevron's* demise, the Proposal's resort to legislative history would be incorrect.

The Current Regulation Demonstrates that the Scope of the Statute is Contrary to the Proposal

By using the words "relates to, or references" in addition to "involves," the current regulation only reinforces that the relevant activity is the underlying event, not trading on the underlying

[29] 31 U.S.C. § 5362(1)(E) (2006).

event. It would not make sense for a futures contract or swap to "reference" trading in the contract; to the contrary, the word "reference" is a clear direction to focus on the underlying event that the contract "references." Thus, under the current regulation, like the statute, the relevant activity for purposes of the Commission's event contract analysis is the activity on which the contract is based (or to which the contract refers) rather than the contract itself.[30]

Additionally, the Proposal to amend the regulatory language to *remove* the words "relates to, or references" is a substantive provision that is being proposed to conform with the Proposal's view of the statute. We oppose this change because it misinterprets the statute.

Legislative History Does not Support the Proposed Rule

Because the text and structure is clear, there is no need to resort to legislative history. That is a bedrock principle of the traditional tools of statutory construction. Nevertheless, the sparse legislative history regarding Section 5c(c)(5)(C)[31] provides no guidance as to whether Congress intended the Commission to limit the scope of Section 5c(c)(5)(C) to instances where the underlying activity of an event contract is one of the enumerated events.

This reading of Section 5c(c)(5)(C) is consistent with the terms used by the Commission in existing Rule 40.11, but not the proposed amendments. Rule 40.11 borrows heavily from the terms used in the statute, including multiple uses of "activity" in both subsections 40.11(a). The Regulation also uses the same term "involves" which appears in the Statute, but also adds the phrase "relates to, or references" when describing enumerated activities. Because "involves" is

[30] Because the Contracts are not based on an enumerated activity, the Commission does not need to consider undertaking a public interest analysis. If the Commission were to conclude otherwise, however, the Commission could either permit the contracts to be listed (the statute authorizes prohibition only upon a Commission determination that the contract would be contrary to the public interest, a determination that the Commission "may" undertake) or conduct a public interest analysis. CFTC Regulation 40.11 should not be read to constitute a blanket prohibition, as that reading could not be squared with the statute. *See* Statement of Commissioner Dan M. Berkovitz Related to Review of ErisX Certification of NFL Futures Contracts, available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement040721 ("if sports event contracts involving gaming are found to have an economic purpose, they should be permitted to be listed on a DCM and retail customers cannot be prohibited from trading those contracts"); Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts, available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521 ("Congress [through Section 5c(c)(5)(C) of the CEA] unambiguously provided a default rule that all event contracts, including the enumerated ones, are allowed.").

[31] The only legislative history that has been cited by the Commission regarding Rule 40.11 involves a short colloquy between Senator Feinstein of California and Senator Lincoln of Arkansas on July 15, 2010. *See, e.g.,* 40.11 Final Rule, 76 Fed. Reg. at 44,786 & nn. 34-35; *see also* Nadex Order, Whereas Clauses 2 & 7. This 555-word back-and-forth between two Senators, which takes up less than two columns of one page of the Congressional Record (Volume 156, Issue 105, S5906-5907 (July 15, 2010)), is particularly weak evidence of the intent of Congress as a whole and the meaning of the provision. *See, e.g., NLRB v. SW General, Inc.,* 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history."). The text is by far the more probative evidence of Congress' meaning. The Proposal's extensive reliance on this sparse legislative history is simply inconsistent with the interpretive approach laid out in *Kisor* and provides an additional reason why Kalshi can self-certify the contracts notwithstanding the Proposal.

the only statutory authority provided by Congress, the Commission cannot expand upon the scope of that term. Thus, the only way to read "relates to, or references" consistent with the Commission's authority is that they are the specific meanings of "involves" that the Commission seeks to adopt.[32] The terms "relates to" and "references," in turn, clearly describe the underlying activity upon which the event contract is based. It would be nonsensical to interpret "relates to" and "references" as describing the act of participating in the event contract itself.

To be clear, Congress could certainly promulgate a law that covers the *participation* in an event contract. But Section 5c(c)(5)(C) is not that law. Instead, applying the traditional tools of construction, Congress enacted Section 5c(c)(5)(C) to prohibit a narrow group of contracts whose underlying activities are the enumerated activities and the CFTC has determined are contrary to the public interest. If the underlying activity of a contract is not an enumerated event, it is outside the scope of Section 5c(c)(5)(C).

II. The Proposal's Definition of Gaming is Flawed

The derivatives industry has long weathered attacks on its character from those who would disparage the derivatives industry as "gambling". Many defenses have been given of the markets that differentiate between gambling and derivatives trading. StoneX, an FCM, offers this:

> There's one key element that sets futures trading apart from gambling: you. The individual determines the rules of the game — not the casino. Futures furnish you with the ability to assume risk, identify rewards, and develop strategies on your own terms.
>
> To illustrate this point, refer to the house-edge table above. Aside from double-odds offerings in craps, players have the best shot at beating a single-deck blackjack game using basic strategy. However, in order for the house edge to be eliminated (0.0%), the game must be unique (single-deck), and the player must implement a specific strategy (basic). If these elements are present and adhered to, your long-term expectation would be to walk away from the game even steven, at best.
>
> What if you could play a game where the house doesn't have the edge? Well, best of luck finding one of those in a casino. However, they do exist in the futures markets. By conducting trade efficiently within the structure of a comprehensive plan, the tables may be turned in your favor. Through defining all aspects of the "game" in question, a trader can quantify an edge in the futures markets. Here's how:

[32] Rule 40.11 cannot exceed the scope of Section 5c(c)(5)(C). Any interpretation of Rule 40.11 that views it as expanding the scope delineated in Section 5c(c)(5)(C) would run afoul of the Constitution's separation of powers and the Administrative Procedure Act.

> Risk: Selecting how much capital to allocate on a trade-by-trade basis limits downside risk exposure. In addition, the ability to cut losses at any point provides an added level of security and promotes longevity in the marketplace.
>
> Reward: The inherent volatility of futures may produce profits above and beyond assumed risk. Instead of having to overcome a built-in house edge on every transaction, beneficial trades may eclipse losses exponentially.
>
> Opportunity: The futures markets offer traders a wide variety of products to choose from, including stock indices, bonds, commodities, and currencies. In addition, markets are open on a 23/5 basis. The potential trading opportunities are limited only by prevailing market conditions and the imagination of the individual.

There are many many more examples dating back decades regarding the difference between gambling and futures. Other differences include structural differences, like the existence of a "house" vs a market, and whether the "house" has control over the game being gambled on. Others draw the defining line at the nature of the activity. Gambling is entertainment, whereas economic trading is not. Indeed, the Federal Government itself considers gambling businesses to be part of the broader arts, entertainment, and recreation sector.

While there are various formulations of the difference between gambling and derivatives trading, there are two common denominators among them all: first, none of them define gaming based on the subject of the transaction. Second, they were all ignored by the CFTC.

The CFTC's Proposal divides all trading into two buckets, trading that is gambling, and trading that is not gambling. And the difference between these two is simply the subject of the trades. It is easy to see the attractiveness to a regulator of this approach. It provides a relatively bright line for the regulator, which is relatively easy to administer. However, there is an implication of this argument that is important. It means that *the sole dividing line between gambling and derivatives trading that is not gambling is the subject of the trade.* The CFTC has *no* other way to distinguish between gambling and derivatives trading?

Consider this. If the CFTC did have a way to distinguish between gambling and derivatives trading, then the Proposal to consider *all* trading on certain topics gambling would make very little practical sense. It would mean that the CFTC recognizes the there could be non-gambling trading on these contracts, but despite that, the CFTC will consider them gambling *anyway*, just because they are on these topics. That not only makes little practical sense, it is certainly contrary to the legislative history that the CFTC points to throughout its Proposal.

In short, the CFTC's proposal means that there is no difference between the gambler and the futures trader, the casino and the exchange, other than the types of bets that they offer. According to the CFTC's proposal, the casino offers bets on blackjack, and the exchange bets on beef.

The CFTC's Proposal has familiar strains, this time from a different piece of legislative history, one that took place many years ago and predates the CFTC in its current iteration, this one a robust conversation that took place on the floor of Congress between then Representative Burdick of North Dakota and other representatives, and recorded in the Congressional Record.

> Mr. Chairman, on the first day of this session I introduced in the House a resolution for the appointment of a Select Committee to investigate the subject of futures trading. It is known as House Resolution 25, and it has been referred to the Committee on Rules. The board of trade lobbyists that infest-this city have sought in every possible way to prevent the appointment of such a committee and the holding of hearings on futures trading. Thus far the Committee on Rules has taken no action on my resolution.
>
> On the second day of last month I addressed the House on the importance of an investigation such as is called for in House Resolution 25. I made mention of some very pertinent facts~ I not only charged that futures contracts are gambling contracts and are generally recognized by the courts as such, but I also charged openly, on the floor of this House, that the practice of futures trading fixes a low ceiling above which the price of wheat and the price of cotton and the price of other exportable products cannot rise, try as we may to enact farm legislation in behalf of agriculture. That is a very grave charge for this House to permit to pass unchallenged.
>
> I charged openly, on the floor of this House, that our farmers in the United States are today as much subject to the economic domination of Great Britain as they were in colonial days, before the Revolutionary War. I charged, and I now renew the charge, that the price of wheat and cotton and other exportable farm products is dictated from England; and that, due to the operation of the futures market ticker tape, American prices are lower than prices paid at Liverpool, which is a buyer's world market. That is a very grave charge for this House to permit to pass unchallenged.
>
> I made other charges, which I am prepared to support. I charged openly, on the floor of the House, that Secretary of Agriculture Wallace condones the criminal conduct of the Chicago Board of Trade and permits his underlings to print, publish, and distribute false propaganda in support of such conduct. I mentioned one of several instances of that sort. I mentioned the propaganda article of H. S. Irwin, a Commodity Exchange Administration pay-roller, which was published in the June 1937 issue of the Illinois Law Review. That is a very grave charge for this House to permit to pass unchallenged.

I charged, and I now renew the charge, that Secretary of Agriculture Wallace and the Commodity Exchange Administration have condemned the favoritism that has been shown by the business-conduct committee of the Chicago Board of Trade in favor of certain traders and against certain other traders. That is a very grave charge for this House to permit to pass unchallenged.

Mr. Chairman, I have barely. begun to mention the charges that I shall, in due time, level against Secretary Wallace, the Commodity Exchange Administration, and the Chicago-Board of Trade. The Commodity Exchange Act is not being enforced as the Congress intended it to be enforced. Secretary Wallace and the Commodity Exchange Administration are equally guilty along with the commodity gamblers who continue, under the protection of friendly governmental agents, to rob and to exploit the farmers. I shall be more specific in my charges. The Commodity Exchange Act, by its express terms and provisions, contemplates that the futures contract markets shall be markets for the future delivery of commodities. Today the wheat futures market, for example, is more of a gambler's market and less of a market for future delivery than it was yesterday. During the fiscal year ended June 30, 1937, the volume of deliveries under wheat futures contracts, on the Chicago Board of Trade, was only fifteen one-hundredths of 1 percent, and in the ensuing fiscal year the volume of deliveries was only thirteen one-hundredths of 1 percent. That is a very grave charge for this House to permit to pass unchallenged.

I charge that Secretary Wallace and the Commodity Exchange Administration, well knowing that one of the chief reasons for the enactment by the Congress of the commodity Exchange Act was to eliminate excessive speculation in futures contract markets, have condoned the recent action of the Chicago Board of Trade in reducing margin requirements in wheat futures trading from 4 cents a bushel to 2 cents a bushel, with the obvious intention of-stimulating speculation. That is a very grave charge for this House to permit to pass unchallenged.

I charge that short selling is rampant in all futures con- tract markets that are under the jurisdiction of Secretary Wallace and of the Commodity Exchange Administration. That is a very grave charge for this House to permit to pass unchallenged.

Mr. Chairman, my time is limited today. I shall have more -to say on this important subject in the near future. However, before I take my seat I wish to go on record. with another very serious charge against Secretary Wallace and . the Commodity Exchange Administration. I refer to the willful violation by the Chicago Board of Trade of one of the most fundamental conditions imposed by the Commodity Exchange Act on futures

contract markets. This willful violation has been under the protection of friendly governmental agents who are responsible to Secretary Wallace.

The Chicago Board of Trade boasts that it is the largest grain market in the world. That is far from the truth. It is a big gambling institution, dealing extensively in lottery tickets on price fluctuations, but. it handles very, very little actual grain . . This has for a long time been a bone of bitter contention between the Chicago Board of Trade, on the one hand, and the farmers, on the other hand. Yet the Chicago Board of Trade will not furnish any :figures. The law requires, as a condition precedent to designation by the Secretary as a contract market that such market shall first make provisions for . . ..

I wrote Dr. J. W. T. Duvel, Chief of the Commodity Exchange Administration, on February 13, asking whether the Secretary of Agriculture had ever complained against the Chicago Board of Trade for failure to keep records and to make reports of cash transactions. I did not ask Dr. Duvel as to records and reports of futures transactions. I asked him specifically as to the violation of the act for failure to keep records and to make reports of cash transactions. Dr. Duvel's reply, dated February 17, 1939, is evasive and unresponsive. . . ..

I here and now charge that Dr. J. W. T. Duvel, Chief of the Commodity Exchange Administration, is protecting and has been protecting the Chicago Board of Trade in a very serious violation of the Commodity Exchange Act in this particular, which is a fundamental condition precedent to its designation by the Secretary of Agriculture as a contract market, without which designation it would not be entitled, under the law, to do business at all. And I charge that Dr. Duvel tried by his letter of February 17 tosuppress the information I asked for. These are very grave charges against Secretary Wallace and Chief Duvel. They are too grave for this House to permit . them to pass unchallenged.

Mr. Chairman, I charge openly, on the floor of this House. that .Secretary Wallace, in condoning the action of La Salle Street, contributes to robbing and exploiting the farmers. If Mr. Wallace were enforcing. the law instead of condoning the illegal practices of the Chicago Board. of Trade, he would be cleaning up the situation so that no investigation would be necessary.

Mr. Chairman, the honor of this -House demands that the light of day be shed on the operations of these futures traders that nullify every legislative attempt to help the farmer and that .seek; by underground means, to defeat the enactment of any measure that would be of constructive aid to agriculture.

. . . ..

I have here a report from Chicago yesterday which states: Quiet but persistent selling of wheat prompted by lower quotations abroad caused fresh declines of as much as one-half cent 1n value here today. Poor demands from importing countries, with shipments of exporters and wheat stocks afloat larger, had a depressing effect on prices at Liverpool and thus indirectly exerted pressure on the Chicago market. If you do not believe this gambling operation has any effect on the price of our grain, listen to this statement from Chicago. John M. MacMillan, Jr., president of Cargill Elevator Co., speaking: The 'position taken by the board of trade would tend to depress the price of corn received by the farmers and would benefit the short sellers in the Chicago corn pit. The only way shorts can fill their contracts is by bringing grain to. the Chicago market. But when they have sold short 100,000,000 bushels and the delivery day arrives and they are not compelled to go on the cash market and buy for the purpose of delivery, you see there is only one side to that market; and that is the selling side, and that is the side which is supported by the board of trade in Chicago and supported by the administration of this act, which is under the supervision of the Secretary of Agri- culture, the Attorney General, and the Secretary of Com- merce. Under the authority of this board their agents have published articles advising the American people it would be much better for us if we would legalize these transactions.

Mr. BOLLES. Mr. Chairman, will the gentleman yield?
Mr. BURDICK. I yield to the gentleman from Wisconsin.
Mr. BOLLES. Is it not the truth that this is one of the great reasons for the depressed price of grain? . . . ..

Mr. LANDIS. I noticed an article stating: Congressman named Burdick, he shot off his mouth over On the Hill. He -has got it off his chest, and if he wants to follow these hearings he can follow them through the record prepared by our stenographers here." Is it a fact that they moved these hearings from Washington to Chicago?

Mr. BURDICK. That is true. Now, there are a lot of Members of Congress, some of them sitting here now, who would like to have taken in that hearing to understand what the situation is and then prepare to meet it by legislation, but the gentleman from Indiana [Mr. Landisl is correct. That statement was made by this attorney for the chicago Board of Trade on February 2, and he says that now if I want to find out what that committee is doing I can follow the records as they shall keep them by their stenographer, and they moved the hearings out of the city of Washington and moved them to the Sherman Hotel in Chicago, and that is where the hearings are taking place now.

However, you see, one of them has been injured. One of these gamblers has been injured himself, and it is a good deal like revolutions. The common people of the world never started a revolution in the history of time. Revolutions are only generated by the barons. When they injure the barons they will have a revolution, but the common people never had one. Now we are injuring the barons in these proceedings, and one of these barons himself states that this practice of protecting the men who sell without protecting the buyer has the effect of depressing the price of grain.

Now, what difference does it make? If we pass the cost of production bill, all the difference in the world. That is one act they do not want passed by this Congress because the moment you do that, you put them out of commission . . There is another bill they do not want passed. They do not want the Townsend bill passed, and I will tell you why they do not. As I pointed out to this House a week ago, they sell so many bushels of paper wheat, that if they had to pay 2 cents on every transaction it would cost them $5 to carry on the fictitious sales that do not represent the sale of one actual bushel. They will fight that plan and they will fight the cost-of-production plan. They will fight anything that interferes with their power to continue gambling transactions in these boards of trade.

I have not anything against any individual in Chicago or elsewhere. The only interest I have in it is the thousands of farmers in my own State and the thousands in other States who cannot meet their interest payments, who can- not make a living, who are living off of this Government. When we have these millions of people in distress in America it seems to me this Congress should be willing to appoint a committee to find out whether all of these statements I am making-are true or false. Information will never hurt anybody, but the fact you do not have the information will hurt the farmers of this country.

When a man on the board of trade can sit there with his heels on a mahogany desk: and make more money out of a bushel of wheat by gambling in it than a farmer in North Dakota or elsewhere in this country can make by digging the wheat out of the soil, it seems to me that the farmer's side of this question should be heard in this Congress, and I am thinking about those farmers, the men who raise corn and wheat and cotton and tobacco.

I know how poor they are. I live w1th them myself, and I know they are so poor they can hardly afford to raise a crop. There is no one who can raise cotton at the price they are getting, today, and if it were not for the fact that these men who own the land have a sympathetic feeling for the men who till it there would be much more suffering in the

> South than there is today. Many, many thousands of the men who produce cotton in America are kept from abject want by-the good will of the men who own the land.
>
> The CHAIRMAN. The time of the gentleman from North Dakota has expired.
> Mr. BURDICK. May I have 1 more minute?
> Mr. GIFFORD. On the bill? I would like to know what the gentleman thinks of. the bill. I yield the gentleman 1 additional minute, Mr. Chairman.
> Mr. BURDICK. The gentleman insists that I talk on the bill--
> Mr. GIFFORD. No; I do not insist.
> Mr. BURDICK. If you do, I will surely give it to you.
> Mr. GIFFORD. No; I do not.
> Mr. BURDICK. The only thing I am asking of this Congress, and that is not very much, is to use your influence if you have any -I do not think I have- to have a committee appointed by this Congress to investigate this gambling institution that does more harm and causes more losses to the American farmer every year than anything else permitted to continue in this country. [Applause.]
> [Here the gavel fell.]

This stirring and historically informative repartee is but one salvo of a broader attack leveled against the derivatives industry over the past 100 or so years. Of course the accusations focussed on the issue du jour. But they are all variations of the same theme, that derivatives contracts are indistinguishable from gambling.

The Proposal's decision to look to state law is very perplexing for many reasons, none the least that the same state laws that call the activities enumerated in the Proposal gambling also call all derivatives contracts gambling. This *certainly* seems to be contrary to the colloquy which was explicit in the two senators' desire to keep gambling out of the futures markets, and also against what we can presume is Congressional intent that futures contracts are not *all* gambling.

Of course, many futures contracts would not be swept up in the Proposal's prohibition. But that's only because they are not event contracts, not because under the Proposal they are *not* gambling.

The CFTC should not just reject the proposal, it should repudiate it. Instead, the CFTC should recognize the point that we begin with. Gambling is distinguished from derivatives trading by more than just the subject.

III. The Proposal's References to the First Enumerated Activity and Its Reliance on Its Incorrect Conclusion in its Kalshi Order.

The first enumerated activity of Section 5c(c)(5)(C) is "activity that is unlawful under any Federal or State law." The underlying activity of election contracts, which is what the Proposal

is referring to, is elections. There is no State or Federal law that makes elections illegal. There is also no State or Federal law that prohibits elections or voting in elections. Accordingly, political event contracts would not fall under the special rule's enumerated act of "illegal activity."

To be sure, 27 states do prohibit, in one form or another, betting on elections. And the CFTC since the days of the Nadex Order has (incorrectly) stated that state gambling definitions of 'wager' and 'bet' are analogous to the act of taking a position in the Political event contracts as a justification for prohibiting those contracts' listing. In this regard, however, the Nadex Order, the Kalshi Order, and the Proposal overextended. Section 5c(c)(5)(C) is limited to the activity underlying the contract, not the participation in the contract itself.

The interplay between the enumerated activity of gaming and activities that are illegal under state or federal law highlights the problems with the Commission's proposed interpretation of both activities. There are at least two fundamental differences between the relevant state gaming or gambling laws and event contracts. As Commissioner Brian Quintenz described with regards to the withdrawn ErisX sports event contract, trading an event contract with a binary outcome is not automatically considered a gamble.[33] Indeed, if Section 5c(c)(5)(C) had assumed that participating in any event contract involved making a wager or gamble, there would have been no need for Congress to individually enumerate "gaming" as a distinct category of event contracts upon which the Commission could make a public interest determination. The fact that Congress separated "gaming" from other event contracts is a clear indication that Congress did not intend for all event contracts to be considered gaming.

In fact, the statutory definition of "bet" or "wager" used by the Proposal itself, in the same statute, clearly indicates that not all CFTC regulated products are gaming. 31 U.S.C. § 5362(1), a part of the Unlawful Internet Gambling Enforcement Act of 2006. That definition of "bet or wager," however, includes two relevant exclusions. First, the term "bet or wager" does not include "any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act."[34] The term also does not include "any other transaction that is excluded or exempt from regulation under the Commodity Exchange Act."[35] The statute cited by the Proposal itself demonstrates that the Proposal's expansive application of Section 5c(c)(5)(C) is incorrect.

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[33] *See* Statement of Commission Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain event contracts (Mar. 25, 2021) (available at https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521) (last visited May 30, 2022). The many other distinctions between an event contract and a gamble include the fact that betting is a game of pure chance without any economic utility while event contracts are non-chance driven outcomes with economic utility.

[34] 31 U.S.C. § 5362(1)(a)(E)(ii).

[35] *Id.* § 5362(1)(a)(E)(iv)(I).

The Proposal's broad interpretation of gaming under the statute and rule would result in prohibiting much of the legally registered activity that the CFTC has previously approved. Indeed, many states ban "gambling" not just on elections, but specifically on the outcomes of future events. For example, New Hampshire bans gambling and defines it as "to risk something of value upon a future contingent event not under one's control or influence"[36] while North Carolina includes a wager on an "unknown or contingent event" in its statutory definition of gambling.[37] New York defines gambling as staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.[38] Other states explicitly prohibit trading on the future delivery of securities and commodities without delivery and which are purely cash-settled, as is normal for products like stock index futures and eurodollar futures.[39] In all, 19 states contain provisions in their state codes that prohibit the listing of at least some subset of contracts that the CFTC has approved.[40]

Under the Proposal's reasoning, because Rule 40.11 prohibits the listing of contracts that "involve" "gaming," laws like these would prohibit ***all*** event contracts. For example, event contracts on the weather and various economic indicators would be considered "risking something of value upon a future contingent event not under one's control or influence." And yet, not only are these event contracts a staple of CFTC regulated DCMs, but the Commission's Core Principles require that event contracts be specifically outside the control or influence of a market participant and not readily susceptible to manipulation. The Proposal's application of

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[36] NH Rev Stat § 647:2(II)(d) (2017); *see also* Alaska Stat. § 11.66.280(3) ("gambling" means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that that person or someone else will receive something of value in the event of a certain outcome;"); Or. Rev. Stat. § 167.117 (7) ("'Gambling' means that a person stakes or risks something of value upon the outcome of a contests of chance or a future contingent event not under the control or influence of the person . . ."); Haw. Rev. Stat. § 712-1220 ("A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence . . . Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health, or accident insurance.").

[37] N.C. Gen. Stat. § 16-1.

[38] NY Penal Law, Chapter 40, Part 3, Title M, Article 225.

[39] For example, the laws of South Carolina, Oklahoma, and Mississippi use the following language: "Any contract of sale for the future delivery of cotton, grain, stocks or other commodities . . . upon which contracts of sale for future delivery are executed and dealt in without any actual bonafide execution and the carrying out or discharge of such contracts upon the floor of such exchange, board of trade, or similar institution in accordance with the rules thereof, shall be null and void and unenforceable in any court of this state, and no action shall lie thereon at the suit of any party thereto."

[40] Moreover, the purpose of the CEA, CFMA and other laws was to create clear and consistent national guidelines; a contrary interpretation would lead to the undesirable result that if one state prohibited a specific kind of contract then the Commission could use the special rule to ban that contract in all states.

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Rule 40.11 would therefore preclude the CFTC from regulating any event contract because event contracts are considered gambling under (some) state laws.[41] Because such an interpretation of "gaming" would lead to absurd results, the traditional tools of interpretation and the process required by the Supreme Court in *Kisor* demonstrate that the Proposal's view cannot be the correct way to interpret Rule 40.11.[42]

Seen in this context, the state laws that prohibit gambling on elections do not and cannot refer to CFTC regulated event contracts. The laws of many states prohibit gambling on event contracts, case-settled commodity futures contracts, and elections as one. Yet, the CFTC clearly continues to regulate and approve of the event contracts and cash-settled commodity futures markets even though it may seem to conflict with those state laws.[43] Event contracts relating to elections should be no different. Indeed, just as other event contracts regulated by the CFTC, Kalshi's political control contract should also not be precluded by the gaming provisions of 40.11.

Furthermore, the CFTC's actions and inactions since the Nadex Order indicate that even the Commission has not continued the Nadex Order's reasoning in this regard. Consider, for example, the Small Cannabis Equity Index Futures Contract listed by the Small Exchange. The Cannabis Index involves the stock prices of companies in the cannabis industry that produce and distribute cannabis for consumption—an activity that is unlawful under Federal law and many State laws. The contract is "dependent on the occurrence, nonoccurrence, or the extent of the

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[41] On this point, it seems that at the very least, Rule 40.11 would be an APA violation, or even unconstitutional, if the analysis in Proposal was taken to its logical conclusion. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

[42] *See, e.g., Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019) ("reading § 2 [of the Twenty-First Amendment] to prohibit the transportation or importation of alcoholic beverages in violation of *any* state law would lead to absurd results that the provision cannot have been meant to produce") (emphasis in original). Indeed, the "Commission agrees that the term 'gaming' requires further clarification and that the term is not susceptible to easy definition." *Provisions Common to Registered Entities: Final Rule*, 76 Fed. Reg. 44,776, 44,785 (July 27, 2011). In the 40.11 Final Rule, the Commission noted that it had previously sought comments regarding event contracts and gaming in 2008 and that the "Commission continues to consider these comments and may issue a future rulemaking concerning the appropriate regulatory treatment of 'event contracts,' including those involving 'gaming.'" 40.11 Final Rule at 44,785. "In the meantime, the Commission has determined to prohibit contracts based upon the activities enumerated in Section 745 of the Dodd-Frank Act and to consider individual product submissions on a case-by-case basis under 40.2 or 40.3." *Id.* That process is undermined if the Proposal's approach to "gaming" stands.

[43] The CFMA explicitly preempts the application of state gambling statutes when it applies to legal commodity futures contracts and as such there is also a federal preemption argument here that the state gambling statutes should not be considered, regardless of the Proposal's misapplication of Rule 40.11. *See* 7 U.S.C. § 16(e)(2) ("This chapter shall supersede and preempt the application of any State or local law that prohibits or regulates gaming or the operation of bucket shops (other than antifraud provisions of general applicability) in the case of—(A)an electronic trading facility excluded under section 2(e)[1] of this title; and (B)an agreement, contract, or transaction that is excluded from this chapter under section 2(c) or 2(f) of this title or sections 27 to 27f of this title, or exempted under section 6(c) of this title (regardless of whether any such agreement, contract, or transaction is otherwise subject to this chapter).").

occurrence" of an event with "potential financial, economic, or commercial consequence,"[44] namely the value of the Cannabis Index. The activities of these companies are production and distribution of cannabis for consumption, which are all activities that are "unlawful under Federal and [many] State laws," and should otherwise fall under the purview of Section 5c(c)(5)(C) and Rule 40.11. Certainly, if the Statute was given the same broad reading that the Commission gave to it in the Nadex Order, the Cannabis Equity Index would certainly "involve" an enumerated activity and be subject to Section 5c(c)(5)(C) and Rule 40.11. Yet, the Cannabis Index contract was self-certified and the Commission did not invoke Section 5c(c)(5)(C) or Rule 40.11. Therefore, it is clear that the Commission has not maintained the Nadex Order's overbroad and incorrect reading of the Act. The Proposal, which the Commission notes is consistent with the Nadex Order, is likewise flawed and inconsistent with the statute.

IV. Public Interest Determinations Should be Contract Specific

The Proposal to determine up front that all contracts that involve enumerated activities are contrary to the public interest is contrary to the statute. As noted above, Congress enacted a rule that gave the CFTC authority to determine that *specific* contracts are contrary to the public interest. Congress did not determine that all contracts involving an enumerated activity are contrary to the public interest. In fact, it clearly determined that a contract involving an enumerated activity *could* be in the public interest, which directly contradicts the Proposal.

Additionally, the statutory language is clear that the determination must be contract specific and not a blanket determination. As noted in the discussion of Step One above, the Special Rule only is relevant in connection with a" listing". If Congress intended for the CFTC to make a blanket rule, the introductory clause to the statute would have no meaning.

Additionally, the sixth enumerated event also demonstrates that Congress did not authorize the CFTC to make a blanket prohibition. As detailed above, if every contract that involves a n enumerated activity is contrary to the public interest, that would render the Commission's further determination, which is required under the statute, meaningless.

V. Public Interest

The CFTC's Proposal takes a surprisingly limited view of the power of its markets to manage risk. In the course of its prior two requests for input from the public on our contracts, the CFTC has heard from hundreds of market participants, from individuals to massive international corporations, how they assess their exposure from elections, and how they would manage that exposure. And the CFTC rejects all of this. Which brings up a fair question. Does the CFTC think that these people are lying? Is the CFTC's official position that these commenters are

[44] *See* 7 U.S.C. § 1a(19) (definition of excluded commodity).

lying? It's hard to know because the CFTC utterly and inexplicably failed to address the prior comments it requested and received in its Proposal.

Certainly some of the commenters on the prior rounds, and doubtless some of the commenters to this Proposal, speculate that no one will use the contract. But it's obvious that good governance principles demand that little to no weight be given to a comment that speculates about how *someone else* will use a contract, relative to the comment from that *very someone else*. Comments informing the CFTC about how the contract will be used are much more grounded in fact and much less speculative than someone guessing how others will not use the contract.

This point is obvious when the two camps of commenters, those pro event contracts and those anti event contracts, have their comments stripped of the linguistic peripherals that commenters use to obfuscate their main points. Those in the pro event contracts camp say this: *we* identify risks and we will event contracts to hedge that risk. Those in the anti event contracts camp say this: *we* will not use the contracts to hedge risk, and *we guess, because there is no way for us to actually know this*, that *those other guys* aren't going to use the contract to hedge risk. Distilled to their essence, it seems incredible that a government agency that prides itself on being data driven and grounded in reality would give *any* weight at all to these comments from the anti even contracts camp. They are not only speculative, they are directly contradicted by the information that the CFTC has asked for and received from the public.

The same is true with regards to the use of the data from the contracts. The CFTC was again told by a broad cross section of the marketplace, from individuals to large multinational corporations, even people within the government itself, how the data is used. And just as with risk management, the CFTC ignores this traditional use of the markets, one that would certainly satisfy its economic purpose test, and should also weigh much stronger than the other considerations than the ones the Commission focused on.

Indeed, the CFTC's position that elections don't have direct impacts that are not diffuse, is very hard to understand. There are huge industries that have direct exposure to elections of all type. The stock market reacts to changes in the polls. We are currently in a hugely important election cycle. Is it at all credible that elections don't have huge economic impacts? If so, why do they dominate not just the regular news headlines, but the business news headlines too?

Mainstream media is filled with headlines about how the upcoming Presidential election will impact Americans. The Wall Street Journal[45] , the New York Times[46], the Washington Post[47],

[45] https://www.wsj.com/buyside/personal-finance/investing/how-u-s-presidential-election-years-affect-the-stock-market
[46] https://www.nytimes.com/interactive/2024/06/16/us/politics/trump-policy-list-2025.html
[47] https://www.washingtonpost.com/dc-md-va/2024/08/08/trump-dc-workers-economy/

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Bloomberg[48], CBS News[49], CNBC News[5051], Yahoo Finance[5253], Fortune[54] , and The Street[55] are just a handful of mainstream outlets that have recently covered how a potential Kamala Harris or Donald Trump presidency might impact various aspects of daily life, including investor portfolios, the stock market, inflation, interest rates, healthcare, retirement savings, mortgage rates, and other policy areas. From the media headlines, it is clear that the upcoming Presidential election is expected to have significant effects on the economy and personal finances of everyday Americans – and people are talking about how they can mitigate the potential impacts.


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Written By Tanza Loudenback

Updated July 22, 2024, 1:30 PM EDT

[48] https://www.bloomberg.com/news/newsletters/2024-07-16/what-a-trump-presidency-might-mean-for-your-money
[49] https://www.cbsnews.com/news/trump-stocks-economy-inflation/
[50] https://www.cnbc.com/2024/07/15/cramer-names-stocks-that-could-rally-or-fall-if-trump-wins-in-2024.html
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[54] https://fortune.com/well/2024/08/06/kamala-harris-tim-walz-win-health-care-changes/
[55] https://www.thestreet.com/investing/morgan-stanleys-explosive-call-on-interest-rates-if-trump-wins

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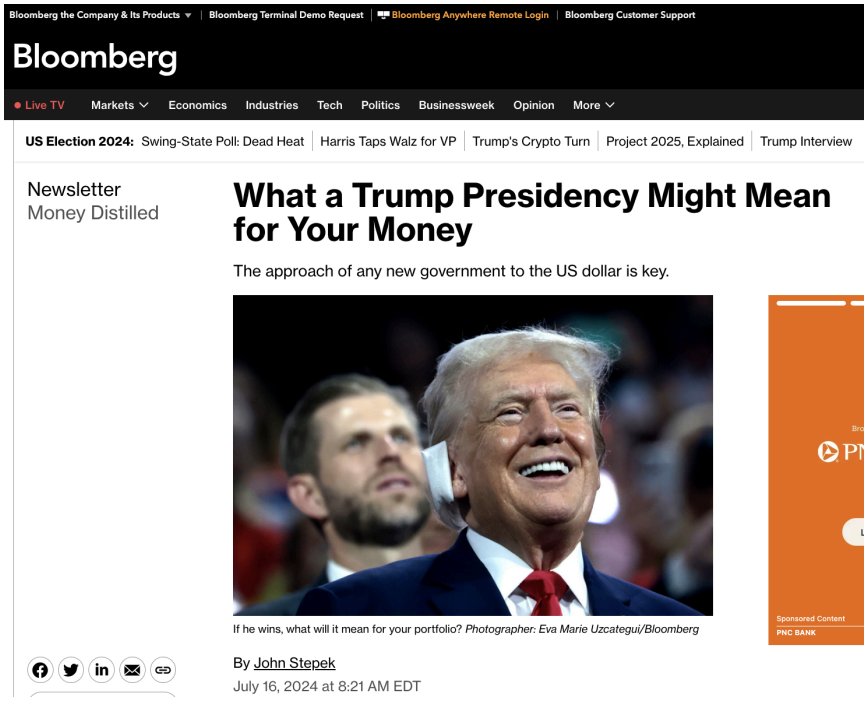

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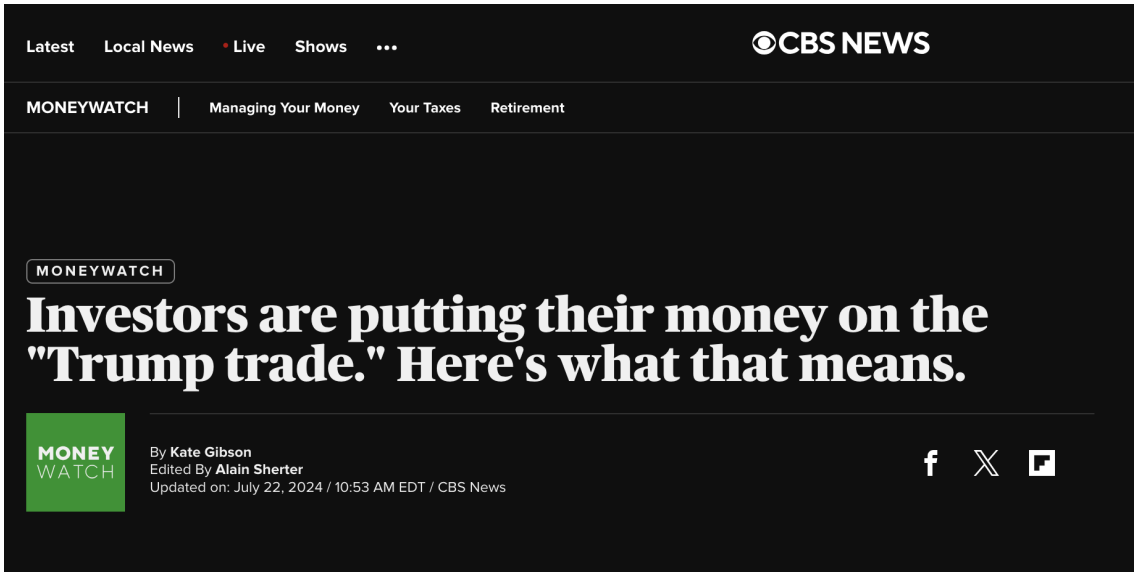
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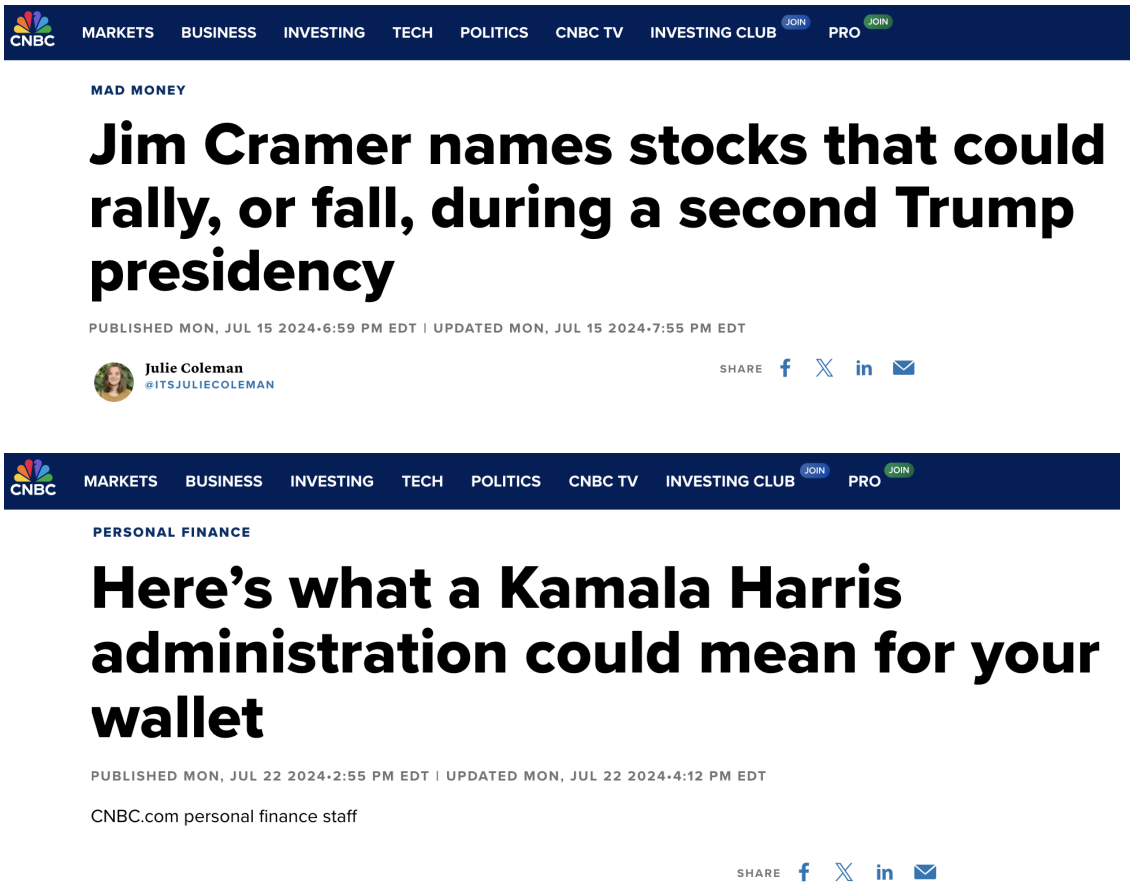
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The 10-year Treasury yield stands at 4.49%, up from 3.9% Dec. 29.

Dan Weil • Jul 1, 2024 7:03 PM EDT

It is simply wrong to assume that individuals and businesses both small and large are not impacted by elections. Elections pose broad risks, many of which cannot be easily managed by other contracts, and certainly not without event contracts. The premise that it is up to the CFTC to tell the market how to assess its risks, and then how to manage those risks, and how to ingest information, and what to do with that information, is simply foreign to the CFTC's markets and its traditional role, and is wrong.

Businesses reasonably assess risk on the basis of "what events can occur that will impact the likelihood of another event occurring." But the CFTC would discount those risks as "too diffuse" to be managed via a contract. That also is simply wrong. In fact, the CFTC's regulations make numerous mentions of risk management that registrants must perform, and there is no question would expect registrants to be able to see several steps down the road, and how one event can impact the likelihood, or risk, of other events. The CFTC would not only expect registrants to identify those risks, they would expect registrants to mitigate those risks. It is therefore surprising that the other arm of the CFTC seems to be saying that firms are limited to identifying and managing only direct risks, but not risks that involve multiple steps and are too "diffuse".

And just as a firm can reasonably identify an election as a risk that can be managed, a firm can reasonably identify an election as a key component that will impact its future planning. The CFTC seems to just ignore that businesses, and individuals, make probabilistic decisions, and elections certainly play a big part in those decisions. Accordingly, probabilistic information on elections is very valuable. Importantly, nothing in the preamble explains why the CFTC ignores the comments it has requested and received, and ignores the importance of elections to all market participants. The CFTC also fails to address why it believes that election contracts will not be used for hedging or for pricing transactions, services, and assets on more than an infrequent basis.

Additionally, the CFTC ignores *actual data* that market participants and industry use prediction market data on elections. Mainstream media, business news, and other sites use prediction markets regularly, noting their odds as an important source of data alongside polls.[56] PredictIt has been in operation for a decade, and the *reams* of evidence of the importance of the data that is generated by markets is well known and well documented.

The discussion above focuses on election contracts because we are currently in the midst of an historic election. To maintain that elections do not pose risks that can be hedged, and election markets will not produce useful data that will be used by industry, is more than arbitrary and capricious. But these truths are not limited only to elections. All event contracts that Kalshi has listed have strong hedging cases. Kalshi incorporates here all of the hedging and price basing

[56] For one example out of many, from August 8, 2024 on Forbes: https://www.forbes.com/sites/brianbushard/2024/08/08/harris-ties-trump-on-election-betting-odds-site-for-first-time/

analyses that it shared previously with the CFTC. Kalshi does not duplicate the arguments here because the arguments are confidential, but these are all information that the CFTC has in its possession, should have considered when creating its proposal but did not, and must consider and address prior to finalizing any regulation.

The events that the CFTC has specifically identified are telling on the entire proposal. Events like Oscars, Grammys, the Nobel Prize, etc. all have huge economic impacts. They don't have the broad impact of national elections, but they have big impacts on the communities that are involved, much the same way that pork bellies prices impact those who care. But while the Proposal is fine with pork bellies, and all the speculative hedging that occurs on those contracts, events that might be a little less familiar to it, like the Grammys, it decides just do not have enough economic impact to be hedged or produce useful data. Never mind the massive creator economy and the importance that these events play to them. Their economic risks, the intense research that social media creators do, are apparently, according to the proposal, non-existent. There is, of course, another interpretation of the Proposal (and again, the Proposal's failure to adequately explain what it is doing leaves a lacuna of information that requires speculation) is *not* that these events do not have economic impact, it's that the people who are impacted will not manage their risks and will not use market data to plan their businesses. How the CFTC would know this is not clear. Certainly many of those in the creator economy come from historically underserved communities who traditionally have been gated out of accessing financial markets because of bias and discrimination.

There is no question, though, that the contracts that are targeted by the Proposal are those that are most relevant to historically underserved communities. It is unfortunate that the CFTC has proposed to miss this opportunity to cater to the needs of historically underserved communities. The CFTC should encourage its regulated markets that are serving underserved communities. It should partner with exchanges to educate and raise awareness of the benefits of regulated markets. It should celebrate the toppling of financial barriers. It should celebrate its regulated markets jettisoning any vestiges of elitism and embrace that its regulated markets are now serving the needs of those whose needs have *not* been served by markets. Instead, the CFTC has not only proposed to prohibit this expansion, the proposal simply dismisses the validity of these economic interests. It could have been hoped that the newfound diversity in the markets would be celebrated.

VI. The Inclusion of "an Occurrence or Non-Occurrence in Connection with such a Contest or Game, Regardless of Whether it Directly Affects the Outcome."

The proposal fails to articulate a rationale for including "an occurrence or non-occurrence in connection with such a contest or game, regardless of whether it directly affects the outcome" in

the definition of gaming. The Proposal's definition of gaming, based on the state law definitions mentioned above, does not include this. Additionally, the CFTC does not provide any rationale how these contracts are not in the public interest. Lumping the outcome of the Super Bowl with the number of viewers of the Super Bowl is incorrect. The CFTC's failure to articulate any rationale for this proposal, and the public interest determination, violates the APA.

VII. The Proposal's Public Interest Determination is Overbroad

The Proposal will ban a tremendous variety of contracts. The CFTC's public interest determination fails to provide a rationale for all but a small number of contracts. Accordingly, the proposal violates the APA. The CFTC is required to provide a rationale that would allow the public to know why each contract that the CFTC is proposing to ban is banned.

VIII. The Proposal Regarding Existing Contracts

The CFTC's Proposal will harm market participants by requiring the contracts to be wound down. To be clear, the CFTC has not identified any harm from listing the contracts. Not a single harm. The disproportionality of this is manifest. The CFTC does not sufficiently articulate why this harm to market participants is justified, nor does it show that it considered alternatives. This proposal is ill-conceived and should be reconsidered. The failure to articulate a rationale, and failure to consider less harmful alternatives violate the APA.

IX. Anticompetitive Considerations

The CFTC's analysis is facially flawed. The CFTC stated that they found that this proposal will have "no anticompetitive effects." That is so patently false that it is hard to understand what the CFTC means. The first step this analysis would take is to identify where these contracts are available. The answer is on multiple platforms. They are available on Kalshi, and on other platforms that are not regulated by the CFTC. The Proposal will ban these contracts on Kalshi. The Proposal will not ban these contracts on the other platforms. To be clear, market participants today have a choice of where to trade, Kalshi and other platforms. The CFTC's Proposal will prevent Kalshi from competing with these other exchanges. It is hard to imagine a proposal that is *more* anticompetitive than this. The CFTC's Proposal on this is again beyond arbitrary and capricious.

X. Sound Risk Management

The CFTC's proposal states that "The Commission has not identified any effect of the proposed amendments on sound risk management practices." As detailed above, event contracts, perhaps especially the ones that are included in the definition of gaming, provide very important risk

management tools. They provide hedging tools and data that is used for risk management. In addition, these are tools that are not otherwise available to many participants. The CFTC's concussion is incorrect and unsupported.

XI. Price Discovery

The CFTC states that "While the proposed amendments are not likely to have an impact on price discovery in CFTC-regulated markets, the Commission acknowledges that certain event contracts could have limited informational value in other contexts outside the scope of CFTC-regulated markets that may be lost if the proposed amendments are adopted." As detailed above, this conclusion is flatly contradicted by reality. The informational value is extensive, and broad. It is not limited at all.

XII. Efficiency, Competitiveness, and Financial Integrity of Markets

Being that Kalshi is the only exchange that offers any contracts that would be affected by this Proposed rule, the CFTC's discussion of these factors as it regards existing exchanges is limited to the impact that it will have on Kalshi. First, Kalshi notes that the CFTC did not engage with it prior to making this Proposal. It received no questions regarding the impact that this Proposal would have on it. Kalshi is therefore at a loss to understand what the CFTC based this section of the Proposal on. This fails to satisfy 15(a).