Mr. Christopher J. Kirkpatrick
September 23, 2022

The New Sports Economy Institute

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

Re: Commodity Futures Trading Commission Regulation 40.11 Review of KalshiEx Proposed Congressional Control Contracts

The New Sports Economy Institute ("NSEI," or "we"), a non-profit organization, welcomes the opportunity to respond to the Commodity Futures Trading Commission's ("CFTC," or the "Commission") request for comment on the proposed Congressional Control Contracts proposed by KalshiEx LLC ("Kalshi").

NSEI's mission is to transform society through sports by 1) promoting sports investing; 2) building a stronger economy with stronger ethics; 3) to bring financial literacy to the masses through sports initiatives. NSEI operates its principal website at www.thenewsportseconomy.org. NSEI has been an active participant in the courts and has submitted multiple amicus briefs, including one to the Supreme Court of the United States in *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. ___ (2018). NSEI is also actively participating in public policy discussions. Among other things, NSEI submitted a public comment to the CFTC regarding the ErisX NFL Futures Contracts[1] and co-authored a comment letter to the SEC on its concept release re: Harmonization of Securities Offering Exemptions.[2]

[1] Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=64806.
[2] Available at https://www.sec.gov/comments/s7-08-19/s70819-6193339-192500.pdf.

NSEI is affiliated with a for-profit company that shares the common mission of transforming society through sports: Crystal World Holdings, Inc. ("CWH"). In executing on that mission, NSEI's focus is on financial literacy education, thought leadership and public policy discussions, while CWH focuses on a related goal: making sports an asset class. To the best of CWH's knowledge, they are the first commercial entity that has developed a sports-based financial product destined for CFTC jurisdiction in the United States, patent pending in several countries: SportsRiskIndex® ("SRI"). SRI is an index developed by CWH that tracks revenue generation capabilities of sports franchises. An index for each sports franchise is produced through a variety of commercial factors such as attendance and TV ratings. SRI futures, also developed by CWH, are cash-settled futures contracts that settle based on the SRI. CWH has been granted a patent in China for the SRI.

CWH, together with the United States Futures Exchange ("USFE"), its designated contract market ("DCM") partner at the time, were in discussions with the CFTC regarding the SRI as early as 2008. While CWH was ultimately not able to bring that product to the market at the time (through its DCM), because USFE had to shut down for financial reasons in the midst of the 2008 recession, we believe the process equipped us to provide unique perspectives on this matter. Similar to NSEI, CWH is also an active participant in policy discussions; for example, a CWH subsidiary submitted a comment letter to the CFTC's concept release re: appropriate regulatory treatment of event contracts in 2008.[3] CWH also co-authored a comment letter to the SEC on its concept release re: Harmonization of Securities Offering Exemptions.[4]

NSEI commends the Commission on inviting the public to comment on the Kalshi Congressional Control Contracts and is pleased to share its views on the specific questions posed by the Commission.

1. **Do these contracts involve, relate to, or reference gaming as described in Commission regulation 40.11(a)(1) and section 5c(c)(5)(C) of the Commodity Exchange Act, or in the alternative, involve, relate to, or reference an activity that is similar to gaming as described in regulation 40.11(a)(2) or section 5c(c)(5)(C) of the Commodity Exchange Act? ?**

They absolutely do.

The biggest challenge the Commission will face in this decision is to determine what Congress actually meant by 'gaming.' Indeed, the conflation of terms gaming and gambling is the core issue here.

[3] Available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/frcomment/08-004c023.pdf.
[4] Available at https://www.sec.gov/comments/s7-08-19/s70819-6193339-192500.pdf.

As mentioned above, NSEI submitted an amicus brief to the Supreme Court of the United States in *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. ___ (2018) (the "Amicus Brief,") which is the most comprehensive treatment on the gaming vs. gambling debate to date. We refer the Commission and other readers to the Amicus Brief[5], but here is the key insight: gambling and gaming are not the same. Rather, they are two sets of activities that overlap to some extent. Assuming prize and consideration exist, games that are skill-based (e.g. chess) are clearly not gambling. At the same time, claims on future contingent events, like sports bets, clearly are gambling, but they are not games. In the overlapping area, casino games, e.g. roulette, are both gaming and gambling, because i) they are games, and ii) they do not involve enough skill, thus characterized as gambling. In short, there is gaming that is not gambling, and there is gambling that is not gaming.

With that distinction made, what could have Congress possibly intended with the 'gaming' prong of the provision? In the absence of clear definitions, legislative history should be given substantial weight, and from a legislative history perspective, there is strong support that Congress was worried about gambling, not gaming, as evidenced by the following exchange:[6]

> *Mrs. FEINSTEIN. It is very important to restore CFTC's authority to prevent trading that is contrary to the public interest. As you know, the Commodity Exchange Act required CFTC to prevent trading in futures contracts that were "contrary to the public interest" from 1974 to 2000. But the Commodity Futures Modernization Act of 2000 stripped the CFTC of this authority, at the urging of industry. Since 2000, derivatives traders have bet billions of dollars on derivatives contracts that served no commercial purpose at all and often threaten the public interest.*
>
> *I am glad the Senator is restoring this authority to the CFTC. I hope it was the Senator's intent, as the author of this provision, to define "public interest" broadly so that the CFTC may consider the extent to which a proposed derivative contract would be used predominantly by speculators or participants not having a commercial or hedging interest. Will CFTC have the power to determine that a contract is a gaming contract if the predominant use of the contract is speculative as opposed to a hedging or economic use?*
>
> *Mrs. LINCOLN. That is our intent. The Commission needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed "event contracts."* ***It would be quite easy to construct an "event contract" around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling.*** *(emphasis added).*

[5] https://www.thenewsportseconomy.org/_files/ugd/8497cc_9236dd1cdce8480793369483cf36684a.pdf.
[6] Congressional Record, Proceedings and Debates of the 111th Congress, 2nd Session, Senate, July 15, 2010, available at https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf.

One of the commenters, Jeremy Weinstein, submitted a comment letter[7] in which he took the following position:

The prohibition is not whether people can make an illegal bet on an outcome- for example who will win an election or whether the price of wheat will increase- but whether the instrument "involves, relates to, or references" activities listed by the CFTC in Rule 40.11 as against the public interest.

This view has no support whatsoever in legislative history. As mentioned above, making a bet on an outcome where such positions, in totality, do not serve the public interest was precisely what Congress was concerned about (*The Commission needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed "event contracts.").*

To support his position, Mr. Weinstein uses the example of that ErisX's ("Eris") proposed NFL futures contracts, which were ultimately withdrawn:

The Eris contracts referenced only gaming. In contrast, the Kalshi instruments do not reference terrorism, assassination, war, gaming, or an activity that is unlawful under any State of Federal law. Rather, they reference elections, which are legal under all state and federal laws, and present risks that people may wish to hedge.

That assertion does not pass muster. The Eris contracts did not reference gaming. They referenced sports outcomes the same way Kalshi contracts reference election outcomes. Elections are legal under federal and state law, but so are sports games. Said differently, when one considers what the contract references, it is best to think about what the contract settles on. What is the future contingent event, the outcome of which will determine how money will change hands between participants? Again, the triggering events are sports games and elections, both of which are clearly legal.

We agree with Mr. Weinstein that, as proposed, the Eris contracts would have been contrary to the public interest. We also agree that relative to the Eris contracts, the Kalshi contracts presumably have some hedging utility. But none of that is inconsistent with the view that Congress simply intended for the Commission to evaluate all financial contracts along a spectrum that ranges from pure entertainment to serving the public interest and filter out the ones that are purely or substantially entertainment claims because they are gambling. Any assertion to the contrary would simply be inconsistent with legislative history.

On that note, we vehemently disagree with Commissioner Pham's position that the Kalshi contracts do not involve gaming. That seems to be a truism, something believed to be true, but not something that has room for rebuttal. Not involving gaming is not a decision that can be made at the outset. That is precisely the analysis Congress empowered the Commission to perform, to separate the

[7] Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=69723.

wheat from the chaff, or contracts that serve the public interest from those that don't. Commissioner Pham may very well be right that the Kalshi contracts do not involve gaming (or really, gambling) but that should be the determination that comes after an extensive analysis, not a statement that comes before. It is not a foregone conclusion. Rather, it is the result of a process.

The Commission has an obligation to characterize contracts and place them somewhere on the public interest spectrum to determine whether or not they are gambling; that is Congress's mandate. How public interest will be measured is up to the Commission, but the economic purpose test, while repealed with the Commodity Futures Modernization Act of 2000, arguably remains the best tool to do so. Indeed, the Commission acknowledged that "[It] may be relevant to analyzing the findings and purposes discussed in … the Act."[8] Moreover, at least for the event contracts, Congress intended to restore this power to the CFTC ("[T]he legislative history … indicates Congress's intent to restore, for the purposes of that provision, the economic purpose test that was used by the Commission to determine whether a contract was contrary to the public interest … prior to its deletion by the Commodity Futures Modernization Act of 2000.")[9]

2. **Should the Commission consider whether similar offerings are available in traditional gaming venues such as casinos or sports books and/or whether taking a position on elections or congressional control is defined as gaming under state or federal law?**

The Commission should consider whether similar offerings are available, but not because it should impact the Commission's decision whether or not the election contracts should be allowed. Quite the contrary, the Commission should make a decision based on the merits first. Then, the commission should take an inventory of all venues that are offering election contracts. If, at that point, the Commission had decided that the election contracts should be allowed, then all these markets are essentially unregistered DCMs and they should either i) start the process to become a DCM; or ii) stop listing and trading of such contracts. Alternatively, if the Commission had decided that Kalshi's election contracts should not be allowed, then similar offerings should not be available *anywhere*.

Basically, an entity holding itself as a casino or sportsbook cannot be a license to list and trade contracts that are i) either explicitly rejected by the Commission; or ii) allowed by the Commission provided that the regulatory framework is followed. This, unfortunately, is exactly what happened during the pandemic. One sportsbook started taking bets on the weather,[10] listing and trading contracts that were, in essence, weather derivatives. Another sportsbook came close to listing and trading election contracts; luckily, the state of West Virginia reversed course quickly and those

[8] Concept Release on the Appropriate Regulatory Treatment of Event Contracts, Federal Register, Vol. 73 No. 89, May 7, 2008, Notices.
[9] Order Prohibiting The Listing Or Trading of Political Event Contracts, CFTC, April 2, 2012.
[10] Available at https://www.baltimoresun.com/gambling/sns-sportsbook-bovada-gamblers-bet-city-based-weather-20200317-sjnfyht2nvca5nic3sf76mqub4-story.html.

contracts never saw the light of day.[11] Regardless of the state intervention, we believe that the Commision has exclusive jurisdiction over any election contract, regardless of what venue they are offered on.

This is precisely the incentive problem the Commission should avoid by enforcing the rules equally to everyone. Nadex (f/k/a Hedgestreet) invested significant time and effort into its election contracts as well as into maintaining its license as a DCM. It was certainly the Commission's right to prohibit the listing and trading of the election contracts that Nadex proposed; that's precisely what Congress empowered the Commission for. What is not fair is that substantially the same contract pops up in an entertainment-focused venue somewhere and eschews regulation. That cannot be what Congress intended.

3. **Do these contracts involve, relate to, or reference "an activity that is unlawful under any State or Federal law" as described in Commission regulation 40.11(a)(1) and section 5c(c)(5)(C) of the Commodity Exchange Act?**

NSEI does not think so. This provision is intended to be a catch-all provision that foresees the possibility that assassination and terrorism are activities that are illegal. Such activities are numerous and it is impossible to list them all. The overarching principle for Congress in enacting this provision was to prevent providing financial incentives for any unlawful inactivity to occur. For example, to the extent that sexual harassment is illegal under certain state and federal laws, any contract along the lines of "Will such and such be sexually harrassed at some point in the next ten years," might be considered a vehicle that might incentivize that activity. Clearly, that would be contrary to public interest.

Elections themselves are clearly an allowed activity, in fact, they are the cornerstone of our democracy. Where the election contracts could run afoul is whether there is enough economic purpose (notwithstanding the fact that the economic purpose test provision being repealed) that allows them to be used for price discovery and/or hedging purposes. If the Commission determines that not to be the case, then they are primarily entertainment claims and should not be allowed.

4. **In determining whether any of these contracts falls under the prohibition pursuant to Commission regulation 40.11(a)(1) as an activity that is unlawful under any State or Federal law, to what extent should the Commission be influenced by whether all states' laws permit gaming (including sports gaming), and/or by the prohibition of interstate betting under Federal law?**

This is another area where lack of consensus around the words gaming and gambling creates inconsistent and unfair outcomes. In NSEI's opinion, the Commission has jurisdiction over *all* event contracts. Whether they settle on sports outcomes, election outcomes or weather outcomes should

[11] https://www.wsj.com/articles/west-virginia-approves-then-disapproves-betting-on-elections-11586384497

make no difference whatsoever. They all fall under the Commission's jurisdiction, why would they not? The only relevant question is whether or not they serve the public interest, arguably by relying on the economic purpose test. If they do, they should be allowed, and listed and traded on DCMs and only on DCMs. If they don't, they shouldn't be allowed on any platform.

In fact, one of the ex-Commissioners stated that a football game is a commodity.[12] While we understand that position did not necessarily reflect the Commission's views, we agree with that statement. There is no logical boundary that separates sports outcomes from elections from weather. They all fit into the definition of the excluded commodity under the Commodity Exchange Act.

The traditional view when it comes to gambling, states have jurisdiction as to whether or not to allow gambling within their borders. NSEI's opinion is that view is only partially true; and, once again, the confusion is tied to not having consensus or clarity on the definitions and differences between gaming and gambling. When it comes to gaming, more specifically casino gaming, NSEI agrees that states have jurisdiction. There is a very good reason as to why this is the case: casino gaming is limited to a physical space, the casino, so the gambling activity happens on the casino floor. Only people that are within that state's borders are involved with that gambling activity, so it is natural for the state's local police or tribal law enforcement to have jurisdiction.

Sports gambling on the other hand transcends state borders. The sports bettor will be in one state, the game will be played in another and organized by a league that is headquartered in yet another state. Equally important, there are serious integrity concerns that also transcend state borders; game-fixing in Florida can impact a sports fan in Maine. In sum, NSEI's view is that the Commission has jurisdiction over sports-based event contracts the exact same way it has jurisdiction over election-based event contracts or weather-based event contracts. The fact that the Professional and Amateur Sports Protection Act ("PASPA") was repealed by the Supreme Court of the United States in *Murphy* in 2018 is simply a non-event as far as CFTC jurisdiction is concerned. That states, post-PASPA repeal, have jurisdiction over sports gambling is an opportunistic myth that allows the gambling faction to lobby state legislatures to obtain favorable outcomes. The fact remains that sports gambling contracts are claims on future contingent events (sports outcomes) the exact same way election contracts are claims on future contingent events (elections). We believe the Commission has jurisdiction either way. Any enforcement differences across this spectrum seems to reflect political priorities rather than economic or regulatory principles.

We invite the Commission to consider this hypothetical scenario which delivers this tension perfectly. If the Commission rejects Kalshi's election contracts, what prevents Kalshi from trying to obtain a gambling license in the states where it is available and offer the election contracts as a gambling product, presumably under the purview of that state's gaming regulator? If the Commission then asserts jurisdiction and tries to shut down such contracts, the counterargument, naturally, will be that their contracts are not any different from sports betting contracts. Thus,

[12] https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521.

through a series of conflicts that may well end up in litigation, the Commission may actually lose jurisdiction of all event-related contracts. That certainly doesn't seem like the proper outcome, as it would be inconsistent with legislative intent and certainly not what the Commission would want to happen for we would end up with the finance version of the Wild West in every state.

Election contracts may have some utility. Whether that is enough for ultimate listing and trading is at the Commission's discretion. As a reference point, when Nadex approached the Commission with what was a substantially similar offering, the Commission did not find sufficient economic purpose. Regardless, it is uncontroversial that an election contract has more social utility than a sports bet. Allowing the former purely because of the (partial) existence of the latter would make the Commission's existence moot as it would mean that pretty much anything that can be traded should be allowed. At the same time, not allowing the former but allowing the latter is utterly inconsistent with Congress's purpose. That's the primary dilemma the Commission finds itself debating.

The overarching issue is perverse incentives. The probability of an event contract, or any financial contract for that matter, making it to the market should increase with the merit of the product, and not by choice of a venue. It is incongruent that an entity that spends the time and effort on regulation and has a product that has some utility can be denied access, but a product that eschews regulation altogether and consciously isolates itself to a gambling venue can reach the masses. That outcome would only incentivize participants to stay away from regulation.

5. **Are the contracts substantively different than Nadex's previously proposed contracts such that the Commission's analysis should be different? For reference, please see "CFTC Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts" (Apr. 2, 2012) available at: https://www.cftc.gov/PressRoom/PressReleases/6224-12?**

NSEI doesn't believe that the contracts are substantially different from Nadex's, or that price discovery and the hedging utility, if any, has changed materially. The only thing that seems to have changed seems to be a more lax attitude with respect to what is being allowed to trade.

6. **Do the contracts serve a hedging function? Are the economic consequences of congressional control predictable enough for a contract based on that control to serve a hedging function? Please provide tangible examples of commercial activity that can be hedged directly by the contracts or economic analysis that demonstrates the hedging utility of the contracts.**

That is ultimately for the Commission to decide but there seems to be too many variables impacting major policy decisions. Tax policy, for example, is influenced by congressional control, but is the correlation strong enough to meaningfully hedge risks related to tax policy? To be sure, whether the federal tax rate is 21% or 35% is an input that impacts many strategic decisions for a multinational,

including where to hire, which entities within the group should be the economic owners of intangible assets, where to build manufacturing plants etc., but whether a corporate treasury group would use the proposed contracts to manage these types of risks is unclear. In any event, if the goal is to hedge tax-related risks, a contract that settles on the tax rate itself seems to be a better hedging mechanism than the proposed contracts.

7. **Are there unique economic risks tied to the outcome of congressional control that cannot be hedged via derivative products on equities, debt, interest rates, tax rates, asset values, and other commodity prices?**

Potentially. The onus should be on the applicant to articulate what unique economic risks are tied to the outcomes of congressional control and also argue how the contracts can help market participants use these products to manage these unique economic risks (if any).

8. **What standard should the Commission use in reviewing the contact's hedging function? Is it sufficient that a contract could theoretically be used for hedging or, should an exchange provide evidence of demonstrated need by likely hedgers in the market? How often must a contract be used for hedging or what percentage of market participants or open interest must represent hedging use?**

Similar issues arose when the CFTC was evaluating the box office futures contracts, which were allowed by the Commission via 3-2 vote but ultimately were outlawed by Congress. On the one hand, having at least some industry participants expressing a preliminary interest seems to be a helpful indicator. On the other hand, it is true that having a contract live on the markets could generate hedging activity that may not have been previously anticipated.

Bright line tests such as percentage of participants, etc. should probably be avoided, as they could unduly punish legitimate users in periods of excessive speculation. A better approach, which would probably require development of a new policy/rulemaking where the products would periodically be reviewed on an established schedule, say, every five years, to reassess whether the product is still being used as intended. Like legislative oversight where standing committees are responsible for the continuous review of the work by government agencies, so too should the CFTC with all future contingent event contracts so as to not let the intended use of the contracts escape themselves and become something they were not intended for.

9. **Should the Commission consider contract and position sizes and the exchange's intended customer base to help assess whether a product is likely to be used for hedging in at least some cases? Are very small dollar value contracts targeted at individual retail customers likely to have hedging utility for such customers when the contracts offer positions on 2 macro level national political events? Does whether contracts are margined or fully collateralized affect this analysis?**

It is conceivable that a retail customer could have a real need for hedging, e.g. gas prices, or mortgage rates. Obviously, the fact that some contracts could have hedging utility for retail customers does not mean that would necessarily be the case for all contracts. An election does not seem to create much financial risk for any one individual. Retail consumers can still serve a valuable speculator function and provide liquidity to the hedger (to the extent there is hedging utility). At the same time, if the primary purpose of the retail customer is the provision of liquidity as a speculator as opposed to hedging, requiring the product to be fully collateralized seems to make sense in the interest of consumer protection.

10. **Should the Commission consider the contract design and payout when trying to assess the economic utility of the contract? For example, are binary contracts useful for hedging nonbinary economic events?**

Theoretically, a portfolio of binary contracts could be combined to hedge nonbinary risks. How well that would work would obviously depend on the nature of non-binary risks as well as the contract design of the binary contract. A more continuous payout mechanism might be, in certain cases, a better way to manage non-binary risks (assuming they serve the public interest and are consistent with the other requirements of the Commodity Exchange Act).

11. **Do the contracts serve a price-basing function? For example, could they form the basis of pricing a commercial transaction in a physical commodity, financial asset, or service?**

Potentially. The onus should be on the applicant to argue how the contracts are envisioned to serve a price-basing function. In fact, in this particular case, the bar is even higher because the proposed contracts, as noted by Kalshi, have already been trading on unregistered venues, giving the markets many opportunities to use the prices as a basis for other commercial activity. The offeror of a product that has never traded before could at least argue that the product did not have an opportunity where the resulting prices could be incorporated into broader commercial activity. In this case, there should already be a robust history of price-basing given the long trading history.

12. **Are the proposed contracts contrary to the public interest? Why or why not?**

As mentioned above, public interest is best understood as a spectrum.

Event contracts are claims on future contingent events. It is NSEI's position that all claims, including election contracts lie somewhere on the public interest spectrum. The spectrum itself ranges from claims that are used purely for entertainment purposes to claims that are clearly beneficial for society as a whole, like agricultural commodity futures. Election contracts are arguably

somewhere close to the middle on that spectrum.[13] Reasonable people can agree to disagree on its exact location; where election contracts exactly fall on this spectrum is akin to asking whether poker is a game of skill or game of chance. It is a fairly subjective evaluation that has a binary outcome, the product will either be allowed or it won't.

What shouldn't be subject to disagreement is that election contracts have more social utility than sports gambling contracts. Regardless of how the Commission characterizes the election contracts, as noted above in our response to #4, sports bets i) are contracts that the Commission would find, upon evaluation, are contrary to the public interest; and ii) are contracts that trade on unregulated venues. Thus, not taking any enforcement action on sports bets yet disallowing election contracts would seem inconsistent. However, that inconsistency alone cannot result in election contracts being allowed, either. As the Commission pointed out, the relevant test is public interest.

We encourage the Commission to use this as an opportunity to make a holistic evaluation of its jurisdictional boundaries, and apply the provisions of the Commodity Exchange Act in a fair and equitable manner.

13. **Could the trading of these or other political control or election-based contracts affect the integrity of elections or elections within the chamber of Congress? Could it affect the perception of the integrity of elections within the chamber of Congress?**

The fact that election decisions are based on participation of large groups of people, on its face, seems to make it unlikely that the integrity of elections can be easily compromised. However, perception is a different matter entirely, and as we have seen, it doesn't take much to advance ideas around elections being rigged. The fact that election outcomes can now be speculated on would only make the perception issue worse. In addition, there are some considerations around potentially providing perverse incentives to the public, to the extent hurting a political candidate could result in a financial windfall.

14. **Could the contracts facilitate violations of, or otherwise undermine, federal campaign finance laws or regulations? For example, could the contracts make it easier to sidestep prohibitions governing coordination between candidate campaign committees and political action committees?**

We feel that conflicts of interest may arise. The ability for campaign managers and other officials to hedge contracts or potentially even take a position against their own campaign could potentially lead to violations of campaign laws or regulations and in the minimum, undermine the integrity, or the perception of integrity of our nation's voting system. To some extent, these problems may be

[13] See, NSEI comment Re: Commodity Futures Trading Commission Rule 40.11 Review of Proposed RSBIX NFL Futures Contracts (Industry Filing 20-004), p. 13. Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=64806.

mitigated by carefully considering who is allowed to participate in the trading of these contracts.

15. **Do the contracts present any special considerations with respect to susceptibility to manipulation or surveillance requirements? For example, could candidate campaign committees or political action committees manipulate the contracts by trading on internal, non-public polling data?**

Potentially. To the extent candidate campaign committees, political action committees, or other entities have access to material, non-public data, there should be either some sort of disclosure requirements; or alternatively, an outright ban on participation. Please also refer to our response to #16, below.

16. **Should campaign committees, political action committees, candidates for the House and Senate, and other entities involved in political fundraising and expenditures or likely to hold non-public information, or subject to Federal Election Commission oversight, be prohibited from participating in the contracts? Would such a prohibition help address federal campaign law or manipulation and surveillance concerns? How would such restrictions impact the Commission's determination of whether the contracts are contrary to the public interest?**

Traditionally, there was a view that trading on material nonpublic information was (and still is) bad for traditional equity markets. However, in commodity futures markets it was a feature, not a bug. That dichotomy largely evolved because of the different purposes the markets served, asymmetric information was unfair when everybody was competing for the same returns, but the futures markets were primarily being used for risk management purposes, thus catering to the very people who had asymmetric information about the risks they were facing.

Lately, that view has started being challenged.[14] It has been argued that "[i]t is frequently possible to obtain and trade upon material, nonpublic information, in breach of a duty of trust or confidence, in commodities markets."[15] NSEI shares that view and believes that it is important to recognize how the definition of commodity has evolved over time. When commodities were largely contained to agricultural commodities, information, even if nonpublic, was mostly local, somewhat observable and largely dispersed over many parties. A farmer had visibility only on his harvest, anybody could drive by the corn fields and make some general observations, and no single person really knew how bad the weather would be. The definition of commodity has evolved and some of these very assumptions started to change. For example, an event contract that settles on who will win the Nobel Prize in economics, would seemingly be decided by only a few people. That does not mean

[14] See, e.g., Insider Trading in Commodities Markets, 102 *Virginia Law Review* 447 (2016). Reprinted in 58 Corporate Practice Commentator 1047 (2016).
[15] Id, at 449.

that the contract should not be allowed to trade, it just means that participation should be very carefully considered.

In sum, we believe that there should be a presumption of potential insider trading in any commodity contract, and DCMs, with significant input from the Commission, should carefully consider who should be allowed to trade the contracts and what disclosures should be required.

17. What other factors should the Commission consider in determining whether these contracts are "contrary to the public interest?"

NSEI believes the following factors should be considered by the Commission in determining whether any proposed contracts, including those proposed by Kalshi, are contrary to public interest:

Existence of Genuine Commercial Risk. One factor that the Commission can use is to assess whether genuine commercial risk exists. If not, the Commission need not go any further.

Evaluation of Contracts As Effective Tools of Managing the Risk. If genuine commercial risk exists, the Commission can look to whether the proposed contracts are effective ways to manage that risk. If the contract purports to help industry participants to manage a naturally occurring (as opposed to artificially created) risk, the settlement structure should be aligned to the risks that are to be managed.

Industry Representations Around Use. The Commission should give weight toward whether the targeted group intends to use the contracts proposed. That point may not be determinative on its own, but it is an important factor. For example, the Commission has rightly questioned how exactly the box office futures will be used when the movie industry was generally taking the position that they do not intend to use the contracts.

Price Discovery. Trading results in prices, which can be beneficial for the industry from a price basing or price dissemination perspective. Whether the Kalshi contracts are useful in that regard, is a question for the Commission, but with heavy input from Kalshi. As noted above, the bar should be set higher for Kalshi because of the trading history of the proposed contracts.

Totality of Circumstances. There may be other collateral considerations that the Commission may want to consider. For example, if a contract results in substantially better financial literacy for society, that would be a positive factor. Certain science-claim type contracts may be helpful in steering our youth toward STEM-fields. To the extent Kalshi contracts will motivate people to vote, that would be an important consideration. Of course, the opposite could also happen; if instead of voting, people end up worrying about closing their positions on the day of elections, that would be considered a negative factor.

Integrity and Manipulation. As it has done to date, the Commission should continue to carefully evaluate incentives the contracts will create. Event contracts, relative to other formats, are more susceptible to integrity issues. Sports-based event contracts are especially problematic. With a contract that settles on the spread or game outcome, one missed shot could change the outcome completely. Election markets, in contrast, while having legitimate integrity issues in their own right, are generally less prone to actions by a single individual.

Desired Organizing Principle for Financial Markets. Since inception, the Commission has been guided by the public interest principle, which manifested itself through the economic purpose test. As noted earlier in this comment, this has been the guiding principle for financial markets, even after the repeal of the economic purpose test. The gold standard in evaluating any financial construct is still whether or not it serves an economic purpose. The Commission should not deviate from that overarching principle now, and continue to apply the provisions of the Commodity Exchange Act diligently and consistently across all products and venues, registered or otherwise.

Again, NSEI thanks the Commission for requesting comments from the public.

The New Sports Economy Institute