



July 21, 2023

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
<https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7394>

Re: CFTC Review of KalshiEx Proposed Congressional Control Contracts
Under CFTC Regulation 40.11

Dear Mr. Kirkpatrick:

I am responding to the CFTC's Questions on the KalshiEX LLC ("Kalshi") "Will <chamber of Congress> be controlled by <party> for <term>?" Contracts for Public Comment ("CFTC 2023 Questions").¹ I respond despite signs that the CFTC has already made up its mind.

The Kalshi contracts are clearly not prohibited under the Commodity Exchange Act ("CEA") and CFTC regulations. These prohibit *an instrument* that has any involvement with, relationship to, or *reference* a defined set of listed activities. 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. These listed activities are "terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law" or "an activity that *is similar ... and* that the Commission determines, by rule or regulation, to be contrary to the public interest." "Elections" is not in this list, and elections are not "similar" to terrorism, assassination, war, gaming, or an activity that is unlawful under any state and federal law.

Part One

The CEA defines "event contracts" as "an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not

¹ CFTC, Release No. 8728-23, *CFTC Announces Review of Kalshi Congressional Control Contracts and Public Comment Period*, Jun. 23, 2023, avail. at <https://www.cftc.gov/PressRoom/PressReleases/8728-23>.

described [here]) that is (I) beyond the control of the parties to the relevant contract ...; and (II) associated with a financial, commercial, or economic consequence.”² In 2008, the CFTC explained, “event contracts may be based on eventualities and measures as varied as the world’s population in the year 2050, the results of political elections, or the outcome of particular entertainment events. ... Event contracts have been based on ... the accomplishment of certain scientific advances, ... the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages.”³

In 2010, §745 of the Dodd-Frank Act added §5c(c)(5)(C) to the CEA:

Special Rule For Review And Approval Of Event Contracts And Swaps Contracts.— (i) Event Contracts.—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)), 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— (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. (ii) Prohibition.—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. ...⁴

The law provides that the CFTC “may determine” that “such” event contracts are “contrary to the public interest” for one of six listed reasons, and if the CFTC does so, “such” event contracts are prohibited. A year later the CFTC promulgated Rule 40.11.⁵

Review of event contracts based upon certain excluded commodities. (a) Prohibition. A registered entity *shall not list for trading or accept for clearing* on or through the registered entity any of the following: (1) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act,⁶ that *involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful* under any State or Federal law; or (2) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act, which involves, relates to, or references an activity that is *similar* to an activity enumerated in § 40.11(a)(1)

² CEA §1a(19)(iv).

³ CFTC, *Concept Release ...*, 73 Fed. Reg. 25669 at 25669-70 (May 7, 2008).

⁴ §5c(c)(5)(C)(i)-(ii) (emphasis supplied).

⁵ CFTC, *Final Rule, Provisions Common to Registered Entities*, 76 Fed. Reg. 44776 (Jul. 27, 2011).

⁶ “an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is— (I) beyond the control of the parties to the relevant contract, agreement, or transaction; and (II) associated with a financial, commercial, or economic consequence.”

of this part, ***and that the Commission determines***, by rule or regulation, to be contrary to the public interest.⁷

In Rule 40.11(a)(1), as expressly permitted by §745, the CFTC made the determination that event contracts that meet five of Congress’s six reasons ***are*** contrary to the public interest and therefore ***are*** prohibited. In Rule 40.11(a)(2) the CFTC included Congress’s statutory mechanism for making a further “similar” determination for any specific contract that is “***similar***” to the first five reasons ***and*** against the public interest.

For example, on December 15, 2020, the CFTC received a self-certification by the Eris futures exchange for listing three financially settled contracts called “RSBIX NFL Futures Contracts.”⁸ The CFTC told Eris that it had determined that these futures contracts “may involve, relate to, or reference . . . gaming” under Rule 40.11, instructed Eris to suspend listing the proposed futures contracts for a 90-day review period,⁹ and posted questions for public comment.¹⁰ I and others commented.¹¹ Eris’s futures contracts involved, related to, ***and*** referenced sports gambling, as was clear in their names¹² – the “moneyline,”¹³ “point spread,”¹⁴ and “over/under”¹⁵ for individual games - terms of sports gambling and the three main types of illegal sports bets.¹⁶ The standard of Rule 40.11(a)(1) is “gaming,” not “illegal gaming.” An “activity that is unlawful under any Federal or State law” under §5c(c)(5)(C)(i)(I) is a separate and distinct prohibition than “gaming” under §5c(c)(5)(C)(i)(V).

Therefore, even if gambling on football was legal in every state, the ErisX contracts were prohibited under the statute and Rule 40.11 because they referenced “gaming” and football is a “game.” On March 22, 2021, just one day before the end of

⁷ 17 C.F.R. §40.11 (emphasis supplied).

⁸ Eris, CFTC Regulation 40.2(a) Certification (Dec. 14, 2020) (“Eris Certification”), avail. at <https://www.cftc.gov/sites/default/files/filings/ptc/20/12/ptc121520erisdcm005.pdf>.

⁹ Letter from Christopher J. Kirkpatrick, Secretary of the Commission, CFTC, to Mr. Thomas Chippas, Chief Executive Officer, Eris (Dec. 23, 2020), avail. at <https://www.cftc.gov/sites/default/files/filings/documents/2020/orgdcmerrissignedletter201223.pdf>.

¹⁰ CFTC, Release No. 8345-20, *CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC* (Dec. 23, 2020), avail. at <https://www.cftc.gov/PressRoom/PressReleases/8345-20>.

¹¹ Comments for Industry Filing 20-004, avail. at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=5203>; my comment at <https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=31489>. See discussion at Zachary Zagger, *Sportsbooks Could Use Derivatives Market, But Is It Betting?*, Law360, Feb. 17, 2021, avail. at <https://www.law360.com/articles/1355199/sportsbooks-could-use-derivatives-market-but-is-it-betting->.

¹² Eris Certification, pp. 4-6.

¹³ E.g., Sports Interaction Insights, *Moneyline Betting Explained*: “A moneyline bet is one of the easiest kinds of bets you can make at a sportsbook.”, avail. at <https://news.sportsinteraction.com/guide/moneyline-betting-explained>.

¹⁴ E.g., Bookies.com, *Point Spread Betting Explained*, avail. at <https://bookies.com/guides/what-is-point-spread-betting>.

¹⁵ E.g., Bookies.com, *Understanding Over/Under Betting For Sports Bettors* (“In NFL betting, the Over/Under is the most popular way to wager on totals, with lines set for every game on Sunday and in prime time for Monday Night Football and Thursday Night Football.”) avail. at <https://bookies.com/guides/how-to-do-over-under-betting>.

¹⁶ See Appendix A, “Sports Wagering Primer” in Strumpf, Dept. of Economics, Univ. of N.C., Chapel Hill, *Illegal Sports Bookmakers* (Feb. 2003) avail. at <http://users.wfu.edu/strumpks/papers/Bookie4b.pdf>.

the 90-day review period, Eris withdrew its self-certification.¹⁷ It soon became apparent that the CFTC would have issued an order denying the NFL Contracts.

Public statements by two CFTC Commissioners over the following weeks, as well as the Freedom of Information Act, highlighted a deficient CFTC rulemaking process,¹⁸ which with additional deficiencies continues to be applied by the CFTC to the Kalshi contracts. Then-Commissioner Quintenz, who went on to work for Kalshi,¹⁹ publicly stated, “the statute is unconstitutional, the regulation is invalid, and even without those issues, there were flaws in the Order that made it arbitrary and capricious.”²⁰ Then-Commissioner Dan Berkovitz’s made a public statement that treated the CFTC’s public interest determination in Rule 40.11 as if it had never happened,²¹ even though he was the CFTC’s General Counsel when Rule 40.11 was promulgated.²²

By §745 of the Dodd-Frank Act, as implemented in part by Rule 40.11(a), Congress made a policy determination to restrict certain event contracts. The standard of Rule 40.11 and §745 is not whether the trader of the instrument is involved in the illegal activity; it is whether *the instrument* has any involvement with, relationship to, or reference of listed activities. Therefore, the CFTC should not have approved the Eris contracts. An earlier CFTC Order prohibiting a Nadex election contract for involving gaming within the meaning of §5c(c)(5)(C)(V)²³ was incorrect. 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- since people can make illegal bets on anything, including the direction of any price of any futures contract, but whether *the instrument “involves, relates to, or references”* activities listed by the CFTC as against the public interest in Rule 40.11. These are “terrorism, assassination, war, gaming, or an activity

¹⁷ Alexander Osipovich and Dave Michaels, *NFL Futures Plan Withdrawn as Regulator Prepared to Reject It*, Wall Street Journal, Mar. 23, 2021, avail. at https://www.wsj.com/articles/nfl-futures-plan-withdrawn-by-exchange-as-regulator-prepared-to-spike-it-11616521600?st=4woyq3k67shbwg6&reflink=article_email_share&mg=prod/com-wsj.

¹⁸ Jeremy Weinstein, *Football Gambling Futures Contract: Can the CFTC Measure up to the Keystone Cops?*, 41 Futures and Derivatives Law Report (Aug. 2021), avail. at <https://bit.ly/3qJrBZ4>.

¹⁹ *Former CFTC Commissioner Brian Quintenz Joins Our Board* (Nov. 16, 2021), avail. at <https://kalshi.com/blog/former-cftc-commissioner-brian-quintenz-joins-our-board>.

²⁰ Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given Sunday in the Futures Market (Mar. 25, 2021) B.3, avail. at <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521>.

²¹ Statement of Commissioner Dan M. Berkovitz Related to Review of ErisX Certification of NFL Futures Contracts: Sports Event Contracts: No Dice Unless There is an Economic Purpose and the Exchange is Open to the Public (Apr. 7, 2021), avail. at <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement040721>.

²² CFTC, *Commissioner Dan M. Berkovitz*, avail. at <https://web.archive.org/web/20190321055134/avail.at.https://www.cftc.gov/About/Commissioners/CommissionerDanMBerkovitz/index.htm>.

²³ CFTC, *In the Matter of the Self-Certification by North American Derivatives Exchange, Inc., of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission* (Apr. 2, 2012) at p. 2, avail. at <https://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf>. See CFTC, Release No. 6224-12, *CFTC Issues Order Prohibiting North American Derivatives Exchange’s Political Event Derivatives Contracts* (Apr. 2, 2012), avail. at <https://www.cftc.gov/PressRoom/PressReleases/6224-12> (“the contracts involve gaming and are contrary to the public interest, and cannot be listed or made available for clearing or trading”).

that is unlawful under any State or Federal law” or “an activity that is *similar ... and* that the Commission determines, by rule or regulation [i.e., not on a one-off basis],²⁴ to be contrary to the public interest.” The Eris contracts referenced gaming. In contrast, the Kalshi instruments *do not reference* terrorism, assassination, war, gaming, or an activity that is unlawful under any state or federal law, or any similar activity that the Commission has determined by rule or regulation to be contrary to the public interest. Rather, they reference elections, which are legal under all state and federal laws, and present risks that people could use the contracts to hedge.

Last year in response to a Kalshi self-certification, the CFTC posted and asked its Questions on the Kalshi “Will <party> be in control of the <chamber of Congress>?” Contracts for Public Comment (“CFTC 2022 Questions”).²⁵ Many responded to the CFTC 2022 Questions, including me.²⁶ Yet, the CFTC provided no indication of what the CFTC did with all that public input. In fact, a self-appointed market “watchdog” complained to the CFTC’s inspector general when one Commissioner sought to shed some light on it.²⁷

After the CFTC’s vaporware Kalshi elections contract review, the CFTC withdrew previously granted no action relief to a venue that trades election event contracts.²⁸ The reason the CFTC stated was “The [venue] has not operated its market in compliance with the terms of Letter 14-130.” The CFTC provided no indication of evidence of the manipulation risks of which it asked in the CFTC 2022 Questions or the CFTC 2023 Questions. That withdrawal is currently in litigation.²⁹

If the CFTC does not want election event futures contracts, it can propose rules

²⁴ The texts of CEA §5c(c)(5)(C) and Rule 40.11 differ. The statute authorizes the CFTC to make a determination that types of activity could be against the public interest, whereas in the text of Rule 40.11 the CFTC made such a determination. See answer to Question 1 below.

²⁵ CFTC, Release Number 8578-22, *CFTC Announces Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11*, Aug. 26, 2022, avail. at <https://www.cftc.gov/PressRoom/PressReleases/8578-22>.

²⁶ Avail. at <https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=33678>.

²⁷ Better Markets, *Better Markets Files Complaint With CFTC IG To Investigate CFTC Commissioner Pham’s Apparent Disclosure Of Highly Confidential Agency Information Involving Kalshi’s Application*, December 9, 2022, avail. at <https://bettermarkets.org/newsroom/better-markets-files-complaint-with-cftc-ig-to-investigate-cftc-commissioner-phams-apparent-disclosure-of-highly-confidential-agency-information-involving-kalshis-application/>. Better Markets has also demanded that said Commissioner recuse herself from this process. Better Markets, *The CFTC Should Not Be Used As A Sneaky Backdoor To Unleash Gambling On U.S. Elections, Undermining Public Trust, Democracy, And The Commodity Markets*, June 26, 2023, avail. at <https://bettermarkets.org/newsroom/the-cftc-should-not-be-used-as-a-sneaky-backdoor-to-unleash-gambling-on-u-s-elections-undermining-public-trust-democracy-and-the-commodity-markets/>.

²⁸ CFTC Letter No. 22-08, Withdrawal of CFTC Letter No. 14-130 (Aug. 4, 2022), avail. at <https://www.cftc.gov/csl/22-08/download>. CFTC Staff Letter 14-130 (Oct. 29, 2014); CFTC, *CFTC Staff Provides No-Action Relief for Victoria University of Wellington, New Zealand, to Operate a Not-For-Profit Market for Event Contracts and to Offer Event Contracts to U.S. Persons*, avail. at <https://www.cftc.gov/PressRoom/PressReleases/7047-14>.

²⁹ *Clarke et al. v. CFTC*, 5th Cir., case no. 22-51124. See, e.g., Katryna Perera, *5th Circ. Judge Decries CFTC ‘Bully’ In Election Betting Suit*, Law360, February 8, 2023; *Election Betting Co. Can Continue For Now*, 5th Circ. Says, Law360, Jan. 27, 2023; Katryna Perera, *Election-Betting Firm Sues CFTC Over Order To Shut Down*, Law360, Sept. 12, 2022.

that prohibit them in a public rulemaking process in accordance with the Administrative Procedures Act. It can provide the regulations of event contracts that it teased 15 years ago.³⁰ Right now, the CFTC does not have a rule that prohibits the Kalshi contracts; certainly they are not prohibited by §5c(c)(5)(C) or Rule 40.11.

Part Two

Several of the CFTC’s numbered questions are set forth below with my responses.

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 Commission regulation 40.11(a)(2) and section 5c(c)(5)(C) of the Commodity Exchange Act?

No, they do not. These contracts are not about games or subjects of gambling, such as a football game or whether a roulette wheel will stop on red. People can make legal or illegal bets on any outcome- for example who will win an election or by how much the price of wheat or interest rates will increase. Therefore, to say these contracts involve gaming would be to say that all futures contracts involve gaming. Please see discussion in Part One above.

The CFTC 2023 Questions and CFTC 2022 Questions differ for this question. In 2022, the CFTC asked about “regulation 40.11(a)(2) or section 5c(c)(5)(C)”. The texts of §5c(c)(5)(C) and Rule 40.11 differ. The statute authorizes the CFTC to make a determination that types of similar activity could be against the public interest, whereas in Rule 40.11 the CFTC made such a determination. Nowhere does §5c(c)(5)(C)(i) say that the CFTC must make its public interest determination on a contract-by-contract basis. In fact, §5c(c)(5)(B),³¹ referring to approval as the default state unless prohibited, and the prohibition of §5c(c)(5)(C)(ii) against listing any contract “determined by the [CFTC] to be contrary to the public interest” under § 5c(c)(5)(C)(i), each refer to futures contracts in the singular, while §5c(c)(5)(C)(i), which authorizes the CFTC to make public interest determinations, refers to contracts in the plural. This change to Question 1 perhaps indicates that the CFTC believes “gaming” has the same meaning in the statute and the rule.

2. What role does the requirement that the contracts trade in multiples of 5000 and/or the position limits applicable to the contracts play in the analysis of whether the 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?

None, since the contracts do not involve, relate to, or reference “(I) activity that is

³⁰ CFTC, *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25669 (May 7, 2008); comment file at <https://www.cftc.gov/LawRegulation/PublicComments/08-004.html>.

³¹ “The Commission shall approve a new contract or other instrument unless the Commission finds that the new contract or other instrument would violate this chapter (including regulations).”

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.” Please see discussion in Part One above.

3. 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?

No. The prohibition is not whether people can make a legal or illegal bet on an outcome - for example who will win an election or on the closing price of a futures contract in wheat or interest rates next Tuesday - but whether *the instrument “involves, relates to, or references”* “(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.” Please see discussion in Part One above.

4. 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(e)(5)(C) of the Commodity Exchange Act?

No. Elections are legal under all state and federal laws, just as buying and selling wheat futures or interest rate futures on a DCM is legal under all state and federal laws.

5. In determining whether these contracts involve an activity that is unlawful under any State or Federal law, should the Commission be influenced by whether state laws permit betting on the outcome of elections or other political outcomes and/or by the prohibition of interstate betting under Federal law?

No. “Wagering” is illegal in most states, and it is not the subject of the wager that is illegal. People can break the law by illegally “wagering” on football games, which raindrop will reach the bottom of a train window first, an election outcome, or next Tuesday’s closing price of the March 2024 wheat futures contract. Rule 40.11 prohibits contracts that help people in the business of wagering, not contracts that reference something on which people might wager.

The availability of hedging instruments, including those traded in public futures markets, is an essential tool for businesses to mitigate commercial risks.³² Reducing commercial risks through hedging³³ enhances the ability of any business to succeed. That is what the ErisX futures contracts would have done for organized crime. The ErisX contracts would have given illegal bookies futures contracts to hedge their commercial

³² Thomas A. Hieronymus, *The Economics of Futures Trading* (Commodity Research Bureau, 1971); CFTC, *Final Rule, Position Limits for Derivatives*, 86 Fed. Reg. 3236 at *passim* (Jan. 14, 2021).

³³ “Hedging occurs when positions acquired are economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise. See, e.g., 17 CFR 1.3(z) (definition of bona fide hedging).” CFTC, *Concept Release ...*, 73 Fed. Reg. 25669 at 25672 n. 16.

risks by allowing the futures markets to be used for layoff betting.³⁴ Giving illegal bookies a futures contract to hedge their commercial risks likewise would enhance their ability to succeed. Sports gambling and illegal sports bookmaking are foundational tools for organized crime.³⁵ The ability to hedge commercial risk helps businesses succeed, and the ability to use these futures contracts to hedge commercial risk would have helped these illegal businesses succeed. That success would have inflicted upon the public more of all of the harms that accompany illegal gambling, including money laundering, loan sharking,³⁶ extortion, game-fixing, corruption, infiltration of legitimate businesses,³⁷ and broken families. Likewise, §5c(c)(5)(C)(i)(I) prohibits instruments that would permit any other criminals to hedge their risk through a contract that references crime, or provide an incentive for the commission of crime by, for example, an event contract on burglary statistics in a residential neighborhood. By prohibiting contracts that involve, relate to or reference one particular type of crime, “assassination,” §5c(c)(5)(C)(i)(III) seeks to avoid creating any economic incentive for an assassination.

No such use may be made of the Kalshi contracts and they are accordingly not prohibited by §5c(c)(5)(C)(i)(I).

6. Are the contracts substantively different from Nadex’s previously proposed political event 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)...

Maybe. It does not matter, since the Nadex Order prohibiting an election contract

³⁴ Morris Ploscowe, *New Approaches to Gambling, Prostitution and Organized Crime*, 38 Notre Dame L. Rev. 654, 655-56 (1963) (“Lay-off Betting. Every bookmaker from time to time gets more action on a particular horse or a particular sporting event that he can handle. The losses, in case the bettor wins, may be too great for the individual bookmaker. Like any businessman, therefore, the bookmaker tries to reinsure himself against large losses through the mechanics of lay-off betting. The risks of too great losses are spread through several layers of the bookmaking hierarchy. The top echelons of the hierarchy may take an additional step to insure themselves against too large losses. They may at the last minute bet substantial sums on the horse on which they have large bets (this is so-called comeback money). In this way, if a horse wins, they will have considerable moneys from the track with which to pay off bettors.”).

³⁵ “For the last century and a half, gambling has been the cornerstone of organized crime, providing both power and capital” Prof. Gary Potter, *Criminal Organizations: Vice, Racketeering and Politics in an American City*, p. 72 (1994). See also Kevin B. Kinnee, *Practical Gambling Investigation Techniques*, ch. 1 (Elsevier 1992).

³⁶ FBI, *Illegal Sports Betting*, avail. at <https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/illegal-sports-betting>: “Illegal sports betting has real consequences for people who place and receive wagers—and for the safety of the American public. Organized crime groups often run illegal gambling operations. These groups often use the money made from illegal gambling to fund other criminal activities, like the trafficking of humans, drugs, and weapons. These operations may also be involved in tax evasion and money laundering. One of the FBI’s priorities is to investigate organized crime groups that operate illegal sports betting operations and disrupt and dismantle their activities. Besides possibly funding organized crime activities, people who place wagers with illegal sports betting operations may be at risk of extortion and violence, which bookmakers may use to collect debts.”

³⁷ Kevin B. Kinnee, *Practical Gambling Investigation Techniques*, p. 6 (Elsevier 1992). Mr. Kinnee’s diagram illustration is dramatized in the “Bust Out” episode 23 of HBO’s *The Sopranos* (2000).

as involving gaming within the meaning of §5c(c)(5)(C)(V)³⁸ was incorrect. The prohibition is not whether people can make an illegal bet on an outcome. Please see discussion in Part One above.

7. Are the contracts substantively different from Kalshi's previously proposed, and withdrawn, congressional control contracts? For reference, please see "CFTC Announces Review and Comment Period of KalshiEX Proposed Congressional Control Contracts Under CFTC Regulation 40.11" (August 26, 2022) ...

This question is inappropriate. The CFTC can run a redline and know the differences. The only reason to seek public input on those differences is to receive public input on the meaning and implication of those differences, and the CFTC has hidden those from the public. By its CFTC 2022 Questions, the CFTC solicited, and received, public input, and yet provided no public output. In the ErisX contracts, the CFTC solicited public input, yet provided no output. The CFTC engaged in processes by which it led the public to believe, by taking the public's time for input, that it would provide guidance that future sponsors of futures contracts could learn from and rely upon. Instead, the CFTC did not provide anything to the public. The CFTC now asks the public on the meaning of how the 2023 contracts differ from the 2022 contracts, when the public can have no idea what they mean for outcomes, because the public was not told.

That the CFTC is required to solicit public input does not excuse disrespect to the public that comes from disregarding that input.

8. Do the contracts serve a hedging function? What standard should be used in reviewing the contracts' 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 in order for a contract to serve a hedging function?

Yes, the contracts could serve a hedging function. In connection with the approval of a new futures contract, as a matter of law and common sense, it must be sufficient that the contract could be used for hedging, because without the contracts being available for hedging, all hedging is theoretical and there is no way a proposer could present evidence of how often a contract is used for hedging. I provide evidence of that theoretical hedging function in my answer to Question 9.

³⁸ CFTC, *In the Matter of the Self-Certification by North American Derivatives Exchange, Inc., of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission* (Apr. 2, 2012) at p. 2, avail. at <https://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf>. See CFTC, Release No. 6224-12, *CFTC Issues Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts*, Apr. 2, 2012 ("the CFTC determined that the contracts involve gaming and are contrary to the public interest, and cannot be listed or made available for clearing or trading"), avail. at <https://www.cftc.gov/PressRoom/PressReleases/6224-12>.

9. 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?

Yes. Here are three examples:

One example is business line risk, risk is to a specific existing line of business that may be targeted by one of the political parties. Currently, proxy advisers may become subject to different economic risks based on which party controls Congress. One political party has introduced legislation to amend the Securities Exchange Act to require proxy adviser registration and compliance, opposed by the other political party.³⁹ Compliance would be expensive, and a real economic risks for proxy advisers and their stockholders for which no other hedging instruments are available.

Another example is targeted corporation risk, which is risk to a particular company that has incurred the ire of a political party. Companies in cross-hairs have the unique risks of the economic and reputational damage from boycotts, new legislation, and hearings that can be held by a party in control with the goal of harming them. This presents these companies and their stockholders with very real economic risks that these futures contracts can hedge, and for which no other hedging instruments are available.

Here are three current, real-world examples of targeted corporation risk:

A political boycott⁴⁰ of a beer company⁴¹ is being inflamed by Republican lawmakers. A Republican Senator demanded “investigation” of a beer company’s transgender-friendly marketing campaign,⁴² and that beer company should worry this could translate into hearings were the Republicans to control the Senate. This targeted corporation has so far suffered billions of dollars in revenue, and its stockholders have suffered billions of dollars in market capitalization loss.

Another is Republican retribution against a large entertainment company for speaking against legislation proposed in a state where it is the largest private employer. A Republican Congressman introduced legislation with the stated goal of bankrupting⁴³

³⁹ *House GOP Threatens Crackdown On Proxy Advisers*, Law360, Jul. 13, 2023, avail. at <https://www.law360.com/projectfinance/articles/1699304/house-gop-threatens-crackdown-on-proxy-advisers>

⁴⁰ “A political boycott uses economic coercion to force its victims to speak or act politically in a way that furthers the goals, not necessarily of the speaker, but of the boycotter.” Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 Duke L.J. 1076, 1077.

⁴¹ avail. at https://en.wikipedia.org/wiki/2023_Bud_Light_boycott.

⁴² *Cruz opens a probe into Anheuser-Busch over Dylan Mulvaney partnership*, The Hill, May 18, 2023, avail. at <https://thehill.com/homenews/senate/4011114-cruz-opens-a-probe-into-anheuser-busch-over-dylan-mulvaney-partnership/>.

⁴³ Troy E. Nehls, *Rep. Troy E. Nehls Reintroduces Airlines Independent of Restrictions (AIR) Act*, May 05, 2023, “No corporation should get preferential treatment from the government—especially when it is grooming children. **Go woke, go broke.**” (emphasis supplied) avail. at

this company as punishment. If Republicans control both houses of Congress, this particular economic risk could become a reality for this targeted corporation were there also a Republican President.

Another is a threat a Republican Senator made to 51 large US law firms to hold hearings to investigate the legal advice the law firms provide clients on employment practices,⁴⁴ perhaps to see if that legal advice aligned with the Senator's views. Such hearings would present direct costs to the law firms and indirect costs by interfering with client relations. Such hearings could be held if the Republicans control the Senate, and there are no other instruments available to hedge this risk.

Another example is much broader, long-term risks for which the Kalshi contracts are not optimal hedging instruments right now, but could become such once a political party articulates specific legislation to advance its policies. For example, there are economic risks presented to American Jewry and Jewish-owned businesses by antisemitism. Today, 1 in 4 hiring managers say they are less likely to move forward with Jewish applicants.⁴⁵ Antisemitism presents economic risks to Jewish people and their businesses. Those risks become more directly hedgeable by these contracts if one party proposes legislation implementing antisemitic policies that the other party opposes.

Republican lawmakers have long engaged in dog whistle antisemitism, for example attacking Jewish financier George Soros,⁴⁶ and increasingly include overt

<https://web.archive.org/web/20230510040957/avail>. at <https://nehls.house.gov/posts/rep-troy-e-nehls-reintroduces-airlines-independent-of-restrictions-air-act>; MSNBC, *GOP lawmakers are now attacking Disney at the federal level*, May 11, 2023, avail. at <https://www.msnbc.com/the-reidout/reidout-blog/disney-desantis-boebert-no-fly-zone-rcna84030>.

⁴⁴ Tom Cotton, *Cotton Warns Top Law Firms About Race-Based Hiring Practices*, Jul. 17, 2023, "To the extent that your firm continues to advise clients regarding DEI programs or operate one of your own, both you and those clients should take care to preserve relevant documents in anticipation of investigations and litigation.", avail. at <https://www.cotton.senate.gov/news/press-releases/cotton-warns-top-law-firms-about-race-based-hiring-practices>

⁴⁵ "Key findings include: 26% of hiring managers say they are less likely to move forward with Jewish applicants; top reason for negative bias is belief Jews have too much power and control; 26% make assumptions about whether a candidate is Jewish based on their appearance; 23% say they want fewer Jews in their industry; 17% say leadership has told them to not hire Jews; 33% say antisemitism is common in their workplace; 29% say antisemitism is acceptable in their company." Reasons hiring managers stated they would be less likely to move forward with Jewish applicants included: Jews have too much power and control (38%); Jews claim to be the 'chosen people' (38%); Jews have too much wealth (35%); Jews are greedy (22%); Jews killed Jesus (18%); Jews are an inferior race (18%); Jews are oppressors (18%) and Jews are less capable (17%). Updated: Jan. 19, 2023, avail. at <https://www.resumebuilder.com/1-in-4-hiring-managers-say-they-are-less-likely-to-move-forward-with-jewish-applicants/>.

⁴⁶ A core tenet of modern antisemitism is that Jews control the world through shadowy conspiracies. See Holocaust Museum, *Protocols of the Elders of Zion*, avail. at <https://encyclopedia.ushmm.org/content/en/article/protocols-of-the-elders-of-zion>. A core tenet of both traditional and modern antisemitism is that Jews care most about money. American Jewish Committee, *5 of Kanye West's Antisemitic Remarks, Explained*, Dec. 2, 2022, avail. at <https://www.ajc.org/news/5-of-kanye-wests-antisemitic-remarks-explained>. See Umberto Eco, *The Prague Cemetery* (2010) for an explanation of antisemitism's transition from traditional to modern.

antisemitism in the Republican brand.⁴⁷ The Republican House of Representatives candidate in the 2018 general election in my district was an open Holocaust denier.⁴⁸ Republican President Trump’s Executive Order 13967 parroted Nazi attacks against Jewish “degenerate art,” even attacking US works of a refugee from the Nazis.⁴⁹ A Republican Congresswoman accused a wealthy Jewish family of starting California wildfires using light beams from outer space,⁵⁰ and the Republican leadership effectively

⁴⁷ E.g., Haaretz, *Antisemitism Is Now a Key Part of the Republican Agenda for America: Once fringe and denounced, extremism and antisemitism are now not only at home in the Republican Party, but built into the GOP’s political strategy for the midterms and beyond. As antisemitism in America rises, this is a startling normalization of hate*, Nov. 8, 2022, avail. at <https://www.haaretz.com/us-news/2022-11-08/ty-article-opinion/.premium/antisemitism-now-a-key-part-of-the-republican-agenda-for-america/00000184-56ed-dc83-a7fd-feff297c0000>; Los Angeles Times, *Denouncing antisemitism shouldn’t be hard; for some Republicans, it seems to be*, Dec. 2, 2022, avail. at <https://www.latimes.com/politics/newsletter/2022-12-02/antisemitism-trump-and-the-gop-essential-politics>; *Arizona Republicans to host white nationalist antisemite Nick Fuentes at conference*, AZCentral, Jul. 11, 2023, avail. at <https://www.azcentral.com/story/opinion/op-ed/ej-montini/2023/07/11/arizona-republican-event-features-white-nationalist-nick-fuentes/70400626007/>; Media Matters, *100-plus examples of Republican politicians embracing antisemitic media since 2021*, Dec. 12, 2022, avail. at <https://www.mediamatters.org/diversity-discrimination/100-plus-examples-republican-politicians-embracing-antisemitic-media-2021>; *Dr. Oz Stood in Front of One of Hitler’s Cars at a Fundraiser*, Oct. 7, 2022, avail. at <https://jezebel.com/dr-oz-stood-in-front-of-one-of-hitlers-cars-at-a-fundr-1849630627>.

⁴⁸ “A Republican candidate for Congress in California is openly running as a Holocaust denier, calling it a ‘complete fabrication’ in an interview with The New York Times published Friday.” The Hill, *California GOP congressional candidate runs as open Holocaust denier*, Jul. 6, 2018, avail. at <https://thehill.com/homenews/campaign/395913-california-gop-congressional-candidate-runs-as-open-holocaust-denier/>.

⁴⁹ *Promoting Beautiful Federal Civic Architecture*, 85 Fed. Reg. 83739 (Dec. 23, 2020). “In the District of Columbia, classical architecture shall be the preferred and default architecture for Federal public buildings,” §2(a), and the President shall be notified and given a detailed explanation if the GSA “proposes to approve a design for a new applicable Federal public building that diverges from the preferred architecture set forth in [§]2(a) ..., including Brutalist ... architecture or any design derived from or related to these types of architecture,” and told “whether such design is as beautiful and reflective of ... vigor”. §6(b). “‘Brutalist’ means the style of architecture that grew out of the early 20th-century modernist movement ...” §3(b). EO 13967 attacked by name two buildings designed by a Jewish-born refugee from the Nazis, Bauhaus architect Marcel Breuer (HHS HQ, avail. at <https://www.hhs.gov/about/hhs-headquarters/index.html>) and Robert C. Weaver Federal Building (avail. at <https://www.gsa.gov/historic-buildings/robert-c-weaver-federal-building-washington-dc>), 85 Fed. Reg. at 83740, para. 1. “Among Hitler’s grand plans upon coming to power ... was to purify German culture, to promote the Apollonian ‘classical’ and eradicate the uncontrollably Dionysian ‘primitive,’ a category that included ... avant-garde modernism, Bolshevism, and Jewish culture. ... Harassment of Bauhaus artists began even earlier.” NY Times, *First, They Came for the Art*, Mar. 13, 2014, avail. at <https://www.nytimes.com/2014/03/14/arts/design/degenerate-art-at-neue-galerie-recalls-nazi-censorship.html>; see also Bloomberg CityLab, *How the Bauhaus Kept the Nazis at Bay, Until It Couldn’t*, Mar. 11, 2019, avail. at <https://www.bloomberg.com/news/articles/2019-03-11/100-years-later-how-the-bauhaus-resisted-nazi-germany?sref=9qd489pp>; BBC News, *Bauhaus in pictures: The architects exiled by Nazis*, 16 Jan. 2019, avail. at <https://www.bbc.com/news/in-pictures-46863364>. President Biden rescinded EO 13967. *Executive Order on the Revocation of Certain Presidential Actions*, avail. at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-the-revocation-of-certain-presidential-actions/>.

⁵⁰ Zack Beauchamp, *Marjorie Taylor Greene’s space laser and the age-old problem of blaming the Jews: Why conspiracy theorists always end up pointing the finger at Jews — and why that’s a problem for the GOP*, Jan 30, 2021, Vox, avail. at <https://www.vox.com/22256258/marjorie-taylor-greene-jewish-space->

backed her.⁵¹ Republican Speaker of the House Kevin McCarthy accused three Jewish people, including Soros, of trying to “buy” elections.⁵² The current front runner for the 2024 nomination for Republican presidential candidate publicly dined with open and notorious antisemites, and this was accepted by many Republicans in Congress.⁵³ The Republican conference of the House Judiciary committee supported a virulent antisemite on its Twitter feed, despite real consequences to American Jews.⁵⁴ Supporters of the

laser-anti-semitism-conspiracy-theories. “Blood libel” is the medieval false accusation that Jews kidnap and murder Christian children to use their blood to make Passover Matzah, avail. at https://en.wikipedia.org/wiki/Blood_libel; Sara Lipton, *Seven Centuries of Slander*, New York Review of Books, Sept. 23, 2022, avail. at <https://www.nybooks.com/articles/2021/09/23/blood-libel-seven-centuries-slander/>. “QAnon, conspiracy theory ... adherents believed [in] a cabal of satanic cannibalistic pedophiles within Hollywood, the Democratic Party, and the so-called ‘deep state’” Encyclopedia Britannica, *QAnon conspiracy theory*, avail. at <https://www.britannica.com/topic/QAnon>. QAnon is based in and expands upon blood libel and other antisemitic conspiracy theories. Wikipedia, *QAnon*, avail. at <https://en.wikipedia.org/wiki/QAnon#Antisemitism>. QAnon conspiracy theory is accepted, if not endorsed, by some Republican politicians. Axios, *11 GOP congressional nominees support QAnon conspiracy*, Jul. 12, 2020, avail. at <https://www.axios.com/2020/07/12/qanon-nominees-congress-gop>; *Wisconsin GOP invites QAnon, Jan. 6 conspiracy theorist to speak at state convention*, Wisconsin Examiner, May 5, 2023, avail. at <https://wisconsinexaminer.com/brief/wisconsin-gop-invites-qanon-jan-6-conspiracy-theorist-to-speak-at-state-convention/>; Wikipedia, *QAnon*, avail. at https://en.wikipedia.org/wiki/QAnon#Republican_politicians_and_organizations. The QAnon phenomena seems ripe for transition from “it’s the Democrats” to “it’s the Jews.”

⁵¹ New York Times, *Top House Republican Condemns Marjorie Taylor Greene’s Comments, but Stands by Her*, Feb. 3, 2021, avail. at <https://www.nytimes.com/2021/02/03/us/politics/kevin-mccarthy-marjorie-taylor-greene.html>.

⁵² Kevin McCarthy said on Twitter: “we cannot allow Soros, Steyer, and Bloomberg to BUY this election! Get out and vote Republican November 6th. #MAGA.” avail. at <https://twitter.com/JuddLegum/status/1055170806949523458>.

⁵³ Roll Call, *House GOP overlooks internal antisemitism, points at Democrats*, Dec. 1, 2022, avail. at <https://rollcall.com/2022/12/01/house-gop-overlooks-internal-antisemitism-points-at-democrats/>. Kevin McCarthy “went on to defend Trump, claiming the former president was ignorant of Fuentes’ well-known racist and antisemitic views when he had him over for dinner. ... Like other Republicans, McCarthy has stopped short of directly saying Trump has supported antisemitism with his actions.” Trump was not unaware of Kanye’s antisemitism, as Politico reported two months previously. Politico, *Trump and Kanye West speak amid rapper’s antisemitic rants, acquisition of Parler: A dinner between the two is in the future*, Oct. 17, 2022, avail. at <https://www.politico.com/news/2022/10/17/trump-and-kanye-speak-amid-rappers-anti-semitic-rants-aquisition-of-parlor-00062158>. PBS Newshour, *We asked 57 Republican lawmakers if they condemn Trump’s dinner with Fuentes and Ye. Here’s what they said*, Nov 29, 2022, avail. at <https://www.pbs.org/newshour/politics/we-asked-57-republican-lawmakers-if-they-condemn-trumps-dinner-with-fuentes-and-ye-heres-what-they-said>; Vanity Fair, *Surprise: A Number of Republicans Don’t Want to Condemn Donald Trump’s Dinner With a Couple of Antisemites: They too know where their bread is buttered*, Vanity Fair, Nov. 28, 2022, avail. at <https://www.vanityfair.com/news/2022/11/surprise-a-number-of-republicans-dont-want-to-condemn-donald-trumps-dinner-with-a-couple-of-antisemites>. But see Axios, *McConnell: Anyone meeting with antisemites “highly unlikely” to be president*, Updated Nov 29, 2022, avail. at <https://www.axios.com/2022/11/29/mitch-mcconnell-antisemites-2024-election>; NBC News, *RNC passes resolution condemning anti-Semitism following Trump dinner with Ye*, Jan. 27, 2023, avail. at <https://www.nbcnews.com/meet-the-press/meetthepressblog/rnc-passes-resolution-condemning-anti-semitism-trump-dinner-ye-rcna67922>.

⁵⁴ On Oct. 6, 2022, the House Judiciary Committee Republican caucus tweeted support of Kanye West, on the day Fox News aired West’s antisemitic remarks. The Republican caucus kept the tweet in place despite knowing Kanye was inspiring antisemitic intimidation in Jewish areas of the US, NBC News, *Rise in antisemitism is feared after banner saying ‘Kanye is right’ is hung over Los Angeles freeway*, Oct 24, 2022,

current second-place runner for the Republican 2024 Presidential candidate picketed Disney World with Nazi flags.⁵⁵ One can expect this to get worse, because since 2015 it has only gotten worse. Although Republicans do not have a monopoly on antisemitism,⁵⁶ too many embrace it. If Republican party antisemitism advances to legislative proposals that present American Jewry and their businesses economic risks of lost job opportunities and the need to move out of the US and sell assets at distressed prices, these contracts could hedge those risks. There are no other derivative products or commodity prices that can hedge these risks.

10. 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.

Yes, there are economic consequences of congressional control predictable enough for a contract based on such outcomes to serve a hedging function. See examples in my answer to Question 9. As an additional example, Republican-controlled House or Senate could make good on Republican threats to cause the US to default on its debt,⁵⁷

avail. at <https://www.nbcnews.com/news/us-news/banner-kanye-right-los-angeles-freeway-antisemitic-group-rcna53653>, and elsewhere in the US. ABC News, *Antisemitic message referencing Kanye West displayed outside Florida v. Georgia football game*, Oct. 31, 2022, avail. at <https://abcnews.go.com/US/antisemitic-message-referencing-kanye-west-displayed-florida-georgia/story?id=92387005>. After displaying the tweet for two months, the Republican caucus finally took it down when West pronounced his “love” of Nazis and Hitler, Variety, *Kanye West Praises Hitler in Horrific Antisemitic Tirade*, Dec. 1, 2022, avail. at <https://variety.com/2022/music/news/kanye-west-praises-hitler-antisemitic-tirade-1235447083/>, antagonizing non-Jewish constituents, such as WWII veterans and their survivors. NBC News, *House Judiciary Republicans delete ‘Kanye. Elon. Trump.’ tweet as rapper praises Hitler: Republicans on the House Judiciary Committee had tweeted in apparent support of Ye on Oct. 6. The tweet was removed Thursday, Dec. 1, 2022*, avail. at <https://www.nbcnews.com/politics/congress/house-judiciary-republicans-delete-kanye-elon-trump-tweet-rapper-prais-rcna59654>; Le Monde, *Kanye West praises Hitler and embarrasses the Republican Party*, Dec. 3, 2022, avail. at https://www.lemonde.fr/en/international/article/2022/12/03/kanye-west-praises-hitler-and-embarrasses-the-republican-party_6006495_4.html. The Republican message to American Jews is stark and unambiguous.

⁵⁵ *Nazis Wave Swastikas & DeSantis 2024 Flags, Yell ‘White Power’ Outside Walt Disney World Entrance*, June 10, 2023, Walt Disney World News Today, avail. at <https://wdwnt.com/2023/06/nazis-rally-at-entrance-to-walt-disney-world/>; *Protesters carrying Nazi flags and DeSantis imagery gathered outside Disney World in Orlando, Florida*, Business Insider, Jun. 11, 2023, avail. at <https://www.businessinsider.com/protesters-nazi-flags-desantis-posters-outside-disney-world-2023-6>

⁵⁶ E.g., CNN, *Jewish groups denounce [Democrat] RFK Jr. ’s false remarks that Covid-19 was ‘ethnically targeted’ to spare Jews and Chinese people*, Jul. 15, 2023 (““Covid-19 is targeted to attack Caucasians and Black people. The people who are most immune are Ashkenazi Jews and Chinese,” Kennedy said, adding that “we don’t know whether it’s deliberately targeted that or not.””), avail. at <https://www.cnn.com/2023/07/15/politics/rfk-jr-covid-jewish-groups/index.html>; *White House calls anti-Semitic Covid conspiracy theory voiced by RFK Jr. ‘vile’*, Politico, Jul. 17, 2023, avail. at <https://www.politico.com/news/2023/07/17/white-house-rfk-conspiracy-comment-00106681>.

⁵⁷ Washington Post, *Republicans warn Biden: The next debt limit increase won’t be so easy*, Dec. 13, 2021, avail. at https://www.washingtonpost.com/politics/republicans-debt-ceiling-biden/2021/12/13/b40b6c2a-59d5-11ec-9a18-a506cf3aa31d_story.html.

which would present substantially adverse economic consequences,⁵⁸ although for this risk there are hedging instruments currently available.

11. Should the Commission consider contract and position sizes, size of trade requirements, and/or an exchange's intended customer base to help assess whether a contract is likely to be used for hedging in at least some cases? Does the requirement that all contracts listed on Kalshi must be fully-collateralized affect this analysis? Does the requirement that these contracts trade in multiples of 5000 and/or the position limits applicable to the contracts affect the analysis of the hedging utility of the contracts?

The examples of corporate hedging utility in my answer to Question 9 involve risks that are substantially in excess of the 5,000 contract limit.

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

The question assumes facts not in evidence. As I noted in my answer to Question 9, for Anheuser-Busch and the Walt Disney Company, the economic risks that are hedgeable by the Kalshi contracts are in fact binary.

14. Are the contracts contrary to the public interest? Why or why not?

The inquiry is not if they are contrary to the public interest, but if they involve relate to, or reference "(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." If they do not reference (I), (II), (III), (IV) or (V), which they do not, there is no public interest inquiry. Please see discussion in Part One above.

15. Could the trading of these or other political control or election-based contracts affect the integrity of elections or elections within a chamber of Congress? Could they affect the perception of the integrity of elections or elections within a chamber of Congress?

No to both. There is no way to "fix" an election the way one can "fix" a baseball game by bribing a few players. It is hard to imagine a political candidate accepting a payoff to lose an election, and even harder to imagine proving it. It is extraordinarily unlikely that a person would seek election of a national slate of candidates with policies contrary to that person's economic or political interests, simply to win a fully collateralized futures contract binary outcome. It would be far more economically efficient to leverage a position in a contract with relatively low initial margin, such as

⁵⁸ CBS News, *U.S. debt default could wipe out 6 million jobs and \$15 trillion in wealth, Moody's says*, Sept. 22, 2021, avail. at <https://www.cbsnews.com/news/debt-ceiling-default-6-million-jobs-15-trillion-wealth/>.

crude oil, that will be impacted by the policies of the winning party.

16. *Could the contracts be used to influence perception of a political party or its candidates' likelihood of success? To this end, could the contracts be used to manipulate fundraising or voting?*

One can imagine people buying futures contracts to bid up the perceived chances of a political party, but it is far cheaper and effective to do what is done now, which is to pay companies that present themselves to the public as polling companies to write bogus polls, with a view to manipulating perceptions of which candidate is winning. This was done to create the false narrative of the “red wave” of 2022 that did not come to pass.⁵⁹ Seeking power through elections and false polls is a far more rational and prevalent reason for false polling than would be moving futures contracts.

Perhaps partisans could bid up a futures contract to create a false poll of strength. The effects would be attenuated at the individual candidate level. In either event, this is solved through market depth and public understanding of the predictive power of the contract as reflecting only the views of those participating in that market. The Kalshi contract might skew to overweight the views of those participating in that market, who can afford to collateralize 5,000 contracts. Eventually academic papers will be available instructing how to model to adjust for that skew.

17. *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?*

These contracts do not provide any opportunities to sidestep campaign finance and anti-bribery laws that are not already available from all other futures contracts.⁶⁰

Donors receive far more value for their money – ***and do so legally*** – by donating to candidates to obtain access and special favors than they could ever achieve through some fantastic illegal election futures market manipulation. Hedge fund managers got far more bang for their ***legal*** million dollars from Senator Sinema, who single-handedly prevented the closing of the carried interest tax loophole,⁶¹ than they ever could have hoped to make on futures contracts by spending hundreds of millions illegally seeking to influence hundreds of elections nationwide, especially if those races were to be won by

⁵⁹ New York Times, *The ‘Red Wave’ Washout: How Skewed Polls Fed a False Election Narrative*, Dec. 31, 2022, avail. at <https://www.nytimes.com/2022/12/31/us/politics/polling-election-2022-red-wave.html>.

⁶⁰ See, e.g., Wikipedia, *Hillary Clinton cattle futures controversy*, avail. at https://en.wikipedia.org/wiki/Hillary_Clinton_cattle_futures_controversy; Taylor & Ingersoll, *Hillary Clinton’s Commodities Broker Was Disciplined for a Variety of Violations*, Wall Street Journal; Gottschalk, *If Hillary Clinton Could Make Money in Commodities, Why Can’t You? Well, Let’s Count the Reasons*, Wall Street Journal (Mar. 28, 1994).

⁶¹ Fortune, *Kyrsten Sinema’s donations from investors surged to nearly \$1 million in the year before she killed a huge new tax on private equity and hedge funds*, Aug. 13, 2022, avail. at <https://fortune.com/2022/08/13/sinema-wall-street-money-killing-tax-investors/>.

candidates against the carried interest loophole. On a national level, political parties raise money and seek to win elections; they would not gamble the money on futures contracts, they would buy services and advertisements.

If in the future DCMs propose contracts on individual races, which are not the Kalshi contracts, the CFTC can evaluate those contracts at that time.

18. Do the contracts present any special considerations with respect to susceptibility to manipulation or surveillance requirements?⁶²

No. There are major companies that control large portions of wheat, oil, gas, or other commodity supply or demand. It is appropriate to watch for commodity market manipulation by companies improperly furthering their economic interest. In contrast, no one can “manipulate” which party controls a chamber of Congress. Considering evidence-free conspiracy theories to the contrary is not appropriate. Federal rulemaking must be reasoned.⁶³ There is no “inside information,” and any positing that there is traffics in fantasy conspiracy theory. Polling data would implicate 870 or more candidate for the House, and 66 or 67 for the Senate, and could hardly be “internal.” Please see answers to Questions 15-17 above as well.

Since these contracts are financial instruments in the US’s financial system, those inclined to traffic in antisemitism could use them as evidence in their false narrative of Jewish financier control of the country and over elections.⁶⁴ But the result will not involve the contracts being used to manipulate fundraising or voting, the result will be more antisemitism.

19. What is the price forming information for these contracts while the contracts are trading? If the price forming information includes polling and other election prediction information, is that information regulated? How does the price forming information compare to informational sources (e.g. government issued crop forecasts, weather forecasts, federal government economic data, market derived supply and demand metrics for commodities, market-based interest rate curves, etc.) that are generally used for pricing commodity derivative products within the Commission’s jurisdiction?

Reports such as crop reports, Energy Information Administration reports, and Commitment of Traders reports from the federal government represent the publication of information that people are required by regulation to report to the government. This information could be price forming for futures contracts. The government does not sponsor political polls the way it sponsors reporting the information that people are required to

⁶² The CFTC 2022 Questions also included at the end of this questions: “For example, could candidate campaign committees or political action committees manipulate the contracts by trading on internal, non-public polling data?”

⁶³ A Guide to the Rulemaking Process Prepared by the Office of the Federal Register, avail. at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

⁶⁴ See answer to Question 9 above.

report to it. Rather, the information concerning the leading candidate is reported when the government holds an election, people vote, and the government reports to the public the results of the election.

Unlike in the movie *Trading Places* (1983), where an orange crop report was stolen as part of a scheme to manipulate the NYMEX Frozen Concentrated Orange Juice futures contract, there is no equivalent government report for political polls, nor should there be. That is not the role of the government. Were the government to poll and to seek to regulate political polling, the inevitable result would be the party in power using this to stay in power. Policing polling is certainly not the role of the CFTC. Any such purported policing would feed a false narrative that Congressional elections may be manipulated, not address any concerns, and should have no impacts on the CFTC's determination on whether the contracts have hedging utility or involve, relate to, or reference, one of the six prohibited activities.

It is highly inappropriate for the CFTC to even hint that the government should regulate political polls; taken together with Questions 20 and 22, it seems to indicate that the CFTC is hinting that it is considering regulating polling, or harbors some belief that approving these contracts somehow would justify the CFTC in regulating polling, or that its inability to regulate polling should be a reason to not approve these contracts. The CFTC should clarify what it means by Question 19.

20. *Should, and if so how would, the registered entity listing the contracts take steps to address possible manipulative and/or false reporting activity involving the price forming information for the contracts, while the contracts are trading?*

No. It is not possible to manipulate elections the way bad actors can manipulate commodity prices. The CFTC should not regulate political polls, or require private companies to monitor and report on them, on the grounds that such polls, if false, could be used to manipulate futures prices. As was the case for the bogus polls used to generate the false narrative of the 2022 “red wave” that did not come to pass, the goal of a false poll is to win an election, not to manipulate a futures price. Perhaps someone inclined to create a false narrative of a coming win might invest in both bogus polls and trying to bid up a futures contract; this risk does not justify the CFTC seeking to directly or indirectly regulate polling, because for the latter the problem is solved by market depth. The inability of the CFTC to regulate polling should not be a reason to deny the futures contract.

The CFTC approved film box office receipt futures contracts,⁶⁵ finding them “not

⁶⁵ CFTC, Release Number 5834-10, *CFTC Approves Box Office Receipt Contracts Submitted by Media Derivatives*, <https://www.cftc.gov/PressRoom/PressReleases/5834-10>, See dissenting statement of Commissioner Sommers, <https://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/mdexdissentingsommers061410.pdf>, noting that the CFTC even at that time (2010) needed to proceed with the events contracts rulemaking that it had floated in 2008. This remains the case. See Anderson, *Back to the Future[s]: A Critical Look at the Film Futures Ban*, 29 *Cardozo Arts & Ent. L.J.* 179 (2011), avail. at <https://www.cardozoaelj.com/wp-content/uploads/Journal%20Issues/Volume%2029/Issue%201/Anderson.pdf>.

readily susceptible to manipulation,”⁶⁶ even though not only studios, but third parties, can advertise movies (an analogue to buying and promoting false polls) to affect box office receipts or deploy “insider status” to predict them. The CFTC even said that “false ... rumors or misreporting does not constitute a legal basis to conclude that a proposed futures or options contract would violate” the CEA.⁶⁷ Film box office receipt futures had at best a tiny fraction of the potential hedging utility of the Kalshi contracts.

See also answers to Questions 19-23.

22. *Should the Commission be responsible for surveilling, and enforcing against, possible manipulative and/or false reporting activity involving the price forming information for the contracts, while the contracts are trading?*

No. The Federal Election Commission enforces against campaign finance violations. There are gasoline futures contracts, and it is the Federal Trade Commission that is responsible for surveilling and enforcing against gas market manipulation.⁶⁸ There are electricity and natural gas futures contracts, and it is the Federal Energy Regulatory Commission that is responsible for surveilling and enforcing against energy market manipulation.⁶⁹ The CFTC does not have to be responsible for surveilling and enforcing against manipulation or illegal conduct in the underlying for it to take action should the regulator with jurisdiction do so and provide the information to the CFTC.⁷⁰ There are futures on assets and prices that are subject to manipulation beyond the CFTC’s jurisdiction to regulate and investigate, and on which the CFTC can piggyback for its enforcement should manipulation be discovered by the law enforcement agency with jurisdiction. For example, the CFTC relied on the investigations of the UK Financial Conduct Authority when assessing fines against Lloyds Bank for LIBOR manipulation.⁷¹ See also answers to Questions 19-23.

23. *Could trading in the markets for the contracts obligate the*

⁶⁶ CFTC, *Statement of the Commission*, Jun. 14, 2010, pp. 6-9, avail. at <https://www.cftc.gov/idc/groups/public/@otherif/documents/ifdocs/mdexcommissionstatement061410.pdf>.

⁶⁷ CFTC, *Statement of the Commission*, Jun. 14, 2010, p. 8. Ironically, the CFTC included this Statement as Exhibit 3 in CFTC, Brief for Amicus Curiae ... in Support of Rehearing, *Laydon v. Cooperative Rabobank, et al.*, 2d Cir. Case 20-3626, doc. 383, Nov. 29, 2022; see Law360, *CFTC Urges 2nd Circ. Redo Of Yen Libor-Rigging Suit*, Nov. 30, 2022, avail. at <https://www.law360.com/articles/1553368/cftc-urges-2nd-circ-redo-of-yen-libor-rigging-suit->.

⁶⁸ 16 C.F.R. §317 Prohibition of Energy Market Manipulation Rule; FTC, Guide to Complying with Petroleum Market Manipulation Regulations, avail. at <https://www.ftc.gov/sites/default/files/documents/rules/prohibition-energy-market-manipulation-rule/091113mmrguide.pdf>.

⁶⁹ FERC Order 670, 18 C.F.R. §1c.2 Energy market manipulation; FERC Enforcement Resources, avail. at <https://ferc.gov/enforcement-resources>.

⁷⁰ E.g., Dodd-Frank Act §720.

⁷¹ Law360, *Lloyds To Pay \$370M In US, UK Libor-Rigging Deal*, Jul. 28, 2014, avail. at <https://www.law360.com/articles/561429/lloyds-to-pay-370m-in-us-uk-libor-rigging-deal>; CFTC, Release Number 6966-14, July 28, 2014, *CFTC Charges Lloyds Banking Group and Lloyds Bank with Manipulation, Attempted Manipulation, and False Reporting of LIBOR*, avail. at <https://www.cftc.gov/PressRoom/PressReleases/6966-14>.

Commission to investigate or otherwise become involved in the electoral process or political fundraising? If so, is this an appropriate role for the Commission?

No. See answers to Questions 19-22. The CFTC has not been granted authority by Congress to investigate elections or political fundraising. The CFTC does not expand its investigatory jurisdiction into an area by simply approving a contract in an underlying. The ICE futures contracts on Rotterdam coal, Brent crude oil, California Carbon allowances, London Cocoa, UK government bonds, US government bonds, UK equities, Austrian financial energy, and freight between Mediterranean ports, do not obligate the CFTC to investigate those markets that are under the primary jurisdiction of foreign governments, other federal agencies, or U.S. states, and the CFTC probably lacks the jurisdiction to do so.⁷² The CFTC cannot expand its investigatory jurisdiction whenever it likes simply by approving futures contracts that involve underlyings that it would like to investigate.

24. What other factors should the Commission consider in determining whether these contracts are “contrary to the public interest?”

The only relevant factors that the CFTC should consider are set forth in the statute. Therefore the only relevant factors for CFTC inquiry are whether elections for control of Congress are one of, or an activity that is similar to, one of “(I) activity that is unlawful under any Federal or State law; (II) terrorism; (III) assassination; (IV) war; [or] (V) gaming” They are not. Title 17 gives the CFTC no “contrary to the public interest” denial authority outside of Rule 40.11.

Conclusion

I and many other members of the public have provided very detailed responses to three CFTC requests on event contracts. I hope the CFTC has not prejudged this matter, and I hope that the CFTC will provide useful information to the public in return.

Yours truly,



Jeremy D. Weinstein

⁷² E.g., *Laydon v. Coöperatieve Rabobank U.A., et al.*, No. 20-3626 (2d Cir. Oct. 18, 2022); *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022).