

Congress of the United States

Washington, DC 20510

July 24, 2023

The Honorable Rostin Behnam
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Comment on KalshiEX LLC's Congressional Control Contracts

Dear Chair Behnam:

We write today in response to the Commodity Futures Trading Commission (CFTC) review of and [request for public comment](#) on KalshiEX, LLC's (Kalshi) congressional control event contract [proposal](#). As Members of Congress, we feel a special responsibility to ensure that the democratic process by which we are elected is safeguarded at every turn and we view Kalshi's proposed event contract as posing a fundamental threat to that goal. Especially at a time when a majority of American voters believe democracy is under threat, the stakes are too high to incentivize activities that would further erode trust in the integrity of our democratic institutions or elected leaders. We strongly believe that Kalshi's proposed congressional control event contract is contrary to the public interest and urge the Commission to bar its listing.

As you know, the CFTC regulates derivatives and commodities – like wheat, soybeans and cattle – that are vital to all Americans. Properly regulating and policing those markets ensures commodities are delivered in the right amounts at the right times, and at prices that are reasonably reflective of the supply and demand available to the American people. These are critical functions, and CFTC plays an important role in the daily lives of all Americans as it undertakes its mission.

In this instance, however, the CFTC is being asked to make a decision that fundamentally implicates areas outside of its mission: American elections. The CFTC's involvement in gambling and elections would be a wild departure from the core principles and historic foundations of the futures markets it is responsible for regulating and overseeing. The primary purpose of those markets is to serve as a mechanism for hedging risk and facilitating price discovery for physical commercial purchasers and producers of commodities that are vital to every American family. Those markets do not exist to promote, facilitate or enable widespread speculative gambling among retail traders and are not intended or designed to function as casinos.

Kalshi's proposal seeks to have the CFTC consent to allowing Kalshi to offer de facto betting contracts on the outcome of elections in the United States via so-called "event contracts." These contracts would allow participants to place money at risk as they predict which political party will control a chamber of the United States Congress for a given term. Ultimately, participants who correctly predict control of a chamber of Congress would receive a monetary payout based on the market's assessment of the probability of the outcome, while participants who guess incorrectly lose their monetary investment.

Gambling on elections in this way is concerning for many reasons, and the CFTC itself has, in fact, already reached this very conclusion. Under Section 5c(c)(5)(C)(i) of the Commodity Exchange Act, the CFTC may prohibit event contracts that involve(1) an activity that is unlawful under state or federal law,

(2) terrorism, (3) assassination, (4) war or (5) gaming.¹ Additionally, because not all undesirable contracts may fall neatly within the specific categories listed, the CFTC adopted a regulation, 40.11(a)(2), that prohibits event contracts involving an activity that is “similar to” the activities enumerated above so long as the CFTC determines the contract to be “contrary to the public interest.”² The legislative history of CEA Section 5c(c)(5)(C) indicates that the CFTC should consider whether the event contract *as a whole* involves activities listed under Section 5c(c)(5)(C)(i), meaning that the CFTC should consider, among other things, the event underlying the event contract, in this case, elections, and the purpose of the contract, betting on elections. Moreover, the CFTC broadened the scope of Section 5c(c)(5)(C)(i) through the adoption of Regulation 40.11(a)(1), which now prohibits not only an event contract that “involves” the five enumerated activities but also one that “relates to, or references” them.

In 2012, the CFTC was presented with a proposal that was substantially similar to the Kalshi proposal from the North American Derivatives Exchange (NADEX). The NADEX proposal also sought to offer binary event contracts relating to the political control of each chamber of Congress in a given term, and similarly planned to pay out monetary amounts to winning individuals. After analysis of the NADEX proposal, the CFTC, in an April 2, 2012 order, denied the listing of the NADEX contract on the basis that it not only included an activity prohibited under state law and involved or was similar to “gaming,” but also because it was deemed contrary to the public interest. In stating its decision, the CFTC noted such an event contract could “potentially be used in way that would have an adverse effect on the integrity of elections.” We agree and believe the 2012 determination provides a strong basis for a similar determination on Kalshi’s current proposal.

Free, fair and transparent elections are the foundation of American democracy. When our constituents exercise their fundamental right to vote, they are not merely choosing the winner of a contest. They are making a values-based declaration regarding the future direction of our country and the nature of the policy that should govern it. The CFTC should avoid blessing any betting scheme that would frustrate that expectation by undermining the credibility of our democratic elections and contributing to voter cynicism about the political process.

That means rejecting proposals such as those put forward by NADEX and Kalshi. While these proposals are facially similar and what was true of this type of political event contract in 2012 remains true today, now, 11 years later, the stakes are even higher. As betting apps proliferate on mobile phones, widespread gambling on our elections through the simple click of a button has an insidious effect upon the purpose, function and integrity of the electoral process. Moreover, since 2012, our nation has seen a deluge of dark money attempt to drown out the voices of voters, an undercurrent of election denialism and extremism, and an increase in politically-motivated violence. The proposed political event contract would only further incentivize such activity and encourage bad actors, or even those just looking to make a fast dollar, to interfere with our elections and seek to sway voters outside of the democratic process.

For example, it is easy to imagine how artificial intelligence (AI) or social media might be manipulated to quickly circulate false and misleading information within hours or days of an election that could move enough votes to change the results.³ As Bloomberg News reported on July 12, 2023:

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

² 17 C.F.R. § 40.11.

³ See, e.g. *AI’s Use in Elections Sets Off a Scramble for Guardrails*, New York Times (June 25, 2023) online at: www.nytimes.com/2023/06/25/technology/ai-elections-disinformation-guardrails.html?smid=nytcore-ios-share&referringSource=articleShare.

AI holds the potential to supercharge the dissemination of misinformation in political campaigns. The technology is capable of quickly creating ‘deepfakes,’ fake pictures and videos that some political operatives predict will soon be indistinguishable from real ones, enabling miscreants to literally put words in their opponents’ mouths. Deepfakes have plagued politics for years, but with AI, savvy editing skills are no longer required to create them.⁴

Deepfakes are already being deployed to impact voters, and as technology advances, so does this threat. Allowing gambling on elections would exacerbate this, as now the fulfillment of an individual’s political goals would not only hang in the balance, but so would their money. Given the current environment where many Americans already question the integrity of U.S. elections, this would be adding fuel to the fire at the worst possible time.

With this incentive would also come the incentive to increase the flow of dark money in our political process. Since the Supreme Court’s disastrous decision in *Citizen’s United v. FEC*, we have witnessed the perverse and pervasive influence of large sums of undisclosed, unchecked and unregulated money in our political process. Kalshi’s proposal would likely exacerbate this in two ways. First, with payouts of up to \$100 million per contract, the proposal would incentivize the flow of funds to boost a candidate’s chances of winning an election and incentivize even higher spending on our elections. And, unlike a traditional campaign contribution, bets placed through the event contract would also provide the bettor – or in this case, a bettor and contributor – the added incentive of effectively recouping the amount of their donation as well as an additional profit. Allowing the personal financial gain of deep-pocketed donors and special interests – rather than the priorities of every day Americans – to dictate our nation’s policymaking agenda is squarely against the public interest.

Second, because the CFTC is not equipped or authorized to enforce election laws, the prospect of the Commission assuming the role of an “election cop” raises very serious concerns about the misalignment of such a role with the CFTC’s historic mission and mandate as established by Congress. While the additional spending related to Kalshi’s proposed event contract could increase the recognition or standing of a given candidate, it would likely not fall under the types of contributions regulated under existing campaign finance law. Absent the Federal Election Commission’s expertise in such forms of regulation, the money spent under the contract could be even more untraceable than existing forms of dark money. That result is clearly contrary to the public interest.


Finally, there is the potential for an event contract like Kalshi’s to increase incidents of terrorism or assassination, two of the categories that are expressly defined as “contrary to public interest.” Harassment, threats and violence against election workers and elected officials continues to rise. According to a 2023 survey conducted by the Brennan Center for Justice, nearly one third of election officials have been harassed, abused or threatened because of their job. Forty five percent of local election officials said they fear for the safety of their colleagues. The potential for monetary gain would only increase the possibility of these grave threats and further undermine the safety and integrity of our elections.⁵

⁴ *AI is Making Politics Easier, Cheaper and More Dangerous*, Bloomberg News (July 11, 2023) online at www.bloomberg.com/news/features/2023-07-11/chatgpt-ai-boom-makes-political-dirty-tricks-easier-and-cheaper?srnd=premium&sref=mQvUqJZj.

⁵ *Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference*, Brennan Center for Justice (Apr. 25, 2023) online at: <https://www.brennancenter.org/our-work/analysis-opinion/poll-election-officials-shows-high-turnover-amid-safety-threats-and>.

No one should be able to wager the rights and opportunities of millions of individuals for his or her personal gain. Elections free from interference, abuse or the corrupting influence of money are in the public interest, as is the prohibition of activities that could reasonably incentivize individuals to interfere with our electoral process. For these reasons, we urge the CFTC to again recognize the dire implications of betting on elections and deny the Kalshi congressional control event contract.

Sincerely,

A handwritten signature in black ink that reads "John P. Sarbanes". The signature is fluid and cursive, with a long horizontal stroke at the end.

Representative John P. Sarbanes

A handwritten signature in blue ink that reads "Jamie Raskin". The signature is cursive and clearly legible.

Representative Jamie Raskin