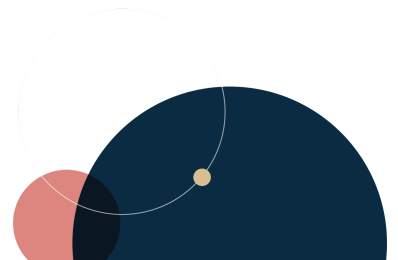


Proposed CFTC Event Contract Rule Creates Uncertainty, Could Stifle Markets with Consequential Commercial Value

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Overview

The Commodity Futures Trading Commission (CFTC or Commission) initiated its highly anticipated event contracts rulemaking process, voting 3-2 along party lines to approve a notice of proposed rulemaking that would revamp the agency’s event contract review process.¹ The proposal (Event Contract Proposal or Proposal) would prohibit an event contract “involving” certain activities from being listed on a derivatives exchange. Categories of contracts found to involve those activities – such as broadly-defined “gaming” contracts – would be deemed “contrary to the public interest” and prohibited from trading (or clearing) on a CFTC-registered derivatives exchange (or clearing organization). If adopted, the Proposal would arguably deter and prevent a broad swath of event contracts from trading in U.S. markets. Current exchange registrants and market participants, and platforms or markets offering event contracts, should strongly consider submitting a comment letter by the **July 9** deadline.

Background

Event contracts are binary options that conclude with a pre-determined payout based on the outcome of an underlying occurrence of an event. The contracts become subject to an additional Commission review process (i.e., separate from the DCM Core Principles and other requirements) if they involve an enumerated activity set out in the Commodity Exchange Act (CEA) and CFTC regulation. Exchanges are prohibited from listing these contracts where the Commission determines it is “contrary to the public interest.”² The Proposal would alter this approach. If adopted, all event contracts involving an Enumerated Activity would be codified as “contrary to the public interest” and prohibited from being listed (or cleared).

Notably, the Commission has expressed that the change in review process should “reduce the likelihood that contract filings that *raise potential* public interest concerns are submitted to the Commission.”³ Emphasis added. But by discouraging registrants from proposing or listing event contracts with “potential” public interest concerns (as opposed to the statutory standard of being determined or found “contrary to the public interest”),⁴ the Commission has introduced additional regulatory risk into self-certifying such a contract and furthered its “chilling effect” on the market.

In practice, pre-determining that all contracts involving Enumerated Activities (with an arguably broader scope due to the breadth of the proposed “gaming” definition) are contrary to the public interest, regardless of their economic purpose or pricing utility, introduces additional uncertainty for CFTC-registered and aspiring exchanges in the event contract markets space, as well as unregistered platforms (like sportsbooks), currently authorized and operating gaming markets under state law.

The Proposal follows a flurry of legal and regulatory activity impacting the event contract market. The Proposal also comes in response to a “significant increase” in the number of event contracts listed by CFTC-registered exchanges, as well as applications for listing event contracts for trading by both current and prospective exchanges.⁵ In response, the CFTC expressly acknowledges its intent in the Proposal: to reduce the amount of internal resources devoted to the review of event contracts.⁶

CFTC Oversight of Event Contracts.

The CEA does not define event contracts. However, event contracts are generally understood to produce a binary payoff structure based upon the “occurrence, extent of an occurrence, or contingency” that underlies the contract.⁷ The CEA grants the CFTC the authority to prohibit a registered entity – including a designated contract market (DCM), derivatives clearing organization (DCO), and swap execution facility (SEF) (each a Registered Entity) – from listing or clearing certain types of event contracts if determined to be “contrary to the public interest.”⁸ The types of event contracts that the CFTC can prohibit involve activity set forth in the CEA, including “activity that is unlawful under any Federal or State law; terrorism; assassination; war; gaming; or other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.”⁹

The Commission’s event contract review authority operates in addition to existing statutory requirements that apply to any contract a Registered Entity attempts to offer for trading (e.g., ensuring that a derivative contract is not readily susceptible to manipulation). When attempting to list a contract for trading, a Registered Entity can undergo either a self-certification process¹⁰ that requires a compliance attestation and submission to the Commission (among other requirements), or can opt to voluntarily seek pre-approval from the CFTC.¹¹

Where the Commission determines that an event contract may involve an Enumerated Activity, it: (1) notifies the Registered Entity it has “potentially violated” CFTC regulation;¹² and (2) commences a 90-day review process,¹³ pursuant to which it “may determine” that the contract is “contrary to the public interest.”¹⁴ During the review process, the listing entity is requested to suspend the trading of the contract. Where the flagged contract is deemed “contrary to the public interest,” the Commission has, in practice, issued an order prohibiting its listing.¹⁵

To determine whether a contract is “contrary to the public interest,” the Commission has applied an “economic purpose test.” In the past, that test was statutorily required with respect to all futures contracts, but was removed from the CEA by the Commodity Futures Modernization Act of 2000 (CFMA). The Commission re-imposed the test on Registered Entities seeking to list event contracts by referencing the legislative history of Dodd-Frank.¹⁶ The Commission has interpreted the “restored” economic purpose test as requiring “an evaluation of an event contract’s utility for hedging and price basing purposes.”¹⁷

In addition to applying a version of the “economic purpose test,” the CFTC has recently considered other factors when evaluating whether a particular contract is “contrary to the public interest.” These factors include:¹⁸

- whether transactions are, as stated in the “findings” provision of the Act, “affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information...”
- the legislative history of CEA section 5c(c)(5)(C); and
- other factors the Commission determines to consider in its discretion, such as “whether a contract may threaten the public good.”

The event contract review process has resulted in a number of determinations prohibiting Registered Entities from listing event contracts.¹⁹ These determinations were made with respect to political “control” contracts that involved settlement payments based on the number of seats held by a particular party, or the party affiliation of the Speaker of the House and President Pro Tempore.²⁰

In each determination, the Commission found that the underlying activity involved gaming (an Enumerated Activity) and was contrary to the public interest. In the Kalshi Order, the Commission found that the contracts involved an additional Enumerated Activity: activity unlawful under state law. The order is currently under judicial review.²¹ Separately, the Commission has previously commenced review of sport betting contracts that were withdrawn by a Registered Entity before a final determination was issued.²²

Summarizing the Event Contract Proposal

The Proposal (1) further specifies the types of event contracts falling within the scope of CEA Section 5c(c)(5)(C) and “contrary to the public interest”, (2) further aligns the language of CFTC Rule 40.11 with the CEA, and (3) proposes technical amendments to CFTC regulation to enhance clarity and organization.²³ This summary focuses on event contracts that may involve an Enumerated Activity deemed “contrary to the public interest”.

If adopted, the Event Contract Proposal would formally alter the Commission's current review process by broadly defining the scope of event contracts involving Enumerated Activities, particularly "gaming," and pre-determining any of these contracts as "contrary to the public interest" prohibited from trading or clearing.

Contracts "Involving" An Enumerated Activity

The Event Contract Proposal reiterates the Commission's broad interpretation of event contracts found to "involve" an Enumerated Activity. More specifically, the Proposal finds an event contract to "involve" an Enumerated Activity not only with respect to the contract's underlier, but where the contract "also involves other characteristics" merely *related to* an Enumerated Activity.²⁴ The interpretation has previously raised concerns within the Commission, with some Commissioner's expressing a view that the underlying activity (such as "political control") must itself constitute an Enumerated Activity (such as gaming or unlawful activity under any Federal or State law) for the Commission to prohibit a contract's listing.²⁵

In an effort to support its interpretation of "involve," the Commission cites to a colloquy regarding the then-proposed Dodd-Frank Act provision, ultimately enacted as CEA section 5c(c)(5)(C). Such colloquies are often used during debate on legislation to engage in pre-arranged discussions between two or more Senators to elaborate on specific issues. They can be live on the floor of the US Senate or submitted in writing into the Congressional Record as part of the record of the debate on the particular legislation. There were numerous such colloquies submitted at the end of the debate on passage of the House Senate Conference Report on Dodd Frank on July 15, 2010. (5902-5930 in the Cong. Record)

One such colloquy was between two Senators (Blanche Lincoln and Diane Feinstein) regarding event contracts, including those involving sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament, and suggests that contracts around the event constitute activity intended to be restricted from trading on derivatives exchanges.²⁶ On the basis of this language, the Commission concludes (as it did in the Kalshi Order) that an event contract must be "considered as a whole" when determining whether it "involves" an Enumerated Activity. It then proceeded to expand the definition of "gaming" beyond the scope defined in the colloquy.

Furthermore, the Proposal does not mention the next sentence from the Feinstein-Lincoln colloquy, which provides further detail regarding factors that define "gaming" or gambling. Specifically, Senate Agriculture Committee Chair Lincoln continued, "These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling."

Defining "Gaming" (and Expanding its Application)

The Event Contract Proposal would codify a definition of "gaming" for the first time. In general, the proposed definition would encompass the staking or risking of value on outcomes and occurrences "in connection with" a game or contest. If adopted, the Proposal would extend the reach of the Commission's event contract review authority beyond its current interpretation of that authority. This expansion is most notable in the sports betting context, where the Commission's event contract review has been limited to game outcomes and total points accumulated.²⁷ The Commission aims to reduce the number of individualized-contract reviews it must perform, but notes "there may continue to be instances" where contract-specific reviews are appropriate to evaluate potential "gaming" contracts.²⁸

Relying on state law gaming definitions and re-affirming previous interpretation, the Event Contract Proposal defines gaming as “the staking or risking by any person of something of value upon:

- the outcome of a contest of others;
- the outcome of a game involving skill or chance;
- the performance of one or more competitors in one or more contests or games; or
- any other occurrence or non-occurrence *in connection with* one or more contests or games.” Emphasis added

It is difficult to reconcile the Proposal’s definition of event contracts associated with Enumerated Activity as including contracts “in connection with” Enumerated Activity with the CEA’s definition of event contracts associated with Enumerated Activity as including only contracts that “involve” Enumerated Activity. Applying the former standard will likely result in fewer event contracts being listed than suggested by the plain meaning of the statute.

Specific CFTC-provided examples of event contracts that would be considered “gaming” event contracts include the following:²⁹

- Political event contracts, which encompass the outcome of one or more domestic or foreign (general or primary) political contests.
- Awards contests, including the Emmys, Oscars, Grammys, athletics awards contests (e.g., the Heisman Trophy), Nobel Prize, or Pulitzer Prize.
- Professional or amateur sports games and their outcome.
- Any occurrence or non-occurrence “in connection with” a contest or game, including:
 - the entry or withdrawal of a candidate from a political contest, or whether the candidate polls above or below a threshold,
 - whether a particular individual is nominated for an award or attends an award ceremony; and
 - in an athletic game, the score or individual player or team statistics at given intervals during the game, whether a particular player will participate in a game, and whether a particular individual will attend a game.
- Other non-sporting and “games of chance”, as recognized in the federal Unlawful Internet Gambling Enforcement Act.

Importantly, the Commission clarifies that certain event contracts may simultaneously constitute two separate Enumerated Activities. In previous actions, the Commission has found political control contracts to constitute both “gaming” and “unlawful state activity.”³⁰ Applying this interpretation to sports betting contracts, the Commission concludes³¹ that the contracts may still constitute “gaming” (and thus be ineligible for trading on a registered exchange) even if lawfully offered in states that do not prohibit the activity.³²

Considerations for non-Gaming Enumerated Activities

The Event Contract Proposal finds that political event contracts, including the staking of value in contracts based upon the outcome of contests between electoral candidates, constitute illegal conduct (i.e., “wagering on elections”) in many states.³³ Referring to the Kalshi Order, the Commission expressed its intention to interpret Congressional “control” contracts (that is, contracts based on which political party is in control of a legislative chamber following an

election) as constituting unlawful activity under state laws, given that the outcome of contests between individual electoral candidates was “an essential feature or consequence” of the contracts.³⁴ The Event Contract Proposal also notes that many state codes include laws that are archaic and not enforced, but does not list examples.

The Commission declined to provide definitions for the following Enumerated Activities: war, assassination, and terrorism. However, the Commission states that cyberattacks and other acts of cyberterrorism would “constitute terrorism and in some cases war,” and likely involve “unlawful activity under state or federal law.”³⁵

Public Interest Factors

Limiting the “two-step” approach. In a procedural change, the CFTC’s two-step approach to event contract review – first, determining whether the contract “may” involve an Enumerated Activity, and, second, subsequently determining whether it is “contrary to the public interest” – would be discarded in favor of an approach that presumes an event contract involving an Enumerated Activity is contrary to the public interest. Categorical determinations as to whether an Enumerated Activity is “contrary to the public interest” would be codified. The Commission claims that making this change would “allow for more efficient use of Commission and staff resources by reducing the need to conduct individualized event contract reviews pursuant to § 40.11(c).”³⁶

Where the Commission does determine to undertake a review of a contract, it would generally focus on whether the contract involves an Enumerated Activity. However, for event contracts that are “similar to” an Enumerated Activity, the Commission would publish guidance in the form of “an Appendix E to Part 40.” The Appendix would list factors the Commission may consider when determining whether such event contracts are contrary to the public interest, in addition to other factors deemed appropriate in light of individual facts and circumstances.³⁷

During the event contract open meeting on May 10, Commissioner Johnson – a Democrat who voted in support of the Event Contract Proposal – suggested the Commission may wish to consider hosting a Roundtable to further vet the proposal and gather information on event contracts.³⁸ This could be significant. Among other things, this process could result in a broader array of event contracts being categorically deemed contrary to the public interest and inappropriate for trading on CFTC-regulated exchanges.

Relevant Factors Used to Determine Activity “Contrary to the Public Interest”. The Commission has statutory authority to determine whether a contract found to involve “Enumerated Activity” is contrary to the public interest. The Event Contract Proposal sets out several factors to be used in making such a determination, which will predominantly focus on a contract’s “hedging and price-basing utility.” Acknowledging the limited legislative history of the event contract review process, the Commission relies upon the colloquy to find that the “hedging and price-basing utility” of a contract should be considered as relevant factors in determining the public interest.

Prior to 2000, the CFTC interpreted contract market listing and the public interest standard to include an “economic purpose” test, which centered on whether a particular contract is or would be used for “hedging and/or pricing basing on more than an occasional basis.” That provision was removed by Congress with the passage of the CFMA in 2000, and there is no longer a statutory requirement that contracts meet a hedging or price basing standard to trade on a Registered Exchange.

The Commission could have alternatively interpreted the test's removal as establishing an intentional omission of its application by Congress.³⁹ But it decided to conclude without support that the CFTC should consider "the extent to which a proposed derivative contract would be used *predominantly by speculators or participants not having a commercial or hedging interest.*" Emphasis added. Comparing the colloquy with the pre-2000 economic purpose test, the Event Contract Proposal concludes that the adoption of the former's more rigorous hedging standard is appropriate.⁴⁰

In assessing the hedging or commercial interest in trading an event contract involving an Enumerated Activity, the Commission:

- Finds that such contracts are "likely to be traded predominantly to enable gambling."
- Finds that such contracts usually lack an underlying cash market with bona fide economic transactions, increasing the risk of manipulative activity.
- Acknowledges that the trading in a gaming contract may have "more direct and more predictable economic consequences," but believes this is a small component of the "broader universe of market participants..."
- Expresses a view that retail market participants are most likely to trade for entertainment purposes only.

Other relevant factors include:

- National security and the public good.
- The extent to which a contract brings the CFTC into "areas outside of its primary regulatory remit."
- Whether characteristics of a contract increase the risk of manipulative activity relating to the trading or pricing of the contract.
- Whether the contract could result in participants profiting from harm to any person(s).

Finally, when reviewing an event contract that is "similar to" an Enumerated Activity, the Commission intends to include an Appendix that will provide similar factor-based guidance to determine whether the contract is contrary to the public interest.⁴¹

Contracts Outside the Scope of Enumerated Activities

The Event Contract Proposal provides that the following event contracts based on a "change in the price, rate, value or levels" would "generally fall outside the scope" of the Commission's authority to prohibit the trading of the contracts:

- *Economic indicators*, including the CPI and other price indices; the U.S. trade deficit with another country; measures related to GDP, jobless claims, or the unemployment rate; and U.S. new home sales;
- *Financial indicators*, including the federal funds rate; total U.S. credit card debt; fixed-rate mortgage averages (e.g., the 30-year fixed-rate mortgage interest rate); and end of day, week, or month values for broad-based stock indexes; and
- *Foreign exchange rates or currencies*

The limited contracts listed for exclusion from 40.11 review would not address a number of different event contract types recently or currently being considered by the Commission.⁴² Some of these excluded contracts, such as foreign exchange option contracts, are long believed to fall outside the scope of CFTC Rule 40.11. Observing the limited nature of the carve-out, Commissioner Pham stated that she “finds it stunning that the outer bounds provided” are of such a limited scope in light of the “volume of new contracts” motivating the rulemaking.⁴³

Assessing the Event Contract Proposal’s Impact on Existing Markets

If adopted, the Event Contract Proposal would overhaul the Commission’s event contract review process and broaden the scope of “gaming” contracts. By pre-determining event contracts involving Enumerated Activities as “contrary to the public interest,” a Registered Entity is deterred from listing the event contract via self-certification process or from seeking regulatory approval altogether.⁴⁴ And the scope of event contracts impacted by the Proposal will not be fully understood by a mere reading of the regulation, which the Commission acknowledged by stating its intent to discourage the listing of contracts with the mere *potential* to be contrary to the public interest.⁴⁵

Together, the proposed actions aim to satisfy the Commission’s objective of largely removing itself as the market’s regulator. As the agency states in the Proposal, “the Commission is not a gaming regulator.”⁴⁶

Current Trading or Clearing Activities

The Proposal does not discuss how current event contracts listed for trading or clearing by a Registered Entity would be impacted if the rulemaking is finalized as proposed. Contracts previously listed or cleared by a Registered Entity that would presumably fall under a prohibited “Enumerated Activity” include those “based on the occurrence or non-occurrence of...Oscar award winners” and others.⁴⁷ As noted by Commissioner Mersinger, the “incredibly far-reaching formulation” would cover attendance at sporting events, as well as contracts involving whether a particular nation will host the World Cup.⁴⁸

Separately, non-registered platforms should take note of previous enforcement actions by the CFTC and the Proposal’s Enumerated Activities definitions and guidance. The Commission previously fined an unregistered platform offering binary option event contracts involving Enumerated Activities for failing to register as an exchange and offering illegal, off-exchange futures contracts.⁴⁹ When coupled with the breadth of the Proposal’s “gaming” definition, which would prohibit the listing of event contracts based on game (e.g., sporting event) outcomes, and the staking of value on an occurrence made “in connection with” the sporting event, the Commission’s actions could subject existing lawful state contracts to federal jurisdiction (and prohibition).

As noted in Commissioner Pham’s dissent to the Proposal, “when the act of entering into a derivatives contract that meets the Proposal’s overbroad definition of gaming, drawn from dozens of State laws, is now gaming under the Commission’s jurisdiction, we begin encroaching on State gaming oversight.”⁵⁰ As the Event Contract Proposal suggests a goal of achieving “comity with states,” the CFTC should limit the impact of the rulemaking on existing sports betting platforms and others currently lawfully licensed by or with state authorities to offer similar contracts.

Finally, in the limited circumstances in which the Commission would assess whether a contract is “contrary to the public interest,” the Proposal would apply the more rigorous hedging standard the agency derives from Congressional colloquy. But there is a large body of academic research comparing the predictive nature of event contract markets and other sources of information or data about the outcome of events (e.g. public opinion polling), finding that the market-based price discovery of event contract markets is more predictive than other more sources of data, such as public opinion polling. It is that market-based pricing that a business or company can use to manage its risks to the outcome of such events. The fact that such trading activity is generated between primarily retail speculators, as opposed to trading by institutional producers or other traditional “end users,” does not diminish the value of the market-produced pricing/hedging data, so long as those markets are properly regulated.⁵¹

When will the Event Contract Proposal be finalized?

While the substance of the Event Contract Proposal is noteworthy, the timing of its release should be closely considered. With the Event Contract Proposal approved along party lines, the Chair’s office is motivated to make progress on an event contracts rulemaking. Finalizing the rulemaking prior to the 2024 Election may be difficult for the Commission to achieve, although not an impossibility.⁵²

With a comment deadline of **July 9**, the Commission will need to move quickly to produce a final rule prior to November’s general election. The Congressional Review Act (and the threat of its use in overturning any finalized regulation) will also create added pressure on the Commission to adopt a finalized rule even sooner.⁵³ To finalize within this timeframe, two Commissioners, in addition to the Chair, will need to be united in moving forward with the rulemaking – a process that may entail holding a public roundtable to further vet the proposal and gather information on event contracts. At the Commission’s May 10 open meeting, Chair Behnam was joined by his two Democratic Commissioners in formally proposing this event contract rulemaking by a 3-2 vote.⁵⁴

Annex: Event Contract Reviews (CFTC Rule 40.11)⁵⁵

Click the chart to download

Date:	Firm Name:	General Contract Type:	Event Contract Examples:	Commission Findings:	Commission Action:
Sept. 2023	Kalshi	<ul style="list-style-type: none"> Political "control" 	<ul style="list-style-type: none"> "Control" of a Congressional Chamber (i.e., House of Representatives, Senate) E.g., "will <chamber of Congress> be controlled by <party> for <term>?" 	<ul style="list-style-type: none"> Gaming Unlawful state activity Contrary to the public interest 	Prohibited DCM self-certified event contracts
Aug. 2022 (date of 40.11 review commencement)	Kalshi	<ul style="list-style-type: none"> Political "control" 	<ul style="list-style-type: none"> "Will <party> be in control of the <chamber of Congress>?" 	<ul style="list-style-type: none"> May constitute an Enumerated Activity in CFTC Reg. 40.11(a) and CEA Section 5c(c)(5)(C). 	<ul style="list-style-type: none"> Initiated 40.11 review of DCM self-certified contracts Requested DCM suspend listing and trading of contracts during 90-day review Sought and received public comments relating to the certification <p><i>[pre-approval request withdrawn]</i></p>
Jan. 2022	PolyMarket	<ul style="list-style-type: none"> Political election event Commodity option Economic indicator 	<ul style="list-style-type: none"> "Will Trump win the 2020 presidential election?" "Will the 2021 Tokyo Olympics take place?" "What will the price of \$ETH be on July 19?" "Will US GDP growth be more than 4.9% in Q1 2021?" "Will inflation be 0.4% or more from April to May?" 	<ul style="list-style-type: none"> Contracts constituted commodity option transactions offered off-exchange Binary options contracts are swaps requiring registration (as a DCM or SEF) 	Entered into settlement order with decentralized platform, fining respondent \$1.4 million
Mar. 2021 (date of self-certification withdrawal)	ErisX	<ul style="list-style-type: none"> Sports betting 	<ul style="list-style-type: none"> NFL futures contract based on the outright winner of a game ("moneyline") NFL futures contract based on the winner of a game after considering a point spread ("pointspread") NFL futures contract based on the total points scored relative to a predetermined threshold ("over/under") 	<ul style="list-style-type: none"> May constitute "gaming" May constitute "an activity that is unlawful under any state or federal law" May be "contrary to the public interest" <p>CFTC "would have prohibited" contracts on grounds they involved "gaming" and were "contrary to the public interest."</p>	<ul style="list-style-type: none"> Initiated 40.11 review of DCM self-certified contracts Requested that DCM suspend listing and trading of contracts during 90-day review Sought and received public comments relating to the certification <p><i>[Certification withdrawn by DCM]</i></p>
Oct. 2014	Victoria University of Wellington (NZ)/Predictit	<ul style="list-style-type: none"> Political "control" Economic indicators 	<ul style="list-style-type: none"> Contract details not made publicly available 	<ul style="list-style-type: none"> Market offered event contracts under no-action letter (NAL) 14-130 	<ul style="list-style-type: none"> Market operates pursuant to CFTC NAL 14-130 CFTC attempted to withdraw NAL 14-130 but has been enjoined from doing so
Apr. 2012	Nadex	<ul style="list-style-type: none"> Political "control" Political outcome (i.e., election result) 	<ul style="list-style-type: none"> Democratic Majority in the U.S. House of Representatives Republican Majority in the U.S. House of Representatives Democratic Majority in the U.S. Senate Republican Majority in the U.S. Senate U.S. Presidency (10) 	<ul style="list-style-type: none"> Gaming Contrary to the public interest 	Prohibited DCM self-certified event contracts
June 1993, preceded by Feb. 1992 letter.	Iowa Electronic Markets (IEM)	<ul style="list-style-type: none"> Political outcome (i.e., election result) Presidential election results and other election outcomes Economic indicator contracts 	<ul style="list-style-type: none"> Democratic Party nomination for U.S. Presidency Canadian elections (1993) U.S. House and Senate races (1994) 	Not Applicable	<p>Received no-action letter to operate under limited trading conditions, including:</p> <ul style="list-style-type: none"> 1,000- 2,000 traders; \$5-\$500 limits on select contracts <p>Operate solely for research and academic purposes</p>

Endnotes

¹ Event Contracts, Notice of Proposed Rulemaking, 89 Fed. Reg. 48,968 (June 10, 2024), hereinafter “Event Contracts Proposal”. Available at <https://www.cftc.gov/sites/default/files/2024/06/2024-12125a.pdf>.

² CEA Section 5c(c)(5)(C).

³ Event Contracts Proposal at 48,969.

⁴ CEA § 5c(c)(5)(C).

⁵ Event Contracts Proposal at 48,969.

⁶ *Id.*, providing that “From a resource allocation perspective, this will be of significant benefit to the Commission and its staff, since, in the Commission’s experience, a single § 40.11(c) review is resource-intensive and consumes hundreds of hours of staff time.”

⁷ See, for example, CEA 5c(c)(5)(c)(i).

⁸ CEA § 5c(c)(5)(c)(i).

⁹ *Id.*

¹⁰ CFTC Rule 40.2.

¹¹ CFTC Rule 40.3.

¹² CFTC Rule 40.11(c).

¹³ CFTC Rule 40.11(c).

¹⁴ CEA § 5c(c)(5)(C).

¹⁵ CFTC Rule 40.11 does not explicitly subject all Enumerated Activities to a “contrary to the public interest” determination.

¹⁶ See “In the Matter of the Certification by KalshiEX LLC of Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives” hereinafter, Kalshi Order at p. 13, providing that “the legislative history of CEA section 5c(c)(5)(C) indicates Congressional intent for the Commission to consider, among other things, in its evaluation of whether a contract is contrary to the public interest for purposes of that provision, a form of the “economic purpose test” that was applied to determine whether a contract was contrary to the public interest under former CEA Section 5(g) prior to its deletion by the Commodity Futures Modernization Act of 2000 (“CFMA”).” (Sept. 22, 2023). Available at <https://www.cftc.gov/sites/default/files/filings/documents/2023/orgkexkalshiordersig230922.pdf>.

¹⁷ See “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 CFTC,” (Apr. 02, 2012). Available at <https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf>.

¹⁸ Kalshi Order at p. 13-15.

¹⁹ See, for example, the Nadex Order, available at <https://www.cftc.gov/PressRoom/PressReleases/6224-12>. The Kalshi Order is available at <https://www.cftc.gov/sites/default/files/filings/documents/2023/orgkexkalshiordersig230922.pdf>.

²⁰ *Id.*

²¹ *KalshiEx LLC v. Commodity Futures Trading Commission*, 1:23-cv-03257 (filed Nov. 1, 2023) (D.D.C.).

²² CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC (Dec. 23, 2020). Available at <https://www.cftc.gov/PressRoom/PressReleases/8345-20>.

²³ See, in general, Event Contracts Proposal.

²⁴ Event Contracts Proposal at 48,974, stating that “the question for the Commission in evaluating whether a contract “involves” an Enumerated Activity or prescribed similar activity is whether the contract, considered as a whole, involves one of those activities.”

²⁵ Dissenting Statement of Commissioner Caroline D. Pham on Event Contracts Proposal (May 10, 2024).

²⁶ Blanche Lincoln (AR) (Senate Agriculture Committee Chair). “Event Contracts - S. 5907.” Congressional Record Vol. 156, Number 105 (July 15, 2010).

²⁷ See, for example, the CFTC’s announcement of a 40.11(c) review of ErisX-listed contracts involving three NFL futures contracts: one based on the moneyline; the second on the point spread; and the third on total points for individual NFL games. Available at <https://www.cftc.gov/PressRoom/PressReleases/8345-20>.

²⁸ Event Contracts Proposal at 48,974.

²⁹ *Id.* at 48,976.

³⁰ Kalshi Order at p. 23.

³¹ Event Contracts Proposal at 48,981. In finding that Congress listed “gaming” as a separate Enumerated Activity, the Commission references the emergence of legalized forms of sports gambling fueled by state-authorized gambling on sporting events. After a Supreme Court decision (*Murphy v. N.C.A.A.*, 138 S. Ct. 1461) overturned The Professional and Amateur Sports Protection Act (PAPSA), states were no longer prohibited from authorizing state-sponsored gambling on sporting events.

³² *Id.*

³³ Event Contracts Proposal at 48,977.

³⁴ *Id.*

³⁵ *Id.* at n. 85.

³⁶ Event Contracts Proposal at 48,972.

³⁷ *Id.* at 48,984

³⁸ Commissioner Kristin Johnson, Opening Remarks at CFTC Open Meeting to consider the Proposed Rule regarding Event Contracts (May 10, 2024). “In the past historically, the Commission has used an advanced notice of proposed rulemaking process when dealing with such thorny and complex issues. The advanced notice of proposed rulemaking process and roundtables or other engagement with the public often enable the Commission to form thoughtful views regarding the text of proposed rules. That said, I do believe that we are on our way with respect to a path that will help provide some much-needed clarity for market participants.”

³⁹ Such an interpretation would seem to be more in line with the semantic canon, *casus omissus*, which generally provides that a matter not covered by a statute should be treated as intentionally omitted. See “Statutory Interpretation: Theories, Tools, and Trends,” Congressional Research Service, (updated March 10, 2023). Available at <https://crsreports.congress.gov/product/pdf/R/R45153>.

⁴⁰ Event Contracts Proposal at 48,979.

⁴¹ *Id.* at 48,984.

⁴² See Event Contracts Proposal at 48,969, n. 9, enumerating DCM-listed event contracts based on the occurrence or non-occurrence of “international events, natural disasters in specific U.S. cities, the outcome of cases pending before the Supreme Court of the United States,” and others.

⁴³ Dissenting Statement of Commissioner Caroline D. Pham on Event Contracts Proposal (May 10, 2024), “Given the fact that the Event Contracts Proposal repeatedly states that the broad range and volume of new contracts motivated this rulemaking, I find it stunning that the outer bounds provided are limited to contracts based on: (1) economic indicators, (2) financial indicators, and (3) foreign exchange rates or currencies.”

⁴⁴ CEA § 5c(c)(5)(C)(ii).

⁴⁵ Event Contracts Proposal at 48,972. “The Commission further believes that, by helping to delineate appropriate event contract parameters, the proposed amendments would reduce the frequency of event contract submissions to the Commission that raise potential public interest concerns, which would allow for more efficient use of Commission and staff resources by reducing the need to conduct individualized event contract reviews pursuant to § 40.11(c).”

⁴⁶ Event Contracts Proposal at 48,983.

⁴⁷ See Event Contracts Proposal at 48,969, providing a list of event contracts listed for trading since 2021 that were “based on the occurrence or non-occurrence of international events, natural disasters in specific U.S. cities, heating/cooling degree days and cumulative average temperature in specific cities, the timing of video game and album releases, Oscar award winners, COVID-19 case levels and restrictions, the outcome of cases pending before the Supreme Court of the United States, the passage of specific laws by the U.S. Congress, U.S. Presidential approval ratings, confirmation of U.S. executive branch officials, National Football League (“NFL”) television ratings, the discovery of exoplanets, and the occurrence of a National Aeronautics and Space Administration (“NASA”) moon landing before a certain date.”

⁴⁸ Dissenting Statement of Commissioner Summer K. Mersinger Regarding Proposed Rulemaking on Event Contracts, (May 10, 2024). Available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement051024>.

⁴⁹ In the Matter of Blockratize, Inc. d/b/a Polymarket.com. CFTC Docket No. 22-09 (Jan. 03, 2022). <https://www.cftc.gov/media/6891/enfblockratizeorder010322/download>.

⁵⁰ Dissenting Statement of Commissioner Caroline D. Pham on Event Contracts Proposal, (May 10, 2024). Available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement051024b>.

⁵¹ See, for example, Microsoft Research comment letter submitted Sept. 09, 2022. Available at <https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=33685>.

⁵² Most recently, CFTC rulemakings have generally averaged 9-10 months from proposal to effective date.

⁵³ The Congressional Review Act gives Congress the ability to “disapprove” of a final rule generally within sixty (60) legislative days of its finalization. Notably, the President does retain the authority to veto any disapproval resolution that passes both the House and Senate.

⁵⁴ Commissioner Kristin Johnson, Opening Remarks at CFTC Open Meeting to consider the Proposed Rule regarding Event Contracts (May 10, 2024). “In the past historically, the Commission has used an advanced notice of proposed rulemaking process when dealing with such thorny and complex issues. The advanced notice of proposed rulemaking process and roundtables or other engagement with the public often enable the Commission to form thoughtful views regarding the text of proposed rules. That said, I do believe that we are on our way with respect to a path that will help provide some much-needed clarity for market participants.”

⁵⁵ Certain listings in this Annex are subject to ongoing litigation.

⁵⁶ See 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), commenting on a Draft Order never released by the CFTC due to the DCM’s self-certification withdrawal. Available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521>.

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