



September 21, 2022

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=7311>

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 <party> be in control of the <chamber of Congress>?" Contracts for Public Comment.<sup>1</sup>

The Kalshi contracts are clearly permitted under the Commodity Exchange Act ("CEA") and CFTC regulations, which prohibit *an instrument* that has any involvement with, relationship to, or reference 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 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.

The Kalshi contracts *do not involve, relate to, or reference* terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law. Rather, they reference elections, which are legal under all state and federal laws.

### 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 described [here]) that is (I) beyond the control of the parties to the relevant contract ...;

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<sup>1</sup> 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>.

and (II) associated with a financial, commercial, or economic consequence.”<sup>2</sup> Event contracts are a category of “excluded commodity,” a term that in the CEA originally meant commodities excluded from the CFTC’s authority, as distinguished from agricultural commodities and “exempt” commodities, but now essentially means financial commodities.<sup>3</sup> 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.”<sup>4</sup>

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.

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:<sup>5</sup>

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,<sup>6</sup> that ***involves, relates to, or references*** terrorism, assassination, war, ***gaming***, or an activity that is unlawful under any State or

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<sup>2</sup> CEA §1a(19)(iv).

<sup>3</sup> CFTC, *CFTC Glossary*, letter “E”, avail. at [https://www.cftc.gov/LearnAndProtect/EducationCenter/CFTCGlossary/glossary\\_e.html](https://www.cftc.gov/LearnAndProtect/EducationCenter/CFTCGlossary/glossary_e.html).

<sup>4</sup> CFTC, *Concept Release ...*, 73 Fed. Reg. 25669 at 25669-70 (May 7, 2008).

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

<sup>6</sup> “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.”

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

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 using the six reasons.

Shortly after Rule 40.11 became effective, the Nadex futures exchange sought to self-certify event contracts about who would win the 2012 elections. The CFTC announced a 90-day review<sup>8</sup> and posted questions for public comment.<sup>9</sup> On April 2, 2012, the CFTC issued an order prohibiting the Nadex contracts:<sup>10</sup>

... several state statutes, on their face, link the terms gaming or gambling (which are used interchangeably in common usage, dictionary definitions and several state statutes) to betting on elections, and state gambling definitions of "wager" and "bet" are analogous to the act of taking a position in the Political Event Contracts;<sup>11</sup> ... the Political Event Contracts can potentially be used in ways that would have an adverse effect on the integrity of elections, for example by creating monetary incentives to vote for particular candidates even when such a vote may be contrary to the voter's political views of such candidates;<sup>12</sup> The Commission FINDS that the Political Event Contracts involve gaming as contemplated by CEA Section 5c(c)(5)(C)(i)(V) and Commission Regulation 40.11(a)(1); The Commission FURTHER FINDS that the Political Event Contracts are contrary to the public interest as contemplated by CEA Section 5c(c)(5)(C) ... .<sup>13</sup>

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<sup>7</sup> 17 C.F.R. §40.11 (emphasis supplied).

<sup>8</sup> CFTC, Release No. 6163-12, *CFTC Commences 90-day Review of NADEX's Proposed Political Event Derivatives Contracts* (Jan. 5, 2012), avail. at <https://www.cftc.gov/PressRoom/PressReleases/6163-12>.

<sup>9</sup> avail. at <https://www.cftc.gov/stellent/groups/public/@otherif/documents/ifdocs/nadexquestions.pdf>.

<sup>10</sup> 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) ("Nadex Order") 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 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").

<sup>11</sup> Nadex Order p. 2.

<sup>12</sup> Nadex Order p. 4.

<sup>13</sup> Nadex Order p. 4. According to the CFTC, "CFTC Regulation 40.11 prohibits event contracts that reference terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law, or that involves, relates to, or references an activity that is similar to any of those activities and that the CFTC determines by rule or regulation to be contrary to the public interest. On April 2, 2012, the CFTC issued an Order Prohibiting the Listing or Trading of certain Political Event Contracts at [Nadex]. The

After the Nadex Order, the CFTC Division of Market Oversight provided “no action relief” to the New Zealand Victoria University of Wellington’s request to operate a small-scale, not-for-profit market for trading election-based and economic indicator event contracts for educational purposes, with caps on numbers of trades and traders, and participation limited to students, staff, and academics.<sup>14</sup> The CFTC distinguished these contracts from those in the Nadex Order, including “specifically” that this “request for no-action relief was not in any way premised upon claims that its proposed contracts have any hedging or price-basing utility.”<sup>15</sup>

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.”<sup>16</sup> 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,<sup>17</sup> and posted questions for public comment.<sup>18</sup> I and others commented.<sup>19</sup> Eris’s futures contracts involved, related to, *and* referenced sports gambling, as was clear in their names<sup>20</sup> – the “moneyline,”<sup>21</sup> “point spread,”<sup>22</sup> and “over/under”<sup>23</sup> for individual games - terms of sports gambling and the three main types of illegal sports bets.<sup>24</sup> The standard of Rule 40.11(a)(1) is “gaming,” not “illegal gaming,” so, even if gambling was legal in every state, the contracts would still be prohibited under the statute and Rule 40.11. On March

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contracts, which would have paid out based upon the outcome of certain US federal elections, were determined to involve gaming and to be contrary to the public interest.” CFTC, *Contracts & Products*, avail. at <https://www.cftc.gov/IndustryOversight/ContractsProducts/index.htm>.

<sup>14</sup> 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>.

<sup>15</sup> Staff Letter 14-130 at p. 5.

<sup>16</sup> 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/ptc121520erisdcmndcm005.pdf>.

<sup>17</sup> 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/orgdcmerrisignedletter201223.pdf>.

<sup>18</sup> 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>.

<sup>19</sup> Comments for Industry Filing 20-004, avail.

at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=5203>; my comment at avail. 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->.

<sup>20</sup> Eris Certification, pp. 4-6.

<sup>21</sup> 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>.

<sup>22</sup> E.g., Bookies.com, *Point Spread Betting Explained*, avail. at <https://bookies.com/guides/what-is-point-spread-betting>.

<sup>23</sup> 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>.

<sup>24</sup> 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>.

22, 2021, just one day before the end of the 90-day review period, Eris withdrew its self-certification.<sup>25</sup> 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.<sup>26</sup> Then-Commissioner Quintenz, who is now on the Board of Directors of Kalshi,<sup>27</sup> said, “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.”<sup>28</sup> Then-Commissioner Dan Berkovitz’s public statement treated the CFTC’s public interest determination in Rule 40.11 as a nullity,<sup>29</sup> even though he was the CFTC’s General Counsel when Rule 40.11 was promulgated.<sup>30</sup>

By §745 of the Dodd-Frank Act, as implemented in part by CFTC Rule 40.11(a), Congress made a policy determination to restrict certain event contracts, even if they could be used by legitimate businesses, “because”<sup>31</sup> making such hedging tools available could help persons involved in gambling. 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 Eris contracts correctly should not have been approved by the CFTC, while the Nadex Order 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- 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 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],<sup>32</sup> to be contrary to the

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<sup>25</sup> 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](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).

<sup>26</sup> 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>.

<sup>27</sup> *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>.

<sup>28</sup> 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>.

<sup>29</sup> 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>.

<sup>30</sup> CFTC, *Commissioner Dan M. Berkovitz*, avail. at <https://www.cftc.gov/About/Commissioners/CommissionerDanMBerkovitz/index.htm>.

<sup>31</sup> CFTC, *Final Rule, Provisions Common to Registered Entities*, 76 Fed. Reg. 44776 at 44786 n. 35 (Jul. 27, 2011).

<sup>32</sup> The texts of Section 745 (which is 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

public interest.”

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

Before its unfulfilled 2008 Concept Release on regulating event contracts,<sup>33</sup> the CFTC, “without asserting jurisdiction,” gave no action relief to the Iowa Electric Market (IEM) for professors and students to operate an academic and research, “solely” experimental, non-profit, commission-free, non-DCM, events contract market for elections and economic indicators, with caps on numbers of trades and traders.<sup>34</sup> Additionally, the CFTC gave highly specific and limited no-action relief to the “Iowa Political Stock Market.”<sup>35</sup> The CFTC also asked the SEC if the IEM “earning’s markets” event futures contracts could be options on securities under SEC jurisdiction.<sup>36</sup> The IEM still operates;<sup>37</sup> the Victoria University of Wellington’s iPredict closed.<sup>38</sup>

The CFTC can avoid being confused in the future by providing the regulations of event contracts it teased 14 years ago,<sup>39</sup> instead of its current one-off approach relying on its patch-work of not fully thought-through orders, 30 year old no action letters, and secret orders.<sup>40</sup>

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of Rule 40.11 the CFTC made such a determination. Nowhere in §5c(c)(5)(C)(i) does Congress say that the CFTC must make its public interest determination on a contract-by-contract basis. In fact, §5c(c)(5)(B), (“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).”) 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 Commission 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. And the CFTC itself made the blanket determination allowed in §5c(c)(5)(C)(i) for “such” event contracts when it promulgated Rule 40.11.

<sup>33</sup> CFTC, *Concept Release ...*, 73 Fed. Reg. 25669 (May 7, 2008).

<sup>34</sup> CFTC No-Action Letter No. 93-66 (Jun. 18, 1993), avail. at

<https://www.cftc.gov/idc/groups/public/%401rlettergeneral/documents/letter/93-66.pdf> and unredacted at <http://www.cftc.gov/files/foia/repfoia/foirf0503b004.pdf>.

<sup>35</sup> Staff Letter 92-04a (Feb. 5, 1992) (also noting that the Iowa attorney general had opined to the applicant that its proposed activities did not violate Iowa law), avail. at <https://www.cftc.gov/idc/groups/public/%401rlettergeneral/documents/letter/92-04a.pdf> (superseded by No Action Letter 93-66); materials also partially avail. in CFTC’s electronic FOIA reading room at [https://www.cftc.gov/foia/repfoia/foirf05-003\\_1.htm](https://www.cftc.gov/foia/repfoia/foirf05-003_1.htm); see 73 Fed. Reg. at 25760 and n. 5.

<sup>36</sup> SEC letter to CFTC, p. 2 n. 4, Sept. 3, 2008, avail. at

<https://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/frcomment/08-004c028.pdf>.

<sup>37</sup> avail. at <https://iemweb.biz.uiowa.edu>.

<sup>38</sup> In 2016 for problems that included “an inability to bring the Ministry of Justice round to understanding our views on what would constitute a proportionate level of Anti-Money Laundering due diligence ... ” iPredict, *A Message from iPredict* (Dec. 1, 2016), avail. at

<https://web.archive.org/web/20170929140157/http://www.ipredict.co.nz/app.php?do=message>.

<sup>39</sup> CFTC, *Concept Release on the Appropriate Regulatory Treatment of Event Contracts*, 73 Fed. Reg. 25669 (May 7, 2008). The Concept Release comment file is avail. at <https://www.cftc.gov/LawRegulation/PublicComments/08-004.html>.

<sup>40</sup> “Secret agency law is anathema in our democracy, and should only be tolerated where absolutely

## Part Two

Several of the CFTC's numbered questions with regards to the Kalshi's Congressional control contracts 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 regulation 40.11(a)(2) or section 5c(c)(5)(C) of the Commodity Exchange Act?***

No, they do not. Please see discussion in Part One above.

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

No. The prohibition is not whether people can make an illegal bet on an outcome - for example who will win an election or on the price of wheat - but whether *the instrument "involves, relates to, or references"* activities listed by the CFTC as against the public interest in Rule 40.11. Please see discussion in Part One above.

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

No. Elections are legal under all state and federal laws.

***4. In determining whether any of these contracts involves 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, not the subject of the wager. People can break the law by illegally "wagering" on football games, which raindrop will reach the bottom of a train window first, or election outcomes. Rule 40.11 prohibits contracts that help people wager, not contracts that reference something on which people might wager. Please see discussion in Part One.

***5. Are the contracts substantively different than [sic] Nadex's previously proposed contracts such that the Commission's analysis should be different?***

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necessary." Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given Sunday in the Futures Market, p. 1 (Mar. 25, 2021), avail. at <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521>.

***For reference, please see “CFTC Order Prohibiting North American Derivatives Exchange’s Political Event Derivatives Contracts” (Apr. 2, 2012) available at <https://www.cftc.gov/PressRoom/PressReleases/6224-12>.***

Maybe. It does not matter, since the Nadex Order was wrongly decided. Please see discussion in Part One above.

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

Yes, the contracts serve a very clear hedging function. There are economic consequences of congressional control predictable enough for a contract based on such outcomes to serve a hedging function. For example, the current maximum marginal tax rate on my income over \$628,301 is 37%. I might fear that a Democrat controlled House and Senate would roll back all tax cuts since President Reagan. Before the Kemp-Roth tax cut of 1981, the marginal tax rate on income over \$60,000 was 54% and income over \$215,400 was 70%.<sup>41</sup> Such rollbacks would be a direct personal tax increase to me of hundreds of thousands of dollars. On the other hand, I might fear that a Republican-controlled House or Senate will make good on Republican threats to cause the United States to default on its debt,<sup>42</sup> which would present substantially adverse economic consequences.<sup>43</sup> If the risk-free rate of return is not risk-free, the financial and options models on which the financial system operates would break, which would decimate the value of my investment portfolio.

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

Yes. Like many other American Jews, I am very concerned about the safety and economic risks posed to me and my family by the alarming rise in U.S. anti-Semitism. The Republican candidate in the 2018 general election in my Congressional district was an open Holocaust denier.<sup>44</sup> Republican lawmakers increasingly engage in overt

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<sup>41</sup> Historical U.S. Federal Individual Income Tax Rates & Brackets, 1862-2021, avail. at <https://taxfoundation.org/historical-income-tax-rates-brackets/>.

<sup>42</sup> *Republicans warn Biden: The next debt limit increase won't be so easy*, Washington Post (Dec. 13, 2021), avail. at [https://www.washingtonpost.com/politics/republicans-debt-ceiling-biden/2021/12/13/b40b6c2a-59d5-11ec-9a18-a506cf3aa31d\\_story.html](https://www.washingtonpost.com/politics/republicans-debt-ceiling-biden/2021/12/13/b40b6c2a-59d5-11ec-9a18-a506cf3aa31d_story.html).

<sup>43</sup> *U.S. debt default could wipe out 6 million jobs and \$15 trillion in wealth, Moody's says*, CBS News, Sept. 22, 2021, avail. at <https://www.cbsnews.com/news/debt-ceiling-default-6-million-jobs-15-trillion-wealth/>.

<sup>44</sup> “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.” *California GOP congressional candidate runs as open Holocaust denier*, The Hill (Jul. 6, 2018), avail. at <https://thehill.com/homenews/campaign/395913-california-gop-congressional-candidate-runs-as-open-holocaust-denier/>.



ideological antisemitism.<sup>45</sup> Democratic politicians flirting with anti-Semitism disguised as pro-Palestinian rhetoric or the “Boycott, Divest, and Sanctions campaign”<sup>46</sup> have likewise not been constrained by the main body of their party.<sup>47</sup> An election giving the

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<sup>45</sup> Republican President Trump’s Executive Order 13967 parroted Nazi attacks against Jewish “degenerate art,” even to the point of attacking by name US works of a Jewish-born refugee from the Nazis. “In Washington, DC, Federal architecture has become a discordant mixture of classical and modernist designs.” *Promoting Beautiful Federal Civic Architecture*, 85 Fed. Reg. 83739 at 83740 (Dec. 23, 2020). “In the District of Columbia, classical architecture shall be the preferred and default architecture for Federal public buildings,” Section 2(a), and the President 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 subsection 2(a) ..., including Brutalist ... architecture or any design derived from or related to these types of architecture,” including “whether such design is as beautiful and reflective of ... vigor”. Section 6(b). “‘Brutalist’ means the style of architecture that grew out of the early 20th-century modernist movement ... .” Section 3(b). EO 13967 attacked by name two buildings designed by a Jewish-born refugee from the Nazis, Bauhaus architect Marcel Breuer (HHS HQ, <https://www.hhs.gov/about/hhs-headquarters/index.html> and Robert C. Weaver Federal Building <https://www.gsa.gov/historic-buildings/robert-c-weaver-federal-building-washington-dc>) at 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, <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, <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, <https://www.bbc.com/news/in-pictures-46863364>). President Biden rescinded EO 13967. *Executive Order on the Revocation of Certain Presidential Actions*, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-the-revocation-of-certain-presidential-actions/> As the Republican candidate, Trump’s election advertising stoked hatred by claiming a diabolical global conspiracy of three Jews: the Chairwoman of the Federal Reserve Board, George Soros and a Wall Street CEO. *Anti-Defamation League: Trump Ad Invokes Anti-Semitic Tropes*, NBC News (Nov. 6, 2016) (avail. at <https://www.nbcnews.com/card/anti-defamation-league-trump-ad-invokes-anti-semitic-tropes-n678686>).

<sup>46</sup> See <https://www.adl.org/resources/glossary-term/boycott-divestment-and-sanctions-campaign-bds>.

<sup>47</sup> On April 28, 2019, I wrote my Congressman, Mark Desaulnier:

Dear Mark- Some of your Jewish constituents may have thoughts similar to mine after reading that the murderer of the Chabad House congregant in San Diego was a successful student at Cal. State San Marcos. [e.g., *From Star Student To Suspected Shooter*, Hispanic Outlook, Apr. 2019, avail. at <https://www.hispanicoutlook.com/articles/synagogue-suspected-shooter>]

First, the failure over an extended period of time of federal education authorities to heed Jewish community complaints about the active spread of anti-Semitism on college campuses under the guise of pro-Palestinian activism. You can see [Jewish Congressman from Sherman Oaks, California] Brad Sherman’s frustration in his press release from last year [<https://sherman.house.gov/media-center/press-releases/department-of-education-embraces-state-department-definition-of-anti>], in which he celebrates getting a crumb [in 2018 after sending] his first letter on the matter in 2008. Teaching 18-22 year olds in college that it is ok to hate Jews is wrong and needs to be stopped.

Second, Lloyd Blankfein, who was one of the trio in Trump’s anti-Semitic iconography in 2016 campaign ads (with Janet Yellen and George Soros), accurately stated on Twitter on March 8 in reaction to the “resolution against hate” [passed by the House instead of the condemnation of anti-Semitism initially proposed following offensive anti-Semitic remarks made by a Democratic Congresswoman]:

*The House not focusing on anti-semitism but instead condemning “hate” is like replacing “Black lives matter” with “all lives matter.” In both cases the broadening blunts the history of wrongs done to a particular group and the need to prevent repetitions.*

It was wrong for the House to not take a stand against conflating pro-Palestinian positions with anti-Semitism.

balance of power to extreme elements in either party could have dire consequences for American Jews. A rational American Jew could fear one side more than the other. These personal economic risks, if matters become untenable, include potentially having to relocate my family to another country and sell my assets at distressed prices. There are no derivative products or commodity prices that hedge this risk.

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

The proposed contracts are not contrary to the public interest. In contrast, the Eris sports betting contracts were contrary to the public interest because they would have allowed illegal gambling enterprises to hedge their risks and therefore thrive, and inflicted upon the public more of all of the harms that accompany illegal gambling,<sup>48</sup> including money laundering, loan sharking, extortion, game-fixing, corruption, infiltration of legitimate businesses, and broken families.

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

No to both. There is no way to “fix” an election the same way one can “fix” a sporting event by bribing a few players. It is hard to imagine proving a political candidate accepted a payoff in order to lose an election. There is no way to prove a distinction between someone who wants a candidate to win because of an economic interest of receiving lower taxation or greater social services, feeling so strongly she will win that he bets on it, or someone who wants a candidate to win because he bet on it. It

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Third is the following quote from the murderer [*Who is John Earnest, the suspect in the Poway synagogue shooting?*, San Diego Union-Tribune, Apr. 28, 2109, avail. at <https://www.sandiegouniontribune.com/news/public-safety/story/2019-04-27/who-is-john-earnest-the-suspect-in-the-poway-synagogue-shooting>]: “I am a testament to the fact that literally anyone can do this,” he wrote. “If you told me even 6 months ago that I would do this I would have been surprised.”

While Trump ... uncorked the bottle to allow the ... genie to escape, ... it has in fact escaped, and everyone needs to help get it back in the bottle- and this includes revisiting whether tolerating virulent anti-Semitism on college campuses is acceptable.

Please be aware of the risks presented to your Jewish constituents by the dramatic increase in anti-Semitism, and the failings on both sides of the aisle to address it.

-Jeremy

<sup>48</sup> FBI, *Integrity in Sports and Gaming*, avail. at <https://www.fbi.gov/investigate/organized-crime/integrity-in-sports-and-gaming>; FBI, *Illegal Sports Betting*, avail. at <https://web.archive.org/web/20210320193314/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.”

is extraordinarily unlikely that a person would seek to cause the election of a candidate with policies contrary to that person's overall economic interests, simply to win a bet.

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

These contracts do not make it any easier to sidestep campaign finance and anti-bribery laws than do other futures contracts.<sup>49</sup> Additionally, if in the future exchanges propose contracts on individual races, which are not the Kalshi contracts here, the CFTC can evaluate those contracts at that time.

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

There are major companies that control large portions of wheat, oil, gas, or other commodity output 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.<sup>50</sup> These contracts cannot be manipulated. There is no "inside information." 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 answer to question 16 as well.

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

See answer to question 15 above. There should be no prohibition. There is no "non-public information" on elections. Any such purported prohibition 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 are in the

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<sup>49</sup> See Wikipedia, *Hillary Clinton cattle futures controversy*, avail. at [https://en.wikipedia.org/wiki/Hillary\\_Clinton\\_cattle\\_futures\\_controversy](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).

<sup>50</sup> 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](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

public interest. Donors receive far more value for their money by donating to candidates to directly obtain access and special favors. Hedge fund managers got far more bang for their million dollars from Senator Sinema, who single-handedly prevented the closing of the carried interest tax loophole,<sup>51</sup> than they ever could have hoped to make on futures contracts by spending hundreds of millions seeking to influence dozens of elections nationwide, especially if those races were to be won by candidates against the carried interest loophole. On a national level, political parties raise money and seek to win elections; they are not gambling the money on futures contracts, they are buying services and advertisements.

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

None. These contracts are in the public interest and have hedging utility. To further assure the public of the integrity of the CFTC’s review of these products, the CFTC should note that Brian Quintenz ended his term as a CFTC Commissioner on August 31, 2021,<sup>52</sup> and joined Kalshi’s Board on or before November 16, 2021,<sup>53</sup> and that his CFTC staff counsel, Eliezer Mishory, is the CFTC’s Kalshi contract for this very CFTC review.<sup>54</sup>

Yours truly,



Jeremy D. Weinstein

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<sup>51</sup> *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*, *Fortune* (Aug. 13, 2022), avail. at <https://fortune.com/2022/08/13/sinema-wall-street-money-killing-tax-investors/>.

<sup>52</sup> *Statement of Commissioner Brian D. Quintenz on the End of His Term and Future Plans* (Aug. 19, 2021) avail. at <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement081921>

<sup>53</sup> *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>.

<sup>54</sup> avail. at <https://www.cftc.gov/sites/default/files/filings/documents/2022/orgkexkalshicongressco220829.pdf>.