September 24, 2022

By Electronic Submission

Mr. Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21 Street NW
Washington, DC 20581

Re: Comments on KalshiEx, LLC's Proposed Congressional Control Contracts

Commissioners:

We sincerely appreciate the opportunity to comment on the submission by KalshiEx, LLC of its proposed Congressional control contracts for Commission review and approval. The question of election event contracts raises important issues of both law and public policy, and we commend the Commission for recognizing their importance and seeking public input.

We submit this comment on behalf of an anonymous client with a deep interest in the lawfulness of election event contracts.

We believe the Commission has a sound basis in law and policy for approving Kalshi's proposed contracts. As to the law, we believe that election event contracts like Kalshi's do not "involve gaming" under Section 5c(c)(5)(C) of the Commodity Exchange Act (CEA) or Rule 40.11 of the Commission's regulations, and so are not proscribed by those provisions. In addition, we believe that Rule 40.11, properly understood in light of the CEA and the Administrative Procedure Act (APA), affords the Commission discretion to approve election event contracts even if those contracts do "involve gaming." Finally, as to policy, we believe election event contracts promote the public good by, among other things, enhancing the accuracy of political predictions, promoting new forms of democratic participation, and serving as an economic hedge for both firms and individuals. We thus encourage the Commission to approve Kalshi's proposed contracts.

I. Section 5c(c)(5)(C) and Rule 40.11 Do Not Apply to Election Event Contracts.

Under the CEA, the Commission must approve contracts submitted to it unless the Commission affirmatively finds that they violate the CEA or the Commission's regulations. 7 U.S.C. § 7a-2(c)(5)(B); 17 C.F.R. § 40.3(b). The Commission has expressed concern that election event contracts may conflict with Section 5c(c)(5)(C) of the Act and Rule 40.11, which

together prohibit event contracts based on gaming, four other enumerated activities, or "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest." But an election is not gaming, nor any of the other four prohibited activities, nor a "similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest." Thus, Kalshi's contracts are lawful and should be approved.

The Commission previously found an election event contract to be gaming because the contract itself was a form of gaming. *N. Am. Derivatives Exch., Inc.* (*Nadex*), slip op. at 3 (CFTC Apr. 2, 2012). Respectfully, we believe the Commission erred in that Order and should not adhere to that position here. Section 5c(c)(5)(C) and Rule 40.11 prohibit event contracts where the event on which the event contract is based is an act of gaming. They do not prohibit event contracts simply because entering into the contract might itself be construed as a form of gaming. Indeed, as explained below, *all* event contracts involve making predictions (and related wagers) about future "occurrences" that are outside of the relevant parties' control. Were this facial similarity with "gaming" all that were required to fall within Section 5c(c)(5)(C)'s reach, every event contract would be implicated—a plainly untenable result. Moreover, even if considered under the *Nadex* Order's framing, an election event contract is still not gaming. "Gaming" has a well-established and precise meaning: betting on games of chance. An election is not a game of chance—or even a game at all—so staking money on an election is not gaming. Finally, at the very least, Section 5c(c)(5)(C) and Rule 40.11 do not clearly prohibit election event contracts and several traditional canons of construction weigh against construing them to do so here.

A. Standard of Review.

The meaning of the Commodity Exchange Act and the Commission's regulations is a question of law to be answered using "the traditional tools of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (cleaned up). In particular, the Commission must apply these provisions according to their "ordinary meaning." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (citation omitted). The term "gaming" in Rule 40.11(a) comes from Section 5c(c)(5)(C)(i)(V) of the CEA without alteration. Thus, even if genuine ambiguity remains after applying the traditional tools of construction, the Commission still must apply the term's ordinary meaning. *See Kisor*, 139 S. Ct. at 2417 n.5 (an agency does not receive "deference" when it "interprets a rule that parrots the statutory text").

B. An Election Event Contract Is Based on an Election—Not Gaming or Any Other Prohibited Activity.

Under the CEA, an event—that is, an "occurrence, extent of an occurrence, or contingency" outside of the relevant parties' control—can be an excluded commodity that

forms the basis of a contract. 7 U.S.C. § 1a(19)(iv). Under Section 5c(c)(5)(C)(i) of the Act, the Commission may determine that an event contract is contrary to the public interest if the contract "involve[s]" an event falling within one of six categories: "activity that is unlawful under any Federal or State law," "terrorism," "assassination," "war," "gaming," and "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest." *Id.* § 7a-2(c)(5)(C)(i). Contracts that the Commission finds to be against the public interest are prohibited. *Id.* § 7a-2(c)(5)(C)(ii). Rule 40.11 provides that any contract "based upon an excluded commodity … that involves, relates to, or references" the first five categories is prohibited. 17 C.F.R. § 40.11(a)(1).

These provisions are best read to exclude election event contracts. Elections are not games and so cannot be seen as gaming. Nor can the election event contract itself supply the requisite "gaming," as that would upend the statutory scheme by converting every event contract into "gaming." After all, every event contract is based on an uncertain future occurrence. Such an interpretation of "gaming" would thus, in turn, read out of the statute the other terms in Section 7a-2(c)(5)(C)(i)—"war," "assassination," etc—because each would be "gaming" under that view. Such an interpretation is not plausible, as detailed further below.

1. The Statutory and Regulatory Text Shows That Election Contracts Are Based on Elections Rather Than Gaming or Other Prohibited Activities.

An election for public office is not any of the activities enumerated in Section 5c(c)(5)(C)(i). It is (obviously) not an unlawful activity, terrorism, assassination, or war. But neither is it gaming. "Gaming" is the playing of "games of chance for money." *Game*, *New Oxford American Dictionary* (3d ed. 2010). Unlike dice, roulette, and other games of chance, elections are not primarily decided by pure luck; they are decided by the voters' deliberate choices as to who should hold the public office in question. And even more fundamentally, elections are not "games" in the first place. They are not "engaged in for diversion or amusement," *Game*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020), but to determine who will occupy political offices across the country. Finally, an election also does not fall within the final category of a "similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest," 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI), as elections are not similar to unlawful activities, terrorism, assassination, war, or gaming. Section 5c(c)(5)(C) and Rule 40.11 are thus best read as not outlawing election event contracts.

The Commission's *Nadex* order took a different approach, asking instead whether "the contract, considered as a whole," constitutes gaming. Slip op. at 2. Respectfully, we believe that this analysis misconstrues the word "involve" in the Act. Section 5c(c)(5)(C) gives the

Commission the power to ban contracts that "involve" gaming—not contracts that might be seen as *themselves* constituting gaming when "considered as a whole." Specifically, the CEA and the Commission's other regulations consistently use the term "involve" to identify the commodity (event) on which the contract is based.[1] For purposes of the Act, an event contract thus "involves" gaming when the contract is based on a gaming event.

Rule 40.11 confirms as much. The Rule is titled: "Review of event contracts *based upon* certain excluded commodities." 17 C.F.R. § 40.11 (emphasis added). And its text prohibits any "[a]greement, contract, transaction, or swap *based upon* an excluded commodity, as defined in Section 1a(19)(iv) of the Act, that involves, relates to, or references … gaming." *Id.* (emphasis added). The Rule is thus clear that the contract must be "based upon" the particular excluded commodity rather than itself being part of that commodity. In other words, the contract must be based upon gaming rather than the contract itself constituting gaming.

Thus, an event contract that turns on whether a winner will be announced at the next Mega Millions Lottery drawing "involves" gaming within the meaning of the Act, because such a contract is based on a gaming event—a lottery is a game of chance played for money. In contrast, an event contract that turns on the performance of a particular harvest, sector of the energy industry, or election for public office does not "involve" gaming within the meaning of the Act, because that sort of contract is *not* based on a game of chance. Contrary to *Nadex*'s reasoning, it is not dispositive—indeed, it cannot be dispositive—that entering into an event contract might be akin to gaming in some sense (*i.e.*, staking money or other resources on the occurrence of a future event that is outside of the relevant parties' control). *See* slip op. at 2 & nn. 1 & 2. After all, every event contract shares this characteristic. Such an interpretation of Section 5c(c)(5)(C) would thus preclude entering into *any* event contract under the CEA and Rule 40.11—an outcome that is self-evidently untenable, as explained at

---

[1] *See, e.g.*, 7 U.S.C. § 6c(b) ("No person shall offer to enter into … any transaction involving any commodity …."); *id.* § 15b(e) ("Each cotton futures contract … shall be in writing plainly stating … the terms of such contract , including the quantity of the cotton involved …."); *id.* § 16(e)(1)(B) ("Nothing in this chapter shall supersede or preempt … the application of any Federal or State statute … to any transaction in or involving any commodity …."); *id.* 23(b)(1) ("The Commission may set different terms and conditions for transactions involving different commodities."); 17 C.F.R. § 1.17(c)(5)(iii)(C)(1)(iii) ("In the case of over-the-counter swap transactions involving commodities, 20 percent of the market value of the amount of the underlying commodities."); *id.* § 5.9(d) ("A major currency pair security deposit percentage is only applicable when both sides of a retail over-the-counter foreign exchange transaction involve major currencies."); *id.* § 31.8(a)(2)(ii) ("Permissible cover for a long leverage contract is limited to: … one type of bulk gold coins for leverage contracts involving another type of bulk gold coins ….").

greater length below.

2. The Statutory and Regulatory Context Confirms That Election Contracts Are Based on Elections Rather Than Gaming or Other Prohibited Activities.

Context confirms that Section 5c(c)(5)(C)(i) and Rule 40.11 are best understood to not reach election event contracts. By their terms, these provisions apply only to contracts that are based on an excluded commodity that is an event outside the contracting parties' control.[2] Likewise, the other listed activities are events outside the parties' control. An event contract cannot *itself* constitute an act of terrorism, assassination, or war, whereas such acts *can* be the excluded commodities that underly an event contract. It would be very strange if gaming were the only term in Section 5c(c)(5)(C)(i) that referred to the nature of the entire contract rather than to the underlying excluded commodity.

Construing "gaming" to include both the underlying occurrence and the contracts on that occurrence would, moreover, make the other subsections of Section 5c(c)(5)(C) surplus. After all, event contracts on whether New York City will be bombed in October ("terrorism"), whether Kim Jong Un will be killed ("assassination"), or whether Ukraine will defeat Russia ("war") are all equally bets on the outcomes of future events. Each of these could simply be prohibited as a "gaming" contract under the reasoning in the Commission's *Nadex* Order. Indeed, the broad *Nadex* construction would even risk supplanting the catchall provision for "any other similar activity" the Commission identifies "by rule or regulation," 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI), since *any* event contract could be prohibited as "gaming" under that view. That is not plausible.

Finally, although we do not believe the Commission should rely on Section 5c(c)(5)(C)'s legislative history to interpret Section 5c(c)(5)(C),[3] it too supports the view that election event

---

[2] Section 5c(c)(5)(C)(i) refers to commodities described in "section 1a(2)(i) of this title," a provision which does not exist, rather than Section 1a(19)(iv), which defines when an occurrence or contingency is an excluded commodity. That is a scrivener's error, as Rule 40.11 recognizes. *See* 17 C.F.R. 40.11(a)(1) (referring to commodities "defined in Section 1a(19)(iv)"). And that definitional provision defines "excluded commodity" to include, in relevant part, "an occurrence … beyond the control of the parties to the relevant contract, agreement, or transaction; and associated with a financial, commercial, or economic consequence." 7 U.S.C. § 1a(19)(iv)(I)–(II).

[3] As the Supreme Court has explained, "legislative history is not the law"; statutory interpretation must instead be based on "statutory text" and "structure." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (cleaned up).

contracts are not gaming. When asked about the scope of the Commission's power to ban gaming contracts, Senator Lincoln replied that it would cover event contracts based on "sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." 156 Cong. Rec. S5907 (daily ed. July 15, 2010). All these examples are contracts where the underlying commodity is the outcome of a game, which an election is not.

C. An Election Event Contract Is Not Itself Gaming.

But even if the *Nadex* Order were correct to consider the contract as well as the underlying commodity, we respectfully submit that the Order was still mistaken to apply that reasoning to election event contracts. Event contracts based on the outcome of an election might be *wagers*, but not all wagers are *gaming*. "Gaming" refers to placing stakes on the outcome of a game of chance. And as noted above, an election is not a game of chance, a game of skill, or even a game at all.

The ordinary meaning of the word "gaming" is betting on games of chance. *See Gaming*, *Oxford English Dictionary* (3d ed. 2013) ("To take part in an indoor game, of a kind on which stakes or wagers may be placed; *esp.* to play games of chance for such stakes or wagers"); *Game*, *New Oxford American Dictionary*, *supra* ("play games of chance for money"); *Game*, *Webster's Third New International Dictionary* (1961) ("to play for a stake (as with cards, dice, or billiards)"); *Gaming*, *The Cambridge Advanced Learner's Dictionary* (4th ed. 2013) ("the risking of money in games of chance, especially at a casino"). Hence courts have long recognized that "betting is not gaming unless the wager be laid upon a game." *In re Opinion of the Justs.*, 63 A. 505, 507 (N.H. 1906). Had Congress wanted to sweep more broadly, it could have used the more common term "gambling," which encompasses bets on both games of chance *and* "the outcome of particular events" more generally. *Gambling*, *Oxford English Dictionary*, *supra*. Indeed, the statutes relied upon in the *Nadex* Order to support a purported "link" between "gaming" and "betting on elections" mostly use the broader term "gambling," not "gaming." See slip op. at 2 & n. 1.

For contracts to constitute "gaming," there must thus be underlying games of chance. Elections are not games, let alone games of chance. Election event contracts are thus best understood to not constitute gaming.

D. Section 5c(c)(5)(C) and Rule 40.11 Do Not Clearly Prohibit Election Event Contracts.

We further believe that four traditional tools of construction weigh against the Commission applying Section 5c(c)(5)(C) and Rule 40.11 to election event contracts: the federalism canon, the major questions doctrine, the presumption of validity, and the rule of

lenity. For the reasons detailed above, we do not believe these provisions are best read to include election event contracts. But at a minimum, they do not clearly include election event contracts. The Commission acknowledged as much when promulgating Rule 40.11, noting that "the term 'gaming' requires further clarification" and may not extend beyond "participation in traditional 'gaming' activities." Final Rulemaking, 76 Fed. Reg. 44,776, 44,785 (July 27, 2011). Accordingly, the Commission should not interpret these provisions to prohibit election event contracts.

1. The Federalism Canon and the Major Questions Doctrine

The Federalism canon provides that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (citation omitted). Likewise, under the major questions doctrine, the Supreme Court has explained that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022) (citation omitted). We believe that both principles are implicated here.

The regulation of gambling has long been "the particular domain of state law." *Ala. Ass'n*, 141 S. Ct. at 2489. As a government of enumerated powers, the federal government does not possess a "general police power," which is instead "retained by the States." *United States v. Lopez*, 514 U.S. 549, 567 (1995). Legislation "to protect the public morals" lies at the core of the police power. *Chi., B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906). And gambling laws are quintessential public morals legislation. *See Murphy*, 138 S. Ct. at 1469. Hence, the lawfulness of gambling has long been a question of state law. *See id.* at 1468–71. The "general federal approach" has been to prohibit certain interstate activities related to gambling, but "only if that conduct is illegal under state or local law." *Id.* at 1483; *see* 18 U.S.C. §§ 1084, 1952, 1953, 1955; 31 U.S.C. § 5363.

The regulation of gambling is also a matter of vast political and economic significance. Gambling is both a "controversial issue" and an "immensely popular" pastime, *Murphy*, 138 S. Ct. at 1469, 1483, which involves a great deal of money. In 2020, for instance, customers of a single British betting company collectively staked £434 million (about $566 million) on the outcome of the U.S. presidential election. T. Adinarayan & D. Chowdhury, *Bettors Stampede Back in Favor of Biden as Results Stream in*, *Nat'l Post* (Nov. 4, 2020), https://tinyurl.com/4w54t2dk. If the Commission interprets "gaming" broadly, the size of the economic activity implicated will naturally be even greater. *See Ala. Realtors*, 141 S. Ct. at 2489 (evaluating the "majorness" of a question by the larger consequences of the agency's assertion of authority, not merely the consequences of the specific outcome it is defending).

Given these considerations, the Commission should not read Section 5c(c)(5)(C) to require that it ban event contracts which do not involve traditional gaming activities, *i.e.*, games of chance. If Congress had wished to confer that authority on the Commission, it would have said so explicitly.

2. The Presumption of Validity

Under the presumption of validity, an "interpretation that validates outweighs one that invalidates." Scalia & Garner, *supra*, at 66. Accordingly, the Commission should not adopt an interpretation of Rule 40.11 that would place it in conflict with Section 5c(c)(5)(C) or the APA if another interpretation is fairly possible. *Cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (applying the same principle for a statute vis-à-vis the Constitution). Because reading Rule 40.11 to cover election event contracts would place it in conflict with those statutes, we respectfully submit that the Commission should not read it to apply beyond contracts involving games of chance.

Section 5c(c)(5)(C) empowers the Commission to prohibit contracts involving gaming only by "determin[ing]" that such contracts are "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i), (ii). And the APA requires the Commission to give a reasoned explanation for its determination. 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). In issuing Rule 40.11, the Commission noted that the term "gaming" may not extend beyond "participation in traditional 'gaming' activities" and that it would "continue[] to consider" whether there are "bases for distinguishing" such activities from "trading in contracts linked to the occurrence (or non-occurrence) of events." Final Rulemaking, 76 Fed. Reg. at 44,785. The Commission thus never determined that election event contracts or other event contracts that are not traditional gaming activities are contrary to the public interest. Still less did it give a reasoned explanation for such a determination. If Rule 40.11 covers these event contracts, then it conflicts with Section 5c(c)(5)(C) and is arbitrary and capricious under the APA. The rule should thus instead be read to apply only to contracts involving games of chance.

3. Rule of Lenity

Where "a reasonable doubt persists" about the scope of a penal provision, the provision must be construed not to impose liability. *Moskal v. United States*, 498 U.S. 103, 108 (1990). A penal provision is one whose violation may be punished with a civil or criminal penalty. *See Wooden v. United States*, 142 S. Ct. 1063, 1086 & n.5 (2022) (Gorsuch, J., concurring in the judgment) (collecting authorities); Scalia & Garner, *supra*, at 297. Section 5c(c)(5)(C) and Rule 40.11 implicate both kinds of penalty. The Commission may civilly punish a registered entity that violates Rule 40.11 with suspension or revocation of its registration. 7 U.S.C.

§ 7b. And any person who willfully violates Rule 40.11(a) is guilty of a felony. *Id.* § 13(a)(5). Nor does it matter that the Commission does not seek to punish Kalshi in this proceeding. "The rule of lenity … is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language." *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992). As such, it always applies to a penal provision, even when the provision is being applied in a nonpenal context. *Id.* Once the rule of lenity is applied, Section 5c(c)(5)(C) and Rule 40.11 are best understood to not cover election event contracts, given the Commission's own stated doubt concerning whether contracts involving "gaming" include wagers on events that are not games of chance or even games.

II. Section 5c(c)(5)(C) and the APA Require an Individualized Public-Interest Determination in This Proceeding.

If the Commission nevertheless determines that Rule 40.11 applies to election event contracts, then we believe it should interpret that Rule as giving it discretion to nonetheless approve them—an approval it should grant for the reasons detailed in Part III below. Section 5c(c)(5)(C) and the APA are best understood as requiring case-by-case determinations by the Commission for contracts falling in the enumerated categories. That means the Commission must make a public-interest determination and give a reasoned explanation for such a determination here. This is especially true in light of the fact that the Commission has not yet determined whether gaming generally or Kalshi's contracts in particular are contrary to the public interest nor given a reasoned explanation for any such determination.

A. Section 5c(c)(5)(C) Requires an Individualized Public-Interest Determination.

Under Section 5c(c)(5)(C), the Commission must decide whether contracts involving gaming are contrary to the public interest on a case-by-case basis. The statute is best understood to not permit a categorical determination that such contracts are always contrary to the public interest.

Start with the relevant text of Section 5c(c)(5)(C)(i):

> 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 … 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 … gaming.

7 U.S.C. § 7a-2(c)(5)(C)(i). The Commission may make a public-interest determination only "[i]n connection with the listing of agreements, contracts, transactions, or swaps … by a" registered entity. *Id.* That is, the determination must be *in response to* a registered entity listing a contract involving gaming. Moreover, the determination applies to "*such* agreements, contracts, or transactions … if *the* agreements, contracts, or transactions involve" gaming. *Id.* (emphases added). When used as an adjective, "such" refers to particular things already mentioned. *See Such*, *Oxford English Dictionary*, *supra* ("The previously described or specified; the (person or thing) before mentioned."); *Such*, *Black's Law Dictionary* (11th ed. 2019) ("That or those; having just been mentioned"). The use of the definite article also indicates that the clause speaks of particular contracts, not contracts involving gaming generally. And the verb "determine" offers further support: It carries an adjudicative connotation, suggesting a case-by-case decision. *See Determine*, *Black's Law Dictionary*, *supra* ("The act of deciding something officially; esp., a final decision by a court or administrative agency"); *Determine*, *Oxford English Dictionary*, *supra* ("To settle or decide (a dispute, question, matter in debate), as a judge or arbiter.").

Zooming out, the sentence structure of Section 5c(c)(5)(C) would be awkward and redundant if it was meant to refer to contracts involving gaming generally. Had that been Congress's intent, it could simply have said, "The Commission may determine that agreements, contracts, or transactions that are based on certain excluded commodities … are contrary to the public interest if they involve gaming."

Moreover, another clause of Section 5c(c)(5)(C), which addresses the clearing of swaps, uses the same sentence structure to unambiguously require an individualized determination:

> *In connection with the listing* of a swap for clearing *by a derivatives clearing organization*, the Commission shall *determine*, upon request or on its own motion, the initial eligibility, or the continuing qualification, of a derivatives clearing organization to clear *such a swap* under those criteria, conditions, or rules that the Commission, in its discretion, determines.

7 U.S.C. § 7a-2(c)(5)(C)(iii)(I) (emphases added). A single derivatives clearing organization's "initial eligibility" and "continuing qualification" can only be individualized determinations. And the Commission's implementing regulation recognizes as much. *See* 17 C.F.R. § 39.5 (outlining process for reviewing swaps on an individualized basis).

In addition, Section 5c(c)(5)(C)(iv)'s deadline makes sense only if it refers to an individualized determination. "The Commission shall take final action under clauses (i) and (ii) in not later than 90 days from the commencement of its review unless *the party* seeking to offer *the contract or swap* agrees to an extension of this time limitation." 7 U.S.C. § 7a-

2(c)(5)(C)(iv) (emphases added). This language is best understood as acknowledging that a determination under Section 5c(c)(5)(C)(i) concerns a specific contract brought by a specific party. Thus, "final action" under that provision cannot be the issuance of a rule of general applicability. On top of that, a 90-day deadline is likely too short in the context of notice-and-comment rulemaking. For instance, two hundred sixty-seven days elapsed between the Notice of Proposed Rulemaking (NPRM) and the Final Rulemaking for Rule 40.11.

Finally, Rule 40.11 assumes that the Commission will determine the public interest on a case-by-case basis. While Rule 40.11(a)(1) may seem like a categorical prohibition when read in isolation, Rule 40.11(c) provides that the Commission can prohibit a contract involving gaming only after public notice and a 90-day review period. That would be quite unnecessary if the Commission only needed to decide whether a contract involved gaming, which would be cut and dry in many cases. *See infra* Part III.A (discussing Rule 40.11(c) further).

But even if the statute could be read to empower the Commission to categorically prohibit every contract that "involves" gaming, we submit it would exceed the statute's scope to prohibit every contract that merely "relates to" or "references" gaming. 17 C.F.R. 40.11(a)(1). Section 5c(c)(5)(C) allows the Commission to prohibit only contracts that "involve" gaming. 7 U.S.C. § 7a-2(c)(5)(C)(i). Rule 40.11 is best understood as staying within that statutory constraint and as not expanding the Commission's power beyond contracts "involving" gaming, as detailed in Part I above.

B. The Commission Has Not Yet Made an Applicable Public-Interest Determination.

Even if Section 5c(c)(5)(C) did not require an individualized public-interest determination, we respectfully submit that the Commission should make one here. The Commission can ban contracts involving gaming only if it first determines that such contracts are "contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i), (ii). But the Commission has not yet made a public-interest determination that applies to Kalshi's contracts.

Nor did the Commission determine that gaming contracts are always contrary to the public interest when it issued Rule 40.11. The text of Rule 40.11(a)(1) does not mention the public interest. Neither did the NPRM, which said only that Section 5c(c)(5)(C) "authorizes the Commission to prohibit" contracts involving gaming and that the Commission is acting "[p]ursuant to this authority." 75 Fed. Reg. 67,282, 67,288–89 (Nov. 2, 2010). The Commission did mention the public interest in the Final Rulemaking, where it said that it "would like to note that its prohibition of certain 'gaming' contracts is consistent with Congress's intent to 'prevent gambling through the futures markets' and to 'protect the public

interest from gaming and other events contracts.'" 76 Fed. Reg. at 44,786 (quoting legislative history). But this is not a *determination by the Commission* that gaming contracts violate the public interest. It is an *observation* that *Congress* has found gaming contracts to be contrary to the public interest and that the Commission is simply complying with that finding. Although we appreciate the Commission's desire to respect the will of Congress, Congress left it to "the Commission" to "determine" whether gaming contracts "are contrary to the public interest." 7 U.S.C. § 7a-2(c)(5)(C)(i). But finally and besides, even if this discussion did amount to a public-interest finding, as discussed above, it was limited to "traditional 'gaming' activity," which does not include election event contracts. Final Rulemaking, 76 Fed. Reg. at 44,785; *supra* Part I.D.2.

Appropriately, the Commission did make an individualized public-interest determination in its *Nadex* Order. Slip op. at 4. But that finding by its terms was limited to "the Political Event Contracts," *id.*, the defined term the Commission used for the specific contracts Nadex had proposed in that proceeding, *id.* at 1. Naturally, the Commission's finding was also based on the specific facts and arguments presented in that proceeding, which are not identical to the ones presented here. Accordingly, if the Commission determines that Kalshi's contracts involve gaming—which, as discussed above, would be contrary to the ordinary meaning of both "involve" and "gaming"—we believe it should also make an individualized public-interest finding to conform to the requirements of Section 5c(c)(5)(C).

C. The Commission Has Not Yet Explained Any Applicable Public-Interest Finding.

For similar reasons, we believe the Commission should make a public-interest determination here to conform to the APA. The APA requires agencies to give reasoned explanations for their decisions. 5 U.S.C. § 706(2)(A). The Commission has not yet given a reasoned explanation on whether Kalshi's contracts or gaming contracts generally are contrary to the public interest. To the contrary, the Commission acknowledged that it would "continue[] to consider" whether contracts involving events that are not "traditional 'gaming' activities" should be banned at all. Final Rulemaking, 76 Fed. Reg. at 44,785.

In addition, the APA requires the Commission "to appreciate the full scope of [its] discretion" when making decisions. *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1911 (2020). When issuing Rule 40.11, the Commission appeared to believe that Congress had already determined that gaming contracts are contrary to the public interest. *Supra* Part II.B. We believe the Commission should acknowledge its discretion (and obligation) to make its own public-interest determination and exercise it.

Moreover, even setting aside the text of Section 5c(c)(5)(C), we do not believe the legislative history of that provision justifies a determination that gaming contracts are contrary to the public interest. The Final Rulemaking discerned Congress's intent from a single colloquy by two Senators. Final Rulemaking, 76 Fed. Reg. at 44,786 & nn. 34–35 (citing 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010) (statements of Sens. Lincoln and Feinstein)). But Congress does not speak authoritatively through legislative history, only through duly enacted statutes. *Allina Health Servs.*, 139 S. Ct. at 1814. And even when courts consult legislative history, they accept only "clear evidence of congressional intent." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). Floor statements by individual Senators are not enough. Such statements "rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017); *accord Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017).

III. Election Event Contracts Promote the Public Interest.

If the Commission determines that Kalshi's contracts involve gaming, we submit that the Commission retains the discretion to find that they are not contrary to the public interest. It should exercise that discretion to approve them.

A. Rule 40.11 Permits the Commission to Consider the Public Interest Here.

Nothing in the CEA or the Commission's regulations prohibit it from approving individual contracts that fall within Rule 40.11(a). Rule 40.11(a) forbids a "registered entity" to "list" for trading a contract that involves gaming (emphasis added). It says nothing about what the Commission can do. Rule 40.11(c) requires the Commission to "issue an order approving or disapproving" the contract by the end of the 90-day review period. But it does not identify the standard by which the Commission must approve or disapprove requests or otherwise limit the Commission's discretion in any other way. Thus, nothing in Rule 40.11 prevents the Commission from approving a contract involving gaming on the ground that the contract is consistent with the public interest. Nor does any provision of the CEA. To the contrary, the Act requires the Commission to determine the public interest on a case-by-case basis. 7 U.S.C. § 7a-2(c)(5)(C)(i); supra Part II.A.

B. The Predictive Value of Election Event Contracts Serves the Public Interest.

As the Commission recognized in its *Nadex* Order, the public-interest standard is not limited to the narrow question of whether a contract satisfies the economic purpose test. Slip op. at 4. Despite recognizing this general principle, the Commission has not yet publicly

considered the benefits of election event contracts beyond whether it has an economic purpose. Such contracts have a separate and unique benefit to the public—they provide a mechanism for accurately predicting election results.

An academic study of the Iowa Electronic Markets found that the markets have "no obvious biases" in forecasting election results and have "considerable accuracy." J. Berg et al., *Results from a Dozen Years of Election Futures Markets Research*, *in* 1 *Handbook of Experimental Economics Results* 742, 746 (Charles R. Plott & Vernon L. Smith eds., 2008). The Iowa Markets consistently outperform conventional polls, predicting presidential election results within 1.5%, compared to 1.9% on average for polls. *Id.* The Iowa Markets are also "more stable than polls over the course of election campaigns." *Id.* at 747. And their prices "do not follow poll results"; rather, they "predict changes in polls." *Id.* at 749.

More accurate predictions promote the public interest. Accurate information about the future is as vital to politics as to business. Politicians and the public both rely on predictions about elections in the form of polls and expert commentary to shape their behavior. Politicians use this information to understand whether their message is resonating with the public and to reshape it as needed. The public uses this information to know what candidates and events are worth paying attention to, and to make decisions as to how to most effectively allocate scarce resources. By providing more accurate predictions, election event contracts can only improve our democracy. The CEA recognizes that commodity futures trading serves the "national public interest by providing a means for … discovering prices" and "disseminating pricing information through trading." 7 U.S.C. § 5(a). Election events contracts provide an analogous public benefit in the political arena, in addition to the price-discovery benefits discussed below.

Election event contracts can be particularly useful in down-ballot races and for less-established candidates. National polling firms are less likely to conduct polls for district-level and local races. Whatever polling is conducted is less accurate, and campaigns have to spend money to conduct internal polling that is not released to the public. According to academic researchers, election prediction markets remain "extremely accurate" even at the district level. J. Wolfers & E. Zitzewitz, *Prediction Markets*, 18 *J. of Econ. Perspectives* 107, 112 (2004). Election event contracts would thus allow the public and candidates with lower levels of funding to have accurate predictions in races that would otherwise be neglected. Democratizing the availability of accurate predictive information for less well-funded candidates and races in smaller markets serves the ends of democracy by helping to level the playing field for these otherwise marginalized candidates and races.

Election prediction markets promote democratic values and expand participation in our democracy in additional ways. To obtain analysis of future election results today,

members of the public largely have to rely on polls conducted by a small number of elite firms and a small class of expert commentators in the media. If election event contracts were to become more widespread, ordinary members of the public would be able to improve political discourse and learn from their fellow citizens through participation in prediction markets. Election event contracts have the power to harness the wisdom of the crowd and to open up a new avenue of political participation that would not otherwise exist.

The Commission's rationale in *Nadex* for concluding that the contracts at issue there harmed the public interest was that those contracts could create "monetary incentives to vote for particular candidates even when such a vote may be contrary to the voter's political view of such candidates." Slip op. at 4. Naturally, this would be concerning if it took place on a large scale, but it seems unlikely to occur in any given case. The effect of a single vote on any election is negligible, so any financial incentive to vote against one's political views would likewise be negligible. And to the extent someone tried to guarantee a favorable outcome on a contract by buying the votes of others, that would be a crime under federal law. 18 U.S.C. § 597.

C. Election Event Contracts Pass the Economic Purpose Test.

In any event, election event contracts serve the public interest even under the economic purpose test. In *Nadex*, the Commission asserted that "the unpredictability of the specific economic consequences of an election means that" the contracts Nadex had proposed "cannot reasonably be expected to be used for hedging purposes." Slip op. at 3. But the Commission did not explain its reasoning on this point, and there are good reasons to think otherwise.

First, on an intuitive level, it is easy to see how even one election result can have significant economic consequences for certain firms and individuals.[4] Although there are many elected officials in America, much of the law governing business today comes in the

---

[4] Many individuals have commented in this proceeding identifying consequences of elections against which election event contracts would allow them to hedge. *See, e.g.*, Comment of Ian W., No. 69730 (Sept. 22, 2022) (explaining that Congress this term "was literally *one vote* away from changing the capital gains tax treatment" that applied to him); Comment of Valentin Perez, No. 69725 (Sept. 21, 2022) (as a small business owner, taxes and immigration policy); Comment of Jacob Faircloth, No. 69683 (Sept. 13, 2022) (explaining that the SALT deduction is unlikely to be fully restored in the near future unless the Democrats control Congress); Comment of Mike Ee, No. 69681 (Sept. 12, 2022) (explaining that changes to Medicare funding would affect the income of his wife, who works at a hospital); Comment of Amir K. Kaushik, No. 69656 (Sept. 5, 2022) (as an international student, immigration policy).

form of regulations issued by administrative agencies. Administrative agencies largely answer to one person: the President. Presidential candidates can have starkly different positions on how certain industries should be regulated, meaning the outcome of the presidential election can have significant financial consequences for firms in those industries. Control of Congress, the subject of Kalshi's proposed contracts, has similarly observable consequences. Which party controls Congress after the midterms will determine whether the country will have a united or divided government for the next two years, and economically significant legislation favored by one of the two major parties is much more likely to pass under a united government. And on many issues, the major parties have clear differences in their platforms that party leaders ensure are followed once they are in power, so one can often foresee the sorts of policies a united government will enact into law.

Second, there is concrete empirical evidence of the economic impact of elections. One study, for instance, examined the equity prices of 41 firms whose activities would be favored under the policy platforms of George W. Bush and 21 firms favored under those of Al Gore in the wake of the 2000 presidential election. Brian Knight, *Are Policy Platforms Capitalized into Equity Prices? Evidence from the Bush/Gore 2000 Presidential Election* 2 (Nat'l Bureau of Econ. Res., Working Paper No. 10,333, 2004). The study found a statistically significant effect: on average, the value of Bush-favored firms was 3% higher than they would have been under a Gore administration, while the value of Gore-favored firms was 6% lower. *Id.* at 9–10. The difference was more pronounced in industries where the difference in the candidates' policy views was greater. Tobacco firms, for instance, were worth 13% more under Bush relative to Gore. *Id.* at 11. For firms sensitive to regulation in areas where candidates have significant policy disagreement, election event contracts would easily be able to serve a hedging function.

* * * * *

We again thank the Commission for seeking public input on these important questions. We urge the Commission to approve Kalshi's proposed contracts because they do not involve gaming and are not contrary to the public interest.

Very truly yours,

Caesar A. Tabet
Partner

direct dial: 312.762-9480
email: ctabet@tdrlaw.com

cc: The Honorable Rostin Behnam, Chairman
The Honorable Kristin N. Johnson, Commissioner
The Honorable Christy Goldsmith Romero, Commissioner
The Honorable Summer K. Mersinger, Commissioner
The Honorable Caroline D. Pham, Commissioner