Even Better Markets

Comment in Opposition to the Event Contract Proposal

The Commission should not implement any of its proposed amendments to its rules concerning event contracts in certain excluded commodities, for all of the reasons described below.

The Commission should also not seriously consider the parroting of the Proposal by various lobbying groups who claim to be non-partisan and independent with a stated goal of promoting "the public interest in the financial markets, support[ing] the financial reform of Wall Street, and mak[ing] our financial system work for all Americans again." Contrary to the contents of comments of that ilk, this Proposal will not "promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more;" it will do the exact opposite.

I. The Proposal Fundamentally Misunderstands the Usage of the Term "Involve" in the CEA, Runs Afoul of Basic Canons of Statutory Construction, and is Not Supported by Feeble Legislative History.

The only consistent, coherent interpretation of the CEA's event-contract provision is that the word "involve," read in its statutory context, links the enumerated activities in the statute to a contract's event—not to the act of trading it. This event-focused reading makes sense of each enumerated activity and accommodates the statute's broader structure.

What does not make sense is the Commission's contrary reading that "Congress's choice of the broader term "involve" means that CEA section 5c(c)(5)(C) encompasses both event contracts whose underlying is an Enumerated Activity or prescribed similar activity, and event contracts with a different connection to an Enumerated Activity or prescribed similar activity, because, for example, they "relate closely" to, "entail," or "have as an essential feature or consequence" such activity. No matter how broad, a single statutory term in a single sentence cannot perform two completely different tasks simultaneously. The Commission's Proposal attempts to turn the word "involve" into a shapeless, adaptive, and subjective creation is incredulous. It is utterly implausible that Congress—through a single word—repeatedly shifted the focal point of a crucial statutory inquiry back and forth across five subparagraphs of the same sentence.

This impassable obstacle to the Commission's interpretation of the CEA is referred to as the consistent-meaning canon. Statutory terms have fixed meanings; they do not expand and contract to fit particular applications.

In an attempt to move the goalposts, the Proposal attempts to wave its hands at the definition of the term "involves" to "include 'to relate to or affect,' 'to relate closely,' to 'entail,' or to 'have as an essential feature or consequence'" and provides, in a footnote, references to definitions provided by Merriam Webster, Random House College Dictionary, Riverside University Dictionary, and a synonym from Roget's International Thesaurus. But regardless of the volume of what the Commission throws at the wall, none of it sticks. And none of it really matters. No matter which dictionary definition is used to define the term "involve" in the statute, the essential analysis of the statutory provision is what work the word performs in the statute, and the result of that analysis must apply equally to the entire statute. In the words of the Supreme Court, "a single [statutory] formulation" must be read "the same way each time it is called into play." Ratzlaf v. United States, 510 U.S. 135, 143 (1994). And when one term "applies without differentiation to" a set of defined "categories," reading it to perform different work as to "each category would … invent a statute," not "interpret one." Clark v. Martinez, 543 U.S. 371, 378 (2005); see also Reno v. Bossier Par. Sch. Bd., 528 U.S. 320, 329 (2000) ("refus[ing] to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying").

The Proposal's position on the only relevant part of this analysis is that the term "involve" "encompasses both event contracts whose underlying is an Enumerated Activity or prescribed similar activity, and event contracts with a different connection to an Enumerated Activity or prescribed similar activity, because, for example, they 'relate closely' to, 'entail,' or 'have as an essential feature or consequence.'" Exposed to its simplicity, the work performed by the term "involve" according to the Commission's reading is NOT CONSISTENT across the statute.

Try as it might, the Commission cannot escape that inconsistency. Again, even accepting that "involve" means "relate to" or "entail," it would be bizarre for Congress to switch back and forth between two fundamentally different inquiries in rapid succession—asking first whether trading the contract entails unlawful activity, then whether the contract's underlying event entails terrorism, assassination, or war, then reverting to inquire whether trading the contract entails gaming.

The Commission identifies no statutory term that has ever been construed that way. It suggests there is no problem under the consistent-meaning canon because, in its view, "involve" consistently performs one of two possible tasks—either the contract's underlying is one of the statutory activities, or the contract has a "different connection" with the enumerated activity. But that semantic maneuver would render the canon meaningless. As any English speaker understands, defining a term to mean "X or Y" assigns it two meanings, not one.

As an unnecessary illustration of the absurdity of the Commission's Proposal, consider a hypothetical where a theater policy requires parents to accompany minor children to any screening that "involves" violence or drug use. In context, that policy

clearly uses the word "involve" to refer to the film's content, not to the behavior of attendees—even though it is semantically possible for the act of attending the screening to "involve" the listed activities. Now suppose the policy also lists "horror" and "science fiction" alongside "violence" and "drug use." Those additional objects of "involve" place the policy's focus beyond doubt, because it is not semantically possible for the act of attending a screening to entail science fiction or horror. As a result, "involve" can only refer to the underlying film across all four categories. No reasonable person would understand it to refer to the film's content with respect to science fiction and horror, but to the attendees' behavior with respect to violence and drug use. Nor would anyone call that odd construction "consistent." While the definition of "involve" is unchanged, the word would perform two very different tasks. The Commission's reading of the CEA fails for the same reason.

The Proposal also ignores the canon of statutory interpretation called statutory context. Context underscores the Commission's error, because its interpretation would reduce multiple statutory terms to surplusage and unwind the U.S. Code to revive a sweeping pre-clearance regime that Congress repealed.

The Commission's construction of "involve" ultimately requires two enumerated activities (gaming and unlawful activity) to swallow their neighbors—and to upset the statute's basic structure, whereby event contracts are subject to public-interest review only in narrowly defined circumstances. Start with "gaming." Regardless of the specific definition of the term "gaming" (as will be discussed at length below), construing "involve" to refer to the actions of traders would capture all contingent events. The problem with the Commission's reading is even starker when it comes to "unlawful activity." Because multiple States already ban wagering on any contingent event, construing "involve" to refer to the act of trading would subject every event contract to public-interest pre-clearance.

Finding no refuge in statutory text or construction, the Proposal turns to a particularly unreliable fragment of legislative history: a short floor colloquy between two Senators. Putting aside the legal question of whether this feeble legislative history is of any import when the actual statute is clear, the colloquy does not actually support the Commission's reading of the statute. The Senators repeatedly expressed concerns about contracts contingent on certain events: both "events that threaten our national security," such as "terrorist attack[s]," and "sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." They never suggested that the behavior of traders might be the statute's focal point, and nothing in their brief exchange (which was likely added to congressional record after the fact due to the lack of any video evidence of this discussion happening on CSPAN) supports the Commission's inconsistent reading.

The only viable interpretation, contrary to the contents of the Proposal, is that the statute authorizes public-interest review only when a contract's underlying event involves (relates to, entails, etc.) gaming or an unlawful activity. That reading respects the statutory structure, works with all of the enumerated activities, and

affords each category a clear and appropriately constrained sweep. It is clearly the correct interpretation.

II. The Proposed Rulemaking Definition of Gaming Is Wildly Incorrect and Overboard.

The proposal's definition of "gaming" fails to meaningfully clarify the term "gaming," as the Commission acknowledged that it one day must in the Adopting Release of Rule 40.11, and is far too broad.

A. Political Event Contracts Should NOT Fall Within the Definition of Gaming

The Proposal, parroting the flawed analysis in the Kalshi Order, includes elections in the definition of "gaming", reasoning that (1) "gaming" means "gambling," which some statutes define to include staking money on the "outcome of a game, contest, or contingent event; and (2) taking a position in an election contract would be staking something of value upon the outcome of a contest. That logic hinges on an overbroad interpretation of "gaming" that cannot be squared with ordinary usage and is flatly foreclosed by statutory context.

As detailed below, "gaming" ordinarily means playing games of chance for money. It can also refer to betting on games, including sporting events. Elections are not games, nor are they comparable in any meaningful way to sporting events. So event contracts contingent on elections cannot fairly be said to "involve" "gaming." As a matter of ordinary meaning, "gaming" is too narrow to encompass election contracts.

As a threshold matter, the CEA says "gaming," not "gambling." Dictionaries define "gaming" as "playing at games of chance for money." Gaming, Concise Oxford English Dictionary (11th ed. 2008); see also Gaming, Merriam-Webster.com ("playing games for stakes"); Gaming, New Oxford American Dictionary (3d ed. 2010) ("games of chance for money"). "Gaming" is most closely associated with "casino gambling." Gaming, Am. Heritage Dictionary (4th ed. 2009); see also Gaming, Cambridge Dictionary of Am. English (2d ed. 2008) ("industry in which people gamble by playing cards and other games in casinos"). "Gaming" can describe betting on other games too. See Gaming contract, Chambers Dictionary (13th ed. 2014) ("a wager upon any game (eg a horse race or football match)"); Gaming, Bouvier Law Dictionary (2011 ed.) ("[a] contract to enter a game of skill or chance that one might win or lose"; parties "play a game with certain rules at cards, dice, or another contrivance"). But the common denominator, as the term's root itself suggests, is the existence of a game.

That is just as true in federal and state statutes as it is in common parlance. Federal statutes, the most relevant source for determining congressional intent, use

"gaming" to refer to betting on games. See, e.g., 25 U.S.C. § 2703(6)–(8) (defining "gaming" classes in Indian Gaming Regulatory Act). Indeed, the only federal statute that the Kalshi Order cites to justify its sweeping reading of "gaming" never uses that term, except to cross-reference other laws (such as the Indian Gaming Regulatory Act). See 31 U.S.C. §§ 5361–5367. Congress instead used "bet or wager"—not "gaming"—to refer to "staking … something of value upon the outcome of a contest of others." And it expressly excluded derivatives regulated under the CEA—like event contracts—from such "bets" and "wagers." State legislatures likewise overwhelmingly use "gaming" and related terms to refer to playing or betting on games. See, e.g., Iowa Code Ann. § 725.7(1) ("illegal gaming" means "[p]articipat[ing] in a game for any sum"); Mass. Gen. Laws Ann. ch. 271, § 2 ("gaming" means "dealing, operating, carrying on, conducting, maintaining or exposing any game for pay").

Consistent with ordinary usage, federal law, and state law, "gaming" must involve a game. Mere betting—in the absence of an underlying "game"—does not constitute gaming. If two employees stake $5 on whether their boss will show up for work on Monday, they have certainly made a bet, but no one would say that they are "gaming." Likewise, if a business buys derivatives pegged to the future price of pork bellies, that might be colloquially characterized as "betting," but it certainly is not "gaming."

An election contract is not "gaming," either. Elections are not games. They are not remotely analogous to casino games, lotteries, bingo, or even sporting events. Elections, unlike "games," are not staged for entertainment or to facilitate speculation for sport. See Game, Merriam-Webster's Collegiate Dictionary (11th ed. 2020) ("engaged in for diversion or amusement"). Rather, elections—again, unlike games—have extrinsic effects outside the contest itself, and indeed carry significant economic consequences in the real world. Buying or selling election event contracts therefore does not amount to "gaming."

Even looking past all of that, elections are not "contests" for purposes of the statutory definitions on which the Commission relies. The Commission cannot identify a single statute, case, or other legal authority that characterizes elections as "contests". And in the context of the gambling statutes on which the Commission bases its argument, it is clear that "contests" does not include elections. Of the eight statutes that define gambling to mean wagering on games or contests (but nothing else), three separately ban betting on elections—which would be superfluous if elections were already "contests." And the other five use "contests" in ways that clearly refer to events typically staged for amusement and betting. No one, for example, would classify a federal election as a "contest … of skill, speed or power of endurance of human or beast." Nor would anyone understand an election to be a "contest" when that word appears in a list neighboring "game, gaming scheme, or gaming device," or "game, lottery, or contrivance."

The Commission's favorite snippet of legislative history only proves the point. Senator Lincoln's litany of "sporting events"—a football game, a horse race, and a golf tournament—is perfectly consistent with an ordinary reading of "gaming." But the proposition that staking something of value on an election is a reasonably comparable activity to betting on sports is truly ludicrous. An election is not a game. It is not staged for entertainment. It has vast extrinsic and economic consequences. Does the CFTC really believe that there is no difference between the Super Bowl and the election? Who wins the presidential election has the same impact on people as to whether Seabiscuit wins the Kentucky Derby? Which political party is in control of the House and the Senate has no direct impact on Americans more than who wins the Masters golf tournament? If staking money on an election is reasonably comparable to sports betting, so too is staking money on wheat harvests, demand for gold, or oil production levels.

Indeed, even the Commission isn't buying what it's selling. The CFTC has never taken issue with event contracts involving the price of bitcoin, the price of the S&P 500 futures, and the price of a foreign currency in the next 20 minutes, litigation outcomes, the Billboard Hot 100, or the Academy Awards (until it suddenly appeared in the Proposal, anyways). None of those things is "gaming" either, but all of them have much less impact on people than elections. The CFTC's "interpretation, already severely battered by the statutory language and the legislative history, suffers still another blow from its departure from the agency's own past practice." Cf. Nat'l Ass'n for Better Broad. v. FCC, 830 F.2d 270, 277 (D.C. Cir. 1987).

B. The Proposed Definition of "Gaming" Swallows Up the Other Enumerated Activities

A fatal flaw in the Proposal's definition is that defining "gaming" that broadly would subject every event contract to heightened public-interest review, because anyone who trades an event contract is by definition staking money on a contingency beyond his control. If that were the case, each of the other enumerated activities would be rendered superfluous.

In convoluted fashion, the Commission observes that some dictionaries connect "gaming" with "gambling," and points to some definitions of "gambling" that sweep in any and all wagers on uncertain contingencies. But that approach—treating "gaming" as a catchall for anything colloquially described as "gambling" or "wagering"—would sweep every event contract into this category. And it's hard to imagine a less reasonable construction of a single exception on an enumerated list than one that consumes each of its neighbors and the general rule to boot. This interpretation does not make sense.

While the Proposal tries to walk the tightrope here, it doesn't make it. To start, "gaming" is not the same thing as "gambling." Dictionary definitions and common legal usage alike confirm that gaming—unlike the broader terms "gambling" or

"wagering"—typically requires a predicate game. To be sure, all "gaming" is a form of "gambling," which is why definitions of the former sometimes cross-reference the latter. But the converse is not true: Not all "gambling" is "gaming." Congress chose the narrower term and not the broader one.

Next, conflating "gaming" with "gambling" only walks the Commission into another problem. The ordinary definition of "gambling" is too broad to fit here, since it would capture all contingent events. The Commission is thus forced to gerrymander a limited definition of "gambling" to cover wagers on games or contests—but no other bets. That limit is artificial and unpersuasive and untenable in context, since it would turn all event contracts into "gaming." But, as described throughout this comment, even a definition of "gaming" that encompasses wagers on contests but not all wagers on contingent events fails for lack of any support in the CEA or legislative history. There is no reason why Congress would have used the word "gaming" in such an idiosyncratic way—and the Commission doesn't bother to supply one. If Congress had intended to cover contracts on elections, it surely would have said so more simply.

[In a rare bright spot, unlike a comment of Better Markets which fails at every step of the Kalshi Order, the Proposal rightfully abandons its reliance on the Unlawful Internet Gambling Enforcement Act (which does not use the word "gaming" at all).]

Moreover, the Commission's construction would render superfluous all the other enumerated activities—ignoring the interpretive principle that every clause and word of a statute should have meaning. And it would grant the CFTC a roving commission to scrutinize the social utility of all event contracts—a sweeping, surprising power Congress would not hide in a single word. Especially when that word on its face—and based on its legislative history—appears to be concerned with casinos and sports. Statutory context thus forecloses the Commission's overbroad approach to "gaming." Giving the term its ordinary meaning—betting on games—avoids all of those pitfalls.

C. The "Any Other Occurrence or Non-Occurrence in Connection with One or More Contests or Games" Clause is Unbounded.

The proposal attempts to unobtrusively expand the definition of "gaming" to include "any other occurrence or non-occurrence in connection with" a game or contest. As explanation, the Commission describes this particular clause as "the staking or risking of something of value upon any other occurrence or non-occurrence in connection with a contest or game" and "makes clear [] that it is of no import whether or not such occurrence or non-occurrence directly affects the outcome of a contest or game." This radically wide-ranging definition is indefensible, as it includes in its ambit every potential "occurrence or non-occurrences in connection with" a game without any nexus to whether it has any relevance on the outcome of the game itself.

In attempting to draw a line in the water, the proposal includes various examples: "(i) whether a particular candidate enters or withdraws from a political contest, or polls above or below a certain threshold; (ii) whether a particular individual is nominated for an award or attends an award ceremony; and (iii) in the context of 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."

These examples uncover the shallowness of any attempted logical distinction and application of the proposed definition. According to the CFTC's own examples, "whether a particular individual will attend a game" e.g., whether a celebrity attends the Olympics or any other sporting event, should be considered "in connection with" a game and constitute gaming, but whether that same celebrity attends the DNC or a concert would not. For an event contract on the attendance of a celebrity or any other individual, it should not matter the nature of the event that she is attending. Consider the same celebrity attending a performance at an arena on two nights in a row, in the same seat, with the same company. The first night is a concert, and the second is an NBA playoff game. According to the CFTC's own examples, an event contract on the celebrity's first night's attendance would be benign but an event contract on the second night's attendance would be gaming. The mental gymnastics required to possibly contemplate a reasonable difference in this poorly concocted proposal should earn an Olympic gymnastics medal; but it won't be done, because it can't be done.

In the same vein, or Seine, the proposal would consider an event contract on the host city of the next Olympics would be considered "gaming" as being "in connection with" the Olympic games. But the Olympic games create a significant economic impact for the potential host cities: a July 18, 2024 Global Finance article describes the various sources of revenue for the host city including, domestic sponsorships, ticketing, hospitality, venue operations, and the local revenue and economic boost of tourism, construction, and the like. Host cities also receive a portion of the IOC revenue, which the article estimates as Paris receiving $1.7 billion for the 2024 Olympic Games, and Los Angeles and Brisbane slated to receive $1.8 billion each for the Olympic Games of 2028 and 2032. With a significant economic impact such as this at stake, it would seem incredulous to consider all Olympic adjacent contracts as "gaming."

The Proposal itself recognizes that this definition is far beyond anything heretofore seen in law and regulation. In introducing the four illustrated examples of the proposed definition, the Proposal states that "the first three examples . . . reflect types of games or contests which . . . have been recognized as gambling, betting, or wagering under relevant state and federal statutes, and would constitute "gaming" under the proposed definition." As a threshold matter, the fact that the Commission could only find tangential statutory relevance to three out of four examples it

proposes to include in the definition indicates that, at the very least, the fourth example is a complete Commission creation based on nothing more than conjecture.

D. The Definition of "Gaming" Should Not Include Elections and Awards

Instead of the tortured reasoning presented in the Proposal to expand the definition of "Gaming" to fit agency whims, the Commission should simply acknowledge that if Congress had wanted to list elections and awards as additional enumerated activities in the CEA, it would have done so. Congress could have included elections and awards in the list of enumerated activities in the CEA. Congress could have defined "gaming" to include "contests, elections, or awards." But, as discussed above, Congress did neither of those. Congress did not include elections and awards in the discussion or definition of "gaming", and the Commission can't do so on its own either.

The Commission is fond of relying on the 2010 colloquy as supporting legislative history for various aspects of the Proposal. Although there is much doubt about the relevance of that colloquy to the substantive matters at hand as described throughout this comment and countless others, the colloquy is not only unhelpful to the Proposal in this instance but it militates against the proposed definition for one simple reason: The entire discussion of the colloquy centers around examples of sporting events.

Senator Lincoln's response to Senator Feinstein's question about the CFTC's authority to determine that a contract is a "gaming" contract, was that "[i]t would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." The Proposal cherry-picks from the colloquy for the proposition that "Senator Lincoln stated that the provision was intended, in part, to assure that the Commission had the authority to "prevent gambling through futures markets." But this misses the point, and contorts it. Senator Lincoln described sporting events as associated with "gaming," but not elections or awards or anything else that the Commission could imagine.

In fact, in comment number 74357 for this Proposal, former Senator Lincoln discusses the 2010 colloquy at length, and writes as follows:

> *I am deeply troubled by the recent proposal put forth by the CFTC, the federal agency that is tasked with administering the CEA. In prohibiting broad categories of contracts, the CFTC's proposal relies heavily on a 2010 Senate colloquy between me and the late Senator Feinstein for support. But the CFTC proposal goes well beyond what we intended. This heavy-handed proposal to ban markets, rather than regulating them, risks undermining the core principles that underpin our financial markets – principles we strived to*

uphold through carefully crafted legislation that encourages innovation and provides consumer protections.

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However, it is my view that [the Proposal's] interpretation entirely misses the mark. The law was meant to capture recreational gambling on sporting events and casino-type activities, not the Nobel Prize in Physics or the outcome of major elections. These events are nothing like the Super Bowl, the Kentucky Derby, or the Masters Tournament. If we had intended to include these events, we would have done so explicitly. We did not, because those events – unlike the result of a sports match – have real and significant economic consequences. Prohibiting futures contracts on those events would therefore inhibit the sort of legitimate economic activity that our markets are designed to promote. Further, it would push this existing legal economic activity to unregulated, offshore markets with little to no consumer protections.

The Proposal's flimsy reliance on an unsupportive colloquy for a proposition that is not addressed in that colloquy should be scrapped.

III. Political Event Contracts Are in the Public Interest.

Several comments have raised concerns that allowing election contracts could create incentives to manipulate election outcomes or perceptions, undermining election integrity, and that political event contracts pose significant risks to public interest, market integrity, and investor protection. This is preposterous.

Political event contracts are consistent with the public interest in multiple ways. First, they can consistently and reliably serve both of the core public interest functions of the derivatives markets, namely hedging against price risk and enabling price discovery (or price basing). Second, political event contracts would not undermine election integrity, foster market manipulation, or inappropriately cast the CFTC into the role of election regulator.

A. Political Event Contracts Serve a Meaningful Hedging and Price Discovery Function.

As described at length in the various submissions to the Commission with regards to Kalshi's Congressional Control Contracts, the Kalshi Order, and again with this Proposal – which the Commission must consider again – election contracts serve a meaningful and undisputed hedging and price basing function.

Businesses face a panoply of potential ways that they can suffer harm that will affect and impact their value, the value of their services, and the value of their assets. These potential harms are risks. Risks include valuation risk (the value of

the business's services or asset's decline), funding risk (access to credit or other funding declines), and operational risks (possible disruptions or errors in the production process that undermine their earnings), among many others. Each one of these general categories of risk will manifest and impact each business according to the business's unique activities, profile, composition, etc. And in addition to these examples, there are many more categories of risks, including strategic risks (e.g., getting outcompeted by a competitor), reputation risks, liability risks and beyond.

There are three steps that businesses generally follow when they are managing the risk of harm. The first step is to identify the risk, meaning the various places where the business can suffer harm, such as negative movement in costs, income, valuations, etc. The second step is for the business to assess how likely it is that the potential harms will materialize, and how severe or acute will the impacts of these harms be. In order to do that, the business must consider the factors that can impact the likelihood and severity of the risks, such as by making a harm more likely or less likely to occur, or making a harm more severe or less severe, etc. These include market conditions and all related factors that can have a bearing on the potential harm.

To illustrate, a business might identify that a decline in profit margin is a harm that it faces. One of the many factors that could cause this harm is changes in demand for its product that will change what it can charge. The business won't stop there, though. It will identify what trends or events will create a change in demand for its product. For example, the business will consider what market forces impact its core customer base. A slowdown in that sector might have a corresponding downward impact on the demand for the business's product. To illustrate, consider a builder of extra-large river barges in the upper Midwest. They know that "changes in demand" impact their risk, but they need to know what affects demand. Naturally, they look to key factors such as lower grain yield in the upper Mississippi River Valley (as lower grain yield may mean lower need for river barges). Both of these are factors that will impact the acuteness of the risk, i.e., whether the harm is likely to happen and how severe it will be if it does happen. As a result, they may purchase short contracts on grain futures in order to hedge their risk.

Many businesses face potential harms that are impacted by inflation. Inflation can impact nearly all term contracts, impacting the business's actual costs from the contracts. For instance, a firm locked into a 10-year commercial lease on their office space will see lower real costs as a result of inflation than with a shorter lease. However, if the company is also an intermediate supplier and has locked in their sales contracts (e.g., they have agreed to sell 100,000 tons of DAP [di-ammonium phosphate] fertilizer at $900/ton), then the real value of those sales decline and inflation will harm them. Of course, inflation affects many other risks as well. Higher inflation raises the probability that the Federal Reserve raises its target interest rates, which tends to substantially reduce stock valuations and the value of assets. Inflation is just one of many examples of factors that impact the likelihood

and severity of potential harms. To mitigate those risks, they may seek to purchase any one of many inflation hedges, such as inflation swaps, inflation-protected Treasuries, or inflation event contracts.

Political control represents another factor that could impact a company's risk profile, much like inflation, and firms proceed using the same risk management strategy as before. A company first identifies risks–operational, reputational, valuation, credit, etc.– and then identifies the ways those risks could rise or fall. The aforementioned fertilizer company may be purchasing fertilizer inputs like potash from other countries (potash is often found in Russia, Belarus, and China) and identify their largest operational risk as disruption in the global potash supply chain. They further identify that changes in congressional political control could increase the probability that the supply chain is disrupted since different Congresses may take different approaches to tariffs, sanctions and other trade-related policies. As a result, changes in political control directly increases (or decreases) the firm's operational risks.

Perhaps the clearest example of this description of risk management comes from the CFTC's report "Managing Climate Risk in the U.S. Financial System" ("CFTC Climate Report"). As expounded at length in Chapter 2 of the report, the report talks at length about transition risk, which they define as the "risk associated with the uncertain financial impacts that could result from a transition to a net-zero emissions economy". They note that transition risk implicates "market, credit, policy, legal, technological, and reputational risks" for firms and must be a part of any honest risk assessment. Most importantly, the report specifically identifies how transition risks "could arise, for example, from changes in policy" along with other factors such as "technological breakthroughs, and shifts in consumer preferences and social norms".

As the Financial Stability Oversight Council (created by the Dodd-Frank Act and including the Department of Treasury, the Federal Reserve Board, the OCC, the CFPB, SEC, FDIC, FHFA, and the NCUA) corroborates, policy changes (along with technological change and consumer preference changes) "especially if delayed or uneven in application and therefore requiring more abrupt economic shifts—may lead to sharp changes in the values of certain assets or liabilities, impacting nonfinancial activity and the financial sector". As a draft rule from the Federal Reserve Board states, "Financial institutions with sound risk management practices employ a comprehensive process to identify emerging and material risks related to the financial institution's business activities. The risk identification process should include input from stakeholders across the organization with relevant expertise (e.g., business units, independent risk management, internal audit, and legal). Risk identification includes assessment of climate-related financial risks across a range of plausible scenarios and under various time horizons." As both reports show, firms must consider all of the risks facing their businesses, and the only honest and accurate way to do so is to consider the way changes in policy affect those risks.

There is ample precedent from the CFTC recognizing that businesses manage risk by considering the factors that impact the likelihood and severity of potential harms. The CFTC's Climate Report notes that "uncertainty associated with policy risk is already penalizing oil companies that are investing in undeveloped fossil fuel reserves" and "financial market participants are already looking for ways to manage transition risk in their investment portfolios."

Commenters to Kalshi's Congressional Control Contract overwhelmingly agreed, including (though hardly limited to) academics such as Nobel Laureate Robert Shiller and former Chair of the Council of Economic Advisors Jason Furman; former policymakers former SEC Commissioner Joseph Grundfest and former CFTC Commissioner Mark Wetjen; and members of private industry, such as AB-inBev board member Jorge Paulo Lemann (a major participant in extant agricultural futures), the CEO of Continental Grain Company Paul Fribourg, and Susquehanna International Group Head of Strategic Planning David Pollard. Angelo Lisboa, a Managing Director of J.P. Morgan argued that large institutions already trade such products over-the-counter. The public press and private businesses routinely discuss how election outcomes are traded significantly through other exchange-traded assets, like stocks.

In addition, businesses themselves often note their consideration of elections as an important factor in their risk management. Consider a few examples, starting with Thomas A. Fanning, CEO of Southern Company, an energy company: "Coal depends on what happens with environmental. And that really depends a lot to a large extent on the elections going forward. If you have a blue wave, it may be that we would see perhaps tighter regulation and co-waning importance, but we'll see."[1] Thomas Peterffy, Chairman of Interactive Brokers, a brokerage firm: "Well, in the last couple of weeks, we do notice some moderation in activity, and -- which would be expected as we come up to the election. And then, of course, I think it will pick up when the results come out, especially if the Senate goes Democratic, I expect that people will start taking the long-term gains because of the expected 43% long-term capital gains tax rate. And then of course, we are looking further down the road, more and more spending that will result in asset inflation, including higher and higher stock prices."

As the New York Times's Conor Dougherty reported in 2016, "Executives at Jack in the Box said uncertainty over the election could be affecting consumers' willingness to buy Jumbo Jacks and cheeseburgers. Commercial real estate brokers said the election was causing businesses to hold off on new office leases. Auto dealers said the results could determine how many people buy cars. From banking to oil to pharmaceutical companies, to real estate agents and even cruise ship operators,

[1] The Motley Fool. "Southern Company (SO) Q3 2020 Earnings Call Transcript."

everyone seems to think wariness ahead of the election is affecting their business. Sometimes for the better, mostly for the worse."[2]

Thus, it is clear that businesses consider political control and elections important factors that can have significant economic impact. This reality is recognized by the CFTC in the CFTC's Climate Report and the aforementioned FSOC report.

Banks likewise regularly inform their clients as to how Congressional elections may impact their client's extant risks. In 2020, investment bank research divisions offered projections about the economic and financial impacts of various political outcomes. For example, Goldman Sachs's chief economist stated publicly that full Democratic control of government would cause the bank to upgrade their earnings forecast by sharply increasing the probability that a large fiscal stimulus bill would become law.[3] Full Democratic control would also, according to the bank's insights, "likely include a stimulus package in Q1, followed by infrastructure and climate legislation. In this scenario, we would expect legislation expanding health and other benefits, financed by tax increases, to pass."[4]

Election contracts are appropriate for businesses that face risk impacted by political control. For these businesses, election contracts can be an important hedge that is part of their overall risk management process that a business will follow. Consider an enhanced geothermal systems company producing process heat for industrial processes (e.g., paper mills). The business will identify the potential harms that the company faces. Naturally, there are many operational risks (what if one of the boring rigs breaks?), but those are hardly the only risks they face.

But the business may determine that other potential harms will be directly impacted by elections and political control. For example, retained profits and shifts in the demand curve are influenced by which party wins Congress, as parties have substantially different positions on corporate taxes[5], zero-carbon subsidies, and

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[2] Conor Dougherty. 2016. "The Election's Effect on the Economy? Doughnut Sales Are Probably Safe." The New York Times.

[3] Matthew Fox. 2020. "Goldman's chief economist breaks down why a Biden-led blue wave would prompt an upgrade in growth forecasts". Business Insider.

[4] Thomas Franck. 2020. "Goldman Sachs says Democratic sweep would unleash 'substantially' more stimulus." CNBC.

[5] This is not just rates. The tax code is filled with numerous and interrelated provisions that impact businesses in different ways. The business may have a number of different provisions that, while seemingly minor to the average citizen, impact them deeply. For instance, while millions of companies are affected by the headline marginal tax rates (making marginal tax rates a good candidate for a policy-specific event contract), a small number are affected by individual provisions such as the treatment of carried interest (for hedge funds) or easements for wetland protection. However, for the firms for which those "minor" provisions matter, they matter a great deal. In order to get enough liquidity, those firms would essentially pool their liquidity on a general Congressional

emission standards for industrial processes. As a result, depending on how the Congressional election plays out, certain risks become more salient. Mitigatory actions may be insufficient–an industrial enhanced geothermal systems ("EGS") firm cannot cost-efficiently diversify into fossil fuels to reduce their exposure to clean energy subsidy policy in the same way a corn farmer cannot cost-efficiently diversify into an uncorrelated domain in order to reduce their exposure to agriculture prices. A firm may conduct some simple math: a given party winning may increase the probability of beneficial tax changes by 20%, creating an expectation of $1 million ($5 million * 20%) more in retained profits, but have a 50% chance of enacting environmental rules that reduce demand by 10%, creating an expectation of loss of $1.5 million (50% * 10%/1% * $300,000). As a result, a financial hedging product may be more appropriate. Suppose the probability of Party X winning control of Congress was 33.3% and the price of the $5000 contract was thus $1,666.67. In that case, they would purchase 60 contracts for a total of $100,000. If the adverse event does occur, the firm would be paid $300,000 to compensate for their expected losses. If the adverse event does not occur, they would not be paid, but they would reap the benefits of the more favorable event occurring.

This one example amongst thousands provided to the Commission demonstrates how election contracts provide an obvious hedging utility.

B. Misplaced Election Integrity Concerns

In its discussion the non-exclusive list of examples of "gaming" set forth in proposed § 40.11(b)(2), the Commission specifically notes that "staking or risking something of value upon the outcome of a political contest, including an election or elections, or upon an occurrence or non-occurrence in connection with such a contest" would be included in the proposal. Plainly speaking, as described above, it should not be: elections are not games, as is obvious to anyone who votes.

As justification for this, the Commission raises several alleged concerns. First, that "this particular subset of gaming contracts would raise unique additional public interest concerns relating to election integrity and the perception of election integrity, and the appropriate role of the Commission in this area." The Commission creatively considers a hypothetical where "permitting trading in these types of contracts could create monetary incentives to vote for particular candidates even when such votes may be contrary to a voter's (or organized groups of voters') political views." Second, "conduct designed to artificially affect the electoral process could be used to manipulate the markets in such contracts, or conversely, that the markets in such contracts could be manipulated to influence elections or electoral perceptions." And as an example, "false reporting or other misinformation—such as

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control contract, where the firms who care about each of the thousands of minor provisions all might participate.

inaccurate polling or voter surveys or false news reporting—could be used to distort the information underlying price formation in such contracts."

These concerns fall flat. Neither the proposal nor the Kalshi Order make any effort to substantiate either aspect of this parade of horribles, and instead, ignore contrary evidence. The Commission can find no real-world examples that election contracts incentivize manipulation of elections, including by spreading misinformation. By contrast, the comments submitted to the Commission in support of Kalshi's election contracts note repeatedly that the likelihood of this kind of manipulation occurring is extremely remote.

If anything, listing the contracts on federally regulated exchanges would ameliorate manipulation concerns associated with unregulated and offshore markets. And the neutral, market-driven data generated by a regulated exchange is the best way to mitigate the threats of misinformation, including from the fake polls that the CFTC purports to worry about. In the Kalshi Order, and again with this proposal, the CFTC did not consider any relevant data and and analysis, ignored all contrary evidence, and instead speculated that election contracts could create monetary incentives to vote for particular candidates, even when such votes may be contrary to a voter's political preferences or views of such candidates.

Besides for the speculative nature of this concern, it is not credible: voting for an opposing candidate to potentially influence an outcome contingent on dozens of federal elections is not plausible. As described in the comments surrounding the Kalshi Order, the concern that voters will steal votes from themselves is speculative, abstract, and almost entirely absent from experience with political prediction markets. More fundamentally, the notion that an election market would meaningfully alter incentives to manipulate elections or to distribute misinformation is utterly implausible: Given the enormous consequences of election outcomes, the massive sums already spent by political campaigns, and the sheer volume of inputs to the national political discourse, election contracts would, at most, be a drop in the bucket.

Moreover, the very length to which the Commission stretches this public interest concern demonstrates the very lack of any actual substantive concern. As noted in footnote 124 of the proposal: "The Commission believes that permitting trading in contracts involving political contests in a foreign jurisdiction, or concerning a supranational organization, also would raise these public interest concerns, just as permitting trading in contracts involving political contest in the United States would." But to think that by allowing trading on a contract on a political contest in a foreign jurisdiction on a CFTC-regulated DCM would have any possible impact of "public interest concerns relating to election integrity and the perception of election integrity, and the appropriate role of the Commission in this area" in a foreign election, i.e. a foreign country where the CFTC has not one iota of possible jurisdiction is an idea completely untethered to reality. Is the CFTC concerned for the perception of weather integrity or the accuracy rate of meteorologists' forecasts?

No. Are there "monetary incentives" or concerns of "false reporting or other misinformation" to forecast for rain when a meteorologist wants a sunny day or other manipulation concerns as to the weather itself? No. And weather markets are traded on CFTC-regulated entities. The same should be true for elections.

C. The "Election Cop" Concern is Inconceivable and Incongruent with Commission Practice

As an additional concern, the proposal notes that the Commission "is not tasked with the protection of election integrity or enforcement of campaign finance laws. However, if trading was permitted on CFTC-registered exchanges in event contracts that involve the staking or risking of something of value on a political contest, then the Commission could find itself investigating the outcome of an election itself."

That suggestion is frankly absurd. The CFTC regulates countless derivatives markets involving commodities over which it lacks independent expertise or authority. For example, while the Commission oversees trading in futures contracts on the S&P 500, it does not regulate stocks; that is the job of the Securities and Exchange Commission, which the CFTC relies on to police the underlying market. Likewise, while the CFTC supervises trading on derivatives based on GDP data, it is the Bureau of Economic Analysis that has responsibility for producing and ensuring the integrity of that data.

The same is true for various other contracts where the role of the Commission is to oversee the trading, as described in the 2008 Concept Release on the Appropriate Regulatory Treatment of Event Contracts: The Commission is not the crop yield police and hasn't displaced the role of the USDA. The Commission is not the police for changes to corporate officers or asset purchases and has not displaced the role of the SEC. The Commission is not the police for regional insured property losses, which is the domain of state insurance regulators. The Commission is not the bankruptcy police, which is the domain of the courts. The Commission is not the temperature police. And the list goes on.

As the proposal recognizes "it is unlikely that Congress intended for the Commission to exercise its jurisdiction or expend its resources" to regulate elections. That is correct. The Federal Election Commission, Department of Justice, and many other state and federal regulators already shoulder the critical responsibility of ensuring that our elections are fair and secure. Having election contracts trading on a CFTC-regulated exchange will not transform the Commission into the police for elections, just as the Commission is not the police for the many contracts already trading on CFTC-regulated exchanges.

IV. The Current Judicial Review of the Kalshi Order

The proposal acknowledges that the Kalshi Order is currently pending "judicial review." Critically fatal to this proposal, however, the Commission ignores the fact that the substance of this proposal itself is under judicial review: The statutory underpinnings of this proposal will rise or fall based on the outcome of the judicial review of the Kalshi Order as this proposal is substantively based on the flawed reasoning in the Kalshi Order. The timing of this proposal – during judicial review of its substance and legality – seems like an attempt to potentially influence the judicial review or disregard it altogether.

V. Missing Comment Letters

This proposal demonstrates the Commission's continued refusal to engage with the points and evidence submitted by commenters. This includes comments relevant to the definition of gaming, Regulation 40.11, and event contracts generally – i.e., the substance of this proposal – most recently surrounding requested by the Commission prior to the Kalshi Order. As this proposal, the Kalshi Order, and the materials submitted as part of the judicial review make clear, the Commission has and continues to make poorly supported assertions in the face of concrete contrary proof staring at it right from the pudding bowl.

The CFTC asked for the public's input on the substantive points of this proposal prior to issuing the Kalshi Order, but then summarily ignored the public's input and the reams of evidence provided and instead cherry-picked a few comments that supported the CFTC's agenda of protecting Wall Street's monopoly over risk management and market access tools.

Some of the many examples of the comments ignored by the CFTC include industry participants, academics, CFTC-registrants, former CFTC officials and a host of others.

One theme described by various comments but seemingly absent from the Commission's discussion on this topic is that partisan control of Congress has vast economic consequences—both directly and through its influence on policy—which is why major financial institutions routinely offer projections on the economic impacts of election outcomes. Ahead of the 2020 federal election, for instance, Bank of America analyzed the likely effects of different congressional outcomes on fiscal stimulus, tariffs, tax rates, and regulations. Researchers, too, have consistently found that the balance of political power affects the prices of equities, commodities, and other assets. Businesses and individuals who submitted comments agree: A software company serving green-energy ventures explained in a comment that its success hinges in part on political outcomes, including control of Congress and associated policy changes. A fund founder set forth how biotech startups face congressional risks, including cuts to research funding and stalled regulatory appointments. And the CEO of a recycling robotics firm recounted that legislation expanding recycling is likely to rise or fall depending on which party triumphs.

Similarly, a comment of renowned investor Jorge Paolo Lemann explained that "[a]n investment may look very different if hypothetical legislative and regulatory events" occur—and if an election outcome makes those events "materially more likely," it "poses significant risk to the parties to the deal." For example, if Republicans take control of Congress in 2024, renewable-energy subsidies will not vanish overnight. But a Republican win would present a serious risk of cuts. Allowing election related contracts to be traded on CFTC-registrants allow green-energy firms to hedge that risk. Commenters wrote that their firm would hedge against risk that a "hostile" government "could be elected," not merely "that a particular policy will be enacted" and that investors consider how business "risks indisputably rise when certain Congresses come into power, and hedging instruments are needed to mitigate that risk".

This example, of which there are many more, demonstrates this proposal's hamartia: the continued refusal to engage with the points and evidence submitted by commenters that are on point but adverse to the Commission's agenda laid out in the proposal. I encourage the Commission not to do the same with this comment, and all other similar comments submitted.

VI. The Proposal's Costs and Benefit Analysis is Just Wrong

Measured relative to the baseline status quo condition, this Proposal would not create meaningful benefits for market participants and the public and would instead result in substantial costs, costs that would far outweigh any (incorrect) benefit the Proposal suggests.

As required to by Section 15(a) of the CEA, the Commission must consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders, including five specific categories of impact: (i) protection of market participants and the public; (ii) efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations.

This Proposal fails in each one.

A. The Costs of the Proposed Definition of Gaming Considerably Eclipse Any (Incorrectly) Perceived Benefit

The Commission contemplates "that some registered entities may incur a one-time compliance cost to understand and implement the proposed "gaming" definition." But the Proposal doesn't seem to understand the far-reaching implications of its proposed regulation. The only "one-time compliance cost" that is possible under the Proposal is the cost of closing down a registered entities' business. Because, as explained above, the Proposal is so pervasive to event contracts, it will have a chilling effect on the regulated industry (but not the unregulated industry, they will happily continue to serve U.S. customers without any form of oversight) far more than the 10 hours approximated by the Commission.

The destructive impact of this Proposal is indicated by the Commission's own explanation of anticipated implementation: "if the proposed rule amendments are adopted, the Commission anticipates that exchanges whose product offerings include contracts that involve "gaming," as proposed to be defined, will, in order to ensure compliance with the rules, file § 40.6 self-certification submissions to permanently delist the contracts and remove reference to the contracts in their exchange rules. Exchanges may also need to take steps to effectuate the orderly wind-down of contracts involving "gaming" that are listed and available for trading as of the date of publication of final rule amendments in the Federal Register , and that have settlement dates beyond the 60-day implementation period proposed by the Commission." In other words, the Commission is anticipating the entire businesses will be shuttered, in 60 hours or less.

Unlike the Commission's assertion otherwise, the number of contracts impacted by this Proposal is vast.

The Commission claims that "the proposed definition also would support the Commission and its staff in the effective oversight of derivative markets—including by supporting the efficient and effective administration of the contract submission and review process, by helping to reduce the likelihood that contracts are submitted to the Commission that raise public interest concerns. In this regard, among other things, the proposed definition would promote the Commission's responsible stewardship and efficient use of the tax dollars appropriated to it by reducing the need for individualized contract reviews pursuant to § 40.11(c). In the Commission's experience, a review pursuant to § 40.11(c) is resource-intensive and consumes hundreds of hours of staff time. Based on prior experience, the Commission estimates that each review conducted pursuant to § 40.11(c) takes, on average, approximately 625 hours of Commission staff time, at a cost of approximately $220,012." But instead of focusing on curtailing the industry on unreasonable ground, the Commission should embrace its regulatory function, develop a mechanism to more efficiently review event contracts, and ask Congress to fund more staff

B. The Commission Fails to Contemplate the Costs of the Proposed Amendments to Further Align with Statutory Language Which Are Vast, Far More than Any Potential Benefit

As described above, the Proposal's understanding of the term "involve" in the Statute is incorrect and inconsistently applied by the Commission. The Proposal also fails to analyze the associated costs and benefits of this change at all.

One obvious cost of this aspect of the Proposal is that it creates wild uncertainty. The Proposal would create a malleable definition that would be applied by the Commission at whim, resulting in registered entities and market participants not

knowing whether or not an event contract would be singled out by the Commission for 40.11 analysis, thus disrupting the event contract industry. There are no benefits to consider for this result. Perhaps that is why the Commission didn't list any.

C. The Proposal Fails Each of The Section 15(a) Factors

The Proposal's evaluation of the costs and benefits of the proposed amendments to § 40.11 in light of the five broad areas of market and public concern identified in section 15(a) of the CEA fails.

1. Protection of Market Participants and the Public

Contrary to the Commission's stated belief, the proposed amendments to § 40.11 will not protect market participants and the public. Unlike the Commission's assertion that event contracts "could particularly create confusion and risk for retail market participants, and that the proposed amendments would, accordingly, enhance protection of market participants", the opposite is true. The proposed prevention of the listing for trading or acceptance for clearing by registered entities of certain event contracts and those involving "gaming," as proposed to be defined, would harm market participants by removing a bona fide hedging instrument from the few financial risk management tools available to the mainstream public, i.e., event contracts on on events directly related to retail market participants businesses and lives.

2. Efficiency, Competitiveness, and Financial Integrity of Markets

The Proposal will decimate the efficiency, competitiveness, and financial integrity of the event contract markets it is seeking to remove from the CFTC-regulated space. Under the guise of a "just limited to gaming" analysis, the Commission claims that "a significant proportion of [event contract] offerings would not be impacted by the proposed amendments, suggesting that the overall impact of the rule amendments should be relatively modest." Moreover, the stated belief of the Commission is that "by further specifying types of event contracts that are contrary to the public interest and therefore may not be listed for trading or accepted for clearing, the proposed amendments also will support these and other registered entities' ability to develop and list new products with enhanced confidence regarding such products' compliance with the CEA and CFTC regulations. The Commission believes that this should assist registered entities, as well as applicants for registration, in making informed business decisions with respect to product design, which may enhance competitiveness and efficiency."

The only help that this Proposal would provide is to eliminate the indecision of whether the regulated path is the right one. If approved, the event contract sphere will be forced away from the regulated space; a result that, as demonstrated from

the FTX collapse and the existence of Polymarket, is surely not one the Commission is hoping for.

3. Price Discovery

As barely acknowledged by the Commission, the proposed amendments will have a direct and significant impact on price discovery in CFTC-regulated markets. As is obvious, event contracts provide strong informational value about the consensus of a crowd of market participants who are willing to put money where their mouth is, i.e., a strong price basing utility. That the Commission did not include this in the Proposal indicates that it has yet to understand the true value of event contracts, specifically for its price basing utility. Instead of shutting them down, the Commission should seek to understand and guide the future development of event contract markets.

4. Sound Risk Management Practices

The Commission could not identify any effect of the proposed amendments on sound risk management practices. That is because, in the Commission's mind, the proposed amendments are in the public interest. The exact opposite is true. As described above, all market participants are involved in risk management of their businesses, for example, or other aspects that impact their lives. Those are risks that can be managed by event contracts. When those event contracts are overseen by the CFTC, that risk management is done in a sound and safe manner. The Commission should look to embrace event contracts; not reject them for lack of understanding.

5. Other Public Interest Considerations

The Proposal's consideration of public interest considerations is a straw man. The Commission first states that the purpose of 40.11 is for the Commission "to determine that certain event contracts are contrary to the public interest and therefore may not be listed or made available for clearing or trading on or through a registered entity" and therefore, the proposed amendments "seek to support this objective by further specifying the types of event contracts that are contrary to the public interest and therefore may not be listed for trading or accepted for clearing."

Because, as described above, the Proposal misconstrues the Commission's statutory mandate and the public interest, it follows that any mistaken consideration of the public interest necessarily fails. A building cannot be successfully built on faulty foundations. So, too, this Proposal.