

Securities Regulation Daily Wrap Up, EXCHANGES AND MARKET REGULATION—CFTC renews scrutiny of political event contracts, (Jun 26, 2023)

By [Anne Sherry, J.D.](#)

If approved, the contracts will settle based on which political party controls the House and Senate.

The CFTC is taking more time to review a self-certified event contract that settles based on political control of the chambers of Congress. Amid calls for the CFTC to issue proactive regulation in this area, including from dissenting Commissioner Summer Mersinger, the agency's questions for commenters hint that it may see the contracts as a form of "gaming." The Commission has 90 days for its [review](#); the public has 30 days to submit comments.

The CFTC was going to consider initiating the review at an [open meeting](#), but [decided](#) to use its seriatim process instead.

KalshiEX LLC self-certified the "Will be controlled by for ?" contract; the CFTC review effectively postpones it for 90 days. The contract would pay out based on the party affiliation of the Speaker of the House or the President Pro Tempore of the Senate on the expiration date.

The first few [questions](#) of the 24 the CFTC cast out for public comment concern whether the contracts "involve, relate to, or reference gaming" as described in the Commodity Exchange Act and rules thereunder. The agency also asks for comment on whether the contracts have a hedging or price-basing function, whether they are contrary to the public interest, and whether they could interfere with the political process.

Need for regulatory clarity. As Commissioner Mersinger argues in [dissent](#), the Commission must permit the listing of event contracts unless they both fall into certain categories listed in the Commodity Exchange Act and are contrary to the public interest. The categories are 1) activity that is unlawful under any Federal or State law; 2) terrorism; 3) assassination; 4) war; and 5) gaming. The CFTC's only public interpretation of this provision, a 2011-2012 conclusion that similar contracts constituted "gaming," should be revisited. Mersinger says: "gaming" means risking money on the result of a game.

Mersinger observes that Kalshi submitted the original contracts for CFTC approval nearly a year ago. The exchange requested two 90-day extensions and made [changes to the contracts](#) to address concerns raised in comment letters, including a minimum purchase requirement to reduce the risk that the contracts will be used for casual betting; enhancing the contracts' hedging utility; and expanding prohibitions on trading by persons holding material nonpublic information.

"It is fundamentally unfair for the Commission to use Kalshi's good-faith efforts to improve its contracts as an opportunity to further delay a decision related to these contracts and, more concerning, avoid undertaking a rulemaking process that is both necessary and overdue with respect to these questions," Mersinger writes.

Some of the original comments on Kalshi's proposal also called for regulatory clarity. The Futures Industry Association [said then](#) that additional CFTC clarity and guidance would bring transparency and regulatory certainty to event contracts, which have large overseas markets and widely available products.

Fair treatment. Commissioner Caroline Pham also [dissented](#) from the decision to review the contracts. Pham said that such action could violate a recent Fifth Circuit order enjoining the CFTC from closing the PredictIt Market, which also lists political event contracts. "I believe that it is only fair for either both exchanges to list the political control contracts, or neither of them should," Pham wrote.

Last fall, Pham gave an interview to Politico where she signaled that the CFTC was preparing to rule against the Kalshi application and that she strongly disagreed with that decision. The watchdog group Better Markets filed a [complaint](#) with the CFTC Inspector General alleging that Pham violated her ethical obligations by tipping off Kalshi to the pending action.

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