

Securities Regulation Daily Wrap Up, EXCHANGES AND MARKET REGULATION—CFTC disapproves KalshiEX Congressional Control Contracts, sees them as ‘gaming’, (Sep 22, 2023)

By Suzanne Cosgrove

The controversial contracts would have settled based on which parties controlled the chambers of the U.S. Congress.

The CFTC has disapproved KalshiEX LLC’s Congressional Control Contracts, prohibiting their listing, trading and clearing on its platform. Described as event contracts, they would have been cash-settled, binary (yes or no) contracts offered by the designated contract market based on the question: “Will (chamber of Congress) be controlled by (party) for (term)?”



“The Commodity Exchange Act enumerates certain categories of commodities for which derivatives may be contrary to the public interest if listed on an exchange,” said CFTC Chairman Rostin Behnam in a [statement](#). “These include contracts that involve gaming or activity that violates state or federal law. Kalshi’s Congressional control contracts fall into both of these categories. Betting or wagering on elections, as proposed by Kalshi, meets the definition of gaming,” he said.

The Congressional Control Contracts involve “gaming,” because taking a position in the contracts would be staking something of value upon the outcome of a contest of others, the [CFTC said in its order](#).

Settlement values of the contracts would have been determined by the party affiliation of the leader of the identified chamber of Congress on the contracts’ expiration date. In the case of the House of Representatives, the leader would be the Speaker of the House, and in the case of the Senate, it would be the President Pro Tempore. An absolute amount would have been paid to the holder of one side of the contract at settlement, with no payment made to the counterparty.

Kalshi self-certified the political event contracts on June 12, 2023, and the CFTC initiated a review of the contracts, pursuant to CFTC Regulation 40.11(c), on June 22, 2023, according to [a CFTC release](#). In addition, on June 23, 2023, the Commission opened a public comment period to help evaluate Kalshi’s submission.

Behnam said 1,378 public comments were submitted in response to questions aimed at informing the Commission’s review.

Controversial contracts. Although it self-certified the contracts this summer, Kalshi embarked on their pursuit more than a year ago. As reported in [Securities Regulation Daily](#), Kalshi sent a voluntary submission of the product for Commission review and approval in July 2022.

In last year’s submission to the CFTC, Kalshi stated that contracts on political control of Congress have been available to U.S. market participants for nearly a decade. In addition, without naming New Zealand-based PredictIt, it noted a similar contract had been available for trading on an unregistered venue since 2014, operating under a no-action letter issued by the CFTC’s Division of Market Oversight.

The CFTC later withdrew its no-action relief for PredictIt, stating that the trading platform’s operator, Victoria University, had not operated its market in compliance with the terms of the relief.

“The approval of political event contracts of the type presented in the order would require the CFTC to exercise its

oversight and enforcement authorities in the manner of an election cop,” Behnam said this week. “Our new authorities would per se include monitoring elections, candidates, and countless participants in the political machinations that proliferate in the media and cyberspace in an effort to prevent manipulation and false reporting within the political system -- something that the CFTC currently lacks the mandate to do.”

Mersinger holds fast. [As reported in June](#), Commissioner Summer Mersinger previously argued against the CFTC’s disapproval of the political event contracts. On Friday, she again indicated her [dissent](#).

Mersinger argued that the Commission must permit the listing of event contracts unless they fall into certain categories listed in the Commodity Exchange Act and are contrary to the public interest. Those categories include activity that is unlawful under any federal or state law, terrorism, assassination, war and gaming.

The CFTC order’s focus on individual elections is flawed, [Mersinger said](#). In addition, the order fails to establish that the Congressional Control Contracts involve the enumerated activities of gaming, and activity that is unlawful under state law. “The order eschews a much more natural interpretation of the ordinary meaning of “gaming” in Section 5c(c)(5)(C): Risking money on the result of a game,” she said.

With respect to the category of activity that is unlawful under state law, “I do not question that placing bets or wagers directly on the result of an election of a public official would violate the statutes and common law cited in the order,” Mersinger said. However, the Congressional Control Contracts do not settle directly on the election of any individual representative or senator, she said.

“The order does not cite any authority that any state statute or common law could be used—and no instance in which it has been used—to prosecute a person for staking something of value upon the political party that will control the U.S. House of Representatives or Senate as an indirect result of a multitude of elections,” Mersinger said.

Commissioner Caroline Pham also released [a statement](#) regarding the event contracts. Pham said she abstained from voting on the issue because she believed a May 2023 order by the U.S. Court of Appeals for the Fifth Circuit involving PredictIt (*Clarke v. CFTC*) may eventually prevent the Commission from taking action on KalshiEx, LLC’s Congressional Control Contracts.

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