

Securities Regulation Daily Wrap Up, CFTC NEWS—D.C. Cir.: Commission argues federal court should reinstate halt on KalshiEX event contracts, (Oct 16, 2024)

By Suzanne Cosgrove

Finding that the contracts “involve” the enumerated activity of “gaming,” the Commission said the definition of “gaming” includes betting or wagering on elections.

In an ongoing legal tug of war between the CFTC and KalshiEX LLC over the exchange platform's event contracts, the CFTC Wednesday filed a brief in the D.C. District Court arguing that the court should reverse its Oct. 2 judgment that essentially cleared the way for Kalshi to offer the event contracts, known as Congressional Control Contracts, and reinstate a Commission order that would halt the listing and trading of the contracts ([KalshiEX LLC v. CFTC](#), No. 24-5205 (D.C. Cir. Oct. 16, 2024)).

The CFTC's latest appeal, filed in response to an [Oct. 2](#) D.C. district court ruling, maintains the Commission properly exercised its authority under the Commodity Exchange Act to prohibit, if against the public interest, certain contracts that include at least one of five enumerated activities listed in CEA Section 5c(c)(5)(C) and Regulation 40.11(a).

The Commission determined that the contracts involve two of the enumerated activities – “gaming” and “activity that is unlawful under any... State law.” Further, the CFTC found that the contracts are contrary to public interest because they have negligible hedging and price-basing utility, have a potential negative impact on election integrity or the perception of election integrity, and could incentivize the spread of misinformation.

For its part, Kalshi argued it would suffer irreparable harm if it were not allowed to launch the contracts during the 2024 election period. However, “Kalshi's claims of financial loss are deeply misleading and, in any event, pale compared to the harm that would flow from allowing election gambling on U.S. futures markets,” the CFTC argued.

Argument's twists and turns. The original CFTC order barred Kalshi from offering election betting contracts on its federally registered derivatives exchange. Kalshi bounced back with a lawsuit under the Administrative Procedure Act that challenged the Commission's order. On September 6, 2024, the district court granted judgment to Kalshi, followed by a memorandum opinion on Sept. 12, which the CFTC appealed.

In a brief filed on [Sept. 14](#), the CFTC asked the court to stay the district court's Sept. 6 and Sept. 12, 2024 orders and prevent Kalshi from offering election contracts during the current election season – and before the court could definitively rule on whether the CEA authorizes the CFTC to disallow the contracts.

Wordsmithing. In Wednesday's brief, the CFTC said the district court “erred at every turn,” in its most recent decision and rejected the meaning of four separate terms or phrases in the statute:

- First, although the statute applies where certain “agreements, contracts, or transactions involve” an enumerated activity, the court held that the statute applies more narrowly than the words say: only where the contract's underlying event – in this case, the elections themselves -- involves the enumerated activity.
- Second, the court erroneously held that “gaming” refers only to betting on games, and not any other form of gambling.
- Third, the court held without basis that the Commission may not examine “transactions” that involve gaming (i.e., trading the contracts), although the statute plainly says that it may.

- Finally, the holding that “unlawful activity” cannot capture election-betting contracts even though state law prohibits gambling on elections.

The “Special Rule.” The Commission noted in the filing that a designated contract market, or DCM, wishing to offer a new product will usually self-certify it and trade it one business day after submission of its proposal to the CFTC, without waiting for the Commission to take action. If the DCM follows a set of core principles and the contract complies with the CEA and CFTC regulations, in most cases the Commission has no statutory vehicle to object to.

However, under the Special Rule for certain event contracts, the Commission may determine whether a given contract should be disallowed as contrary to the public interest. Contrary events involve activity that is unlawful under federal or state law, are linked to terrorism, assassination, war, gaming, or similar activity determined by the Commission to be contrary to the public interest.

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Companies: KalshiEX LLC

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