Securities Regulation Daily Wrap Up, COMMODITY FUTURES—U.S.: Former lawmakers, regulator weigh in on Dodd-Frank history and gaming oversight, (Oct 9, 2026)

By Mark S. Nelson, J.D.



Former Sen. Dodd and former CFTC Chair Gary Gensler argued that the Dodd-Frank Act did not create a secret pathway to exclusive federal oversight of gaming.

Former U.S. Senator Christopher J. Dodd and former SEC and CFTC Chair Gary Gensler filed separate amicus briefs in the pending appeal of a Third Circuit opinion by New Jersey regulators over whether states can regulate prediction markets. The central issue is whether federal law preempts prediction market regulations by state and tribal authorities. Dodd and Gensler emphasized that neither the Dodd-Frank Act nor its legislative history created a back door path to granting federal regulators, such as the CFTC, near exclusive oversight of gaming, an activity traditionally regulated by state and tribal authorities. As a result, both Dodd and Gensler urged the justices to grant New Jersey's petition for a writ of certiorari and to resolve an issue that implicates the scope of national financial regulatory authorities (Brief of Amici Curiae, *Flaherty v. KalshiEX*, LLC, No. 26-299 (U.S. Oct. 08, 2026) (Christopher J. Dodd); Brief of Amici Curiae, *Flaherty v. KalshiEX*, LLC, No. 26-299 (U.S. Oct. 08, 2026) (Gary Gensler)).

According to Gensler, not only does the statutory text of the Commodity Exchange Act (CEA) and of the Dodd-Frank Act amendments to the CEA counter the notion that the federal government could exclusively regulate sports betting, placing that authority solely in the federal government would contradict the interests of key senators who aided passage of the Dodd-Frank Act.

"The answer—from *Amicus* as someone who was there—is that Congress did not transfer jurisdiction over sports betting from the States to the CFTC," said Gensler. He then explained how at least one senator would not have undermined states' interests in regulating gaming. Said Gensler: "To put the argument in the plainest real-world terms: Senate Majority Leader Harry Reid of Nevada would never have consented to legislation displacing an activity so critical to his state's economy and politics by permitting sports betting only under CFTC auspices."

Gensler also made familiar arguments about whether sport bets hedge economic risk—he said they do not.

Dodd's amicus brief likewise focused on the statutory definitions applicable to swaps and derivatives. According to Dodd, swaps are intended to be used to hedge economic risk and that Congress, in enacting the Dodd-Frank Act reforms of swaps and derivatives markets, assumed that a derivative is an instrument for managing risk that is independent of the related contract. In other words, Congress did not intend for regulators to adopt a kind of "circular" logic regarding swaps and derivatives.

Dodd then sought to apply this theory to prediction markets. "Treating the wager's own payout as the requisite 'financial, economic, or commercial consequence' therefore allows the contract to manufacture the statutory predicate for its own treatment as a swap," said Dodd.

Gensler also noted that the CEA's "special rule" prohibiting certain event contracts was not designed to surreptitiously allow federal oversight of gaming. "The Special Rule's purpose was to give the CFTC authority to prohibit 'agreements, contracts, or transactions' that involve 'gaming,' unlawful activity, terrorism, war, or assassination from being listed on regulated markets," said Gensler.

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And then returning to his original theme, Gensler said that the language of the Dodd-Frank Act regarding the CEA was intended to address issues that arose during the Great Recession and not to address sports betting.

Lastly, Dodd's brief argued that the Dodd-Frank Act and the CEA never made the CFTC the exclusive regulator of sports betting, or for that matter, necessarily all issues related to designated contract market (DCM)-listed contracts.

Said Dodd: "The Third Circuit acknowledged this carveout, [], but never explained how a statute that expressly allows state law claims can preempt the field in which those claims arise."

There is at least one other related petition for a writ of certiorari pending before the Supreme Court with other such petitions possibly to follow. In a footnote, Gensler's amicus brief observed that a petition filed by Robinhood Derivatives, LLC suggests that the Third Circuit case might have vehicle issues or otherwise be premature in light of the CFTC's plans to address prediction markets via regulation. "A change in the CFTC's current regulation prohibiting exchanges from listing gaming contracts, though, would have no effect on the preemption question presented," said Gensler (See *Robinhood Derivatives, LLC v. Dreitzer*).

The case is No. 26-299 (Christopher J. Dodd) and Gary Gensler.

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Companies: KalshiEX, LLC

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