Public Statements & Remarks

Dissenting Statement of Commissioner Summer K. Mersinger Regarding Order on Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives

September 22, 2023

I respectfully dissent from the Order Prohibiting Listing for Trading of Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives (the "Order"). I cannot support the Commission[1] taking this trip "through the looking glass"[2] in order to cover up the fact that for over 13 years, it has failed to follow the process that Congress specifically authorized for situations like this: A notice-and-comment rulemaking.

As I have stated publicly before,[3] my dissent should not be taken as an endorsement of the contracts before us. But even if the Commission thinks these contracts are a bad idea, that does not give us the authority to re-write the statute to claim an authority that Congress did not give us because we have been derelict in applying the authority that Congress did give us. Accordingly, I respectfully dissent.

The CFTC's Statutory Authority

Our governing statute, the Commodity Exchange Act ("CEA"), grants the CFTC the authority to prohibit an "event contract" from being listed for trading if it involves one of five specifically enumerated activities and is contrary to the public interest.[4]

The Order rejects event contracts with respect to control of the U.S. Senate and House of Representatives ("Congressional Control Contracts") that KalshiEx, LLC ("Kalshi"), a registered exchange (referred to in the CEA as a "designated contract market" or "DCM"), wants to list for trading. The Order—

1. Finds that the Congressional Control Contracts involve an enumerated activity even though none of the enumerated activities mentions Congressional control, or elections, by—
    - Mischaracterizing the nature of the contracts; and
    - Adding words to the statute that are not there.
2. Finds that the Congressional Control Contracts are contrary to the public interest on the basis of an "economic purpose test" that—
    - Is not mentioned in the statute;
    - Has been eliminated for other purposes as a result of amendments to the CEA; and
    - Was not designed for the type of contract at issue.

Event Contracts in Brief

CEA Section 5c(c)(5)(C), which was added to the CEA in 2010 by the Dodd-Frank Act,[5] provides that the Commission may determine that event contracts based upon the occurrence, extent of an occurrence, or contingency are "contrary to the public interest" if they "involve" one of five enumerated categories: 1) activity that is unlawful under any Federal or State law; 2) terrorism; 3) assassination; 4) war; or 5) gaming.

1. The Commission's Event Contracts Rule is Inconsistent With, and Contradicts, the CEA

The Commission's practice of adding words to the CEA's event contract provisions began early, when it implemented CEA Section 5c(c)(5)(C) by promulgating CFTC Rule 40.11[6] about a year after enactment of the Dodd-Frank Act.[7] Whereas CEA Section 5c(c)(5)(C) grants the Commission discretion to determine whether a DCM's event contract is contrary to the public interest if the contract "involves" one of the enumerated categories, Rule 40.11 refers to an event contract that "involves, relates to, or references" an enumerated category.

Even worse, Rule 40.11 contradicts the statute. CEA Section 5c(c)(5)(C) grants the Commission discretion to determine *whether* a DCM's event contract that involves an enumerated activity is contrary to the public interest. CFTC Rule 40.11(a), by contrast, provides that a DCM "*shall not* list for trading" a contract that involves (or relates to, or references) an enumerated activity (emphasis added). Read literally, Rule 40.11(a) removes entirely the flexibility that Congress granted the Commission to evaluate DCM event contracts from a public interest perspective.

Our rules should provide market participants and the public with clarity and certainty as to how the Commission interprets the CEA. Unfortunately, the Commission's Rule 40.11 regarding event contracts creates confusion rather than clarity by adding words that are not present in the statute and contradicting the provisions of the CEA they purport to construe.

I cannot support an Order that is based, in part, on a rule with these legal shortcomings. For purposes of my vote and this Statement, therefore, I have analyzed Kalshi's Congressional Control Contracts pursuant to the statutory provisions in CEA Section 5c(c)(5)(C), not the provisions of CFTC Rule 40.11.

2. The Commission's Prior Order Regarding Event Contracts is Distinguishable, and Wrong

The Order generally adheres to the Commission's only public interpretation of CEA Section 5c(c)(5)(C) back in 2011-2012, which prohibited event contracts that another DCM, the North American Derivatives Exchange ("Nadex"), sought to list for trading.[8] Nadex sought to list contracts that were similar to Kalshi's Congressional Control Contracts, but importantly, Nadex also sought to list 10 U.S. Presidency binary contracts.

The Commission's rejection of the Nadex request undoubtedly was influenced by the Nadex request to let traders take a position directly on the result of a Presidential election. Kalshi has not made that request—its contracts are limited to Congressional control. Thus, the Commission's action regarding Nadex is distinguishable.

But even if the Nadex contracts on Congressional control are considered separately, in the words of Socrates, "it is better to change an opinion than to persist in a wrong one."[9] While restating the conclusions of the Nadex Order might be the path of least resistance, I believe that we should embrace the wisdom of Socrates and change our opinion, rather than persist in a wrong one.

Kalshi's Congressional Control Contracts Do Not Involve an Enumerated Activity that is Subject to a Public Interest Review Under the CEA

The Congressional Control Contracts are cash-settled, binary (yes/no) contracts based on which political party will control a chamber of the U.S. Congress for a given term. The settlement values of the Congressional Control Contracts are determined by the party affiliation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate.[10]

As noted above, to be subject to a public interest review, CEA Section 5c(c)(5)(C) requires that an event contract "involve" an enumerated activity. But the enumerated activities in CEA Section 5c(c)(5)(C) do not mention Congressional control.

Accordingly, in an effort to find an enumerated activity into which it can squeeze the Congressional Control Contracts nonetheless, the Order focuses on individual elections for the House and Senate: "The Congressional Control Contracts are premised on the outcome of Congressional election contests, which ultimately determine the party affiliation of the Speaker and the [President Pro Tempore]."[11]

1. The Order's Focus on Individual Elections is Flawed

There are three flaws in the Order's focus on individual Congressional elections as the source of an enumerated activity subject to a public interest review. First and foremost, just as the enumerated activities in CEA Section 5c(c)(5)(C) do not mention Congressional control, they also do not mention elections, either. Congress easily could have listed Congressional control, or elections, or both, as enumerated activities subject to a public interest review; it did not.

Second, the Order's focus on individual Congressional elections mischaracterizes the nature of Kalshi's Congressional Control Contracts. While it is generally custom for the House to elect as Speaker a member of the party in the majority,[12] and for the Senate to select as President Pro Tempore the longest-serving Senator from the party of the majority, these are not requirements under the Constitution.[13] In fact, before 1890, the President Pro Tempore was not selected based on an election outcome at all. Rather, the Senator to hold that office was selected every time the Vice President was not present in the Senate Chamber.[14] Additionally, in years when the Senate has been closely divided, the legislative body has seen more than one President Pro Tempore designate a second Senator as "president pro tempore emeritus."[15]

The Speaker of the House does not have to be an elected member of the House or a candidate formally nominated by the two dominant parties.[16] There even has been discussion of the possibility of a non-sitting House member being nominated for Speaker.[17] There also are numerous press accounts during times of narrow divide in the House that led to speculation about the majority party's lacking the necessary votes for Speaker, which would allow the minority party's Speaker nominee to win the majority of votes.[18]

The point is that the selection of the Speaker of the House and the President Pro Tempore of the Senate are decisions that are independent of the individual Congressional elections that precede them. While it may be customary that the party affiliation of these officials is premised on the outcome of the elections, that is neither legally required nor guaranteed. The Order's focus on individual Congressional elections in determining whether the Congressional Control Contracts are subject to a public interest review mischaracterizes the nature of these contracts given their method of settlement.

Third, and relatedly, Kalshi's Congressional Control Contracts do not directly involve any particular election. No one election will determine which party wins, and which party loses, on a Congressional Control Contract. Rather, given its settlement mechanism, the result of a Congressional Control Contract depends indirectly on the cumulative outcomes of 435 elections for the House, and approximately 33 elections for the Senate (combined with the party affiliations of the other approximately 67 Senators for whom there are no elections).

Again, to be subject to a public interest review, CEA Section 5c(c)(5)(C) requires that an event contract "involve" an enumerated activity. There is little doubt that an event contract directly on the election of a particular candidate to a particular office—such as the U.S. Presidency contracts that Nadex sought to list for trading—"involves" an election. But to reach Kalshi's Congressional Control Contracts, the Order reads CEA Section 5c(c)(5)(C) as requiring that an event contract "involve, directly or indirectly," an enumerated activity. The statute, however, contains no such reference to indirect involvement of the type presented here.[19]

Thus, the Order's focus on individual elections is flawed. Elections are not an enumerated activity in CEA Section 5c(c)(5)(C). And the Order, without any discussion or analysis: 1) mischaracterizes the settlement method of the Congressional Control Contracts as the inexorable result of individual elections; and 2) erroneously treats the indirect relationship between the Congressional Control Contracts and individual elections the same as the direct relationship of an event contract on the result of a specific election.[20]

2. The Congressional Control Contracts Do Not Involve Gaming or Activity that is Unlawful Under State Law

Even if we overlook these fundamental flaws in its analysis and accept the Order's focus on individual elections, the Order fails to establish that the Congressional Control Contracts involve the enumerated activities of: 1) gaming; and 2) activity that is unlawful under State law. Neither category applies.

The Order recognizes that neither the CEA nor the Commission's rules define the term "gaming."[21] ***In the Rule 40.11 Adopting Release implementing CEA Section 5c(c)(5)(C), the Commission acknowledged that "the term 'gaming' requires further clarification," and said that the Commission may issue a future rulemaking concerning event contracts that involve "gaming."***[22] ***But no such future Commission rulemaking has been forthcoming.***

Lacking any definition or clarification of the term "gaming" with which to evaluate the Congressional Control Contracts, the Order attempts to divine the term's "ordinary meaning" through the following tortured chain of reasoning:

- Gaming means gambling;

- Several state statutes link gambling to betting or wagering on elections; and, therefore,
- The Congressional Control Contracts constitute gaming.[23]

The Order engages in this sophistry because, based on the descriptions provided in the Order, 7 of the 8 state statutes that it cites that use either the term "gaming" or the term "gambling"—use "gambling."[24] As a result, the statement in the Order that several state statutes, "on their face," link the term "gaming" to betting or wagering on elections[25] is misleading.

Alas, though, the Order's linguistic gymnastics equating "gaming" with "gambling" are undermined by one of the very state statutes it cites. The cited Kentucky statute defines "gambling" as "staking or risking something of value upon the outcome of a contest, game, *gaming scheme, or gaming device* which is based upon an element of chance . . ."[26] If "gaming" means "gambling," then there would be no need for the statute's redundant definition of "gambling" as a "gaming scheme, or gaming device."

Indeed, one has to ask: If Congress intended for "gambling" to be an enumerated activity, is it more likely that Section 5c(c)(5)(C) would have:

- Included "gambling" in its list of enumerated activities; or
- Enumerated "gaming" and hoped the Commission would consider "gaming" to mean "gambling"?

That the answer is the former becomes even clearer when it is noted that the one federal statute cited in the Order—the Unlawful Internet *Gambling* Enforcement Act[27]—uses the word "gambling" (not "gaming") in its very title.

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*. Cambridge Dictionary defines "gaming" as "the risking of money in games of chance, especially at a casino; gaming machines/tables."[28]

In fact, this was how Senators Lincoln and Feinstein viewed gaming in the very colloquy about CEA Section 5c(c)(5)(C) that is cited in the Order. In responding to Senator Feinstein's question about the Commission's authority under Section 5c(c)(5)(C) to determine that a contract is a gaming contract, Senator Lincoln said 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."[29] Thus, the legislative history associates gaming with sporting events, *i.e.,* games.[30]

With respect to the enumerated 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. But as discussed above, the Congressional Control Contracts do not settle directly on the election of any individual Representative of Senator. 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 (and, in the Senate, the party affiliations of Senators who are not even up for election).[31]

Again, if Congress had intended for event contracts involving Congressional control to be an enumerated activity, it easily could have done so, either by explicitly enumerating it or by enumerating event contracts that involve, directly or indirectly, elections. Confronted instead with Congressional silence, I do not believe the Commission can simply decree that the Congressional Control Contracts are subject to a public interest review. And this is especially the case when Congress provided the Commission with another path – a notice-and comment rulemaking – which path the Commission has failed to follow for many years now.

In addition to the five enumerated categories of activity set out above, CEA Section 5c(c)(5)(C) also includes a sixth category providing that the Commission may determine that an event contract that involves "other similar activity" to the enumerated categories is contrary to the public interest. Congress included an important caveat, though: The Commission can only exercise its discretion to determine that a contract involving "other similar activity" is contrary to the public interest by rule or regulation.[32]

Thus, Section 5c(c)(5)(C) contains a ready-made process for the Commission to determine, through a public rulemaking, whether event contracts involving Congressional control are appropriate for listing and trading by DCMs like Kalshi. Further, a rulemaking process would allow the Commission to fix the obvious legal shortcomings in existing Rule 40.11, which implements CEA Section 5c(c)(5)(C), as discussed above.

At any point during the 13 years since the enactment of the Dodd-Frank Act, the Commission could have undertaken such a public rulemaking process as specifically provided for in Section 5c(c)(5)(C). Such a rulemaking could have, among other things, defined the term "gaming," identified activities that the Commission considers "similar" to the enumerated activities and would therefore be subject to a public interest review, and set forth standards and criteria the Commission would use in determining whether to exercise its discretion to undertake such a public interest review.[33]

The Commission has been aware that there is significant interest in event contracts relating directly to elections, and to Congressional control, for a very long time. In 2008, two years before the Dodd-Frank Act became law, the Commission was already struggling with the treatment of event contracts. In its "Concept Release on the Appropriate Regulatory Treatment of Event Contracts," the Commission stated:

> [E]vent contracts may be based on eventualities and measures as varied as the world's population in the year 2050, *the results of political elections*, or th outcome of particular entertainment events. The Commission's staff has received a substantial number of requests for guidance on the propriety of tradin various event contracts under the regulatory rubric of the Commodity Exchange Act . . .[34]

In addition, the Commission's staff has issued two no-action letters permitting the offer of political indicator event contracts to U.S. persons without registration as a DCM, which relief remains in effect today.[35] Finally, as noted above, in 2011, Nadex (a registered DCM like Kalshi) sought to list event contracts based on majority control of the House and Senate similar to Kalshi's Congressional Control Contracts, as well as 10 U.S. Presidency binary contracts.

Yet, rather than undertake the hard work of a rulemaking process to build a foundation for evaluating event contracts such as the Congressional Control Contracts, the Commission has squandered the decade since the enactment of the Dodd-Frank Act and the issuance of the Nadex Order. Even during the year since Kalshi initially submitted its contracts,[36] the Commission still has not initiated a rulemaking process as expressly provided for in the CEA.[37] ***It is wholly inconsistent with principles of "good government" for the Commission to subject DCM event contracts to a public interest review without providing any regulatory certainty as to the definitions and standards it will apply in doing so.***

A Commission Rulemaking on Event Contracts Should Address the Flawed Public Interest Review in The Order, Too

A rulemaking process on event contracts, as contemplated by Congress, also would enable the Commission, for the first time, to interpret the "contrary to the public interest" standard in CEA Section 5c(c)(5)(C) (both generally, and with respect to event contracts on Congressional control and directly on elections in particular). Specifically, such a rulemaking should establish the identifiable factors the Commission will consider when evaluating event contracts pursuant to that standard.

Such a rulemaking is vitally important because the public interest review set out in the Order is fundamentally flawed—which is another reason for my dissent.

1. The Order Improperly Resurrects, Based on a Single and Ambiguous Colloquy, the Economic Purpose Test that the CFTC Previously Removed for Other Purposes

The CEA does not define "public interest" for purposes of CEA Section 5c(c)(5)(C). The Order relies on legislative history of Section 5c(c)(5)(C) to conclude that Congress purportedly intended, for purposes of a public interest review of an event contract, to resurrect "a form of the economic purpose test" that the Commission had used to determine whether contracts were contrary to the public interest—until that public interest requirement was removed from the CEA by the Commodity Futures Modernization Act of 2000 ("CFMA").[38]

The legislative history that the Order is relying on with respect to the resurrection of the economic purpose test consists of a single colloquy between Senator Dianne Feinstein and Senator Blanche Lincoln, reading in relevant part as follows:

> Mrs. Feinstein: . . . Will the CFTC have the power to determine that a contract is a gaming contract if the predominant use of the contract is speculative as opposed to hedging or economic use?
>
> Mrs. Lincoln: That is our intent. The Commission needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed event contracts. It would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commerc purpose. Rather, they would be used solely for gambling.[39]

To be clear, the Dodd-Frank Act did not codify the economic purpose test in the CEA. And I cannot accept the Commission's conclusion that this isolated colloquy between two Senators establishes an intent by the whole of Congress that the Commission conduct its public interest reviews of event contracts based on the economic purpose test that had been eliminated as a result of amendments to the statute a decade earlier.

After all, neither Senator Feinstein nor Senator Lincoln used the term "economic purpose test." As someone who spent over a decade working in Congress, and who was present on the Senate floor for countless colloquies and even had a hand in preparing talking points for similar floor discussions, I am confident that if the Senators believed we should resurrect the economic purpose test, they would have said just that.[40]

2. The Order Applies an Economic Purpose Test That Was Not Designed for Contracts Like the Congressional Control Contracts

The two prongs of the economic purpose test, which the Order adopts as a primary component of its public interest review of the Congressional Control Contracts, evaluate: 1) the contract's utility for price basing; and 2) whether the contract can be used for hedging purposes.

The Order states the price basing prong of the economic purpose test as follows: "[P]rice-basing occurs when producers, processors, merchants, or consumers of a commodity establish commercial transaction prices *based on the futures price* for that or a related commodity."[41] As the Order thus indicates, the price basing prong of the economic purpose test was designed primarily for the traditional futures contracts that were listed and traded on futures exchanges for decades before Congress enacted the CFMA in 2000. The Order confirms this by attributing the foregoing statement of price basing to the CFTC's "*Futures* Glossary."[42] Further, the Feinstein-Lincoln colloquy makes clear that the Senators' statements about economic purpose were made with futures contracts in mind.[43]

The Order then finds that the Congressional Control Contracts fall short with respect to price basing: "[T]he price of the Congressional Control Contracts is not directly correlated to the price of any commodity, and so the price of the Congressional Control Contracts could not predictably be used to establish commercial transaction prices."[44] This is not surprising, given that traditional futures contracts differ significantly from binary (yes/no) event contracts such as Kalshi's Congressional Control Contracts.

As noted above, the Commission's own Event Contract Concept Release in 2008 recognized that unlike traditional futures contracts, event contracts do not necessarily relate to market prices. The Commission stated that "[i]n general, event contracts are neither dependent on, nor do they necessarily relate to, market prices or broad-based measures of economic or commercial activity," and elaborated as follows:

> Since 2005, the Commission's staff has received a substantial number of requests for guidance on the propriety of offering and trading financial agreeme that may primarily function as *information aggregation vehicles*. These event contracts generally take the form of financial agreements linked to eventual or measures that *neither derive from, nor correlate with, market prices* or broad economic or commercial measures.[45]

In other words, the structure of a wide array of event contracts (described by the Event Market Concept Release as "information aggregation vehicles") may preclude them from satisfying the Order's price basing requirement. This is the inevitable result of imposing an economic purpose test that was not designed for event contracts.

The same is true with respect to the hedging purpose prong of the economic purpose test. That is, the Order holds the Congressional Control Contracts to a hedging purpose requirement that may be difficult for them to meet because that test was not designed for this type of contract. The Order itself recognizes this when it says that "the binary payout of the Congressional Control Contracts . . . limits their utility as a vehicle for hedging any eventual economic effects resulting from which party controls a chamber of Congress."[46]

Thus, the Order determines that the Congressional Control Contracts are contrary to the public interest by using an economic purpose test that was not designed for such contracts. As a result, it imposes price basing and hedging requirements that many event contracts, due to their structure, may have little chance to pass. A public rulemaking process should fully explore whether this is appropriate, or whether the Commission should instead develop a standard for a public interest review of event contracts that is appropriately tailored and well-suited to the nature of the contracts being reviewed.

3. The Order Improperly Rejects, Without Discussion or Analysis, Comments from Experts that the Congressional Control Contracts Meet the Economic Purpose Test

Notwithstanding the foregoing questions as to whether the economic purpose test should be applied to Kalshi's Congressional Control Contracts, several distinguished economists, academics, and professional market participants have submitted comment letters explaining how the Congressional Control Contracts meet the price basing and hedging purpose prongs of that test.[47] The Order acknowledges some of these comments in a cursory manner, but summarily dismisses them, saying only that "the Commission has considered [their] assertions."[48] The Order does not point to any economic analyses or academic studies to rebut these comments from experts in their fields.

Rather, the Order simply decrees with respect to price basing that "the price of the Congressional Control Contracts could not predictably be used to establish commercial transaction prices." It ignores the input of several academics who commented to the contrary:

> In our experience observing the market, financial market participants routinely use the probability of various parties' controlling Congress (and the Presidency) to accurately price various assets. An accurate valuation of many investments, assets, physical commodities, and the value of services requ an accurate assessment of the future trajectory of the political environment. The political environment has significant and predictable impacts on busines and it is a significant factor that affects valuations.[49]

Similarly, the Order simply decrees with respect to hedging:

> [C]ontrol of a chamber of Congress could, following a number of independent intervening events, generally affect a wide variety of personal liabilities and economic factors, but that does not establish that the Congressional Control Contracts can be used for specific, identifiable hedging purposes and thus d not establish the hedging utility of the Congressional Control Contracts.[50]

There are several deficiencies in the Order's hedging analysis. First, the Order focuses on hedging with respect to particular public policies, and fails to meaningfully address the point raised by Christopher Hehmeyer (with 45 years of experience in the futures business), who focused not on "the contract's utility for hedging *policy risk* that is associated with Congressional control," but rather "on the contract's utility for hedging the *direct risk* that stems from Congressional control and elections in general," citing as examples media companies and consultancies, among others.[51]

What is more, given the Order's acknowledgement that control of a chamber of Congress could generally affect a wide variety of personal liabilities and economic factors, its conclusion regarding hedging simply amounts to a view that the Congressional Control Contracts may not be particularly good hedging vehicles. Indeed, the Order makes that explicit elsewhere when it states that "control of a chamber of Congress does not, in and of itself, have sufficiently direct, predictable, or quantifiable economic consequences for the Congressional Control Contracts *to serve an effective hedging function*."[52]

Market participants should be permitted to make their own choices about what financial products meet their hedging needs.[53] It is simply not the CFTC's role to deny them that choice altogether because we feel a given product is not "effective enough" for hedging purposes.

If the Commission is going to insist on determining whether an event contract is contrary to the public interest based on an economic purpose test that is not mentioned in the CEA and was not designed for these types of contracts, it should engage in notice-and-comment rulemaking and specifically address the arguments and conclusions of those who share their professional expertise with us – rather than dismiss them out-of-hand, as in the Order.

The Order's Unfortunate Consequences

The Commission's issuance of this Order prohibiting the listing for trading of Kalshi's Congressional Control Contracts will lead to several unfortunate consequences that, I regret, will reflect poorly on the Commission.

First, it puts the Commission in the untenable position of prohibiting a registered and regulated exchange from listing event contracts relating to Congressional control, while the Iowa Electronic Market and Victoria University of Wellington currently can undertake the same activity outside of the regulatory framework of the CEA. I recognize that the staff no-action relief to these latter markets is based on their representations that they are small, non-profit markets. Still, having found that contracts on Congressional control constitute gambling and are contrary to the public interest, it is difficult to understand how the Commission can credibly say that a little unregulated gambling in this area for academic purposes is acceptable.

Second, absent a notice-and-comment rulemaking process, the Commission continues to shroud its approach to event contracts in mystery. The Order contravenes Congress' direction that the CFTC promote responsible innovation,[54] and undermines the CFTC's commitment to its own stated Core Values of being "Forward-Thinking" (*i.e.,* challenging ourselves to stay ahead of the curve) and providing "Clarity" (*i.e.,* providing transparency to market participants about our rules and processes).[55]

Finally, while the Commission can (and should) still undertake a rulemaking process to define terms such as “gaming” and “contrary to the public interest,” and to identify the factors the Commission will use to determine whether DCM event contracts involve activity similar to the enumerated categories in CEA Section 5c(c)(5)(C) and are contrary to the public interest—doing so after issuing this Order is hardly “good government.” If such a rulemaking were to conclude that event contracts such as the Congressional Control Contracts are permissible, Kalshi (like Nadex before it) will have been deprived of an opportunity to list a potentially profitable new business line, and market participants will have been deprived of the opportunity to hedge risks acknowledged by many economists, academics, and derivatives professionals as genuine. On the other hand, if such a rulemaking were to conclude that such event contracts are impermissible, it will inevitably be viewed by many as intended simply to rubber-stamp the conclusion that the Commission has already reached in this Order.

Conclusion

Which brings me back to where I began. Congress could have enumerated event contracts involving Congressional control (and/or indirectly on elections) in the Dodd-Frank Act. It did not do so. Instead, Congress entrusted the CFTC with the discretion to determine, through a rulemaking process: 1) whether such contracts are similar to any of the enumerated activities in CEA Section 5c(c)(5)(C)); and, if so, 2) whether they are contrary to the public interest.

Again, my dissent should not be taken as an endorsement of Kalshi’s Congressional Control Contracts. Commenters have raised serious concerns about election integrity that warrant careful consideration by the Commission. Kalshi inevitably runs the risk that even if the Commission permits it to list for trading its Congressional Control Contracts at this time, the CEA provides that the Commission may prohibit it from doing so in a proper rulemaking in the future.

As discussed above, my dissent is based on my view that, whether the Commission’s conclusion is right or wrong, the analysis in the Order is inconsistent with the authority that Congress has granted us at best, and exceeds that authority at worst. It is further based on my view that it is important for the Commission to make this determination the right way—by undertaking a public rulemaking process as authorized by the CEA to establish a legal framework for exercising its discretion to determine whether event contracts, including those relating to Congressional control, may be prohibited from trading because they are contrary to the public interest.

This is not merely elevating form over substance. A notice-and-comment rulemaking would require the Commission to provide a comprehensive discussion and analysis of all relevant issues and opposing viewpoints. It could not, as it does in this Order, simply dismiss without discussion or analysis comments contrary to its preferred result out of hand.

Since there has been no rulemaking process, and in light of the substantial deficiencies in the Order regarding whether Kalshi’s Congressional Control Contracts are subject to a public interest review and, if so, whether they are contrary to the public interest, I respectfully dissent.

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[1] This Statement will refer to the agency as the “Commission” or “CFTC.” All web pages cited herein were last visited on September 21, 2023.
[2] Lewis Carroll, *Through the Looking-Glass and What Alice Found There* (Chicago, W.B. Conkey Co. 1900).
[3] *See* Dissenting Statement of Commissioner Summer K. Mersinger Regarding Commencement of 90-Day Review Regarding Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives (June 23, 2023), available at Dissenting Statement of Commissioner Summer K. Mersinger Regarding Commencement of 90-Day Review Regarding Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives | CFTC (https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement062323).
[4] CEA Section 5c(c)(5)(C)(i)(I)-(V), 7 U.S.C. § 7a-2(c)(5)(C)(i)(I)-(V).
[5] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”).
[6] CFTC Rule 40.11, 17 C.F.R. § 40.11.
[7] *See* Provisions Common to Registered Entities, 76 Fed. Reg. 44776 (July 27, 2011) (“Rule 40.11 Adopting Release”).
[8] *See* CFTC Order Prohibiting North American Derivatives Exchange’s Political Event Derivatives Contracts (April 2, 2012) (“Nadex Order”), available at https://www.cftc.gov/PressRoom/PressReleases/6224-12 (https://www.cftc.gov/PressRoom/PressReleases/6224-12.).
[9] *See* Liz Flynn, “20 Socrates Quotes that Apply to Business,” Money Inc. (March 29, 2020), available at https://moneyinc.com/socrates-quotes/ (https://moneyinc.com/socrates-quotes/).
[10] *See* Order at 2.
[11] *Id.* at 10 (footnote omitted).
[12] *See* Speakers of the House (1789 to Present), U.S. House of Representatives, History, Art & Archives, available at https://history.house.gov/People/Office/Speakers-Intro/#:~:text=The%20Speaker%20is%20elected%20at,the%20new%20Congress%20is%20elected (https://history.house.gov/People/Office/Speakers-Intro/#:~:text=The%20Speaker%20is%20elected%20at,the%20new%20Congress%20is%20elected).
[13] *See* About the President Pro Tempore, United States Senate, available at https://www.senate.gov/about/officers-staff/president-pro-tempore.htm#:~:text=The%20Constitution%20instructs%20the%20Senate,conceived%20as%20a%20temporary%20replacement (https://www.senate.gov/about/officers-staff/president-pro-tempore.htm#:~:text=The%20Constitution%20instructs%20the%20Senate,conceived%20as%20a%20temporary%20replacement).
[14] *See* About the President Pro Tempore: Historical Overview, United States Senate, available at https://www.senate.gov/about/officers-staff/president-pro-tempore/overview.htm (https://www.senate.gov/about/officers-staff/president-pro-tempore/overview.htm).
[15] *See* About the President Pro Tempore: Presidents Pro Tempore, United States Senate, at n.5, available at https://www.senate.gov/about/officers-staff/president-pro-tempore/presidents-pro-tempore.htm (https://www.senate.gov/about/officers-staff/president-pro-tempore/presidents-pro-tempore.htm).
[16] Valerie Heitshusen, *Speakers of the House: Elections, 1913-2023*, Congressional Research Service, 4 (September 14, 2023), available at https://crsreports.congress.gov/product/pdf/RL/RL30857 (https://crsreports.congress.gov/product/pdf/RL/RL30857). In 12 of the 15 elections since 1997, at least one member has voted for a candidate who was not formally nominated by either major party. In every initial ballot for the Speaker since 2013 (excluding 2017) at least one candidate receiving a vote or votes was not a member of the U.S. House of Representatives. *Id.*
[17] *See* Pete Williams, Can an Outsider be Speaker of the House?, NBC News (October 9, 2015), available at https://www.nbcnews.com/politics/congress/can-outsider-be-speaker-house-n441926 (https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.nbcnews.com%2Fpolitics%2Fcongress%2Fcan-outsider-be-speaker-house-n441926&data=05%7C01%7CTArbit%40CFTC.gov%7Ca8e2e7270fb4488488b408dab8fc3bbf%7Cff902a6348374fa7905b52887c7f3cff%7C0%7C0%7C638025690719050791%7CUnknown%
[18] *See* Sarah Ferris, John Bresnahan, and Heather Caygle, Pelosi Faces Tight Margins for Speaker’s Vote, Politico (December 11, 2020), available at https://www.politico.com/news/2020/12/11/nancy-pelosi-speaker-vote-444409 (https://www.politico.com/news/2020/12/11/nancy-pelosi-speaker-vote-444409)); Philip Ewing, Pelosi is Narrowly Reelected Speaker, NPR (January 3, 2021), available at https://www.npr.org/2021/01/03/952422397/pelosi-poised-to-be-reelected-speaker-but-slimmer-majority-makes-it-tight (https://www.npr.org/2021/01/03/952422397/pelosi-poised-to-be-reelected-speaker-but-slimmer-majority-makes-it-tight); and Benjamin Siegel and John Parkinson, Pelosi Wins Tight Race for House Speaker, ABC News (January 3, 2021), available at https://abcnews.go.com/Politics/nancy-pelosi-faces-razor-thin-margin-house-speaker/story?id=75017441 (https://abcnews.go.com/Politics/nancy-pelosi-faces-razor-thin-margin-house-speaker/story?id=75017441).

[19] Congress knows how to reference indirect activity, as our research has identified 18 instances in which it has used the phrase "directly or indirectly" elsewhere in the CEA. *See* CEA Sections 1a(7), 1a(14), 2(a)(1)(C)(v)(IV), 2(a)(8), 4a(a)(1), 4a(b)(1) and (2), 4b(e), 4c(a)(4)(A), 4f(c)(1)(i), 4i (three times), 4o(1), 4t(a)(1)(A) and (B), 4t(c), and 5b(a)(1); 7 U.S.C. §§ 1a(7), 1a(14), 2(a)(1)(C)(v)(IV), 2(a)(8), 6a(a)(1), 6a(b)(1) and (2), 6b(e), 6c(a)(4)(A), 6f(c)(1)(i), 6i (three times), 6o(1), 6t(a)(1)(A) and (B), 6t(c), and 7a-1(a)(1). Most notably, CEA Section 2(a)(8), 7 U.S.C. § 2(a)(8), provides that no Commissioner or employee of the Commission "shall . . . *participate, directly or indirectly,* in any registered entity operations or transactions of a character subject to regulation by the Commission." (Emphasis added) Congress thus specifically brought indirect "participation" within the scope of CEA Section 2(a)(8), but it chose not to do so with respect to indirect "involvement" in CEA Section 5c(c)(5)(C) with respect to event contracts.

[20] In another context, the Order cites dictionary definitions of the word "involve" that include "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence." *See* Order at 5 and n.11. If it is being suggested that the word "involve" therefore necessarily encompasses indirect involvement, I disagree. For example: If my son plays in his team's soccer game, he is directly "involved" in that game; if I watch the game from the stands, I am indirectly "involved" in the game. There is a distinction between direct and indirect involvement, and unlike other provisions of the CEA, Congress did not say that its use of the word "involve" in CEA Section 5c(c)(5)(C) includes indirect involvement such as the indirect relationship of the Congressional Control Contracts to individual Congressional elections.

[21] *See* Order at 8.

[22] Rule 40.11 Adopting Release, 76 Fed. Reg. at 44785.

[23] *See* Order at 8-9.

[24] *Id.,* n.22 and 24. The 7 cited state statutes that the descriptions in the Order indicate refer to "gambling" and not "gaming" are Georgia, New York, Texas, Virginia, Illinois, Nebraska, and North Dakota. The only cited state statute that uses the term "gaming" as opposed to "gambling" is New Mexico.

[25] *Id.* at 9.

[26] *Id.* at 8 n.22 (citing Ky. Rev. Stat. Ann. § 528.010(6)(a) (West 2023)) (emphasis added).

[27] *Id.* at 9 (citing the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367) (emphasis added).

[28] *See* "gaming" definition, CAMBRIDGE DICTIONARY, available at https://dictionary.cambridge.org/us/dictionary/english/gaming (https://dictionary.cambridge.org/us/dictionary/english/gaming).

[29] *See* 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statements of Senator Dianne Feinstein and Senator Blanche Lincoln), available at http (https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf)s://www.congress.gov/11 (https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf)1/crec/2010/07/15/CREC-2010-07-15-senate.pdf (https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf) ("Feinstein-Lincoln colloquy"). Senator Lincoln was then the Chair of the Senate Committee on Agriculture, Nutrition, and Forestry, which is the CFTC's authorizing committee.

[30] In a footnote, the Order asserts that "[n]one of the Super Bowl, the Kentucky Derby, or the Masters Golf Tournament are, of themselves, 'gaming,'" and that "sports typically are not understood to be 'gaming'—they are understood to be 'games.'" It cites no statute, legislative history, court decision, or other authority, to support either assertion. *See* Order at 7 n.18.

[31] At least one state statute cited in the Order could not be used for that purpose, since the Order indicates that it is expressly limited to municipal elections. *See* Order at 11 n.26 (citing Colo. Rev. Stat. Ann. § 31-10-1531 (West)).

[32] CEA Section 5c(c)(5)(C)(i)(VI); 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI).

[33] Actually, since event contracts generally take the form of binary options, the Commission had statutory authority even before the Dodd-Frank Act to engage in a rulemaking process pursuant to its plenary authority over trading in options pursuant to CEA Section 4c(b), 7 U.S.C. § 6c(b).

[34] Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 Fed. Reg. 25669 (May 7, 2008) (footnotes omitted, emphasis added) ("Event Contract Concept Release").

[35] *See* CFTC Letter No. 93-66 (Division of Trading and Markets, June 18, 1993), issued to the Iowa Electronic Market, available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/93-66.pdf (https://www.cftc.gov/sites/default/files/idc/groups/public/%40lrlettergeneral/documents/letter/93-66.pdf), and CFTC Letter No. 14-130 (Division of Market Oversight, October 29, 2014), issued to Victoria University of Wellington in New Zealand, available at https://www.cftc.gov/csl/14-130/download (https://www.cftc.gov/csl/14-130/download). In both cases, the markets were to be operated on a non-profit basis, for academic and research purposes only, and subject to certain limitations intended to keep the markets relatively small.

[36] Kalshi initially submitted a prior version of its Congressional Control Contracts for Commission approval on July 20, 2022 (the "2022 Submission"), but later withdrew that request on May 16, 2023, before the Commission had issued a decision. On June 12, 2023, Kalshi certified the Congressional Control Contracts that are the subject of the Order. Although the certified contracts currently before the Commission include three revisions to address concerns that were voiced about the prior iteration of the contracts, they are materially similar to the original contracts, and as a result, the vast majority of substantive public comments from the 2022 Submission continue to apply. Accordingly, this Statement will cite to comment letters submitted on both the 2022 Submission and the current Congressional Control Contracts that are before us.

[37] The CFTC's Spring 2023 regulatory agenda, published as part of the government-wide Unified Agenda of Federal Regulatory and Deregulatory Actions, includes an event contracts rulemaking. *See* Regulatory Information Service Center, Unified Agenda of Regulatory and Deregulatory Actions (Spring 2023), available at Agency Rule List - Spring 2023 (reginfo.gov) (https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3038&csrf_token=E8E9F0700F7A4D2C99221E64D861757B70E2855F Sadly, though, the stated target date for issuance of a notice of proposed rulemaking on event contracts was September 2023, which target obviously will be missed.

[38] Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000). The Order notes that the pre-CFMA economic purpose test looked to "whether the contract reasonably can be expected to be, or has been, used for hedging and/or price basing on more than an occasional basis." But it then goes a step further and asserts that the legislative history of CEA Section 5c(c)(5)(C) indicates Congressional intent to modify the economic purpose test to be used by the Commission in conducting its public interest reviews of event contracts to consider instead "whether a contract is used predominantly by speculators or market participants not having a commercial or hedging interest." *See* Order at 13-14 and n.29.

[39] Feinstein-Lincoln colloquy, n.29, *supra,*

[40] The Order tries to bolster the basis for applying the economic purpose test by citing to the Congressional findings in CEA Section 3(a), 7 U.S.C. § 5(a), that "[t]he transactions subject to [the CEA] . . . are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair, and secure financial facilities." But the question at hand is whether Congress, when it enacted the Dodd-Frank Act, intended to resurrect the economic purpose test and require that it be used by the Commission in determining whether an event contract that falls into an enumerated category is contrary to the public interest pursuant to CEA Section 5c(c)(5)(C). For the reasons set forth above, it did not.

[41] *See* Order at 18 (emphasis added; footnote omitted).

[42]*Id.* at 18 n.36 (emphasis added).

[43] Senator Lincoln cited terrorist attacks, war and hijacking as examples of events that "pose a real commercial risk to many businesses in America," but stated that "*a futures contract* that allowed people to hedge that risk [of terrorist attacks, war, and hijacking] . . . would be contrary to the public interest." Senator Feinstein thanked Senator Lincoln and concluded that "*[a] futures market* is for hedging." Order at 14 n.30 (quoting Feinstein-Lincoln Colloquy, n.29, *supra*) (emphasis added).

[44] Order at 19.

[45] Event Contract Concept Release, 73 Fed. Reg. at 25669-25670 (emphasis added). More specifically, the Event Contract Concept Release noted that: 1) event contracts based on environmental measures (such as the volatility of precipitation or temperature levels) or environmental events (such as a specific type of storm within an identifiable geographic region) will "not predictably correlate to commodity market prices or other measures of broad economic or commercial activity;" and 2) event contracts based on general measures (such as the number of hours that U.S. residents spend in traffic annually or the vote-share of a particular candidate) "do not quantify the rate, value, or level of any commercial or environmental activity," and that contracts on general events (such as whether a Constitutional amendment will be adopted) "do not reflect the occurrence of any commercial or environmental event." *Id.* at 25671.

[46] Order at 18. *See also* European Securities and Market Authority ("ESMA"), Product Intervention Analysis – Measure of Binary Options at 14 (June 1, 2018) ("Unlike vanilla options, which are often used for hedging purposes, binary options provide a fixed payoff if a specified event occurs . . . This inherent feature of the [binary options] products limits the value of the product as a hedging tool . . ."), available at esma50-162-214_product_intervention_analysis_binary_options.pdf (europa.eu) (https://www.esma.europa.eu/sites/default/files/library/esma50-162-214_product_intervention_analysis_binary_options.pdf).

[47] *See, e.g.,* Letter from Jason Furman (filed September 18, 2022) (former Chairman of the Council of Economic Advisers under President Obama, serving as his Chief Economist); Letter from Robert Shiller (filed September 24, 2022) (recipient of Nobel Prize in Economic Sciences, joined by seven professors and academic researchers in economics, political science, and law); Letter from Christopher Hehmeyer (filed September 20, 2022) (futures market participant since 1977, former Chairman of the National Futures Association and board member of the Futures Industry Association); and Letter from Justin Wolfers (filed July 23, 2023) (professor of public policy and economics, University of Michigan, joined by four other professors of economics, law, and business).

[48] Order at 16; *see also* Order at 18.

[49] Wolfers, *et al.,* Letter at 1; *accord,* Shiller*, et al.,* Letter at 1.

[50] Order at 17.

[51] Hehmeyer Letter at 1 (emphasis in the original).

[52] Order at 15 (emphasis added).

[53] Commenters supported this view. *See* Wolfers, *et al.,* Letter at 2 (". . . the CFTC should not substitute its judgment for market participants' own assessment of their risks and how best to manage their risk"); *accord,* Shiller, *et al.,* Letter at 2 (same).

[54] CEA Section 3(b), 7 U.S.C. § 5(b).

[55] CFTC Core Values, Forward-Thinking and Clarity, available at https://www.cftc.gov/About/AboutTheCommission (https://www.cftc.gov/About/AboutTheCommission).

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