

Elections Betting Pays Off, For Now: Implications for Future Event Contracts

November 8, 2024

On October 2, 2024, the U.S. Court of Appeals for the D.C. Circuit cleared the way, at least for the time being, for betting on the outcome of U.S. elections.¹ The D.C. Circuit denied the Commodity Futures Trading Commission's ("CFTC") motion for an emergency stay pending its appeal of a lower court decision, greenlighting the trading of elections event contracts. The Court held that the CFTC failed to demonstrate irreparable harm to itself or the public, a prerequisite for a stay.²

The outcome of the appeal on the merits, with significant implications for the availability of election gambling contracts in the United States as well as the scope of the CFTC's authority more broadly, greenlighted elections betting through the November presidential elections.³ This week's election results have seemingly confirmed expectations set by elections betting markets, which had projected a Trump victory.

In addition to the appeal, the outcome of the presidential elections is likely to significantly impact the CFTC's options and next steps in regulating political event contracts. This fall, the CFTC was preparing to issue a proposed amendment to its rules on event contracts to clarify the CFTC's authority to review political events contracts. Because the proposed amendment effectively memorialized the CFTC's positions in the *Kalshi* case, the recent losses in federal court undermine CFTC's ability to implement the proposed amendment as originally conceived. In the ongoing appeal and in a recent statement by Chairman Rostin Benham, the CFTC has maintained its position that elections gambling contracts are illegal, but noted that it will continue to police election betting markets while further proceedings play out.⁴

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¹ *KalshiEX LLC v. Commodity Futures Trading Comm'n* ("CFTC"), No. 24-5205, 2024 WL 4364204 (D.C. Cir. Oct. 2, 2024).

² *Id.* at *4.

³ Under a scheduling order entered by the D.C. Circuit on October 11, 2024, subsequent briefing is set to conclude on December 6, 2024, after the U.S. presidential elections.

⁴ See Lydia Beyoud, *CFTC to Police Bet Platforms But Would Rather not: Benham*, Bloomberg (Oct. 22, 2024), <https://www.bloomberg.com/news/articles/2024-10-22/cftc-to-police-bet-platforms-but-would-rather-not-chair-says>.



BACKGROUND

While the term “event contract” is not defined in CFTC regulations, event contracts are generally understood to be a type of derivative contract, typically with a binary “Yes” or “No” payoff, that is based on the outcome of an underlying occurrence or event.⁵ Businesses and individuals may use event contracts to hedge against economic risk or to speculate.

Statutory Background

Under the Commodity Exchange Act (“**CEA**”), events contracts, regulated as futures, can only be offered on federally regulated exchanges, known as “Designated Contract Markets” (“**DCMs**”).⁶ While most event contracts traded on DCMs are subject to cursory review by the CFTC for compliance with general contract listing standards, Congress amended the CEA in 2010 to authorize more detailed CFTC review of certain categories of DCM-listed event contracts to determine whether they are consistent with public interests.⁷

More specifically, under the CEA’s “Special Rule” the CFTC can review event contracts that “involve...activity that is unlawful under Federal or State law, terrorism, assassination, war, gaming, or other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.”⁸

CFTC implementing regulation, Regulation 40.11, correspondingly prohibits DCMs from listing any event contract that “involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under State or Federal law,” or “an activity that is similar to [the enumerated activities] and that the Commission determines, by rule or regulation, to be contrary to the public interest.”⁹

CFTC History of Regulating Political Event Contracts

Since 2010, the CFTC has relied on Regulation 40.11 and the Special Rule to take actions related to political event

contracts, which are not specifically enumerated as a reviewable category.

- In April 2012, the CFTC issued an order prohibiting the DCM Nadex from listing certain event contracts contingent on election outcomes for the U.S. Congress. It reasoned that the contracts involved gaming and were contrary to public interest.¹⁰
- In January 2022, the CFTC fined Polymarket, an offshore unregistered prediction market platform for “offering off-exchange event-based binary options contracts” to U.S. customers without registering as a DCM or SEF, ordering it to pay a \$1.4 million penalty and to wind down U.S. operations.¹¹
- In August 2022, the CFTC withdrew a no-action letter it had previously issued to PredictIt, a political futures market launched by the Victoria University of Wellington in New Zealand as a data gathering tool, which had permitted PredictIt to operate in the United States without registering as a DCM.¹² The CFTC claimed that PredictIt was no longer operating within the terms of its no-action letter, but did not identify any specific instances of non-compliance.¹³ PredictIt obtained a preliminary injunction from the Fifth Circuit Court of Appeals, and further litigation is ongoing.¹⁴

Proposed Rule Amendment

Earlier this year, the CFTC proposed to clarify its rules relating to political event contracts through a rule amendment. The CFTC proposed amending Regulation 40.11 to specify the type of contracts that fall within the scope of CEA Section 5c(c)(5)(C) and to define “gaming” with illustrative examples, including a “political contest,” “the outcome of an awards contest,” and “the outcome of a game in which one or more athletes compete.”¹⁵ To align

⁵ CFTC, *Contracts & Products: Event Contracts*, <https://perma.cc/4FPT-L2SN>.

⁶ Event contracts could also be offered to non-retail market participants in the form of a swap on a swap execution facility.

⁷ 7 U.S.C. § 7a-2(c)(5)(C)(i).

⁸ *Id.*

⁹ 17 C.F.R. §§ 40.11(a)-(b).

¹⁰ “CFTC Issues Order Prohibiting North American Derivatives Exchange’s Political Event Derivatives Contracts” (Apr. 2, 2012), <https://www.cftc.gov/PressRoom/PressReleases/6224-12>.

¹¹ “CFTC Orders Event-Based Binary Options Markets Operator to Pay \$1.4 Million Penalty” (Jan. 3, 2022),

<https://www.cftc.gov/PressRoom/PressReleases/8478-22>; Dale

Brady, “CFTC Orders Event-Based Binary Options Markets Operator to Pay \$1.4 Million Penalty,” YAHOO: FIN. (Jan. 25, 2022), <https://finance.yahoo.com/news/polymarket-shuts-u-traders-comply-161312465.html>.

¹² See “CFTC Staff Withdraws No Action Letter to Victoria University of Wellington, New Zealand Regarding a Not-For-Profit Market for Certain Event Contracts” (Aug. 4, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8567-22>.

¹³ *Id.*

¹⁴ *Clarke v. CFTC*, 74 F.4th 627, 644 (5th Cir. 2023); *Clarke v. CFTC*, 1:24-cv-00614-DAE (W.D. Tx.).

¹⁵ Proposal at 48974-75, available at:

<https://www.cftc.gov/sites/default/files/2024/06/2024->

the Regulation with the text of the CEA, the CFTC also proposed removing the terms “relate to” and “reference” wherever they appear and referring to event contracts that “involve” an Enumerated Activity or prescribed similar activity.¹⁶ Two Republican commissioners dissented from the proposed amendment, citing its breadth.¹⁷ A substantial part of Commissioner Summer K. Mersinger’s disagreement focused on what she considered to be an overly-broad understanding of the term “gaming.” As an example, the Commissioner pointed out that it does not make sense that under the Proposal, given the “in connection with” contests language, betting on whether Taylor Swift attends a Kansas City Chiefs match would be disallowed, but betting on whether she attends a Beyoncé concert would not. She also contended that the CFTC’s equation of “gaming” with gambling on contests and elections surpasses Congress’ intended reach for the Special Rule, arguing that Congress would have enlisted contests and elections as part of the Enumerated Activities if it had intended to encompass these.¹⁸ Commissioner Caroline D. Pham argued that the proposal creates “a vast gray area for exchanges” through an overbroad definition of “gaming,” and that the CFTC’s election integrity concerns were misplaced. Commissioner Pham pointed out that the Federal Election Commission policies campaigns, and much as the listing of crop yield futures does not result in the CFTC displacing the role of the USDA, the CFTC is not tasked with policing elections.¹⁹

The comment period on the proposed rule closed on August 8, 2024.²⁰ However, because the proposed rule effectively codified the CFTC’s position in the *Kalshi* lawsuit, it is likely inconsistent with the district court’s interpretation of the CEA in *Kalshi*, which defined “gaming” and “involve” more narrowly than the CFTC proposal.

[12125a.pdf](#); Rostin Behnam, Chairman, CFTC, Statement Regarding Proposed Event Contracts Rulemaking (May 10, 2024),

<https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement051024>.

¹⁶ Proposal at 48973.

¹⁷ Dissenting Statement of Commissioner Caroline D. Pham on Event Contracts Proposal, (May 10, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement051024b>; Dissenting Statement of Commissioner Caroline D. Pham on Event Contracts Proposal, (May 10, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement051024b>.

¹⁸ Dissenting Statement of Commissioner Caroline D. Pham on Event Contracts Proposal, (May 10, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement051024b>.

¹⁹ Dissenting Statement of Commissioner Caroline D. Pham on Event Contracts Proposal, (May 10, 2024),

The Kalshi Lawsuit

KalshiEx LLC (“Kalshi”), a DCM registered with the CFTC, lists event contracts on topics ranging from Rotten Tomato scores for movies to predictions on the weather, inflation rates and presidential approval ratings.²¹ Kalshi presents the contracts as a means for individuals and businesses to “profit from their convictions” and hedge risks.²² Unlike PredictIt, referenced above, which has a limit of \$850, institutions and wealthy individuals can wager up to \$100 million per contract on Kalshi.²³

Since June 2023, Kalshi has been involved in legal proceedings with the CFTC about its ability to offer “Congressional Control Contracts” whose payoff depends on which political party will control Congress after the November 5 presidential elections.

Kalshi self-certified that the Congressional Control Contracts complied with the CEA and CFTC regulations in June 2023. Following a review by the CFTC, on September 22, 2023, the CFTC issued an order prohibiting Kalshi from listing the Congressional Control Contracts, with one commissioner dissenting and one abstaining from the decision.²⁴ The CFTC determined that the contracts involved two activities enumerated under the CEA special rule—gaming and unlawful activity—and are contrary to the public interest.²⁵ To reach this conclusion the CFTC first determined that “involve” under CEA Section 7a-2(c)(5)(C)(i) (which is not defined in the statute) refers broadly to activity that is related to an enumerated activity, rejecting Kalshi’s argument that a contract only involves an enumerated activity if it is the contract’s underlying purpose.²⁶ The CFTC found the contracts “involved” “gaming” based on the ordinary dictionary meaning of the term, because “betting or wagering on elections”

<https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement051024b>.

²⁰ Extension of Comment Period for Proposed Amendments to Event Contracts Rules, 89 Fed. Reg. 55528 (June 27, 2024).

²¹ *See About Kalshi* (last visited Sept. 29, 2024)

<https://kalshi.com/about>. *Markets*, <https://kalshi.com/> (last visited Sept. 29, 2024).

²² *Why Trade on Kalshi?*, <https://kalshi.com/blog/article/why-trade-on-kalshi> (last visited Sept. 29, 2024).

²³ CFTC Reply Br. at 9 n.8, No. 24-5205 (Sept. 14, 2024 D.C. Cir.).

²⁴ CFTC Order (Sept. 22, 2023),

<https://www.cftc.gov/sites/default/files/filings/documents/2023/0rgkexkalshiorsig230922.pdf>; “CFTC Disapproves KalshiEX LLC’s Congressional Control Contracts” (Sept. 22, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8780-23>.

²⁵ *Id.*

²⁶ Order at 13-14.

constitutes gambling.²⁷ As to “unlawful activity,” the CFTC found this category was satisfied because receiving a payout based on the results of an election is illegal in many states.²⁸ Finally, the CFTC determined the Congressional Control Contracts were against public interest because they did not have “sufficiently direct, predictable, or quantifiable economic consequences” as a financial hedging mechanism and could have a negative impact on the integrity of elections or the perception of integrity by creating monetary incentives to vote for candidates or incentivizing the spread of misinformation.²⁹

Kalshi challenged the CFTC Order in the District Court for the District of Columbia, and on September 12, 2024, District Court Judge Jia M. Cobb granted Kalshi’s motion for summary judgment on the grounds that the contracts do not involve unlawful activity or gaming.³⁰

The court reviewed the CFTC Order under the Administrative Procedure Act to determine if it is “arbitrary and capricious” and noted that because of the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) overruling the Chevron doctrine of deference to an agency’s statutory interpretation, Judge Cobb relied on “traditional tools of statutory construction” to resolve the parties’ motions.³¹

Judge Cobb rejected the CFTC’s argument that “gaming” equates to “gambling,” because it would mean “all event contracts would be subject to review...because they all involve purchasing (and thus risking money on) some contingent event with the hope of receiving a payoff,” which would swallow the list of specifically enumerated activities under the CEA.³² The court also rejected the CFTC’s more limited definition of gambling as “stak[ing] something of value upon the outcome of contests of others,” finding the definition unclear and unsupported.³³

The court also rejected the CFTC’s argument that the contract “involves” an enumerated activity if the act of trading the contract “amounts to” the activity. Judge Cobb pointed out that the “act of trading in” can never amount to certain of the enumerated activities, such as war and terrorism, and saw no basis to read “involve” more broadly for unlawful activity and gaming than the other categories.³⁴ The court noted that the CFTC’s proposed interpretation would “render its reach too broad,” because

many states define unlawful gambling as staking money on any contingent outcome, so unlawfulness under state law could be a hook for reviewing all (rather than the limited enumerated categories) of event contracts.³⁵

On the same day, Kalshi launched its Congressional Control Contracts, which were available to trade for several hours until the CFTC obtained an administrative stay from the D.C. Circuit pending adjudication of an emergency stay motion filed by the CFTC.³⁶

D.C. Circuit Decision

In its ruling on the emergency stay, the D.C. Circuit noted that “the question on the merits is close and difficult.”³⁷ The Court pointed out that Kalshi’s contracts are “materially different” from the elections betting markets that were previously available: Kalshi’s contracts have substantially higher spending limits and no cap on the number of investors, would be the first to be offered on a licensed exchange, and while Kalshi intends to allow only U.S. persons to invest, the CFTC worries that the contracts could be used directly or indirectly by foreign persons or governments.³⁸

However, the Court found that the CFTC failed to demonstrate irreparable harm, as required for an emergency stay. The Court reasoned that the CFTC’s concerns about creating “monetary incentives” to vote are misplaced because voters already commonly vote based on their financial interests. As to concerns about the spread of misinformation, risk of market manipulation, and the burden on the CFTC of regulating an elections market, the Court noted that many of these problems are nothing new, the Commission could draw on the expertise of other agencies and has not demonstrated concrete support for its generalized worries. The Court also pointed out that the CFTC still has the power to forbid certain types of event contracts through a formal rule or notice-and-comment rulemaking finding the contracts are “contrary to the public interest” under subsection VI of the Special Rule, but the CFTC has chosen not to take this step.³⁹

²⁷ *Id.* at 15.

²⁸ *Id.* at 19-20.

²⁹ *Id.* at 22, 27.

³⁰ *KalshiEX LLC v. Commodity Futures Trading Commission (CFTC)*, Civil Action No. 23-3257 (JMC), (D.D.C. Sept. 12, 2024) (decision related to the court’s Sept. 6 order).

³¹ *Id.* at 13.

³² *Id.* at 15-16.

³³ *Id.* at 17-18.

³⁴ *Id.* at 21.

³⁵ *Id.* at 23.

³⁶ Per Curiam Order, No. 1208661514, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Sept. 12, 2024).

³⁷ *KalshiEX LLC*, 2024 WL 4364204 at *4.

³⁸ *Id.* at *2.

³⁹ *Id.* at *5.

The D.C. Circuit's subsequently set a briefing schedule that is set to conclude December 5, 2024 and oral argument to be set for a date thereafter.⁴⁰

In its appeal brief, filed on October 16, 2024, the CFTC reiterated its position that “gaming” and “transaction involving” extends to wagering on political contests and that the contracts are properly understood to be unlawful under state law.⁴¹ Notably, the brief did not engage with the D.C. Circuit's emergency stay ruling, which cast doubt regarding the CFTC's election integrity concerns.

Implication

The rapid growth of event contract innovations have outpaced the regulatory response. Accordingly, the proceedings before the D.C. Circuit are important not only for resolving present dispute but setting roadmap for the scope of CFTC's regulatory authority.

First, for the time being, the D.C. Circuit's preliminary ruling means that election betting was permitted in the run up to the November elections. Kalshi and other platforms, such as Robinhood, offered a range of elections contracts, including contracts on the presidency, specific Congressional races, and governor elections.⁴² The accuracy of these contracts' prediction of a Trump victory have raised questions regarding the potential greater accuracy of prediction markets for predicting election outcomes relative to traditional polling.⁴³

Second, the CFTC's proposed rule amendment, which effectively sought to memorialize the interpretation of the CEA it put forward in the *Kalshi* litigation, may no longer be within the scope of the CFTC's authority due to the district court ruling, at least pending a decision by the D.C. Circuits on the merits of the appeal. Given the dissenting views expressed by Commissioners Mersigner and Pham regarding the CFTC's efforts to constrain prediction markets, Donald Trump's recent victory in the presidential elections may also mean a shift in policy within the CFTC before further movement occurs on the pending proposal.

Third, as pointed out by the D.C. Circuit, it remains to be seen if CFTC could instead add “political contests” as an enumerated category under Regulation 40.11 and Subsection IV of the Special Rule as “other similar activity determined by the Commission, by rule or regulation, to be

contrary to the public interest.” However, an open question and potential source for additional challenges relate to what constitutes “public interest,” an issue that the district court did not address.

Fourth, the *Kalshi* case casts a spotlight on the CFTC's role in regulating markets outside of its traditional areas of expertise: The CFTC has argued in the *Kalshi* case and its proposed rule that its regulations are not designed to address gambling-specific risks and concerns, including consumer protection issues, which are regulated in other Federal and State laws. The CFTC has also claimed that since it is not tasked with the protection of election integrity or enforcement of campaign finance laws, it could not properly carry out its role of regulating the market for contracts on election outcomes. In its October 2 decision, the D.C. Circuit appeared skeptical of these hurdles. It remains to be seen if the operation of the elections event contract markets for the current elections season and any other evidence prepared by the CFTC may alter those views. This point is of particular concern to the CFTC, as these contracts are now available to U.S. retail investors on CFTC-regulated exchanges. Limited ability to restrict contracts tied to politically or socially sensitive outcomes could affect public trust in the CFTC, and potentially undermine public confidence in both the political system and financial markets.

Lastly, the precedent from *Kalshi* of courts interpreting the CEA without deference to the CFTC may embolden other market participants to challenge CFTC authority. This may be particularly challenging for the CFTC as it seeks to expand its authority to regulate other innovative and creative markets and market participants in emerging products that similarly present unique and novel regulatory challenges, such as digital assets and carbon markets.

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⁴⁰ Per Curiam Order, No. 2079666, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Oct. 11, 2024).

⁴¹ Appellant Br., No. 2080035, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Oct. 18, 2024).

⁴² *Elections*, <https://kalshi.com/events/elections> (last visited Oct. 14, 2024); *Introducing the Presidential Election Market*, Robinhood, <https://go.robinhood.com/election>; *Interactive Brokers Announces Trading in Election Forecast Contracts*

Surpasses 1,000,000 on Successful Launch, <https://finance.yahoo.com/news/interactive-brokers-announces-trading-election-180000253.html> (Oct. 7, 2024).

⁴³ André Beganski, *US Election Results a Validation on Prediction Markets*, *Crypto Experts Say*, Decrypt (Nov. 6, 2024), <https://decrypt.co/290498/us-election-results-a-validation-on-prediction-markets-crypto-experts-say>.