



September 28, 2022

Mr. Christopher Kirkpatrick  
Secretary  
Commodities Futures Trading Commission  
1155 21<sup>st</sup> Street NW  
Washington, DC 20581

**Re: CFTC Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11**

Dear Mr. Kirkpatrick,

The Futures Industry Association<sup>1</sup> (“FIA”) welcomes the opportunity afforded by the Commodity Futures Trading Commission (“Commission” or “CFTC”) to provide comments on the proposal by KalshiEX, LLC (“KalshiEx”) to list contracts on which political party will be in control of each chamber of the U.S. Congress (“Congressional Control Contracts”) under CFTC Regulation 40.11(c) (the “Proposal”). We understand KalshiEX, a designated contract market (“DCM”), voluntarily submitted the Congressional Control Contracts for CFTC review. The Commission request for public comment poses several questions for the public to consider. FIA does not have a position on the Proposal or most of the questions posed therein. We nevertheless view Commission action on the Proposal as significant to informing the industry and public on the regulation of event contracts and ask the Commission to keep in mind our general observations when considering the Proposal.

In its August 26 press release on the Proposal, the CFTC stated that “[it] has determined the Congressional Control Contracts may involve, relate to, or reference an activity enumerated in CFTC Regulation 40.11(a) and section 5c(c)(5)(C) of the Commodity Exchange Act and will therefore

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<sup>1</sup> FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. Our membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

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commence a review pursuant to CFTC Regulation 40.11(c).”<sup>2</sup> In conducting this review, we urge the Commission to set forth clear *ex-ante* guidance to market participants about which event contracts are permissible under the Act and applicable CFTC Regulations, including Regulation 40.11.

Prior Commission actions on other event contracts like the Congressional Control Contracts do not appear to have been based upon guidelines or factors that can standardize the analysis of similar contracts and provide legal and regulatory certainty to the markets. To our knowledge, the Commission has not defined “gaming” under the Act but has classified participation in certain event contracts as gaming in responding to requests from Nadex and Victoria University of Wellington, New Zealand.<sup>3</sup> The Commission and CFTC staff’s statements in those determinations suggest that certain event contracts are permissible, and thus not against the public interest, when coupled with use and size conditions. These decisions are years old, limited to specific facts, and do not apply to other market participants. With the passage of time and growth of similar political event markets in the United States and in international markets, we believe it is important that the Commission issue more relevant, practical guidance on what event contracts are permissible under the Act.

As longtime proponents of regulated markets that serve the underlying economy, we see benefits to the Commission clarifying the factors it will consider to determine if an event contract involves an activity enumerated in CEA section 5c(c)(5)(C)(i), including any factors relevant to the determination of event contracts as “contrary to the public interest.” Although the CFTC has previously interpreted the public interest requirement to be the “economic purpose test,” the market would benefit from enhanced transparency regarding how the CFTC applies the economic purpose test, including whether a contract “reasonably can be expected to be, or has been used for hedging and/or price basing on more than an occasional basis” remains relevant to the determination.<sup>4</sup> With large markets overseas for these same

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<sup>2</sup> FTC Press Release, CFTC Announces Review and Public Comment Period of KalshiEx Proposed Congressional Control Contracts Under CFTC Regulation 40.11, Aug. 26, 2022, <https://www.cftc.gov/PressRoom/PressReleases/8578-22>.

<sup>3</sup> *In re the Self-Certification by North American Derivatives Exchange, Inc., of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission*, CFTC Order Prohibiting the Listing or Trading of Political Event Contracts (Apr. 2, 2012), available at <https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf>; CFTC Staff Letter No. 14-130, available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/14-130.pdf>, <https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf>.

<sup>4</sup> See *Economic and Public Interest Requirements for Contract Market Designation*, 47 Fed. Reg. 49,832, 49,836 (Nov. 3, 1982); see also *In the Matter of the Self-Certification by North American Derivatives Exchange, Inc.*, Order Prohibiting the Listing or Trading of Political Event Contracts, *supra* n.3.

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event contracts and with prior action by the Commission to allow limited trading in similar products, we believe that additional CFTC clarity and guidance on all of these issues would bring transparency and regulatory certainty to these widely available products.

We recognize the CFTC's long history of supporting innovation in the derivatives markets. In fact, the CEA explicitly states in the findings and purpose of the Act that the Commission should "promote responsible innovation and fair competition" among market participants. In promulgating the Commission's purpose and mission, Congress was careful to ensure that innovation is advanced *responsibly* and does not jeopardize the integrity or financial stability of the markets or the protections afforded to customers. We urge the Commission to provide clarity to the markets on what commodity contracts are acceptable products for regulated entities and, by contrast, which contracts are against the public interest and not permissible. Only through clear rules, consistently applied, can innovative ideas flourish.

Thank you for your consideration of FIA's comments. If you have any questions or need any additional information with regard to the matters discussed herein, please contact Allison Lurton, Chief Legal Officer and General Counsel, at 202-466-5460.

Sincerely,



Walt Lukken  
President and Chief Executive Officer

cc: Honorable Rostin Behnam, Chairman  
Honorable Kristin N. Johnson, Commissioner  
Honorable Christy Goldsmith Romero, Commissioner  
Honorable Summer K. Mersinger, Commissioner  
Honorable Caroline D. Pham, Commissioner