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Panel: Regulation by Enforcement is Over - Now What?

Do Prediction Markets Risk Reviving Regulation by Enforcement?

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Following the change of administrations after the 2024 Presidential election, both the prior Acting Chairman Carolyn Pham and the current Chairman Michael Selig of the Commodity Futures Trading Commission ("CFTC" or "Commission") declared that CFTC "regulation by enforcement" is a thing of the past.[2] The catch phrase "regulation by enforcement" refers to the use of enforcement actions by government agencies to establish new standards of legal compliance with the law.[3] Fulfilling what many believe to be that laudatory goal, however, might bump up against the subjectivity endemic to the concept. Both past Republican and Democrat administrations of the CFTC have authorized enforcement actions that each

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[2] *See, e.g.*, CFTC Press Release No. 9044-25, "CFTC Division of Enforcement to Refocus on Fraud and Helping Victims, Stop Regulation by Enforcement," ("Commodity Futures Trading Commission Acting Chairman Caroline D. Pham today announced a reorganization of the Division of Enforcement's task forces to combat fraud and help victims while ending the practice of regulation by enforcement."). Available at: https://www.cftc.gov/PressRoom/PressReleases/9044-25. CFTC Website: Public Statements and Remarks, "Chairman Selig: Op-Ed, America's Financial Markets are ready for a Golden Age," ("Instead of developing guardrails that foster ingenuity, the Biden administration focused on *regulation by enforcement*—subjecting novel products such as digital assets and perpetual futures to legacy rules that could not fit the product, but could fit the prosecutor. . . . Under my leadership, the CFTC is charting a new course." Emphasis added.) Available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/seligstatement012026.

[3] The Supreme Court long ago, with some qualifications, validated the practice in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The Court declared that the choice between proceeding by general rule or by *ad hoc* decisions (which can include charges and adjudications in enforcement actions) is one that lies primarily in the informed discretion of the administrative agency and the fact that an *ad hoc* decision of the agency might have a retroactive effect does not necessarily render it invalid. *Id.* at 202-203.

considered at the time to be permissible applications of the CEA to novel sets of facts but that the defendants and sometimes the industry viewed as regulation by enforcement.[4]

Notwithstanding the CFTC's good intentions to refrain from regulation by enforcement, the uncertainties and exigencies in the current state of prediction market regulation could be fertile ground for it to blossom again. That ground includes the recent explosion in trading of novel and varied types of event contracts, the inchoate CFTC regulation of them, the lack of CFTC expertise with the products, the exchanges' ongoing litigation with state gambling regulators over the states' jurisdiction to regulate the contracts, and the novel legal issues they present. In the absence of clear regulations, if market exigencies arise, the CFTC might well have to address them through enforcement actions based on novel applications of the CEA. On the flip side, if the CFTC refrains from enforcing otherwise generally applicable CEA provisions and CFTC regulations, critics might complain of non-regulation by non-enforcement.

This paper will review some of the legal and regulatory debates concerning the CFTC-licensed exchanges' listing and trading of sports event contracts (e.g., contracts on which team will win a particular game) and self-certifying their compliance with the Commodity Exchange Act ("CEA") and CFTC regulations.[5] The central controversy is whether sports event contracts are lawful under the CEA and the CFTC's regulations and whether the exchanges must have state gambling licenses to operate lawfully in those states that require licenses and may not offer such contracts in states that do not permit sports gambling. Those issues are now before many federal and state courts in hotly contested cases between the CFTC-licensed exchanges and the state gambling regulators.[6]

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[4] The judicially established Fair Notice Doctrine is one of the antidotes to regulation by enforcement. Grounded in the Due Process clauses of the U.S. Constitution and the Administrative Procedure Act, it prohibits the government from imposing sanctions against an entity or individual for the alleged violation of a statute, rule, or other law, if the law does not provide fair notice to a reasonable person that the conduct at issue violates the law. *E.g., FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

[5] Examples of sports event contracts on the KalskiEX LLC exchange ("KalskiEX") include contracts picking the winners of the March 19, 2026, March Madness college basketball tournament games between Duke University and Siena College and between The Ohio State University and Texas Christian University and a market with multiple contracts on who will win the Masters Golf Tournament. Available at: https://kalshi.com/category/sports/all-sports. Last visited: March 18, 2026.

[6] The many civil cases include both those initiated by states in state courts seeking injunctions against exchanges and those initiated by exchanges in federal court seeking injunctions against the states from restricting trading, The cases include, among others, *QCX LLC, d/b/a Polymarket US v. Nessel*, 1:26-cv-00710 (W.D. Mich. Mar. 4, 2026); *Nessel v. KalskiEX LLC*, N. 26-1087-CZ (Mich. Cir. Ct. (Ingham Cty.) Mar. 3, 2026); *KalskiEX LLC v. Orgel*, Case No. 3:26-cv-00034, 2026 WL 474869 (M.D. Tenn. Feb. 19, 2026) (granting preliminary injunction against state officials), *appeal pending* (6th Cir.); *KalskiEX, LLC v. Martin*, 793 F. Supp.3d 667 (D. Md. 2025) (denying the Exchange's motion for preliminary injunction against Maryland), *appeal pending*, No. 25-1892 (4th Cir.); *KalskiEX, LLC v. Schuler*, 2026 WL 657004 (S.D. Ohio) (finding the CEA does not govern sports event contracts and denying Exchange's motion for preliminary injunction against State of Ohio), *appeal pending* No. 26-3196 (6th Cir); *Robinhood Derivatives, LLC v. Dreitzer*, Case No. 2:25-cv-01541, 2025 WL 32833 (D. Nev. Nov. 25, 2025) (denying TRO against State of Nevada), *appeal pending (No. 25-7831, 9th Cir.); KalskiEX LLC v. Hendrick,* 25 WL 3286282 (D. Nevada Nov. 24, 2025) (dissolving prior preliminary injunction against State of Nevada), *appeal pending* (No. 25-7516, 9th Cir.); *North American Derivatives Exchange, Inc. d/b/a Crypto.com v. Nevada Gaming Control Board,* Case No. 2:25-cv-00978-APG-BNW, 2025 WL 2916151 (D. Nev. Oct. 14, 2025) (denying TRO

Until February 17, 2026, the CFTC stayed on the sidelines, not appearing in any of the cases to express its view. On that day, the agency filed an *amicus* brief in the 9th Circuit in *North American Derivatives Exchange, Inc., d/b/a Crypto.com v. Nevada,* (hereinafter "Amicus Brief")[7] in opposition to the State of Nevada's claim of jurisdiction to ban the trading of sports event contracts listed on a CFTC-licensed exchange as unlicensed gambling. The CFTC's brief argued that it has exclusive jurisdiction over the sports event contracts because they are swaps, declaring that "States cannot invade the CFTC's exclusive jurisdiction over CFTC-regulated designated contract markets ("DCMs") by re-characterizing swaps trading on DCMs as illegal gambling."[8] The same day, CFTC Chairman Selig published a guest column in the *Wall Street Journal* in which he explained, among other things: "The CFTC will no longer sit idly by while overzealous state governments undermine the agency's exclusive jurisdiction over these markets by seeking to establish statewide prohibitions on these exciting products."[9]

The CFTC followed up those actions with others that implicitly or explicitly affirmed the legality of trading sports event contracts on CFTC-licensed exchanges. These actions included:

> (1) publishing an Advanced Notice of Proposed Rulemaking on Prediction Markets (hereinafter the "Prediction Markets NOPR"), seeking information and public comment on forty distinct areas of legal and policy concerns in regulating event contracts, including some directed specially to sporting event contracts,[10]
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> (2) publishing guidance from the CFTC's Division of Market Oversight on issues exchanges should address when self-certifying new sports-focused contracts,[11] and
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> (3) announcing the agency's Memorandum of Understanding with Major League Baseball ("MLB") that "establishes a framework for the CFTC and MLB to discuss, cooperate, and exchange

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against State of Nevada), *appeal pending* (9th Cir.); and *KalskiEX LLC v. Flaherty*, No. 25-cv-02152-ESK-MJS, 2025 WL 1218313 (D.N.J. Apr. 28, 2025) (granting Kalshi's motion for a preliminary injunction), *appeal pending*, No. 25-1922 (3d Cir.). In March 2026, Arizona filed criminal misdemeanor charges against KalskiEX LLC for alleged illegal betting and wagering. *Arizona v. KalskiEX LLC*, Case no. CR2026-000173-001 and CR2026-000173-002 (Supr. Ct. Maricopa Co., Ariz.), and KalskiEX sued Arizona officials in federal court seeking a preliminary injunction against them, *KalskiEX LLC v. Johnson*, Case no. 2:26-cv-01715 (D. Ariz. 2026).

[7] No. 25-7187 (9th Cir. Feb. 17, 2026), available at: https://www.cftc.gov/PressRoom/PressReleases/9183-26.

[8] *Id.* at 2.

[9] Michael Selig, *States Encroach on Prediction Markets*, Wall S. J. (Feb. 16, 2026), https://www.wsj.com/opinion/states-encroach-on-prediction-markets-6eb43af9?mod=hp_opin_pos_2; Press Release, CFTC Reaffirms Exclusive Jurisdiction over Prediction markets in U.S, (Feb. 17, 2026) https://www.cftc.gov/PressRoom/PressReleases/9183-26.

[10] Prediction Markets, 91 Fed. Reg. 12516 (Mar. 16, 2026).

[11] CFTC Staff Letter No. 26-08, CFTC Press Release No. 9193-26, available at: https://www.cftc.gov/PressRoom/PressReleases/9193-26.

> information concerning issues of common interest including protecting the integrity of professional baseball and the relating prediction markets."[12]

As a predicate to these actions, the CFTC on February 4, 2026, withdrew its 2024 Proposed Rulemaking on Event Contracts[13] which had proposed to define "gaming" in CFTC Regulation 40.11 to include, among other things, sports event contracts.[14]

The CFTC, however, has not withdrawn Regulation 40.11, which, by its terms, prohibits CFTC-licensed exchanges from listing or clearing event contracts that involve "gaming." The CFTC Amicus Brief and the other Commission actions endorsing sports event contact trading on CFTC-licensed exchanges indicate that the CFTC is not intending to enforce Regulation 40.11 to bar trading of sports event contracts. The agency's prosecutorial judgment not to enforce the Regulation, however, might not foreclose potential challenges to the contracts' compliance in the context of private claims and certainly has not deterred the states from commencing their challenges.

The CFTC's position in its Amicus Brief, if accepted, would significantly expand the reach of the agency's power. If its position prevails, sports gambling might gravitate entirely to the CFTC-licensed exchange model, which allows the exchanges to gain nationwide access to bettors without being subject to state regulation, fees and taxes. This would make the CFTC the first federal and preeminent American regulator of the burgeoning business of sports gambling. The CFTC's Prediction Markets NOPR and its MOU with MLB show the agency's commitment to beginning to understand the sports event trading business and the surveillance, regulation and enforcement it requires. Whether the courts—and Congress—will accept the CFTC's new position remains to be seen. Given the ambiguities and complexities, a final resolution may require a Supreme Court decision and/or amendments to the CEA.[15]

As discussed below, (1) the merits of the CFTC's legal position are not free from doubt, (2) the legislative history of the CEA indicates a congressional intent to distinguish derivatives markets from gambling and to keep the regulation of each separate from the other, and (3) taking

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[12] Press Release, CFTC and MLB Sign Groundbreaking MOU (Mar. 19, 2026) https://www.cftc.gov/PressRoom/PressReleases/9199-26.

[13] Proposed Rulemaking on Event Contracts, 89 Fed. Reg. 48968 (June 10, 2024).

[14] Press Release, CFTC Withdraws Contracts Rule Proposal and Staff Sports Event Contracts Advisory (February 4, 2026), https://www.cftc.gov/PressRoom/PressReleases/9179-26; 91 Fed. Reg. 5386 (Feb. 6, 2026).

[15] The stakes are high. If the states' position prevails, CFTC-licensed exchanges could lose substantial revenue because they might not be able to offer trading in their contracts in states that ban sports gambling and in states where an exchange does not have a gambling license. *Forbes* magazine's website reported: "Prediction market trading volume on the Super Bowl will reach $3.1 billion in 2026, up 39% from $2.26 billion last year, according to estimates from Gaming Compliance International, a regulatory intelligence firm that monitors the global online gambling market." Available at https://www.forbes.com/sites/boazsobrado/2026/02/07/prediction-markets-are-the-super-bowls-breakout-winners/. The states fear that losing the argument may decimate their police power to regulate sports gambling and the revenue it generates from licensing fees and taxes, and leave their citizens with little or no protection from the perceived potential harm from unrestrained gambling.

on the new area of regulation could tax the agency's resources, which it has perennially argued to Congress require greater funding to adequately surveil, regulate, and enforce the CEA with respect to the massive traditional derivatives markets.

In addition, the regulation of sporting event prediction markets might require the CFTC to address, for lack of a better description, societal health and financial wellbeing issues related to gambling addiction and its potential harmful impacts on personal mental health and household finances. These kinds of issues have been the province of state regulation and one of the reasons some states have prohibited gambling or constrained it within their respective borders.[16] The CEA has not addressed those issues previously. The CEA's focus is almost exclusively on protecting and assuring the integrity of market prices and trading behavior, the honest solicitation and sale of derivatives, and the honesty and financial soundness of derivatives exchanges, clearinghouses, and market intermediaries.

A. Some of the Unresolved Legal Issues Concerning the CFTC's Authority Over Sports Event Contracts

1. Are sports event contracts within the CEA's definition of "swap"?

The CFTC bases its authority over sports event contracts on the premise that they are within the CEA definition of "swap." As relevant here, the definition of swap includes (1) any "option" that is not an option on an CFTC-licensed exchange-traded future or on a security and (2) "any agreement, contract or transaction . . . that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) *that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence*[.]"[17]

The CFTC's Amicus Brief argues that event contracts are swaps because they are "binary options." But neither the Amicus Brief nor the agency's *Federal Register* releases concerning event contracts explain why event contracts are in fact options. The *Federal Register* releases have gone only so far as to state that event contracts involve binary, "all-or-nothing" outcomes between two alternative outcomes and "are *sometimes referred to* as binary options" by the markets that list them for trading.[18]

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[16] The *Financial Times* reports that gambling is legal in only 31 states and the District of Columbia. See article "The cost of America's sports betting habit," *Financial Times*, March 16, 2026, available at: https://www.ft.com/content/64bacf9f-bf9e-4190-9fad-97fe3a2ded4d?syn-25a6b1a6=1. It also quotes a professor of marketing at UCLA that "We see worsening financial health on average in the states that have legalised sports betting," and reports that a study by a professor of marketing at Southern Methodist University and his colleagues found "spillover" effects in the gambling states after legalization of a 20% increase in alcohol consumption and a 75% increase in calls to gambling helplines. *Id.*

[17] CEA section 1a(47)(A), 7 U.S.C. § 1a(47)(A) (emphasis added).

[18] *See, e.g.*, CFTC Prediction Markets NOPR, 91 Fed Reg. at 12517 (emphasis added) and *citing* only to the CFTC's own Futures Glossary available at https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#B; and Concept Release on the Appropriate Regulatory Treatment of Event Contracts; 73 Fed. Reg. 25669, 25670 (May 7, 2008) ("A

States have argued that sports event contracts are not options as defined by the CFTC or the courts. The CFTC's online "Futures Glossary" defines an option to be "[a] contract that gives the buyer the right, but not the obligation, to buy or sell a specified quantity of a commodity or other instrument at a specific price within a specified period of time, regardless of the market price of that instrument."[19] Courts have used a similar definition.[20] Additional observations include that the CFTC's Futures Glossary does not define "event contract" as an "option,"[21] and the CFTC's Futures Glossary defines "binary option" as: "[a] type of option whose payoff is either a fixed amount or zero." That definition requires the instrument to be an option in the first instance and seems to treat the "binary" characteristic only as a feature of the payoff.

The CFTC Amicus Brief also argues that event contracts are within the CEA definition of swap as a contract that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence. The States' response to this is that the definition is confined to an "occurrence" (such as the probability that a weather event occurs) but does not cover "outcomes," which is the consequence of an event. In essence they argue that an "event" is different from and not an "outcome": an "event" is a happening of some significance that took place or will take place, in a certain location, during a particular interval of time, whereas an "outcome" is the result of an event. They also argue that an event contract is not a "contingency" because a contingency means "contingent event"—a happening that may or may not occur—not the result of an event already scheduled to occur.

In addition, there could be a debate over whether a sports event contract is associated with a potential financial, economic, or commercial consequence within the meaning of the swap definition. In traditional event contracts, such as weather event contracts, the event is expected to cause sufficient financial loss to justify hedging against it. It could be argued that sports event contracts are different because the event is certain to happen and the financial gain or loss from the contract is based solely on who wins the event, not any potential collateral financial impact.

The CFTC Amicus Brief, however, seems to argue that a sports event itself is its own economic consequence and that is enough: "[S]porting events are economic enterprises that generate billions of dollars in economic activity and materially affect both regional and national markets. . . . Stadiums function as regional economic anchors around a network of businesses, including hotels, restaurants, transportation providers, retailers, and event management firm"[22]

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significant number of event contracts are structured as all-or-nothing binary transactions commonly described as binary options" (*citing* to the then trading platform known as Intrade Prediction Markets).

[19] See the CFTC's Futures Glossary is available at https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#O.

[20] *E.g.*, *CFTC v. White Pine Tr. Corp*., 574 F.3d 1219, 1226 (9th Cir. 2009).

[21] See authority at note 19, *supra*.

[22] CFTC Amicus Brief at 19.

The Amicus Brief does not explain how the outcome of a sporting event (i.e., which contestant wins) ties back to the event's financial consequences.

2. Are sports events within the CEA's definition of "excluded commodity" and does the CEA require that the underlying subject of an event contract be an excluded commodity?

The CFTC has stated that the "event underlying an event contract is typically within the definition of the term 'excluded commodity' in CEA section 1a(19)."[23] The CFTC is referring to that part of the definition of "excluded commodity," that includes "an occurrence, extent of an occurrence, or contingency . . . that is beyond the control of the parties to the relevant contract, agreement, or transaction; and associated with a financial, commercial, or economic consequence."[24] The CFTC's position as applied to sports event contracts might be subject to the same interpretive challenges regarding the definition of swap discussed above (i.e., the potential difference between an occurrence and an outcome).

A further open issue is whether the definition limits excluded commodities to underlying events that *no one* could control (such as a weather event) or is intended to imply only that persons with some measure of control over an event are barred from participating in the contract based on it. If the former definition controls, then sports event contracts would fall outside the definition of excluded commodity since any number of people involved with a sports event could have a measure of control over the outcome (e.g., the contestants, coaches, referees).

Even if the outcomes of sports events are not within the definition of excluded commodity, the CFTC's jurisdiction over them nonetheless might not be affected because the definition of swap does not mention "commodity" or "excluded commodity" and therefore can be read *not* to require the underlying that is the subject of a swap to be a commodity or an excluded commodity. It can be argued, however, that Congress defined "event contracts" to require that their underlying be an excluded commodity. In this regard, CEA Section 5c(c)(5)(C),[25] which is discussed in greater detail section A.4 below, sets forth a "special rule" for "event contracts," and it is the only provision in the CEA that expressly addresses event contracts. CEA Section 5c(c)(5)(C) describes event contracts to be those that involve "agreements, contracts, transactions, or swaps in *excluded commodities* that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity."[26]

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[23] CFTC Prediction Markets NOPR, 91 Fed. Reg. at 12523.

[24] CEA section 1a(19), 7 U.S.C. § 1a(19).

[25] 7 U.S.C. § 7a-2(c)(5)(C)(i).

[26] *Id.* (emphasis added).

3. Do sports event contracts fit within the purpose of the CEA because they can provide discovery of future prices of commodities and a means to hedge commercial risk?

CEA Section 3[27] declares that futures markets serve a national public interest by providing: (1) "price discovery," i.e., the ability of businesses to assess futures prices in order to inform the current and future pricing for their products, their production costs and services and (2) "hedging," i.e., the ability to manage the risk of adverse future commodity price movements. A price discovery purpose might prove difficult to satisfy for certain sports event contracts because unlike traditional futures and options, they do not forecast the price or *value* of something. A hedging function also is not clear cut. Sports event contracts are not risk shifting instruments.

However, conceivably there may be circumstances in which it could be argued that a sports event contract might operate as a financial hedge. For example, there might be a correlation between a home team losing and the receipt of less revenue by bars and restaurants adjacent to the stadium or arena where the event is held because fewer patrons will visit the establishments after a home game loss. In such instances, it could be argued that the proprietor could enter into an event contract that will pay off if the home team loses such that any payoff on the contract could offset the diminished revenue after the event.[28]

But this example raises another question—what potential quantum of economic consequences from an event is required to satisfy the CEA's requirement that a contract can provide a hedging function? Would an effect on a few businesses near the event be a sufficient quantum of economic consequence to qualify the contract under the CEA for trading on a CFTC-licensed exchange? Is the answer different if in fact 99.9% of the transactions in the traded contracts are indistinguishable from traditional gambling? Further, to meet the CEA's purpose, is it satisfactory for an exchange in self-certifying a sports event contract's compliance with the CEA and CFTC regulations only to be able to hypothesize some hedging function for a contract, or must an exchange have some empirical and concrete basis to believe the contract will in fact be regularly used for hedging by a critical mass of commercial businesses? The CFTC has not resolved these issues.

4. Are sports event contracts unlawful under CEA Section 5c(c)(5)(C)(i) and CFTC Regulation 40.11 as contracts that involve "gaming"?

In enacting a regulatory scheme for swaps in the Dodd-Frank Act in 2010, Congress added CEA Section 5c(c)(5)(C)(i) **[29]** as a "special rule" to authorize the CFTC to deem contracts to be "contrary to the public interest"—and therefore to bar their trading on CFTC-regulated

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[27] 7 U.S.C. § 5.

[28] A contestant or team owner also hypothetically might offset the financial loss from losing a sporting contest by betting against itself, but the CFTC-licensed event contract markets do not permit such persons to trade in the contracts.

[29] 7 U.S.C. § 7a-2(c)(5)(C)(i).

markets—if they involve: (1) activity that is unlawful under any Federal or State law; (2) terrorism; (3) assassination; (4) war; (5) "gaming;" or (6) "other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."[30] In 2011, the CFTC adopted Regulation 40.11,[31] which prohibits CFTC-registered entities from listing for trading or accepting for clearing any agreement, any agreement, contract, transaction, or swap on an excluded commodity that "involves, relates to, or references" terrorism, assassination, war, "gaming," or "an activity that is unlawful under any State or Federal law."[32]

In June 2024 when the CFTC proposed a definition of "gaming," all Commissioners endorsed the inclusion of sports event contracts in the definition of gaming.[33] The dissents of Commissioners Summer Mersinger and Caroyln Pham to the CFTC's proposed definition concerned other matters and types of events.[34] There seemed little doubt at that time that sports event contracts were considered gaming, and no CFTC-licensed-exchange traded them.

The exchanges have defended the legality of sports event contracts partially on the ground that the term "gaming" in CEA Section 5c(c)(5)(C) and, by extension, in Regulation 40.11 does not cover sports event contracts. They argue that the dictionary definition of "gaming" contemplates simple games, perhaps limited in effect to games of chance (such as dice and card games). The District of Columbia federal district court in *KalskiEX LLC v. CFTC*[35]

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[30] *Id.*

[31] 17 C.F.R. § 40.11.

[32] Some Commissioners and industry participants have criticized the breadth of Regulation 40.11. They argue that CEA Section 5c(c)(5)(C) envisions more of a case-by-case analysis for particular contracts or classes of contracts and does not warrant Regulation 40.11's essentially per se rule that every contract that might fall within the statutory list is automatically prohibited as contrary to the public interest. A second criticism is that Regulation 40.11 broadens the universe of impermissible event contracts beyond the scope of CEA Section 5c(c)(5)(C) to prohibit not only contracts that "involve" certain enumerated topics but also contracts that "relate to or reference" the topics.

[33] Proposed Rulemaking on Event Contracts, 89 Fed. Reg. 48968 (June 10, 2024). This proposed rulemaking defined "gaming" in Regulation 40.11(b)(1) as the staking or risking by any person of something of value upon: (i) the outcome of a contest of others; (ii) the outcome of a game involving skill or chance; (iii) the performance of one or more competitors in one or more contests or games; or (iv) any other occurrence or non-occurrence in connection with one or more contests or games. *Id.* at 48974.

[34] Then Commissioners Summer Mersinger and Carolyn Pham dissented from the decision to publish the proposed rules. Both specifically objected to the proposed definition of "gaming," but both endorsed the definition to the extent it included sports event contracts regulated by the states as gambling. Commissioner Mersinger's dissent stated: "The proposed definition of 'gaming' includes both the outcome of a game and the performance of one or more competitors in a game. *So far, so good.*" *Id.* at 48993 (emphasis added). Commissioner Pham's dissent overtly argued that regulation of event contracts that constitute gambling should reside with the states. She explained, among other things, that "The Tenth Amendment, importantly, protects the American people from Federal encroachment. State regulation of gaming, ranging from betting to lotteries, is long-established in the U.S., and is clearly a power reserved to the States." *Id.* at 48999. The CFTC recently withdrew the 2024 proposed rulemaking in conjunction with proceeding with its Prediction Markets NOPR. CFTC Press Release No. 9179-26 (February 4, 2026) available at: https://www.cftc.gov/PressRoom/PressReleases/9179-26; 91 Fed. Reg. 5386 (Feb. 6, 2026).

[35] 2024 WL 4164694 (D.C.C. Sept. 12, 2024), (motion for a stay of the district court's vacation of the CFTC order denied (at 119 F.4th 58 (Oct. 2, 2024)), and appeal voluntarily dismissed by the CFTC at 2025 WL 1349979 (May 7, 2025).

adopted that view in overturning a CFTC order barring the trading of certain political event contracts that KalskiEX desired to list for trading. The court explained that:

> The CEA does not define "gaming." . . . "When a term goes undefined in a statute, [courts] give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). To discern that meaning, courts often begin with a survey of dictionaries. *See id.* at 569. Dictionaries define "gaming" as "the practice or activity of playing games for stakes" and "the practice or activity of playing games." *Gaming*, Merriam-Webster.com, https://perma.cc/9JZW-SRS2; *see also Gaming*, Oxford English Dictionary, https://perma.cc/R99K-A2HD (defining gaming, in relevant part, as "[t]he action or practice of playing games ... for stakes."). The ordinary meaning of the term "gaming" is thus consistent with Kalshi's position.

The district court's interpretation in *KalskiEX LLC v. CFTC* is not free from doubt. Courts in other cases have split on the issue, and some have enjoined the trading of sports event contracts as unlicensed gambling.[36] The *KalskiEX LLC v. CFTC* court's reliance on particular dictionary definitions is open to challenge because it can be argued that the plain usage of the word "gaming" specifically encompasses sports gambling. The names of the regulatory agencies of at least ten states that regulate sports gambling use the word "gaming" in their titles to describe their regulatory purpose.[37]

In addition, the legislative history of the Dodd-Frank Act supports interpreting "gaming" to include gambling. While legislative history is not necessarily dispositive or a favored basis by itself for statutory construction, it would not appear reasonable to ignore it where it amplifies the understanding of a statute's words where multiple "plain" meanings exist. A draft of the language of CEA Section 5c(c)(5)(C) originally was proposed to Congress by the CFTC but that draft did not include a reference to "gaming" in the list of types of event contracts that could be found not to be in the public interest. During the legislative process, California Senator Dianne Feinstein acted to have "gaming" added to the list. She did that at least in part to buttress the prevention of the listing of event contracts on motion picture box office receipts on CFTC-licensed exchanges.[38] Those contracts were a specific issue of controversy at the time of the Dodd-Frank Act legislation. As explained below, their opponents characterized them as gambling contracts, and they were perceived by the California motion picture industry to be harmful to its interests.

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[36] *See, e.g.*, cases cited at note 3, *supra*.

[37] See the names of the regulatory agencies that oversee sports betting for the states of Colorado, Delaware, Indiana, Michigan, Mississippi, Nevada, New Jersey, Illinois, Maryland and Oklahoma.

[38] These facts come from the personal experience of the author who represented the Motion Picture Association of America, Inc. with respect to its opposition to the CFTC's approval of motion picture box office receipts contracts during the Dodd-Frank Act legislation.

In this connection, before the Dodd-Frank Act was passed, the CFTC had approved new novel trading contracts (two futures and one option) that generally sought to predict and payout on the basis of the amount of motion picture box office receipts that would be generated in the first weekend or month of a new motion picture release. The Motion Picture Association of America, Inc. ("MPAA") (now titled the Motion Picture Association) and its then six constituent motion picture studios (with support from motion picture industry unions, guilds and other interested groups) opposed the CFTC's approval and sought relief from Congress. The MPAA and the other opposing groups expressly characterized the contracts as a means for people to "gamble" on the success or failure of new motion picture releases, which presented a host of harmful effects to legal compliance, competition, creative works, and motion picture economics.

As an example, the then President and Interim CEO of the MPAA in his prepared remarks for the hearing on "Movie Futures" before the Subcommittee on General Farm Commodities and Risk Management of the House Committee on Agriculture on April 22, 2010,[39] testified that the CFTC had applications before it to approve or deny two proposed commodity futures contracts and a commodity option that

> are designed to allow the contracts' users to bet on the level of gross motion picture box office numbers for single and unique motion pictures. … We strongly oppose approval of these proposed contracts *because they are nothing more than gambling* contracts that lack any of the characteristics of legitimate futures contracts, fail to serve any public interest, and will harm all parts of the motion picture industry.[40]

Senator Feinstein's intent in using the word "gaming" as a synonym for gambling is reflected in the following colloquy between Senator Blanche Lincoln and Senator Feinstein with respect to the Dodd-Frank Act legislation:

> 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.

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[39] Hearing to Review Proposals to Establish Exchanges Trading "Movie Futures, before the Subcommittee on General Farm Commodities and Risk Management of the House Committee on Agriculture, 11th Cong., 2d Sess. (April 22, 2010), available at https://www.govinfo.gov/content/pkg/CHRG-111hhrg56431/html/CHRG-111hhrg56431.htm#:~:text=92%20HEARING%20TO%20REVIEW%20PROPOSALS,the%20Commodity%20Futures%20Trading%20Commission.

[40] *Id.* at 45 (testimony of A. Robert Pisano, President and Interim CEO of the MPAA) (emphasis added).

> These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling.[41]

In addition to adding gaming to the list of activities in CEA Section 5c(c)(5)(C), the Dodd-Frank Act responded to the motion picture industry's concerns by excluding motion picture box office receipts from the CEA's definition of "commodity," thereby preventing futures contracts to be traded on them and rendering the CFTC's approvals of the futures contracts and option on motion picture box office receipts nugatory.

5. If sports event contracts are swaps, does the CEA preempt the states from regulating them as gambling?

This issue is perhaps the thorniest. The first sentence of CEA Section 2(a)(l)(A)[42] plainly states the CFTC has exclusive jurisdiction over swaps and futures traded or executed on a CFTC-licensed exchange:

> The Commission *shall have exclusive jurisdiction*, except to the extent otherwise provided in the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and subparagraphs (C), (D), and (I) of this paragraph and subsections (c) and (f), *with respect to accounts, agreements* (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), *and transactions involving swaps or contracts of sale of a for future delivery (including significant price discovery contracts), traded or executed on a contract market designated* pursuant to section 7 of this title or a swap execution facility pursuant to section 7b–3 of this title *or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission* pursuant to section 23 of this title. [Emphasis added.]

The second and third sentences of CEA Section 2(a)(l)(A), often referred to as "the savings clause," among other things, preserve state jurisdiction but do so only to the extent it is not inconsistent with the CFTC exclusive jurisdiction set forth in the first sentence:

> *Except as hereinabove provided*, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory

[41] 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010) (statements of Senator Dianne Feinstein and Senator Blanche Lincoln), available at 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.

[42] 7 U.S.C. § 2(a)(1)(A).

> authorities under the laws of the United States *or of any State,* or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. *Nothing in this section shall supersede or limit the jurisdiction conferred on courts of* the United States *or any State.* [Emphasis added.]

If these were the only sentences addressing state jurisdiction and states did not have long established role in regulating gambling, the jurisdictional boundaries might be clear. However, the federal district court in *KalskiEX LLC v. Martin,*[43] after considering Section 5c(c)(5)(C) and other provisions of the CEA that function to preserve state authority to regulate gambling, held that Congress did not intend for the CEA to preempt state jurisdiction to regulate sports event contracts as gambling even if the sports event contracts are swaps.[44] KalskiEX brought the action to enjoin the Maryland Lottery and Gaming Control Agency and the Maryland Lottery and Gaming Control Commission from pursuing civil and criminal enforcement of Maryland's gaming laws against KalskiEX for offering sports event contracts. Other courts also have upheld the states' jurisdiction.[45] The *Martin* court noted that prior court decisions that found federal preemption had ended their analysis with the terms of CEA Section 2(a)(1)(A). The decision goes through a long catalog of rationales for its holding. Some of the most prominent ones are discussed below.

The court explained that federal preemption of an entire field of law "applies only '[i]n rare cases,' where "Congress 'legislated so comprehensively' in a particular field that it 'left no room for supplementary state legislation'"[46] or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[47] The court found a strong presumption against preemption "because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action'" especially where the conduct in question has been "subject to the historic police powers of the States."[48]

With those standards as a predicate, the court went on to view CEA Section 5c(c)(5)(C) as confirming that "Congress intended for at least some state laws to operate alongside the CEA,

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[43] 793 F. Supp.3d 667 (D. Md 2025), appeal pending. The court for purposes of its decision assumed, but did not decide, that KaslshiEx's sports events contracts are swaps.

[44] *Id.* at 679. Other courts also have upheld the states' arguments on the absence of preemption. The *KalskiEX LLC v. Martin* decision discussed here is just an example for discussion purposes.

[45] See cases in note 3, *supra*.

[46] *Id.* at 676, citing *Kansas v. Garcia*, 589 U.S. 191, 208 (2020) (quoting *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986)).

[47] *Id.*, citing *Arizona*, 567 U.S. at 399, 132 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

[48] *Id*. at 677, quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996).

not to be preempted by it."[49] The court reasoned that in that provision "Congress expressly authorized the Commission to disallow event contracts that 'involve . . . activity that is unlawful under . . . State law[,]'" and that "plain text clearly reflects an affirmative intent to *preserve* state laws governing whether particular conduct is lawful or unlawful."[50] The court concluded that the fact that "Congress expressly authorized the Commission to prohibit particular categories of transactions as contrary to the public interest *based on the fact that the conduct at issue would violate state law* severely undercuts Kalshi's suggestion that Congress intended to displace all state laws that would otherwise apply to transactions that fall within the scope of the CEA."[51]

The court next considered the import of CEA Section 12(e)(2)[52] which provides that the CEA shall supersede and preempt the application of any state law or local law that prohibits or regulates gaming in the case of specific types of transactions, none of which are within the scope of sports gambling. The court concluded that: "

> Congress's decision to expressly preempt state gaming laws for certain transactions and state-insurance laws for swaps—compared to its silence as to all others—is strong evidence that Congress did not intend to regulate so comprehensively as to exclude all state law.[53]

The court also reasoned that the savings clause in CEA Section 2(a)(1)(A), which saves some state laws, cuts both ways with respect to field preemption and, given the presumption against preemption, its ambiguity on balance cuts against a finding of field preemption.[54] The court then, considering the long history of state regulation of gambling, concluded that: "It is highly unlikely that Congress would have overridden state gambling laws without at least some indication in the text and legislative history that it intended to do so."[55]

The court held that conflict preemption does not apply either. Conflict preemption exists when the state laws at issue conflict with federal laws, such as where compliance with both federal and state regulations is a physical impossibility. The court held that conflict preemption does not apply because "So long as Kalshi obtains a license and complies with Maryland sports gambling laws, those laws would not pose an obstacle to Kalshi making the sports gambling portion of its platform available to users in Maryland."[56]

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[49] *Id*. at 680.

[50] *Id*.

[51] *Id*. (emphasis added).

[52] 7 U.S.C. § 16(e)(2).

[53] 793 F. Supp.3d at 681.

[54] *Id*. at 682.

[55] *Id*.

[56] *Id*. at 686.

6. Can problematic trading behavior in sports event markets fall outside the scope of CEA prohibitions?

On February 25, 2026, the CFTC's Enforcement Division published a Prediction Markets Advisory[57] that commended KalskiEX for two separate disciplinary actions it took imposing fines and trading suspensions against two different traders for violating the Exchange's rules. The Advisory also identified the following non-exclusive list of market practices in event markets that would violate the CEA:

- misappropriation of confidential information in breach of a pre-existing duty of trust and confidence to the source of the information (commonly known as "insider trading") pursuant to CEA Section 6(c)(1) and CFTC Regulation 180.1(a)(1) and (3);

- pre-arranged, noncompetitive trading and wash sales, under CEA Section 4c(a)(1) and (2)(A) and CFTC Regulation 1.38(a);

- disruptive trading under CEA Section 4c(a)(5); and

- fraud and manipulation under various CEA sections.

However, whether these prohibitions can be applied to reach all the problematic behavior that could arise in event markets—especially those involving trading on material non-public information—is not entirely clear. One of the Kalshi disciplinary actions may illustrate the issue.

As described in the Division of Enforcement Advisory, one case involved allegations that a political candidate entered into contracts that essentially bet on his own candidacy. According to the Advisory, Kalshi discovered the activity because "In May 2025, social media posts contained videos that appeared to show a political candidate trading on his own candidacy on Kalshi." KalskiEX charged the trader with violating Exchange rules that prohibit trading in a contract over which the trader has direct or indirect influence over the outcome. Kalshi imposed a $2,246.36 financial penalty (disgorgement of $246.36 related to the improper trading activity, plus a $2,000.00 penalty) and a 5-year suspension from direct or indirect access to the Exchange.

The Advisory stated that based on this fact pattern, the trader potentially violated CEA Section 6(c)(1)[58] and Commission Regulation 180.1(a)(1) and (3)[59] for use of a manipulative scheme or artifice to defraud, or engaging or attempting to engage in an act, practice or course of business that operates as a fraud on any other person. But that legal conclusion is debatable. There are legal theories that, conceptually, might implicate a violation of the CEA and

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[57] CFTC Press Release No. 9185-26, available at https://www.cftc.gov/PressRoom/PressReleases/9185-26.

[58] 7 U.S.C. § 9(1).

[59] 17 CFR 180.1(a)(1) and (3).

Regulation 180.1(a) in this fact pattern, but all of them require a further legal element that is not in the fact pattern described in the Advisory. In the absence of those elements, the activity might evade the CFTC's enforcement powers—or require a new interpretation of the CEA, thereby inviting a criticism of engaging in regulation by enforcement.

One potential theory of CEA liability that might be applied to the fact pattern is "misappropriation"—trading on the basis of confidential information. This would posit that the trader traded on the basis of confidential material, nonpublic information about his candidacy in violation of a supposed duty not to do so. But does any political candidate have a legal duty to anyone else not to trade on his candidacy succeeding? Further, what information favorable to the outcome of a campaign is considered material and non-public? Favorable information for the success of a campaign is typically publicized immediately by the campaign. One might argue that the Exchange's rule prohibiting trading by the candidate created such a duty, but that prohibition is the province of the Exchange Rule, not a CEA or CFTC prohibition. The theory of misappropriation also does not seem to fit because, except in what would be exceedingly rare, unusual circumstances, a candidate would have no duty of confidentiality to the source of the information influencing his voting.

Another potential theory is that the candidate's trading was a manipulation that caused the market "price" to be artificial. The ability to establish the existence of an artificial price has proved elusive in many CFTC enforcement cases in the traditional futures markets. The sports event contract setting presents an even more difficult prospect of doing that because price artificiality is defined to be a price that does not reflect the legitimate forces of supply and demand. For sports event contracts there is no actual commodity and no forces of "supply and demand." Developing a new definition of artificial price conceivably might again veer toward regulation by enforcement.

Finally, the existence of a deception or deceptive behavior and an intent to deceive are material elements of a violation of Regulation 180.1(a) (1) and (3). Here, the candidate's trading was disclosed on social media, thereby presumably negating any premise of an intent to deceive.

7. Does the CFTC require additional statutory authority and staff resources to adequately regulate sports event markets?

Historically, Congress has asked the CFTC to regulate the massive derivatives markets on a very modest (some might say meager) budget relative to the breadth and depth of the work required, often leaving the agency pleading to Congress, albeit unsuccessfully, for more funding. Regulating the additional field of sports event prediction markets, which can have thousands of contracts, some of very short durations and many unique, might require a quantum leap in the agency's expertise and resources. Surveillance of the markets to detect wrongdoing and suspicious price abnormalities might require more staff than currently budgeted and additional surveillance tools. Further, if the CFTC is to be the exclusive regulator of sports event markets, the many decades of state regulation of gambling would seem to demonstrate that it will need to expand its mission beyond economic regulation to include addressing the personal health and financial welfare challenges that are associated with excessive or addictive gambling. That might require an amendment to the CEA or a novel interpretation of the CEA.

B. Conclusion

The CFTC's claim to exclusive jurisdiction over sports event contracts and ousting of the states from their claim to regulation of the field is a novel issue that raises many currently unresolved legal and practical issues. One might infer from the split among state and federal trial court decisions to date that reasonable arguments exist on both sides of the question. The ultimate resolution of the issue is uncertain and, in the end, may require additional federal legislation to resolve.