

CFTC Regulation of Binary Event Contracts: A History

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I. Introduction

Event contracts, which are a type of derivative contract whose payoff is based on a specified event, occurrence, or value, have been area of significant attention in the derivatives markets, with several key developments shaping the landscape in 2024 and continuing into early 2025.

In light of the recent focus on event contracts, this paper outlines the history of event contracts regulation by the Commodity Futures Trading Commission (“CFTC” or the “Commission”) and recent regulatory developments in this area.

As we discuss below, the CFTC has been the primary regulator of event contracts. In May 2008, the Commission published a concept release on the appropriate regulatory treatment of event contracts offered by event or prediction markets (the “2008 Concept Release”).² In July 2011, the Commission published final rules prohibiting the listing of certain event contracts in CFTC Rule 40.11.³

Since that time, there has been a significant increase in the listing of CFTC-regulated event contracts on CFTC-regulated exchanges. Event contracts have continued to draw attention from the CFTC and the industry due to regulatory concerns over their classification. On May 10, 2024, the Commission issued a Notice of Proposed Rulemaking, to which two Commissioners, including now Acting Chairman Caroline Pham, dissented.⁴ The rulemaking seeks to amend Commission Regulation 40.11, which prohibits the listing of certain event contracts, and further

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² See Concept Release on Appropriate Regulatory Treatment of Event Contracts, 73 Fed. Reg. 25669, 25671 (May 7, 2008) (“May 2008 Concept Release”).

³ Provisions Common to Registered Entities, 76 Fed. Reg. 44776 (July 27, 2011). The event contracts prohibited are described below.

⁴ 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 Summer K. Mersinger Regarding Proposed Rulemaking on Event Contracts (May 10, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement051024>.

defines certain types of restricted event contracts under the Commodity Exchange Act (“CEA”).⁵ Most recently, during a speech on March 11, 2025, Acting Chairman Pham stated that the Commission is considering reopening the comment period for the May 2008 Concept Release,⁶ indicating that the Commission’s focus on regulating event contracts will continue under the second Trump Administration.

For market participants and those evaluating the CFTC-regulated event contract landscape, the following history will help to better understand the current debate and regulatory developments.

II. History of Event Contracts Regulation

In February 2004, the Commission designated HedgeStreet, Inc. (now North American Derivatives Exchange, Inc., or Nadex) as the first contract market dedicated to trading event contracts.⁷

In May 2008, the Commission published the 2008 Concept Release, which posed 24 specific questions probing the Commission’s regulatory purview over event contracts.⁸ The Commission received a number of comments in response but took no further action at the time. This was, in part, due to the onset of the financial crisis and the Congressional and regulatory response that followed, culminating in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).

In 2010, Congress conferred authority on the Commission with respect to certain event contracts in Section 745(b) of the Dodd-Frank Act, which added Section 5c(c)(5)(C) to the CEA. Under Section 5c(c)(5)(C), the Commission may prohibit certain event contracts from being listed, cleared, or traded through a registered entity⁹ that are “contrary to the public interest.”¹⁰

On July 27, 2011, the Commission published Final Regulation 40.11 under Part 40 of the Commission’s regulations pursuant to the authority granted to the Commission under Section 5c(c)(5)(C). Regulation 40.11(a) prohibits the listing of “[a]n agreement, contract, transaction, or swap based upon an excluded commodity...that involves, relates to, or references terrorism,

⁵ CFTC Issues Proposal on Event Contracts, Release No. 8907-24 (May 10, 2024), <https://www.cftc.gov/PressRoom/PressReleases/8907-24>.

⁶ Keynote Address by Acting Chairman Caroline D. Pham, FIA BOCA50 (Mar. 11, 2025) (“Pham Keynote Address”), https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham13#_ftnref23.

⁷ See CFTC Order of Designation for HedgeStreet, Inc. (Feb. 20, 2004), <https://www.cftc.gov/sites/default/files/opa/press04/opa4894-04.htm>.

⁸ May 2008 Concept Release.

⁹ CEA section 1a(40) defines registered entity to include a designated contract market (“DCM”), derivatives clearing organization (“DCO”), swap execution facility (“SEF”), or swap data repository (“SDR”) registered by the Commission. 7 U.S.C. § 1a(40).

¹⁰ 7 U.S.C. § 5c(c)(5)(C).

assassination, war, gaming, or an activity that is unlawful under any State or Federal law” or “similar” activity that the Commission determines to be “contrary to the public interest.”¹¹

The Commission interprets Section 5c(c)(5)(C) and Regulation 40.11 as requiring a two-step process for determining if an event contract is permissible.¹² First, the Commission considers whether the contract “involve[s]” an activity enumerated in Section 5c(c)(5)(C)(i)(I)–(V) or “other similar activity.”¹³ If the Commission finds that the contract involves such activity, the Commission then considers whether the contract “is contrary to the public interest.”¹⁴ Thus, the Commission will not allow a contract to be listed if the contract (1) involves an activity contemplated by Section 5c(c)(5)(C) and (2) is contrary to the public interest.¹⁵

In December 2020, Eris Exchange, LLC (“ErisX”) filed a self-certification that certain NFL event contracts met the requirements of the CEA. ErisX ultimately withdrew its submission for self-certification in anticipation of the CFTC order denying certification. Commissioner Brian Quintenz, who has been nominated to Chair the Commission and is currently facing confirmation, issued a statement dissenting to the would-be Order finding the ErisX NFL contracts involved gaming, were prohibited by regulation, and were contrary to the public interest.¹⁶ In his statement, Commissioner Quintenz took issue with the categorical prohibition of “gaming” as contrary to the public interest and advocated for a more precise regulatory approach.¹⁷ He also argued that such broad prohibitions contradict statutory requirements and disagreed with what he perceived as the burden being placed on the registrant (ErisX) to establish that the NFL event contracts serve a hedging function (and thus were in the public interest).¹⁸

In June 2023, KalshiEX LLC (“Kalshi”), a DCM, filed a self-certification of political event contracts related to congressional control pursuant to Section 5c(c)(1) of the CEA and CFTC Regulation 40.2, certifying that the contracts met the requirements of the CEA. In September 2023, the Commission rejected Kalshi’s self-certification pursuant to CFTC Regulation 40.2.¹⁹

¹¹ 17 CFR § 40.11(a).

¹² See Fed. Reg. 48968, 48969 (June 10, 2024).

¹³ 7 U.S.C. § 5c(c)(5)(C).

¹⁴ *Id.*

¹⁵ A registered entity seeking to trade or clear an event contract also must comply with the general substantive and procedural requirements that apply to the trading or clearing of derivative contracts. See 89 Fed. Reg. at 48969. For example, a registered exchange, i.e., a DCM or SEF, may not permit trading in contracts that are readily susceptible to manipulation. See 7 U.S.C. § 7(d)(3); 7 U.S.C. § 7b–3(f)(3). Exchanges also must enforce compliance with the contract terms and conditions and monitor trading to prevent manipulation, price distortion, or disruption of the settlement process. See 7 U.S.C. § 7(d)(2), (4); 7 U.S.C. § 7b–3(f)(2), (4).

¹⁶ Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts (Mar. 25, 2021), <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ In re Certification by KalshiEX LLC of Derivatives Contracts with Respect to Political Control of the United States Senate and United States House of Representatives (Sept. 22, 2023), <https://www.cftc.gov/sites/default/files/filings/documents/2023/orgkexkalshiordersig230922.pdf>.

Kalshi sued the CFTC in the United States District Court for the District of Columbia, and the district court granted Kalshi's motion for summary judgment, finding that the political event contracts were permitted under the CEA. The CFTC filed an emergency motion to stay the Order, which was denied, prompting Kalshi to launch its Congressional Control Contracts shortly after the hearing. That same day, the CFTC filed a notice of appeal and an emergency motion to stay the Summary Judgment Order with the United States Court of Appeals for the District of Columbia.²⁰ On September 12, 2024, the Circuit Court ordered that the Summary Judgment Order be administratively stayed pending appeal, which is ongoing in the Circuit Court.²¹

On May 10, 2024, the Commission issued a Notice of Proposed Rulemaking to amend CFTC Regulation 40.11.²² The proposed amendments are intended to "further specify types of event contracts that fall within the scope of section 5c(c)(5)(C)," with a focus on event contracts that involve "gaming."²³ Acting Chairman Pham (then Commissioner) dissented from the event contracts proposal, stating that "[i]nstead of thoughtfully considering how to effectively regulate these markets while fostering innovation, the Event Contracts Proposal ties itself in knots over the bounds of gaming, which Congress has neither asked nor directed the Commission to regulate," and arguing that states should have more autonomy to regulate event contracts.²⁴ Commissioner Summer Mersinger similarly dissented, noting that the proposal exceeds the legal authority conferred upon the Commission in the CEA and "lays the foundation to prohibit entire categories of potential exchange-traded event contracts whose terms and conditions the Commission has never even seen."²⁵

Meanwhile, the Commission has recently seen an increase in the number of contract markets listing contracts related to sporting events, election outcomes, and other novel applications of event contracts. In December 2024, one DCM filed a self-certification with the Commission for certain sports binary event contracts, including contracts for "Title Events" related to

²⁰ See Per Curiam Order, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Jan. 6, 2025), ECF No. 2092681.

²¹ *Id.* On January 17, 2025, the D.C. Circuit Court of Appeals heard oral argument. See *id.*; Courtroom Minutes of Oral Argument, *KalshiEX LLC v. CFTC*, No. 24-5205 (D.C. Cir. Jan. 17, 2025), ECF No. 2094733. The Court of Appeals has not yet ruled on the case.

²² CFTC Issues Proposal on Event Contracts, Release No. 8907-24 (May 10, 2024), <https://www.cftc.gov/PressRoom/PressReleases/8907-24>.

²³ 89 Fed. Reg. 48968 (June 10, 2024).

²⁴ Dissenting Statement of Commissioner Caroline D. Pham on Event Contracts Proposal (May 10, 2024). Acting Chair Pham argued that "[a]n appropriate Event Contracts Proposal would have struck a balance between Federal oversight and State autonomy by focusing on the CFTC's core mandate of promoting market stability and protecting market participants from fraud and abusive practices." *Id.*

²⁵ Dissenting Statement of Commissioner Summer K. Mersinger Regarding Proposed Rulemaking on Event Contracts (May 10, 2024).

professional football, professional hockey, and college sports.²⁶ KalshiEX recently self-certified with the Commission for similar sports contracts on January 22, 2025²⁷ and February 10, 2025.²⁸

III. Reopening Prior Comment Period

Acting Chairman Pham has expressed interest in establishing a regulatory framework for political event contracts, specifically a framework focused on the CFTC's role in promoting market stability while also respecting state autonomy. In a March 11, 2025 speech at an industry conference, she disclosed that the Commission is "currently deliberating" whether it should reopen the comment period for the May 2008 Concept Release.²⁹

Prior to the May 2008 Concept Release, the Commission received a number of requests to provide guidance regarding event contracts, which led the Commission to undertake a "comprehensive review of the Act's applicability to event contracts and markets."³⁰ In publishing the Concept Release, the Commission sought to gain input from interested parties, including CFTC-registered markets, exempt markets, OTC derivatives dealers, capital markets participants, legal practitioners, regulators, and academics regarding the "practical and regulatory issues relevant to regulating event contracts and markets."³¹ In particular, the Commission sought to determine (1) whether event contracts are within CFTC jurisdiction; (2) if so, whether there should be exemptions or exclusions; and (3) how the Commission should address "gaming aspects" of certain event contracts, including "the possible pre-emption of state gaming laws."³²

The 24 questions outlined in the May 2008 Concept Release cover topics such as (1) the public interests that are served by event contracts; (2) jurisdictional determinations, i.e., the factors to be considered in identifying event contracts and event markets; (3) legal implementation, e.g., whether it is appropriate for the Commission to use its CEA Section 4(c) exemptive authority in implementing regulation of event contracts and whether the issuance of no-action relief is appropriate; and (5) market participants.³³

²⁶ Letter from Kevin Dan, Chief Compliance Officer & Chief Regulatory Officer, Crypto.com, to Christopher Kirkpatrick, Secretary of the Commission, CFTC, Certification of Commercial Economic Event Contract (Title Event) – Submission Pursuant to Commission Regulation 40.2(a) (Dec. 19, 2024), <https://www.cftc.gov/sites/default/files/filings/ptc/24/12/ptc12192412179.pdf>,

²⁷ Letter from Xavier Sottile, Head of Markets, KalshiEX LLC, to Secretary of the Commission, CFTC KalshiEX LLC – CFTC Regulation 40.2(a) Notification Regarding the Initial Listing of the "Will <team> win <title>?" Contract (Jan. 22, 2025), <https://www.cftc.gov/sites/default/files/filings/ptc/25/01/ptc01222514045.pdf>.

²⁸ Letter from Xavier Sottile, Head of Markets, KalshiEX LLC, to Secretary of the Commission, CFTC, KalshiEX LLC – CFTC Regulation 40.2(a) Notification Regarding the Initial Listing of the "Will <achievement> be obtained by <participant>?" Contract (Feb. 10, 2025), <https://www.cftc.gov/sites/default/files/filings/ptc/25/02/ptc02102515083.pdf>.

²⁹ Pham Keynote Address.

³⁰ May 2008 Concept Release.

³¹ *Id.*

³² *Id.*

³³ *Id.*

In her March 11 speech, Acting Chairman Pham emphasized that all 24 of the questions posed by the Commission in the May 2008 Concept Release “remain relevant today, particularly questions regarding the public interest in information aggregation and price dissemination, and the utility of information markets.”³⁴

Acting Chairman Pham also referred to the previously announced “prediction markets roundtable” that the Commission will host,³⁵ which she referred to as a “necessary first step” to “change course on the regulation of event contracts” and “establish a holistic regulatory framework that will both foster thriving prediction markets and protect retail customers from binary options fraud such as deceptive and abusive marketing and sales practices.”³⁶ The stated goal of the roundtable is to “develop a robust administrative record with studies, data, expert reports, and public input from a wide variety of stakeholder groups to inform the Commission’s approach to regulation and oversight of prediction markets, including sports-related event contracts.”³⁷

Acting Chair Pham stated that “by reopening the 2008 Concept Release comment period, the Commission can ensure that there is a public comment file in connection with the forthcoming prediction markets roundtable, and further build a robust administrative record spanning over 30 years with studies, data, expert reports, and public input from a wide variety of stakeholder groups.”³⁸

IV. Conclusion

In light of the significant increase in the number of event contract markets and the type of contracts listed for trading by registered exchanges and the Commission’s emphasis on “chang[ing] course on the regulation of event contracts,”³⁹ it is likely that event contracts will remain a core focus for the Commission under the second Trump Administration.

³⁴ *Id.*

³⁵ As of the date of this paper, a date for the roundtable has not been set.

³⁶ Pham Keynote Address.

³⁷ CFTC Announces Prediction Markets Roundtable, Release No. 9046-25 (Feb. 5, 2025), <https://www.cftc.gov/PressRoom/PressReleases/9046-25>.

³⁸ Pham Keynote Address.

³⁹ *Id.*