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From: Bell, Tom W. [tbell@chapman.edu]
Sent: Sunday, July 06, 2008 11:57 PM
To: secretary
Subject: Comment on Concept Release on the Appropriate Regulatory Treatment of Event Contracts

COMMENT

Dear Office of the Secretariat,

I here offer a comment on the CFTC's recent Concept Release on the Appropriate Regulatory Treatment of Event Contracts. Specifically, I offer an answer to question 14: "Should certain underlying events or measures--such as those based on assassinations or terrorist activities--be prohibited altogether due to the social perception and impact of such events? What statutory or other legal basis would support this treatment?"

The CFTC should not forbid trading in claims based on assassinations, terrorist activities, or other criminal acts. Because event markets would offer only relatively thin and traceable trading, they would not offer an attractive investment option to anybody planning to profit from wrongdoing. A would-be terrorist would risk revealing both his plans and his identity if, for instance, he invested in a contract predicting another 9/11. He would instead find it more safe and profitable to simply short certain publicly traded stocks.

Furthermore, event markets in terrorist or criminal acts might benefit the public by revealing life-saving information. Suppose, for instance, that an anthropologist's study of corrido culture convinced her that narcoterrorists had begun planning military raids on border checkpoints in Arizona and California. If she had the opportunity to buy terrorist event claims, she might both profit from her research and tip us all off about looming trouble. Sound public policy suggests that we should encourage that sort of trading—not forbid it.

To judge from their reactions to the Policy Analysis Market proposed by the Pentagon in 2003, politicians might need to learn more about the benefits of using trading to help predict assassinations or other terrorist events. That poses a public relations problem, however—not a legal one. The CFTC thus has no sound reason to presumptively forbid trading in contracts related to such events.

Could you fault claims about assassinations or other terrorist events for giving incentives for wrongful acts? Not very plausibly; as I explain above, it is very unlikely that anyone would find it profitable or prudent to try to use an event market to cash in on wrongdoing. Furthermore, all sorts of investment instruments offer the same incentives. Thus, for instance, a would-be terrorist might go long on oil futures prior to pulling off an attack on a refinery. Indeed, that sort of scenario seems much, much more likely than one involving event markets.

At root, concern about unseemly event market claims boils down to concern about violating a taboo about what sorts of things people discuss openly in a polite society. Those norms merit our concern, granted. They do not, however, justify imposing a speech restriction on event markets. And make no mistake about it; to bar such claims would constitute a restriction on speech.

Specifically, if the CFTC banned certain sorts of event market claims relating to assassinations, terrorist activities, or criminal acts, it would thereby impose a content-based restriction on speech. That would, under present First Amendment jurisprudence, trigger the highest level of judicial review: strict scrutiny. The ban would almost certainly fail to survive that scrutiny, as it would be too broad (stopping not just the bad guys but also the good ones), too narrow (since it would fail to forbid the use of other financial instruments, such as generic futures, from like uses), and not narrowly tailored (since there are other, better ways to discourage bad acts). Those sorts of claims would, moreover, fall within the core of the sort of speech protected by the First Amendment, as they would concern political events.

Our freedoms of speech and expression include the right to ask troubling questions. The

CFTC has no good reason to ban event market claims about assassinations or other illegal acts. Nor can it do so constitutionally.

Thank you.

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