

From: Shrago, Yevgeny
Sent: Tue, 12 Sep 2023 17:00:27 +0000
To: Flood, Nora
Subject: RE: NEW - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts
| DUE: TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM

Thanks Nora, that would be great. Talk soon!

From: Flood, Nora <NFlood@CFTC.gov>
Sent: Tuesday, September 12, 2023 12:12 PM
To: Shrago, Yevgeny <YShrago@CFTC.gov>
Subject: FW: NEW - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE:
TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM

Yevgeny,

Vince forwarded me the email below. DMO staff would be happy to brief you on the Kalshi recommendation. What would be the best way to coordinate? Is it easiest for me to simply circulate a Teams invite for a date/time that's free on your calendar?

Kind regards,

Nora

From: Shrago, Yevgeny <YShrago@CFTC.gov>
Sent: Tuesday, September 12, 2023 11:26 AM
To: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>
Subject: FW: NEW - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE:
TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM
Importance: High

Hi Vince,

Can I get a briefing on this one? Thanks!

From: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>
Sent: Tuesday, September 12, 2023 10:46 AM
To: Adamske, Steven <SAdamske@CFTC.gov>; Allen, Natise L. <NAllen@CFTC.gov>; Anderson, Adrien <AAnderson@CFTC.gov>; Arbit, Terry <TArbit@CFTC.gov>; Behnam, Rostin <RBehnam@CFTC.gov>; Bent, Tamika <TBent@CFTC.gov>; Biagioli, Anthony <ABiagioli@CFTC.gov>; Brown, Karen <KBrown@CFTC.gov>; Burke, Kyndra <KBurke@CFTC.gov>; Campbell, Phyllis <PCampbell@CFTC.gov>; Charley, Willie <WCharley@CFTC.gov>; Coplan, Zachary <ZCoplan@CFTC.gov>; Davis, Kiayana <K_Davis@CFTC.gov>; Dunfee, John <jdunfee@CFTC.gov>; Einstman, John <JEinstman@CFTC.gov>; Faulk-White, Donna <DFaulk-White@CFTC.gov>; Felsenthal, David <DFelsenthal@CFTC.gov>; Gardy, Laura <LGardy@CFTC.gov>; Giles, Mercedes <MGiles@CFTC.gov>; Gillers, David <DGillers@CFTC.gov>; Goldsmith Romero, Christy <CGoldsmithRomero@CFTC.gov>; Guerin, Thomas <TGuerin@CFTC.gov>;

Hutchison, Clark <c_hutchison@CFTC.gov>; Janowski, Peter <PJanowski@CFTC.gov>; Johnson, Kristin <KJohnson@CFTC.gov>; Jung, Harry <HJung@CFTC.gov>; Jurgens, Melissa <MJurgens@CFTC.gov>; Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>; Knauff, Abigail <AKnauff@CFTC.gov>; Lee, Scott <S_Lee@CFTC.gov>; Lewis, Alicia L. <ALewis@CFTC.gov>; Lowe, Gretchen L. <glowe@CFTC.gov>; Lucas, Christopher <CLucas@CFTC.gov>; Mastrogiacomo, Elizabeth <EMastrogiacomo@CFTC.gov>; McGinley, Ian <IMcGinley@CFTC.gov>; McGonagle, Vincent A. <vmcgonagle@CFTC.gov>; Mersinger, Summer <SMersinger@CFTC.gov>; Mixon, Scott <SMixon@CFTC.gov>; Olear, Amanda L <AOlear@CFTC.gov>; Pate, LaTasha <LPate@CFTC.gov>; Pham, Caroline <CPham@CFTC.gov>; Ringle, Judith A <JRingle@CFTC.gov>; Schwartz, Rob <RSchwartz@CFTC.gov>; Shrago, Yevgeny <YShrago@CFTC.gov>; Sidman, Robert <RSidman@CFTC.gov>; Sutton, Jeffrey <JSutton@CFTC.gov>; Tente, Meghan <MTente@CFTC.gov>; Turner, Antoinette <aturner@cftc.gov>; Weyls, Brigitte C <bweyls@cftc.gov>; Wheaton, James G <JWheaton@CFTC.gov>; Woodland, Michelle D. <mwoodland@CFTC.gov>; Wright, Ann <AWright@CFTC.gov>

Subject: NEW - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM

Importance: High

Please note that a new seriatim matter, **23-0187: KalshiEX Proposed Congressional Control Contracts**, has been placed into circulation for review and action by the Commission.

Due Date: Tuesday, September 19, 2023 @ 3:00 p.m.

Division: DMO

To view the seriatim documents for this matter: [Please CLICK HERE.](#)

To see the list of all pending seriatim matters: [Please CLICK HERE.](#)

Thank you.



The Secretariat

Office of the General Counsel

Commodity Futures Trading Commission

InboxSecretariat@cftc.gov



From: Dunfee, John
Sent: Mon, 11 Sep 2023 21:03:44 +0000
To: Flood, Nora
Cc: McGonagle, Vincent A.; Pujol Schott, Sebastian; Tanzi, Grey; Haidar, Steven; Stein, Andrew
Subject: RE: Kalshi - Revised memo and order

Nora,

You can go forward with submitting this to the Secretariat for seriatim circulation with a due date of Sep. 19. Let me know if you have questions or need anything else from me. Thanks.

John



John Dunfee
Chief Counsel
Office of Chairman Rostin Behnam
Commodity Futures Trading Commission
202-285-5286
jdunfee@cftc.gov



From: Flood, Nora <NFlood@CFTC.gov>
Sent: Monday, September 11, 2023 3:59 PM
To: Dunfee, John <jdunfee@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>; Pujol Schott, Sebastian <sps@cftc.gov>; Tanzi, Grey <GTanzi@CFTC.gov>; Haidar, Steven <SHaidar@CFTC.gov>; Stein, Andrew <AStein@CFTC.gov>
Subject: RE: Kalshi - Revised memo and order

John,

(b)(5)

(b)(5)

(b)(5)

Since the 90-day review period under Commission Regulation 40.11(c) ends on Thursday, September 21st, we would propose a voting deadline of **COB on Tuesday, September 19th**.

Kind regards,

Nora

From: Dunfee, John <jdunfee@CFTC.gov>
Sent: Monday, September 11, 2023 10:50 AM
To: Flood, Nora <NFlood@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>; Pujol Schott, Sebastian <sps@cftc.gov>; Tanzi, Grey <GTanzi@CFTC.gov>; Haidar, Steven <SHaidar@CFTC.gov>; Stein, Andrew <AStein@CFTC.gov>
Subject: RE: Kalshi - Revised memo and order

(b)(5)

John

From: Flood, Nora <NFlood@CFTC.gov>
Sent: Saturday, September 9, 2023 8:55 AM
To: Dunfee, John <jdunfee@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>; Pujol Schott, Sebastian <sps@cftc.gov>; Tanzi, Grey <GTanzi@CFTC.gov>; Haidar, Steven <SHaidar@CFTC.gov>; Stein, Andrew <AStein@CFTC.gov>
Subject: Kalshi - Revised memo and order

John,

Attached for your review are revised drafts of the Commission memo and proposed order for the Kalshi Congressional control contracts. (b)(5)

(b)(5)

Best,

Nora

From: Flood, Nora
Sent: Mon, 18 Sep 2023 13:03:44 +0000
To: Bent, Tamika; Anderson, Adrien
Subject: RE: Kalshi Congressional Control Contracts

Sure Tamika.

From: Bent, Tamika <TBent@CFTC.gov>
Sent: Monday, September 18, 2023 8:53 AM
To: Flood, Nora <NFlood@CFTC.gov>; Anderson, Adrien <AAnderson@CFTC.gov>
Subject: RE: Kalshi Congressional Control Contracts

Hi Nora – Unfortunately, my schedule is absolutely insane today. Please can I reach out with time slots that work for us to reschedule the briefing?

Thank you,

Tamika

-----Original Appointment-----

From: Flood, Nora <NFlood@CFTC.gov>
Sent: Friday, September 15, 2023 12:45 PM
To: Flood, Nora; Bent, Tamika; Anderson, Adrien
Subject: Kalshi Congressional Control Contracts
When: Monday, September 18, 2023 9:30 AM-10:00 AM (UTC-05:00) Eastern Time (US & Canada).
Where: Microsoft Teams Meeting

Just let me know if another time might work better for you.

Best,

Nora

Microsoft Teams meeting

Join on your computer, mobile app or room device

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Meeting ID: (b)(7)(E)

Passcode: (b)(7)(E)

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(b)(7)(E)

United States, New York City

Phone Conference ID: (b)(7)(E)

[Find a local number](#) | [Reset PIN](#)

[Learn More](#) | Meeting options

From: Flood, Nora
Sent: Thu, 21 Sep 2023 19:42:39 +0000
To: Bent, Tamika
Cc: McGonagle, Vincent A.; Anderson, Adrien
Subject: RE: Kalshi Congressional Control Contracts - Proposed Order

Thanks Tamika. We're here if you have any questions.

From: Bent, Tamika <TBent@CFTC.gov>
Sent: Thursday, September 21, 2023 3:33 PM
To: Flood, Nora <NFlood@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>; Anderson, Adrien <AAnderson@CFTC.gov>
Subject: RE: Kalshi Congressional Control Contracts - Proposed Order

Thanks, Nora. (b)(5)

Kind regards,

Tamika

From: Flood, Nora <NFlood@CFTC.gov>
Sent: Wednesday, September 20, 2023 1:04 PM
To: Bent, Tamika <TBent@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>; Anderson, Adrien <AAnderson@CFTC.gov>
Subject: Kalshi Congressional Control Contracts - Proposed Order

Tamika,

Just following up on our correspondence earlier this week regarding the proposed Kalshi order that's currently in seriatim circulation.

DMO would be happy to set up a time to brief your office regarding the proposed order, or to answer any questions that your office may have.

Process-wise, we note that tomorrow, September 21, 2023, marks the expiration of the 90-day review period for the subject congressional control contracts. The Commission commenced review of the contracts, pursuant to CFTC Regulation 40.11(c), on June 23, 2023.

CFTC Regulation 40.11(c) provides as follows:

The Commission shall issue an order approving or disapproving ... [a] contract ... that is subject to a 90-day review under [CFTC Regulation 40.11(c)] not later than 90 days subsequent to the date that the Commission commences review, or if applicable, at the conclusion of such extended period agreed to or requested by the registered entity.

Footnote 29 in DMO's recommendation memo to the Commission, on page 11, sets forth additional relevant information regarding the requirements of CFTC Regulation 40.11(c).

Kind regards,

Nora

From: Flood, Nora
Sent: Fri, 15 Sep 2023 13:55:54 +0000
To: Bent, Tamika; Anderson, Adrien
Cc: McGonagle, Vincent A.
Subject: RE: Kalshi Congressional Control Contracts - Proposed Order

Happy to assist. I can circulate a calendar invite for a Teams meeting if that works for you. Would you both be the attendees? Should I be including the Commissioner on the invite as well?

Kind regards,

Nora

From: Bent, Tamika <TBent@CFTC.gov>
Sent: Friday, September 15, 2023 9:37 AM
To: Flood, Nora <NFlood@CFTC.gov>; Anderson, Adrien <AAnderson@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>
Subject: RE: Kalshi Congressional Control Contracts - Proposed Order

Hi Nora – Yes, that would be helpful.

Kind regards,
Tamika

From: Flood, Nora <NFlood@CFTC.gov>
Sent: Friday, September 15, 2023 9:34 AM
To: Bent, Tamika <TBent@CFTC.gov>; Anderson, Adrien <AAnderson@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>
Subject: Kalshi Congressional Control Contracts - Proposed Order

Tamika and Adrien,

Just wanted to follow up regarding the proposed Kalshi order that's currently in seriatim circulation. DMO staff would be happy to provide a briefing regarding the proposed order, if that would be helpful for your office.

Kind regards,

Nora

Nora Flood
Chief Counsel
Division of Market Oversight
Commodity Futures Trading Commission
202-418-6059
nflood@cftc.gov

From: McGonagle, Vincent A.
Sent: Fri, 22 Sep 2023 11:07:28 +0000
To: Kirkpatrick, Chris; Haidar, Steven
Cc: Flood, Nora; Pujol Schott, Sebastian; Tanzi, Grey; Stein, Andrew; Goodman, Chris; Dunfee, John; Gillers, David; Inbox – Secretariat; * ALL OPA DC (FTE)
Subject: Re: Kalshi (2023) Congressional Control Contract Materials For Seriatim

Thanks Chris

From: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>
Sent: Friday, September 22, 2023 6:40:35 AM
To: Haidar, Steven <SHaidar@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>; Flood, Nora <NFlood@CFTC.gov>; Pujol Schott, Sebastian <sps@cftc.gov>; Tanzi, Grey <GTanzi@CFTC.gov>; Stein, Andrew <AStein@CFTC.gov>; Goodman, Chris <CGoodman@CFTC.gov>; Dunfee, John <jdunfee@CFTC.gov>; Gillers, David <DGillers@CFTC.gov>; Inbox – Secretariat <InboxSecretariat@CFTC.gov>; * ALL OPA DC (FTE) <ALLOPADCFTE@CFTC.gov>
Subject: RE: Kalshi (2023) Congressional Control Contract Materials For Seriatim

Good morning,

The Kalshi congressional control contracts matter has completed seriatim. The issuance of the order presented in the seriatim package was approved by the Commission. The final tally of Commission votes is as follows:

Chairman Behnam – Approved

Commissioner Johnson – Concurred, with statement forthcoming

Commissioner Goldsmith Romero – Approved

Commissioner Mersinger – Dissented, with PUBLIC statement forthcoming

Commissioner Pham – Abstain, with PUBLIC statement forthcoming and the following INTERNAL statement:

(b)(5)

(b)(5)

The signed order for this matter is attached to this email.

Please feel free to contact me with any questions or if you need anything further. Thank you.

Chris



Christopher Kirkpatrick
Secretary of the Commission
Office of the General Counsel
Commodity Futures Trading Commission
O: 202-418-5964 | C: 202-378-7405
CKirkpatrick@cftc.gov



From: Haidar, Steven <SHaidar@CFTC.gov>
Sent: Monday, September 11, 2023 6:27 PM
To: Inbox – Secretariat <InboxSecretariat@CFTC.gov>
Cc: McGonagle, Vincent A. <vmcgonagle@CFTC.gov>; Flood, Nora <NFlood@CFTC.gov>; Pujol Schott, Sebastian <sps@cftc.gov>; Tanzi, Grey <GTanzi@CFTC.gov>; Stein, Andrew <AStein@CFTC.gov>; Goodman, Chris <CGoodman@CFTC.gov>; Dunfee, John <jdunfee@CFTC.gov>; Haidar, Steven <SHaidar@CFTC.gov>
Subject: Kalshi (2023) Congressional Control Contract Materials For Seriatim

Dear Secretariat,

DMO is recommending that, pursuant to CEA section 5c(c)(5)(C)(ii) and Commission Regulation 40.11(a)(1), the Commission prohibit congressional control political event contracts self-certified by KalshiEX LLC ("Kalshi"). In connection with this DMO recommendation, please find attached the following materials for seriatim circulation:

- DMO's recommendation memo.
- A list of exhibits to DMO's recommendation memo.
- A proposed order, attached as Exhibit 1 to DMO's recommendation memo, finding that, pursuant to CEA section 5c(c)(5)(C)(ii) and Commission Regulation 40.11(a)(1), the Congressional

Control Contracts are prohibited and may not be listed or made available for clearing or trading on or through Kalshi.

- Exhibits 2-7 to DMO's recommendation memo, which include DMO's summary of comments received in response to the Commission's June 23, 2023 request for comment.

As noted, we are requesting Commission review and vote via the seriatim process. We further request a seriatim end date of close of business on Tuesday, September 19, 2023. The point of contact in the Chair's office for this matter is John Dunfee.

Please don't hesitate to reach out if you have any questions or require any additional information.

Kind regards,



Steven A. Haidar

Assistant Chief Counsel

Division of Market Oversight

Commodity Futures Trading Commission

202-418-5611

shaidar@cftc.gov



SERIATIM CONCURRENCE

SUBJECT: KalshiEX LLC Proposed Congressional Control Contracts

RECOMMENDATION: That the Commission issue the order attached as Exhibit 1, finding that, pursuant to section 5c(c)(5)(C) of the Commodity Exchange Act and Commission Regulation 40.11, the proposed Congressional Control Contracts: (1) involve gaming and activity that is unlawful under State law; (2) are contrary to the public interest; and (3) therefore, may not be listed by, or made available for clearing or trading on or through, KalshiEX LLC

Approve - See attached email and attached PUBLIC statement Chairman Rostin Behnam	9/22/2023 Date
Concur - See attached email and attached INTERNAL statement Commissioner Kristin N. Johnson	9/22/2023 Date
Approve - See attached email Commissioner Christy Goldsmith Romero	9/20/2023 Date
Dissent - See attached email and attached PUBLIC statement Commissioner Summer K. Mersinger	9/20/2023 Date
Abstain - See attached email with INTERNAL statement and attached PUBLIC statement Commissioner Caroline D. Pham	9/21/2023 Date

Completed by the Secretariat: 9/28/2023

From: [Behnam, Rostin](#)
To: [Sidman, Robert](#)
Cc: [Gillers, David](#); [Gardy, Laura](#); [Lewis, Alicia L.](#); [Dunfee, John](#); [Knauff, Abigail](#); [Felsenthal, David](#); [Burke, Kyndra](#); [Davis, Kiayana](#); [Inbox – Secretariat](#)
Subject: Re: VOTING COPY - REVISED DUE DATE - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: THURSDAY, SEPTEMBER 21, 2023 @ 12:00 NOON
Date: Friday, September 22, 2023 6:12:49 AM

Dear Robert,

I approve this matter, 23-0187.

Thank you,

Rostin Behnam
Chairman
**Commodity Futures
Trading Commission**
202-418-5575
rbehnam@cftc.gov

From: Sidman, Robert <RSidman@CFTC.gov>
Sent: Friday, September 22, 2023 6:11 AM
To: Behnam, Rostin <RBehnam@CFTC.gov>
Cc: Gillers, David <DGillers@CFTC.gov>; Gardy, Laura <LGardy@CFTC.gov>; Lewis, Alicia L. <ALewis@CFTC.gov>; Dunfee, John <jdunfee@CFTC.gov>; Knauff, Abigail <AKnauff@CFTC.gov>; Felsenthal, David <DFelsenthal@CFTC.gov>; Burke, Kyndra <KBurke@CFTC.gov>; Davis, Kiayana <K_Davis@CFTC.gov>; [Inbox – Secretariat](#) <InboxSecretariat@CFTC.gov>
Subject: VOTING COPY - REVISED DUE DATE - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: THURSDAY, SEPTEMBER 21, 2023 @ 12:00 NOON

Dear Chairman Behnam,

Attached, and referenced below, for your consideration and vote is ***Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts***.

The specific Recommendation that is the subject of this Commission vote is as follows:

That the Commission issue the order attached as Exhibit 1, finding that, pursuant to section 5c(c)(5)(C) of the Commodity Exchange Act and Commission Regulation 40.11, the proposed Congressional Control Contracts: (1) involve gaming and activity that is unlawful under State

law; (2) are contrary to the public interest; and (3) therefore, may not be listed by, or made available for clearing or trading on or through, KalshiEX LLC.

September 22, 2023

Statement of Chairman Rostin Behnam Regarding CFTC Order to Prohibit Kalshi Political Control Derivatives Contracts

Today's Order prohibits listing or otherwise making available for clearing or trading certain Congressional Control Contracts on or through KalshiEx LLC ("Kalshi") based on findings that such political event contracts involve both gaming and activity that is unlawful under State law, and are contrary to the public interest.^[1] The Commodity Exchange Act (CEA) enumerates certain categories of commodities for which derivatives may be contrary to the public interest if listed on an exchange. These include contracts that involve gaming or activity that violates State or Federal Law. Kalshi's Congressional control contracts fall into both of these categories. Betting or wagering on elections, as proposed by Kalshi, meets the definition of gaming. And in many states, betting or wagering on elections is prohibited by statute or common law. The analysis conducted, determinations reached, and process followed resulting in the Commission's Order are squarely within our duty and discretion.

The Commission's consideration of the Congressional Control Contracts and ultimate vote was guided by careful analysis of statutory language and Congressional intent, and informed by the 1,378 public comments^[2] submitted in response to questions aimed at informing our review.

The Commission has previously considered whether other event contracts that involve political events could satisfy the application of the prongs of the public interest test embedded in the CEA. For almost two decades, registered and prospective registered entities alike have attempted to develop and list products that would elude the definition of gaming and essentially reduce key facets of the democratic process to a source of revenue for some, fascination and entertainment for others, and, critically, an unmandated duty for the CFTC. The approval of political event contracts of the type presented in the Order would require the CFTC to exercise its oversight and enforcement authorities in the manner of an election cop. Our new authorities would per se include monitoring elections, candidates, and countless participants in the political machinations that proliferate in the media and cyberspace in an effort to prevent manipulation and false reporting within the political system—something that the CFTC currently lacks the mandate to do.

It makes sense for the CFTC to have authority to combat fraud, manipulation, and false reporting in underlying commodity markets. But it is impractical for the CFTC to combat them in the underlying market here—a political contest. The implications of such authority are vast, and could extend in a multitude of directions beyond the election itself, political fundraising and polling, to name just two.

For these reasons, I agree with the Commission's determination today that Kalshi's Congressional control contracts should be prohibited.

[1] See CEA section 5c(c)(5)(C)(ii); 7 U.S.C. § 7a-2(c)(5)(C)(ii).

[2] <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7394>.

From: [Johnson, Kristin](#)
To: [Kirkpatrick, Chris](#)
Cc: [Anderson, Adrien](#); [Bent, Tamika](#); [Janowski, Peter](#); [Campbell, Phyllis](#); [Inbox – Secretariat](#)
Subject: Re: VOTING COPY - REVISED DUE DATE - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: THURSDAY, SEPTEMBER 21, 2023 @ 12:00 NOON
Date: Friday, September 22, 2023 5:53:25 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

I concur with the staff recommendation.
My office will share a statement shortly.

Commissioner Johnson

From: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>
Sent: Thursday, September 21, 2023 6:29 PM
To: Johnson, Kristin <KJohnson@CFTC.gov>
Cc: Anderson, Adrien <AAnderson@CFTC.gov>; Bent, Tamika <TBent@CFTC.gov>; Janowski, Peter <PJanowski@CFTC.gov>; Campbell, Phyllis <PCampbell@CFTC.gov>; Inbox – Secretariat <InboxSecretariat@CFTC.gov>
Subject: VOTING COPY - REVISED DUE DATE - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: THURSDAY, SEPTEMBER 21, 2023 @ 12:00 NOON

Dear Commissioner Johnson,

Attached, and referenced below, for your consideration and vote is ***Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts.***

The specific Recommendation that is the subject of this Commission vote is as follows:

That the Commission issue the order attached as Exhibit 1, finding that, pursuant to section 5c(c)(5)(C) of the Commodity Exchange Act and Commission Regulation 40.11, the proposed Congressional Control Contracts: (1) involve gaming and activity that is unlawful under State law; (2) are contrary to the public interest; and (3) therefore, may not be listed by, or made available for clearing or trading on or through, KalshiEX LLC.

From: [Goldsmith Romero, Christy](#)
To: [Charley, Willie](#)
Cc: [Shrago, Yevgeny](#); [Lee, Scott](#); [Coplan, Zachary](#); [Inbox – Secretariat](#)
Subject: RE: VOTING COPY - REVISED DUE DATE - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: THURSDAY, SEPTEMBER 21, 2023 @ 12:00 NOON
Date: Wednesday, September 20, 2023 5:26:01 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

I vote to approve

From: Charley, Willie <WCharley@CFTC.gov>
Sent: Wednesday, September 20, 2023 5:22 PM
To: Goldsmith Romero, Christy <CGoldsmithRomero@CFTC.gov>
Cc: Shrago, Yevgeny <YShrago@CFTC.gov>; Lee, Scott <S_Lee@CFTC.gov>; Coplan, Zachary <ZCoplan@CFTC.gov>; Inbox – Secretariat <InboxSecretariat@CFTC.gov>
Subject: VOTING COPY - REVISED DUE DATE - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: THURSDAY, SEPTEMBER 21, 2023 @ 12:00 NOON
Importance: High

Dear Commissioner Goldsmith Romero,

Attached, and referenced below, for your consideration and vote is ***Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts***.

The specific Recommendation that is the subject of this Commission vote is as follows:

That the Commission issue the order attached as Exhibit 1, finding that, pursuant to section 5c(c)(5)(C) of the Commodity Exchange Act and Commission Regulation 40.11, the proposed Congressional Control Contracts: (1) involve gaming and activity that is unlawful under State law; (2) are contrary to the public interest; and (3) therefore, may not be listed by, or made available for clearing or trading on or through, KalshiEX LLC.

From: [Mersinger, Summer](#)
To: [Kirkpatrick, Chris](#)
Cc: [Lucas, Christopher](#); [Arbit, Terry](#); [Mastrogiacomo, Elizabeth](#); [Pate, LaTasha](#); [Inbox – Secretariat](#)
Subject: RE: VOTING COPY - REVISED DUE DATE - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: THURSDAY, SEPTEMBER 21, 2023 @ 12:00 NOON
Date: Wednesday, September 20, 2023 5:15:00 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Dissent w/ forthcoming public statement.

Summer Mersinger
Commissioner, Commodity Futures Trading Commission

From: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>
Sent: Wednesday, September 20, 2023 11:29 AM
To: Mersinger, Summer <SMersinger@CFTC.gov>
Cc: Lucas, Christopher <CLucas@CFTC.gov>; Arbit, Terry <TArbit@CFTC.gov>; Mastrogiacomo, Elizabeth <EMastrogiacomo@CFTC.gov>; Pate, LaTasha <LPate@CFTC.gov>; Inbox – Secretariat <InboxSecretariat@CFTC.gov>
Subject: VOTING COPY - REVISED DUE DATE - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: THURSDAY, SEPTEMBER 21, 2023 @ 12:00 NOON
Importance: High

Dear Commissioner Mersinger,

Attached, and referenced below, for your consideration and vote is ***Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts***.

The specific Recommendation that is the subject of this Commission vote is as follows:

That the Commission issue the order attached as Exhibit 1, finding that, pursuant to section 5c(c)(5)(C) of the Commodity Exchange Act and Commission Regulation 40.11, the proposed Congressional Control Contracts: (1) involve gaming and activity that is unlawful under State law; (2) are contrary to the public interest; and (3) therefore, may not be listed by, or made available for clearing or trading on or through, KalshiEX LLC.

Dissenting Statement of Commissioner Summer K. Mersinger Regarding Order on Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives

I respectfully dissent from the Order Prohibiting Listing for Trading of Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives (the “Order”). I cannot support the Commission¹ taking this trip “through the looking glass”² in order to cover up the fact that for over 13 years, it has failed to follow the process that Congress specifically authorized for situations like this: A notice-and-comment rulemaking.

As I have stated publicly before,³ my dissent should not be taken as an endorsement of the contracts before us. But even if the Commission thinks these contracts are a bad idea, that does not give us the authority to re-write the statute to claim an authority that Congress did not give us because we have been derelict in applying the authority that Congress did give us. Accordingly, I respectfully dissent.

The CFTC’s Statutory Authority

Our governing statute, the Commodity Exchange Act (“CEA”), grants the CFTC the authority to prohibit an “event contract” from being listed for trading if it involves one of five specifically enumerated activities and is contrary to the public interest.⁴

The Order rejects event contracts with respect to control of the U.S. Senate and House of Representatives (“Congressional Control Contracts”) that KalshiEx, LLC (“Kalshi”), a registered exchange (referred to in the CEA as a “designated contract market” or “DCM”), wants to list for trading. The Order

1. Finds that the Congressional Control Contracts involve an enumerated activity even though none of the enumerated activities mentions Congressional control, or elections, by
 - Mischaracterizing the nature of the contracts; and
 - Adding words to the statute that are not there.
2. Finds that the Congressional Control Contracts are contrary to the public interest on the basis of an “economic purpose test” that
 - Is not mentioned in the statute;

¹ This Statement will refer to the agency as the “Commission” or “CFTC.” All web pages cited herein were last visited on September 21, 2023.

² Lewis Carroll, *Through the Looking-Glass and What Alice Found There* (Chicago, W.B. Conkey Co. 1900).

³ See Dissenting Statement of Commissioner Summer K. Mersinger Regarding Commencement of 90-Day Review Regarding Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives (June 23, 2023), available at [Dissenting Statement of Commissioner Summer K. Mersinger Regarding Commencement of 90-Day Review Regarding Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives | CFTC](#).

⁴ CEA Section 5c(c)(5)(C)(i)(I)-(V), 7 U.S.C. § 7a-2(c)(5)(C)(i)(I)-(V).

- Has been eliminated for other purposes as a result of amendments to the CEA; and
- Was not designed for the type of contract at issue.

Event Contracts in Brief

CEA Section 5c(c)(5)(C), which was added to the CEA in 2010 by the Dodd-Frank Act,⁵ provides that the Commission may determine that event contracts based upon the occurrence, extent of an occurrence, or contingency are “contrary to the public interest” if they “involve” one of five enumerated categories: 1) activity that is unlawful under any Federal or State law; 2) terrorism; 3) assassination; 4) war; or 5) gaming.

1. The Commission’s Event Contracts Rule is Inconsistent With, and Contradicts, the CEA

The Commission’s practice of adding words to the CEA’s event contract provisions began early, when it implemented CEA Section 5c(c)(5)(C) by promulgating CFTC Rule 40.11⁶ about a year after enactment of the Dodd-Frank Act.⁷ Whereas CEA Section 5c(c)(5)(C) grants the Commission discretion to determine whether a DCM’s event contract is contrary to the public interest if the contract “involves” one of the enumerated categories, Rule 40.11 refers to an event contract that “involves, relates to, or references” an enumerated category.

Even worse, Rule 40.11 contradicts the statute. CEA Section 5c(c)(5)(C) grants the Commission discretion to determine *whether* a DCM’s event contract that involves an enumerated activity is contrary to the public interest. CFTC Rule 40.11(a), by contrast, provides that a DCM “*shall not* list for trading” a contract that involves (or relates to, or references) an enumerated activity (emphasis added). Read literally, Rule 40.11(a) removes entirely the flexibility that Congress granted the Commission to evaluate DCM event contracts from a public interest perspective.

Our rules should provide market participants and the public with clarity and certainty as to how the Commission interprets the CEA. Unfortunately, the Commission’s Rule 40.11 regarding event contracts creates confusion rather than clarity by adding words that are not present in the statute and contradicting the provisions of the CEA they purport to construe.

I cannot support an Order that is based, in part, on a rule with these legal shortcomings. For purposes of my vote and this Statement, therefore, I have analyzed Kalshi’s Congressional Control Contracts pursuant to the statutory provisions in CEA Section 5c(c)(5)(C), not the provisions of CFTC Rule 40.11.

2. The Commission’s Prior Order Regarding Event Contracts is Distinguishable, and Wrong

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”).

⁶ CFTC Rule 40.11, 17 C.F.R. § 40.11.

⁷ See Provisions Common to Registered Entities, 76 Fed. Reg. 44776 (July 27, 2011) (“Rule 40.11 Adopting Release”).

The Order generally adheres to the Commission's only public interpretation of CEA Section 5c(c)(5)(C) back in 2011-2012, which prohibited event contracts that another DCM, the North American Derivatives Exchange ("Nadex"), sought to list for trading.⁸ Nadex sought to list contracts that were similar to Kalshi's Congressional Control Contracts, but importantly, Nadex also sought to list 10 U.S. Presidency binary contracts.

The Commission's rejection of the Nadex request undoubtedly was influenced by the Nadex request to let traders take a position directly on the result of a Presidential election. Kalshi has not made that request—its contracts are limited to Congressional control. Thus, the Commission's action regarding Nadex is distinguishable.

But even if the Nadex contracts on Congressional control are considered separately, in the words of Socrates, "it is better to change an opinion than to persist in a wrong one."⁹ While restating the conclusions of the Nadex Order might be the path of least resistance, I believe that we should embrace the wisdom of Socrates and change our opinion, rather than persist in a wrong one.

Kalshi's Congressional Control Contracts Do Not Involve an Enumerated Activity that is Subject to a Public Interest Review Under the CEA

The Congressional Control Contracts are cash-settled, binary (yes/no) contracts based on which political party will control a chamber of the U.S. Congress for a given term. The settlement values of the Congressional Control Contracts are determined by the party affiliation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate.¹⁰

As noted above, to be subject to a public interest review, CEA Section 5c(c)(5)(C) requires that an event contract "involve" an enumerated activity. But the enumerated activities in CEA Section 5c(c)(5)(C) do not mention Congressional control.

Accordingly, in an effort to find an enumerated activity into which it can squeeze the Congressional Control Contracts nonetheless, the Order focuses on individual elections for the House and Senate: "The Congressional Control Contracts are premised on the outcome of Congressional election contests, which ultimately determine the party affiliation of the Speaker and the [President Pro Tempore]."¹¹

1. The Order's Focus on Individual Elections is Flawed

There are three flaws in the Order's focus on individual Congressional elections as the source of an enumerated activity subject to a public interest review. First and foremost, just as the enumerated activities in CEA Section 5c(c)(5)(C) do not mention Congressional control, they

⁸ See CFTC Order Prohibiting North American Derivatives Exchange's Political Event Derivatives Contracts (April 2, 2012) ("Nadex Order"), available at <https://www.cftc.gov/PressRoom/PressReleases/6224-12>.

⁹ See Liz Flynn, "20 Socrates Quotes that Apply to Business," Money Inc. (March 29, 2020), available at <https://moneyinc.com/socrates-quotes/>.

¹⁰ See Order at 2.

¹¹ *Id.* at 10 (footnote omitted).

also do not mention elections, either. Congress easily could have listed Congressional control, or elections, or both, as enumerated activities subject to a public interest review; it did not.

Second, the Order's focus on individual Congressional elections mischaracterizes the nature of Kalshi's Congressional Control Contracts. While it is generally custom for the House to elect as Speaker a member of the party in the majority,¹² and for the Senate to select as President Pro Tempore the longest-serving Senator from the party of the majority, these are not requirements under the Constitution.¹³ In fact, before 1890, the President Pro Tempore was not selected based on an election outcome at all. Rather, the Senator to hold that office was selected every time the Vice President was not present in the Senate Chamber.¹⁴ Additionally, in years when the Senate has been closely divided, the legislative body has seen more than one President Pro Tempore designate a second Senator as "president pro tempore emeritus."¹⁵

The Speaker of the House does not have to be an elected member of the House or a candidate formally nominated by the two dominant parties.¹⁶ There even has been discussion of the possibility of a non-sitting House member being nominated for Speaker.¹⁷ There also are numerous press accounts during times of narrow divide in the House that led to speculation about the majority party's lacking the necessary votes for Speaker, which would allow the minority party's Speaker nominee to win the majority of votes.¹⁸

¹² See *Speakers of the House (1789 to Present)*, U.S. House of Representatives, History, Art & Archives, available at <https://history.house.gov/People/Office/Speakers-Intro/#:~:text=The%20Speaker%20is%20elected%20at,the%20new%20Congress%20is%20elected.>

¹³ See *About the President Pro Tempore*, United States Senate, available at <https://www.senate.gov/about/officers-staff/president-pro-tempore.htm#:~:text=The%20Constitution%20instructs%20the%20Senate,conceived%20as%20a%20temporary%20replacement.>

¹⁴ See *About the President Pro Tempore: Historical Overview*, United States Senate, available at <https://www.senate.gov/about/officers-staff/president-pro-tempore/overview.htm>.

¹⁵ See *About the President Pro Tempore: Presidents Pro Tempore*, United States Senate, at n.5, available at <https://www.senate.gov/about/officers-staff/president-pro-tempore/presidents-pro-tempore.htm>.

¹⁶ Valerie Heitshusen, *Speakers of the House: Elections, 1913-2023*, Congressional Research Service, 4 (September 14, 2023), available at <https://crsreports.congress.gov/product/pdf/RL/RL30857>. In 12 of the 15 elections since 1997, at least one member has voted for a candidate who was not formally nominated by either major party. In every initial ballot for the Speaker since 2013 (excluding 2017) at least one candidate receiving a vote or votes was not a member of the U.S. House of Representatives. *Id.*

¹⁷ See Pete Williams, *Can an Outsider be Speaker of the House?*, NBC News (October 9, 2015), available at <https://www.nbcnews.com/politics/congress/can-outsider-be-speaker-house-n441926>.

¹⁸ See Sarah Ferris, John Bresnahan, and Heather Caygle, *Pelosi Faces Tight Margins for Speaker's Vote*, Politico (December 11, 2020), available at <https://www.politico.com/news/2020/12/11/nancy-pelosi-speaker-vote-444409>; Philip Ewing, *Pelosi is Narrowly Reelected Speaker*, NPR (January 3, 2021), available at <https://www.npr.org/2021/01/03/952422397/pelosi-poised-to-be-reelected-speaker-but-slimmer-majority-makes-it-tight>; and Benjamin Siegel and John Parkinson, *Pelosi Wins Tight Race for House Speaker*, ABC News (January 3, 2021), available at <https://abcnews.go.com/Politics/nancy-pelosi-faces-razor-thin-margin-house-speaker/story?id=75017441>.

The point is that the selection of the Speaker of the House and the President Pro Tempore of the Senate are decisions that are independent of the individual Congressional elections that precede them. While it may be customary that the party affiliation of these officials is premised on the outcome of the elections, that is neither legally required nor guaranteed. The Order's focus on individual Congressional elections in determining whether the Congressional Control Contracts are subject to a public interest review mischaracterizes the nature of these contracts given their method of settlement.

Third, and relatedly, Kalshi's Congressional Control Contracts do not directly involve any particular election. No one election will determine which party wins, and which party loses, on a Congressional Control Contract. Rather, given its settlement mechanism, the result of a Congressional Control Contract depends indirectly on the cumulative outcomes of 435 elections for the House, and approximately 33 elections for the Senate (combined with the party affiliations of the other approximately 67 Senators for whom there are no elections).

Again, to be subject to a public interest review, CEA Section 5c(c)(5)(C) requires that an event contract "involve" an enumerated activity. There is little doubt that an event contract directly on the election of a particular candidate to a particular office — such as the U.S. Presidency contracts that Nadex sought to list for trading — "involves" an election. But to reach Kalshi's Congressional Control Contracts, the Order reads CEA Section 5c(c)(5)(C) as requiring that an event contract "involve, directly or indirectly," an enumerated activity. The statute, however, contains no such reference to indirect involvement of the type presented here.¹⁹

Thus, the Order's focus on individual elections is flawed. Elections are not an enumerated activity in CEA Section 5c(c)(5)(C). And the Order, without any discussion or analysis: 1) mischaracterizes the settlement method of the Congressional Control Contracts as the inexorable result of individual elections; and 2) erroneously treats the indirect relationship between the Congressional Control Contracts and individual elections the same as the direct relationship of an event contract on the result of a specific election.²⁰

¹⁹ Congress knows how to reference indirect activity, as our research has identified 18 instances in which it has used the phrase "directly or indirectly" elsewhere in the CEA. See CEA Sections 1a(7), 1a(14), 2(a)(1)(C)(v)(IV), 2(a)(8), 4a(a)(1), 4a(b)(1) and (2), 4b(c), 4c(a)(4)(A), 4f(c)(1)(i), 4i (three times), 4o(1), 4t(a)(1)(A) and (B), 4t(c), and 5b(a)(1); 7 U.S.C. §§ 1a(7), 1a(14), 2(a)(1)(C)(v)(IV), 2(a)(8), 6a(a)(1), 6a(b)(1) and (2), 6b(c), 6c(a)(4)(A), 6f(c)(1)(i), 6i (three times), 6o(1), 6t(a)(1)(A) and (B), 6t(c), and 7a-1(a)(1). Most notably, CEA Section 2(a)(8), 7 U.S.C. § 2(a)(8), provides that no Commissioner or employee of the Commission "shall . . . *participate, directly or indirectly*, in any registered entity operations or transactions of a character subject to regulation by the Commission." (Emphasis added) Congress thus specifically brought indirect "participation" within the scope of CEA Section 2(a)(8), but it chose not to do so with respect to indirect "involvement" in CEA Section 5c(c)(5)(C) with respect to event contracts.

²⁰ In another context, the Order cites dictionary definitions of the word "involve" that include "to relate to or affect," "to relate closely," to "entail," or to "have as an essential feature or consequence." See Order at 5 and n.11. If it is being suggested that the word "involve" therefore necessarily encompasses indirect involvement, I disagree. For example: If my son plays in his team's soccer game, he is directly "involved" in that game; if I watch the game from the stands, I am indirectly "involved" in the game. There is a distinction between direct and indirect involvement, and unlike other provisions of the CEA, Congress did not say that its use of the word "involve" in CEA Section 5c(c)(5)(C) includes indirect involvement such as the indirect relationship of the Congressional Control Contracts to individual Congressional elections.

2. The Congressional Control Contracts Do Not Involve Gaming or Activity that is Unlawful Under State Law

Even if we overlook these fundamental flaws in its analysis and accept the Order's focus on individual elections, the Order fails to establish that the Congressional Control Contracts involve the enumerated activities of: 1) gaming; and 2) activity that is unlawful under State law. Neither category applies.

The Order recognizes that neither the CEA nor the Commission's rules define the term "gaming."²¹ In the Rule 40.11 Adopting Release implementing CEA Section 5c(c)(5)(C), the Commission acknowledged that "the term 'gaming' requires further clarification," and said that the Commission may issue a future rulemaking concerning event contracts that involve "gaming."²² But no such future Commission rulemaking has been forthcoming.

Lacking any definition or clarification of the term "gaming" with which to evaluate the Congressional Control Contracts, the Order attempts to divine the term's "ordinary meaning" through the following tortured chain of reasoning:

- Gaming means gambling;
- Several state statutes link gambling to betting or wagering on elections; and, therefore,
- The Congressional Control Contracts constitute gaming.²³

The Order engages in this sophistry because, based on the descriptions provided in the Order, 7 of the 8 state statutes that it cites that use either the term "gaming" or the term "gambling" use "gambling."²⁴ As a result, the statement in the Order that several state statutes, "on their face," link the term "gaming" to betting or wagering on elections²⁵ is misleading.

Alas, though, the Order's linguistic gymnastics equating "gaming" with "gambling" are undermined by one of the very state statutes it cites. The cited Kentucky statute defines "gambling" as "staking or risking something of value upon the outcome of a contest, game, *gaming scheme, or gaming device* which is based upon an element of chance . . ."²⁶ If "gaming" means "gambling," then there would be no need for the statute's redundant definition of "gambling" as a "gaming scheme, or gaming device."

²¹ See Order at 8.

²² Rule 40.11 Adopting Release, 76 Fed. Reg. at 44785.

²³ See Order at 8-9.

²⁴ *Id.*, n.22 and 24. The 7 cited state statutes that the descriptions in the Order indicate refer to "gambling" and not "gaming" are Georgia, New York, Texas, Virginia, Illinois, Nebraska, and North Dakota. The only cited state statute that uses the term "gaming" as opposed to "gambling" is New Mexico.

²⁵ *Id.* at 9.

²⁶ *Id.* at 8 n.22 (citing Ky. Rev. Stat. Ann. § 528.010(6)(a) (West 2023)) (emphasis added).

Indeed, one has to ask: If Congress intended for “gambling” to be an enumerated activity, is it more likely that Section 5c(c)(5)(C) would have:

- Included “gambling” in its list of enumerated activities; or
- Enumerated “gaming” and hoped the Commission would consider “gaming” to mean “gambling”?

That the answer is the former becomes even clearer when it is noted that the one federal statute cited in the Order – the Unlawful Internet *Gambling* Enforcement Act²⁷ – uses the word “gambling” (not “gaming”) in its very title.

The Order eschews a much more natural interpretation of the ordinary meaning of “gaming” in Section 5c(c)(5)(C): Risking money on the result of a *game*. Cambridge Dictionary defines “gaming” as “the risking of money in games of chance, especially at a casino; gaming machines/tables.”²⁸

In fact, this was how Senators Lincoln and Feinstein viewed gaming in the very colloquy about CEA Section 5c(c)(5)(C) that is cited in the Order. In responding to Senator Feinstein’s question about the Commission’s authority under Section 5c(c)(5)(C) to determine that a contract is a gaming contract, Senator Lincoln said that “[i]t would be quite easy to construct an ‘event contract’ around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament.”²⁹ Thus, the legislative history associates gaming with sporting events, *i.e.*, games.³⁰

With respect to the enumerated category of activity that is unlawful under State law, I do not question that placing bets or wagers directly on the result of an election of a public official would violate the statutes and common law cited in the Order. But as discussed above, the Congressional Control Contracts do not settle directly on the election of any individual Representative of Senator. The Order does not cite any authority that any state statute or common law could be used – and no instance in which it has been used – to prosecute a person for staking something of value upon the political party that will control the U.S. House of

²⁷ *Id.* at 9 (citing the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367) (emphasis added).

²⁸ See “gaming” definition, CAMBRIDGE DICTIONARY, available at <https://dictionary.cambridge.org/us/dictionary/english/gaming>.

²⁹ See 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.

³⁰ In a footnote, the Order asserts that “[n]one of the Super Bowl, the Kentucky Derby, or the Masters Golf Tournament are, of themselves, ‘gaming.’” and that “sports typically are not understood to be ‘gaming’ – they are understood to be ‘games.’” It cites no statute, legislative history, court decision, or other authority, to support either assertion. See Order at 7 n.18.

Representatives or Senate as an indirect result of a multitude of elections (and, in the Senate, the party affiliations of Senators who are not even up for election).³¹

Again, if Congress had intended for event contracts involving Congressional control to be an enumerated activity, it easily could have done so, either by explicitly enumerating it or by enumerating event contracts that involve, directly or indirectly, elections. Confronted instead with Congressional silence, I do not believe the Commission can simply decree that the Congressional Control Contracts are subject to a public interest review. And this is especially the case when Congress provided the Commission with another path—a notice-and comment rulemaking—which path the Commission has failed to follow for many years now.

In addition to the five enumerated categories of activity set out above, CEA Section 5c(c)(5)(C) also includes a sixth category providing that the Commission may determine that an event contract that involves “other similar activity” to the enumerated categories is contrary to the public interest. Congress included an important caveat, though: The Commission can only exercise its discretion to determine that a contract involving “other similar activity” is contrary to the public interest by rule or regulation.³²

Thus, Section 5c(c)(5)(C) contains a ready-made process for the Commission to determine, through a public rulemaking, whether event contracts involving Congressional control are appropriate for listing and trading by DCMs like Kalshi. Further, a rulemaking process would allow the Commission to fix the obvious legal shortcomings in existing Rule 40.11, which implements CEA Section 5c(c)(5)(C), as discussed above.

At any point during the 13 years since the enactment of the Dodd-Frank Act, the Commission could have undertaken such a public rulemaking process as specifically provided for in Section 5c(c)(5)(C). Such a rulemaking could have, among other things, defined the term “gaming,” identified activities that the Commission considers “similar” to the enumerated activities and would therefore be subject to a public interest review, and set forth standards and criteria the Commission would use in determining whether to exercise its discretion to undertake such a public interest review.³³

The Commission has been aware that there is significant interest in event contracts relating directly to elections, and to Congressional control, for a very long time. In 2008, two years before the Dodd-Frank Act became law, the Commission was already struggling with the treatment of event contracts. In its “Concept Release on the Appropriate Regulatory Treatment of Event Contracts,” the Commission stated:

³¹ At least one state statute cited in the Order could not be used for that purpose, since the Order indicates that it is expressly limited to municipal elections. See Order at 11 n.26 (citing Colo. Rev. Stat. Ann. § 31-10-1531 (West)).

³² CEA Section 5c(c)(5)(C)(i)(VI); 7 U.S.C. § 7a-2(c)(5)(C)(i)(VI).

³³ Actually, since event contracts generally take the form of binary options, the Commission had statutory authority even before the Dodd-Frank Act to engage in a rulemaking process pursuant to its plenary authority over trading in options pursuant to CEA Section 4c(b), 7 U.S.C. § 6c(b).

[E]vent contracts may be based on eventualities and measures as varied as the world's population in the year 2050, *the results of political elections*, or the outcome of particular entertainment events. The Commission's staff has received a substantial number of requests for guidance on the propriety of trading various event contracts under the regulatory rubric of the Commodity Exchange Act . . .³⁴

In addition, the Commission's staff has issued two no-action letters permitting the offer of political indicator event contracts to U.S. persons without registration as a DCM, which relief remains in effect today.³⁵ Finally, as noted above, in 2011, Nadex (a registered DCM like Kalshi) sought to list event contracts based on majority control of the House and Senate similar to Kalshi's Congressional Control Contracts, as well as 10 U.S. Presidency binary contracts.

Yet, rather than undertake the hard work of a rulemaking process to build a foundation for evaluating event contracts such as the Congressional Control Contracts, the Commission has squandered the decade since the enactment of the Dodd-Frank Act and the issuance of the Nadex Order. Even during the year since Kalshi initially submitted its contracts,³⁶ the Commission still has not initiated a rulemaking process as expressly provided for in the CEA.³⁷ *It is wholly inconsistent with principles of "good government" for the Commission to subject DCM event contracts to a public interest review without providing any regulatory certainty as to the definitions and standards it will apply in doing so.*

A Commission Rulemaking on Event Contracts Should Address the Flawed Public Interest Review in The Order, Too

³⁴ Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 Fed. Reg. 25669 (May 7, 2008) (footnotes omitted, emphasis added) ("Event Contract Concept Release").

³⁵ See CFTC Letter No. 93-66 (Division of Trading and Markets, June 18, 1993), issued to the Iowa Electronic Market, available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/93-66.pdf>, and CFTC Letter No. 14-130 (Division of Market Oversight, October 29, 2014), issued to Victoria University of Wellington in New Zealand, available at <https://www.cftc.gov/cs/14-130/download>. In both cases, the markets were to be operated on a non-profit basis, for academic and research purposes only, and subject to certain limitations intended to keep the markets relatively small.

³⁶ Kalshi initially submitted a prior version of its Congressional Control Contracts for Commission approval on July 20, 2022 (the "2022 Submission"), but later withdrew that request on May 16, 2023, before the Commission had issued a decision. On June 12, 2023, Kalshi certified the Congressional Control Contracts that are the subject of the Order. Although the certified contracts currently before the Commission include three revisions to address concerns that were voiced about the prior iteration of the contracts, they are materially similar to the original contracts, and as a result, the vast majority of substantive public comments from the 2022 Submission continue to apply. Accordingly, this Statement will cite to comment letters submitted on both the 2022 Submission and the current Congressional Control Contracts that are before us.

³⁷ The CFTC's Spring 2023 regulatory agenda, published as part of the government-wide Unified Agenda of Federal Regulatory and Deregulatory Actions, includes an event contracts rulemaking. See Regulatory Information Service Center, Unified Agenda of Regulatory and Deregulatory Actions (Spring 2023), available at [Agency Rule List - Spring 2023 \(reginfo.gov\)](https://www.reginfo.gov). Sadly, though, the stated target date for issuance of a notice of proposed rulemaking on event contracts was September 2023, which target obviously will be missed.

A rulemaking process on event contracts, as contemplated by Congress, also would enable the Commission, for the first time, to interpret the “contrary to the public interest” standard in CEA Section 5c(c)(5)(C) (both generally, and with respect to event contracts on Congressional control and directly on elections in particular). Specifically, such a rulemaking should establish the identifiable factors the Commission will consider when evaluating event contracts pursuant to that standard.

Such a rulemaking is vitally important because the public interest review set out in the Order is fundamentally flawed – which is another reason for my dissent.

1. The Order Improperly Resurrects, Based on a Single and Ambiguous Colloquy, the Economic Purpose Test that the CFTC Previously Removed for Other Purposes

The CEA does not define “public interest” for purposes of CEA Section 5c(c)(5)(C). The Order relies on legislative history of Section 5c(c)(5)(C) to conclude that Congress purportedly intended, for purposes of a public interest review of an event contract, to resurrect “a form of the economic purpose test” that the Commission had used to determine whether contracts were contrary to the public interest – until that public interest requirement was removed from the CEA by the Commodity Futures Modernization Act of 2000 (“CFMA”).³⁸

The legislative history that the Order is relying on with respect to the resurrection of the economic purpose test consists of a single colloquy between Senator Dianne Feinstein and Senator Blanche Lincoln, reading in relevant part as follows:

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. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling.³⁹

To be clear, the Dodd-Frank Act did not codify the economic purpose test in the CEA. And I cannot accept the Commission’s conclusion that this isolated colloquy between two Senators establishes an intent by the whole of Congress that the Commission conduct its public interest

³⁸ Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000). The Order notes that the pre-CFMA economic purpose test looked to “whether the contract reasonably can be expected to be, or has been, used for hedging and/or price basing on more than an occasional basis.” But it then goes a step further and asserts that the legislative history of CEA Section 5c(c)(5)(C) indicates Congressional intent to modify the economic purpose test to be used by the Commission in conducting its public interest reviews of event contracts to consider instead “whether a contract is used predominantly by speculators or market participants not having a commercial or hedging interest.” See Order at 13-14 and n.29.

³⁹ Feinstein-Lincoln colloquy, n.29, *supra*.

reviews of event contracts based on the economic purpose test that had been eliminated as a result of amendments to the statute a decade earlier.

After all, neither Senator Feinstein nor Senator Lincoln used the term “economic purpose test.” As someone who spent over a decade working in Congress, and who was present on the Senate floor for countless colloquies and even had a hand in preparing talking points for similar floor discussions, I am confident that if the Senators believed we should resurrect the economic purpose test, they would have said just that.⁴⁰

2. The Order Applies an Economic Purpose Test That Was Not Designed for Contracts Like the Congressional Control Contracts

The two prongs of the economic purpose test, which the Order adopts as a primary component of its public interest review of the Congressional Control Contracts, evaluate: 1) the contract’s utility for price basing; and 2) whether the contract can be used for hedging purposes.

The Order states the price basing prong of the economic purpose test as follows: “[P]rice-basing occurs when producers, processors, merchants, or consumers of a commodity establish commercial transaction prices *based on the futures price* for that or a related commodity.”⁴¹ As the Order thus indicates, the price basing prong of the economic purpose test was designed primarily for the traditional futures contracts that were listed and traded on futures exchanges for decades before Congress enacted the CFMA in 2000. The Order confirms this by attributing the foregoing statement of price basing to the CFTC’s “*Futures Glossary*.”⁴² Further, the Feinstein-Lincoln colloquy makes clear that the Senators’ statements about economic purpose were made with futures contracts in mind.⁴³

The Order then finds that the Congressional Control Contracts fall short with respect to price basing: “[T]he price of the Congressional Control Contracts is not directly correlated to the price of any commodity, and so the price of the Congressional Control Contracts could not predictably

⁴⁰ The Order tries to bolster the basis for applying the economic purpose test by citing to the Congressional findings in CEA Section 3(a), 7 U.S.C. § 5(a), that “[t]he transactions subject to [the CEA] . . . are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair, and secure financial facilities.” But the question at hand is whether Congress, when it enacted the Dodd-Frank Act, intended to resurrect the economic purpose test and require that it be used by the Commission in determining whether an event contract that falls into an enumerated category is contrary to the public interest pursuant to CEA Section 5c(c)(5)(C). For the reasons set forth above, it did not.

⁴¹ See Order at 18 (emphasis added; footnote omitted).

⁴² *Id.* at 18 n.36 (emphasis added).

⁴³ Senator Lincoln cited terrorist attacks, war and hijacking as examples of events that “pose a real commercial risk to many businesses in America,” but stated that “a *futures contract* that allowed people to hedge that risk [of terrorist attacks, war, and hijacking] . . . would be contrary to the public interest.” Senator Feinstein thanked Senator Lincoln and concluded that “[a] *futures market* is for hedging.” Order at 14 n.30 (quoting Feinstein-Lincoln Colloquy, n.29, *supra*) (emphasis added).

be used to establish commercial transaction prices.”⁴⁴ This is not surprising, given that traditional futures contracts differ significantly from binary (yes/no) event contracts such as Kalshi’s Congressional Control Contracts.

As noted above, the Commission’s own Event Contract Concept Release in 2008 recognized that unlike traditional futures contracts, event contracts do not necessarily relate to market prices. The Commission stated that “[i]n general, event contracts are neither dependent on, nor do they necessarily relate to, market prices or broad-based measures of economic or commercial activity,” and elaborated as follows:

Since 2005, the Commission’s staff has received a substantial number of requests for guidance on the propriety of offering and trading financial agreements that may primarily function as *information aggregation vehicles*. These event contracts generally take the form of financial agreements linked to eventualities or measures that *neither derive from, nor correlate with, market prices* or broad economic or commercial measures.⁴⁵

In other words, the structure of a wide array of event contracts (described by the Event Market Concept Release as “information aggregation vehicles”) may preclude them from satisfying the Order’s price basing requirement. This is the inevitable result of imposing an economic purpose test that was not designed for event contracts.

The same is true with respect to the hedging purpose prong of the economic purpose test. That is, the Order holds the Congressional Control Contracts to a hedging purpose requirement that may be difficult for them to meet because that test was not designed for this type of contract. The Order itself recognizes this when it says that “the binary payout of the Congressional Control Contracts . . . limits their utility as a vehicle for hedging any eventual economic effects resulting from which party controls a chamber of Congress.”⁴⁶

Thus, the Order determines that the Congressional Control Contracts are contrary to the public interest by using an economic purpose test that was not designed for such contracts. As a result,

⁴⁴ Order at 19.

⁴⁵ Event Contract Concept Release, 73 Fed. Reg. at 25669-25670 (emphasis added). More specifically, the Event Contract Concept Release noted that: 1) event contracts based on environmental measures (such as the volatility of precipitation or temperature levels) or environmental events (such as a specific type of storm within an identifiable geographic region) will “not predictably correlate to commodity market prices or other measures of broad economic or commercial activity;” and 2) event contracts based on general measures (such as the number of hours that U.S. residents spend in traffic annually or the vote-share of a particular candidate) “do not quantify the rate, value, or level of any commercial or environmental activity,” and that contracts on general events (such as whether a Constitutional amendment will be adopted) “do not reflect the occurrence of any commercial or environmental event.” *Id.* at 25671.

⁴⁶ Order at 18. *See also* European Securities and Market Authority (“ESMA”), Product Intervention Analysis – Measure of Binary Options at 14 (June 1, 2018) (“Unlike vanilla options, which are often used for hedging purposes, binary options provide a fixed payoff if a specified event occurs . . . This inherent feature of the [binary options] products limits the value of the product as a hedging tool . . .”), available at [esma50-162-214-product-intervention-analysis-binary-options.pdf](https://www.esma.europa.eu/press-news/esma-50-162-214-product-intervention-analysis-binary-options.pdf) (europa.eu).

it imposes price basing and hedging requirements that many event contracts, due to their structure, may have little chance to pass. A public rulemaking process should fully explore whether this is appropriate, or whether the Commission should instead develop a standard for a public interest review of event contracts that is appropriately tailored and well-suited to the nature of the contracts being reviewed.

3. The Order Improperly Rejects, Without Discussion or Analysis, Comments from Experts that the Congressional Control Contracts Meet the Economic Purpose Test

Notwithstanding the foregoing questions as to whether the economic purpose test should be applied to Kalshi's Congressional Control Contracts, several distinguished economists, academics, and professional market participants have submitted comment letters explaining how the Congressional Control Contracts meet the price basing and hedging purpose prongs of that test.⁴⁷ The Order acknowledges some of these comments in a cursory manner, but summarily dismisses them, saying only that "the Commission has considered [their] assertions."⁴⁸ The Order does not point to any economic analyses or academic studies to rebut these comments from experts in their fields.

Rather, the Order simply decrees with respect to price basing that "the price of the Congressional Control Contracts could not predictably be used to establish commercial transaction prices." It ignores the input of several academics who commented to the contrary:

In our experience observing the market, financial market participants routinely use the probability of various parties' controlling Congress (and the Presidency) to accurately price various assets. An accurate valuation of many investments, assets, physical commodities, and the value of services requires an accurate assessment of the future trajectory of the political environment. The political environment has significant and predictable impacts on business, and it is a significant factor that affects valuations.⁴⁹

Similarly, the Order simply decrees with respect to hedging:

[C]ontrol of a chamber of Congress could, following a number of independent intervening events, generally affect a wide variety of personal liabilities and economic factors, but that does not establish that the Congressional Control Contracts can be used

⁴⁷ See, e.g., Letter from Jason Furman (filed September 18, 2022) (former Chairman of the Council of Economic Advisers under President Obama, serving as his Chief Economist); Letter from Robert Shiller (filed September 24, 2022) (recipient of Nobel Prize in Economic Sciences, joined by seven professors and academic researchers in economics, political science, and law); Letter from Christopher Hehmeyer (filed September 20, 2022) (futures market participant since 1977, former Chairman of the National Futures Association and board member of the Futures Industry Association); and Letter from Justin Wolfers (filed July 23, 2023) (professor of public policy and economics, University of Michigan, joined by four other professors of economics, law, and business).

⁴⁸ Order at 16; see also Order at 18.

⁴⁹ Wolfers, *et al.*, Letter at 1; accord, Shiller, *et al.*, Letter at 1.

for specific, identifiable hedging purposes and thus does not establish the hedging utility of the Congressional Control Contracts.⁵⁰

There are several deficiencies in the Order's hedging analysis. First, the Order focuses on hedging with respect to particular public policies, and fails to meaningfully address the point raised by Christopher Hehmeyer (with 45 years of experience in the futures business), who focused not on "the contract's utility for hedging *policy risk* that is associated with Congressional control," but rather "on the contract's utility for hedging the *direct risk* that stems from Congressional control and elections in general," citing as examples media companies and consultancies, among others.⁵¹

What is more, given the Order's acknowledgement that control of a chamber of Congress could generally affect a wide variety of personal liabilities and economic factors, its conclusion regarding hedging simply amounts to a view that the Congressional Control Contracts may not be particularly good hedging vehicles. Indeed, the Order makes that explicit elsewhere when it states that "control of a chamber of Congress does not, in and of itself, have sufficiently direct, predictable, or quantifiable economic consequences for the Congressional Control Contracts *to serve an effective hedging function.*"⁵²

Market participants should be permitted to make their own choices about what financial products meet their hedging needs.⁵³ It is simply not the CFTC's role to deny them that choice altogether because we feel a given product is not "effective enough" for hedging purposes.

If the Commission is going to insist on determining whether an event contract is contrary to the public interest based on an economic purpose test that is not mentioned in the CEA and was not designed for these types of contracts, it should engage in notice-and-comment rulemaking and specifically address the arguments and conclusions of those who share their professional expertise with us – rather than dismiss them out-of-hand, as in the Order.

The Order's Unfortunate Consequences

The Commission's issuance of this Order prohibiting the listing for trading of Kalshi's Congressional Control Contracts will lead to several unfortunate consequences that, I regret, will reflect poorly on the Commission.

First, it puts the Commission in the untenable position of prohibiting a registered and regulated exchange from listing event contracts relating to Congressional control, while the Iowa Electronic Market and Victoria University of Wellington currently can undertake the same

⁵⁰ Order at 17.

⁵¹ Hehmeyer Letter at 1 (emphasis in the original).

⁵² Order at 15 (emphasis added).

⁵³ Commenters supported this view. See Wolfers, *et al.*, Letter at 2 ("... the CFTC should not substitute its judgment for market participants' own assessment of their risks and how best to manage their risk"); accord, Shiller, *et al.*, Letter at 2 (same).

activity outside of the regulatory framework of the CEA. I recognize that the staff no-action relief to these latter markets is based on their representations that they are small, non-profit markets. Still, having found that contracts on Congressional control constitute gambling and are contrary to the public interest, it is difficult to understand how the Commission can credibly say that a little unregulated gambling in this area for academic purposes is acceptable.

Second, absent a notice-and-comment rulemaking process, the Commission continues to shroud its approach to event contracts in mystery. The Order contravenes Congress' direction that the CFTC promote responsible innovation,⁵⁴ and undermines the CFTC's commitment to its own stated Core Values of being "Forward-Thinking" (*i.e.*, challenging ourselves to stay ahead of the curve) and providing "Clarity" (*i.e.*, providing transparency to market participants about our rules and processes).⁵⁵

Finally, while the Commission can (and should) still undertake a rulemaking process to define terms such as "gaming" and "contrary to the public interest," and to identify the factors the Commission will use to determine whether DCM event contracts involve activity similar to the enumerated categories in CEA Section 5c(c)(5)(C) and are contrary to the public interest—doing so after issuing this Order is hardly "good government." If such a rulemaking were to conclude that event contracts such as the Congressional Control Contracts are permissible, Kalshi (like Nadex before it) will have been deprived of an opportunity to list a potentially profitable new business line, and market participants will have been deprived of the opportunity to hedge risks acknowledged by many economists, academics, and derivatives professionals as genuine. On the other hand, if such a rulemaking were to conclude that such event contracts are impermissible, it will inevitably be viewed by many as intended simply to rubber-stamp the conclusion that the Commission has already reached in this Order.

Conclusion

Which brings me back to where I began. Congress could have enumerated event contracts involving Congressional control (and/or indirectly on elections) in the Dodd-Frank Act. It did not do so. Instead, Congress entrusted the CFTC with the discretion to determine, through a rulemaking process: 1) whether such contracts are similar to any of the enumerated activities in CEA Section 5c(c)(5)(C)); and, if so, 2) whether they are contrary to the public interest.

Again, my dissent should not be taken as an endorsement of Kalshi's Congressional Control Contracts. Commenters have raised serious concerns about election integrity that warrant careful consideration by the Commission. Kalshi inevitably runs the risk that even if the Commission permits it to list for trading its Congressional Control Contracts at this time, the CEA provides that the Commission may prohibit it from doing so in a proper rulemaking in the future.

⁵⁴ CEA Section 3(b), 7 U.S.C. § 5(b).

⁵⁵ CFTC Core Values, Forward-Thinking and Clarity, available at <https://www.cftc.gov/About/AboutTheCommission>.

As discussed above, my dissent is based on my view that, whether the Commission's conclusion is right or wrong, the analysis in the Order is inconsistent with the authority that Congress has granted us at best, and exceeds that authority at worst. It is further based on my view that it is important for the Commission to make this determination the right way – by undertaking a public rulemaking process as authorized by the CEA to establish a legal framework for exercising its discretion to determine whether event contracts, including those relating to Congressional control, may be prohibited from trading because they are contrary to the public interest.

This is not merely elevating form over substance. A notice-and-comment rulemaking would require the Commission to provide a comprehensive discussion and analysis of all relevant issues and opposing viewpoints. It could not, as it does in this Order, simply dismiss without discussion or analysis comments contrary to its preferred result out of hand.

Since there has been no rulemaking process, and in light of the substantial deficiencies in the Order regarding whether Kalshi's Congressional Control Contracts are subject to a public interest review and, if so, whether they are contrary to the public interest, I respectfully dissent.

From: [Pham, Caroline](#)
To: [Kirkpatrick, Chris](#)
Cc: [Tente, Meghan](#); [Jung, Harry](#); [Weyls, Brigitte C](#); [Giles, Mercedes](#); [Inbox – Secretariat](#)
Subject: Re: VOTING COPY - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM
Date: Friday, September 22, 2023 12:22:36 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

(b)(5)

CDP

From: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>
Sent: Thursday, September 21, 2023 5:22:28 PM
To: Pham, Caroline <CPham@CFTC.gov>
Cc: Tente, Meghan <MTente@CFTC.gov>; Jung, Harry <HJung@CFTC.gov>; Weyls, Brigitte C <bweyls@cftc.gov>; Giles, Mercedes <MGiles@CFTC.gov>; Inbox – Secretariat <InboxSecretariat@CFTC.gov>
Subject: RE: VOTING COPY - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM

Commissioner Pham,

Thank you. This confirms receipt of your message clarifying that your intended response to the Voting Copy of Seriatim 22-0187: KalshiEX Proposed Congressional Control Contracts was to **abstain** from this matter. The Secretariat will update accordingly its records and the voting summary in the circulating Voting Copy (which is currently with Commissioner Johnson). We also acknowledge your intent to submit a public statement.

Respectfully,
Chris

From: Pham, Caroline <CPham@CFTC.gov>
Sent: Thursday, September 21, 2023 4:54 PM
To: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>
Cc: Tente, Meghan <MTente@CFTC.gov>; Jung, Harry <HJung@CFTC.gov>; Weyls, Brigitte C <bweyls@cftc.gov>; Giles, Mercedes <MGiles@CFTC.gov>; Inbox – Secretariat <InboxSecretariat@CFTC.gov>
Subject: Re: VOTING COPY - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM

(b)(5) I abstain from this matter. Public statement to follow.

CDP

From: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>
Sent: Monday, September 18, 2023 5:11:42 PM
To: Pham, Caroline <CPham@CFTC.gov>
Cc: Tente, Meghan <MTente@CFTC.gov>; Jung, Harry <HJung@CFTC.gov>; Weyls, Brigitte C <bweyls@cftc.gov>; Giles, Mercedes <MGiles@CFTC.gov>; Inbox – Secretariat <InboxSecretariat@CFTC.gov>
Subject: RE: VOTING COPY - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts | DUE: TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM

Commissioner Pham,

(b)(5)

Respectfully,
Chris

From: Pham, Caroline <CPham@CFTC.gov>
Sent: Monday, September 18, 2023 4:48 PM
To: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>
Cc: Tente, Meghan <MTente@CFTC.gov>; Jung, Harry <HJung@CFTC.gov>; Weyls, Brigitte C

<bweyls@cftc.gov>; Giles, Mercedes <MGiles@CFTC.gov>; Inbox – Secretariat
<InboxSecretariat@CFTC.gov>

Subject: Re: VOTING COPY - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts |
DUE: TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM

(b)(5)

CDP

From: Kirkpatrick, Chris <CKirkpatrick@CFTC.gov>

Sent: Tuesday, September 12, 2023 10:53:19 AM

To: Pham, Caroline <CPham@CFTC.gov>

Cc: Tente, Meghan <MTente@CFTC.gov>; Jung, Harry <HJung@CFTC.gov>; Weyls, Brigitte C
<bweyls@cftc.gov>; Giles, Mercedes <MGiles@CFTC.gov>; Inbox – Secretariat
<InboxSecretariat@CFTC.gov>

Subject: VOTING COPY - Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts |
DUE: TUESDAY, SEPTEMBER 19, 2023 @ 3:00 PM

Dear Commissioner Pham,

Attached, and referenced below, for your consideration and vote is ***Seriatim 23-0187: KalshiEX Proposed Congressional Control Contracts***.

The specific Recommendation that is the subject of this Commission vote is as follows:

That the Commission issue the order attached as Exhibit 1, finding that, pursuant to section 5c(c)(5)(C) of the Commodity Exchange Act and Commission Regulation 40.11, the proposed Congressional Control Contracts: (1) involve gaming and activity that is unlawful under State law; (2) are contrary to the public interest; and (3) therefore, may not be listed by, or made available for clearing or trading on or through, KalshiEX LLC.

September 22, 2023

Statement of Commissioner Caroline D. Pham Regarding Political Event Contracts

Consistent with my earlier vote to abstain in May 2023, I abstain from voting on this order because I continue to believe that the United States Court of Appeals for the Fifth Circuit's Order in *Clarke v. CFTC*,^[1] may prevent the Commission from taking action on KalshiEx, LLC's (Kalshi) congressional control political event contracts.

On May 1, 2023, the Fifth Circuit issued an Order enjoining the CFTC from "closing the PredictIt Market" or otherwise "prohibiting or deterring the trading of [PredictIt] Market contracts," until 60 days after a final judgment in that case.^[2]

As I explained in my public statement when the Commission announced its review of the subject political event contracts pursuant to Commission Rule 40.11,^[3] any Order by the Commission regarding the listing of Kalshi's political event contracts could be construed to implicate the Fifth Circuit's May 1 Order because the PredictIt Market also lists political event contracts.^[4]

In fact, the Fifth Circuit, in a July 21, 2023 opinion, has already found that the Commission has violated the injunction in the May 1 Order.^[5] The Commission only narrowly avoided sanctions for violating the injunction because of the mercy of the court.

Because I cannot take any action that may be construed to again violate the Fifth Circuit's May 1 Order enjoining the Commission from otherwise "prohibiting or deterring the trading" of contracts listed on the PredictIt Market, and because political event contracts are listed on the PredictIt Market, I therefore must abstain from voting on Kalshi's political event contracts.

[1] See *Clarke v. CFTC*, No. 22-51124 (5th Cir. May 1, 2023) (unpublished order).

[2] *Id.*

[3] 17 C.F.R. § 40.11.

[4] See Dissenting Statement of Commissioner Caroline D. Pham on Political Event Contracts, U.S. Commodity Futures Trading Commission (June 23, 2023), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement062323>.

[5] *Clarke v. CFTC*, 74 F.4th 627, 641-43 (5th Cir. 2023).

REQUEST FOR SERIATIM CIRCULATION

Seriatim No.: 23-0187

Due Date: September 21, 2023 @ 12 noon
Division: DMO-Steven Haidar x 5611

TO: Chairman Rostin Behnam

SUBJECT: KalshiEX LLC Proposed Congressional Control Contracts

May the above mentioned document be circulated to the Commission for Seriatim consideration?

Approved for Circulation: See attached email _____
Signature Date

Chairman's Staff POC: John Dunfee _____