

Investment Management

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Place Your Bets, For Now: Kalshi's Election Contract Market Goes Live After Court of Appeals Denies CFTC's Motion to StayBy [Ethan L. Silver](#), [William Brannan](#), [Trevor A. Levine](#), and [Macauley Venora](#)**What You Need To Know:**

- Kalshi wins case against CFTC, paving the way for Kalshi to list and trade election contracts.
- District Court holds that CFTC exceeded its statutory authority and interpreted its own regulations too broadly.
- District Court clarifies that in order for the CFTC to disapprove a contract listing, the underlying contract itself—not the “act of trading” the contract—must constitute an enumerated activity within CFTC Rule 40.11 to be unlawful or contrary to the public interest.
- The D.C. Court of Appeals denied the CFTC’s motion to block Kalshi from offering the election contracts while it appeals the District Court decision.

On September 12, 2024, Judge Jia Cobb of the U.S. District Court for the District of Columbia (the Court) formally issued a memorandum opinion (the Order) in favor of KalshiEX LLC (Kalshi), a prediction market registered with the Commodity Futures Trading Commission (CFTC) as a designated contract market (DCM) seeking to list congressional control contracts (CCCs), or cash-settled, binary (i.e., yes/no) contracts based on which party controls certain congressional houses. The Order was issued nearly a week after Cobb ruled for Kalshi via bench order. The CCCs, which were self-certified by Kalshi in September 2023, were quickly disapproved via written order by the CFTC pursuant to its authority under CFTC Rule 40.11, effectively banning Kalshi (and others) from listing for trading “event contracts” based on political outcomes. The CFTC determined that the CCCs “involve[d] gaming and activity that is unlawful under state law and [were] contrary to the public interest[.]”¹ Roughly a month later, Kalshi filed a challenge to the CFTC’s order in the Court, alleging the CFTC’s decision was arbitrary, capricious, and otherwise not in accordance with the Administrative Procedure Act.²

The Court sided with Kalshi and permitted it to list the CCCs, rejecting the CFTC’s legal theories as overly broad interpretations of the Commodity Exchange Act (CEA) and CFTC regulations, signaling a win for both the election contract market and event and prediction markets generally. The CFTC quickly appealed the Order and also moved to block Kalshi’s ability to open trading in the CCCs until the D.C. Court of Appeals (Court of Appeals) ruled on its appeal. While the Court of Appeals granted an administrative stay to consider the CFTC’s motion for a stay pending appeal, on October 2, the Court of Appeals denied the CFTC’s motion, paving the way for Kalshi to offer CCCs immediately while the CFTC’s appeal is pending.³ Trading in election contracts has now commenced on Kalshi’s DCM and potentially other DCMs. Although the CFTC’s appeal is still pending, the Order is a promising step for the election contract market and a potentially devastating blow to the CFTC, whose Proposed Rule to further define “gaming” contracts considered “contrary to the public interest” under the CEA now hangs in the balance.⁴

1. Background on Event Contracts

For decades, the CFTC has permitted DCMs to offer what are colloquially known as event contracts or binary options that allow market participants to take a market side based on the outcome of an event. By definition, an event contract is a derivative contract “whose payoff is based on a specified event, occurrence, or value.” As of 2000, DCMs were permitted to self-certify that their proposed contracts complied with the CEA and the CFTC’s regulations, with no prior review required for many types of event contracts. In 2010, Congress further amended the CEA to add Section 5c(c)(5)(C), which permits the CFTC to conduct a pre-review and approval of event contracts.⁵ This authority to review and approve, which remains in effect, was the predominant issue in the Kalshi case.

Under Section 5c(c)(5)(C), the CFTC can undertake a review of event contracts to determine whether they are contrary to the public interest if, and only if, they involve (i) activity that is unlawful under any federal or state law, (ii) terrorism, (iii) assassination, (iv) war, (v) gaming, or (vi) other similar activity determined by the commission, by rule or regulation, to be contrary to the public interest (each, an Enumerated Activity).⁶ Under Rule 40.11(a), a contract that “involves, relates to, or references” one of these Enumerated Activities or is determined by the CFTC to be contrary to the public interest may not be listed or made available for clearing or trading.

The CFTC may pursue a 90-day review of an event contract submitted or self-certified by a DCM under Rule 40.11(c).⁷ Within 90 days of commencing its review, the CFTC must issue an order approving or disapproving the contract. Historically, the CFTC has used its review authority to disapprove event contracts tied to election outcomes. In addition to its disapproval of Kalshi’s CCC offering, in 2012, the CFTC disapproved of an election outcome contract self-certified by Nadex.⁸ In 2020, the CFTC also used its review authority in connection with ErisX Exchange’s self-certification of an event contract based on the money lines, points spreads, and totals for individual NFL games. ErisX withdrew its contract for review before the CFTC issued an order.⁹

If an event contract does not involve one of the Enumerated Activities, a DCM (or other registered entity) may self-certify the contract prior to listing for trading.¹⁰

2. Kalshi

At issue in Kalshi was whether the CCCs involved an Enumerated Activity and thus whether the CFTC had the authority to review and approve (or disapprove) them for or from being listed or whether Kalshi was permitted to self-certify the CCCs for listing pursuant to CFTC Rule 40.2. The CFTC argued that such contracts involved unlawful activity and gaming and were therefore contrary to the public interest. More specifically, the CFTC claimed that (1) “gaming” should be interpreted to include “gambling” and argued that “gambling” is often defined as “staking something of value upon the outcome of a game, contest, or contingent event[.]” and (2) an event contract “involves” an enumerated activity, where the contract’s underlying event is one of the enumerated activities or if the contract has a “different connection to one of the activities,” including “if trading in the contract amounts to the enumerated activity.”

Kalshi claimed that the CFTC’s positions were based on overly broad interpretations of the CEA. The Court agreed.

The Order relied on very simple analyses, including discerning the dictionary definitions of gaming and involve. Specifically, with respect to the CFTC’s argument that the CCCs should be classified as gaming, the Court ruled that the “[CCCs] do not involve unlawful activity or gaming. They involve elections, which are neither.”

Perhaps more impactful was the Court’s analysis of whether the CCCs involved an Enumerated Activity, and specifically the Court’s rejection of the CFTC’s claim that an event contract involves an enumerated activity if the “act of trading the contract” amounts to an Enumerated Activity. Using very straightforward, commonsense

examples, the Court refuted the CFTC's claim. "The 'act of trading in' an event contract can never 'amount to' war. The 'act of trading in' an event contract cannot 'amount to' terrorism. And no one would formulate a construction of the statute to read that an 'act of trading in' an event contract could ever 'amount to' assassination."¹¹ Relying, in part, on this analysis, the Court was able to rule that the act of trading in an election contract could never amount to gaming activity that is unlawful under any federal or state law.

3. Key Takeaways

While the Court of Appeals will still weigh the CFTC's appeal of the Order itself, it refused to grant an emergency stay to block trading in CCCs, determining that the CFTC did not demonstrate "that it or the public will be irreparably harmed while its appeal is heard."¹² The CFTC argued five specific harms that would occur, all related to election integrity and incentives to manipulate the underlying election market.¹³ The Court of Appeals acknowledged that the CFTC's concerns were understandable and that the effects of CCCs on U.S. elections is uncertain; however, it ultimately decided that at this time the CFTC failed to show irreparable harm or that the harm was likely to occur. Importantly, the Court of Appeals did leave the door open for the CFTC to renew its stay request during the pendency of its appeal if it could present more direct evidence of irreparable harm. For example, the court noted that campaigns encouraging the purchase of CCCs, foreign investors bypassing Kalshi's restrictions to trade CCCs in an attempt to interfere with the election, or evidence that CCCs confuse voters about the viability of certain candidates could be compelling evidence of harm that would permit the CFTC to renew its motion to stay the listing of CCCs.¹⁴

The Order itself provides important takeaways both for election contracts and event and prediction markets in the U.S. generally.

For one, the Order is a temporary win for election contracts. More important, though, is the effect the Order may have on the CFTC's Proposed Rule and the CFTC's ability to regulate the prediction and event contract markets in the future. Driven by the CFTC's historic disapproval of sports and political prediction markets and efforts to outright ban them, the Proposed Rule attempts to expand the definition of gaming under Section 5c(C)(5)(C) by defining gaming as "*the staking or risking by any person of something of value upon: (i) the outcome of a contest of others; (ii) the outcome of a game involving skill or chance; (iii) the performance of one or more competitors in one or more contests or games; or (iv) any other occurrence or non-occurrence in connection with one or more contests or games.*" At minimum, if the CFTC decides to push through a final rule modeled after the Proposed Rule (even if it loses its appeal in the Kalshi case), it is very likely that rule will be challenged in court.

Finally, while we await the outcome of the CFTC's appeal, it is clear that the market for prediction contracts, most notably election contracts, is growing. Polymarket, a crypto-powered, offshore prediction market, saw its monthly trading volume exceed \$470 million in August, with similar numbers expected in September as the U.S. presidential election draws closer.¹⁵ Under the terms of a 2022 settlement with the CFTC, Polymarket is not able to offer its markets in the U.S.¹⁶ Multiple U.S. platforms, however, have indicated their intention to offer election contracts on the heels of the Court's Order, and one can assume that those platforms will be ready to offer their products given the Court of Appeals' denial of the CFTC's motion to stay.¹⁷ Whether the CFTC will continue its efforts to ban these markets through rulemakings is another question.

¹ In the Matter of the Certification by KalshiEX LLC of Derivatives Contracts with Respect to Political Control of the United States Senate and United States House of Representatives, available [here](#).

² See *KalshiEx LLC v. CFTC*, No. 23-cv-3257 (D.D.C.).

³ *KashiEX LLC v. CFTC*, (App. D.C.) (October 2, 2024).

⁴ See *Event Contracts*, notice of proposed rulemaking, 89 FR 48968 (June 10, 2024). The Proposed Rule would further define the enumerated activity of "gaming" to include the staking or risking by any person of something of value on (i) the outcome of a political contest, including an election or elections; (ii) the outcome of an awards contest; (iii) the outcome of a game in which one or more athletes compete; or (iv) an occurrence or non-occurrence in connection with such a contest or game, regardless of whether it directly affects the outcome. *Id.* at 48975.

⁵ CEA Section 5c(c)(5)(C).

⁶ Event contracts based on a change in the price, rate, value, or levels of the following would generally fall outside of the scope of CEA Section 5c(c)(5)(C) and Regulation 40.11.

⁷ 17 C.F.R. § 40.11(c).

⁸ <https://www.cftc.gov/PressRoom/PressReleases/6224-12>.

⁹ <https://www.cftc.gov/PressRoom/PressReleases/8345-20>.

¹⁰ CEA section 5c(c)(1) and CFTC Regulation 40.2.

¹¹ KalshiEx at 21.

¹² KalshiEx (App. D.C.) at 8.

¹³ *Id.* at 9-14.

¹⁴ *Id.* at 15.

¹⁵ <https://dune.com/fergmolina/poly-market-markets-data>.

¹⁶ In its order, the CFTC found that Polymarket had been operating an illegal, unregistered or non-designated facility for event-based binary options, online trading contracts, known as "event markets." See <https://www.cftc.gov/PressRoom/PressReleases/8478-22>. The Court of Appeals noted in its denial of the CFTC's motion to stay that "[w]hether Polymarket has complied" with the restriction in its settlement order to prohibit U.S. investors from trading on its platform "is in question." KalshiEx (App. D.C.) at 5.

¹⁷ Interactive Brokers has indicated that it plans to offer election contracts through its newly launched DCM, ForecastEx. See Election Betting is Going Mainstream after Major Brokerage gets on Board.

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