REWRITING THE RULEBOOK: THE CFTC'S PUBLIC INTEREST DETERMINATION PROPOSAL FOR PREDICTION MARKETS

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On 10 June 2026, the Commodity Futures Trading Commission (CFTC or the Commission) published a Notice of Proposed Rulemaking (Proposal) seeking public comment on amendments to CFTC Regulation 40.11 and related provisions. As part of this long-anticipated release, the CFTC proposes a procedural framework for determining whether an event contract is contrary to the public interest. What follows below is a preliminary summary of the CFTC's proposal and the accompanying review process.

The Commission's proposed rule will face substantial cross-currents. At a fundamental level, the Commission is seeking broad administrative authority to determine whether certain event contracts are in the public interest or readily susceptible to manipulation. The Commission takes this broad approach despite a number of public challenges to its authority, which in effect will take the position that the Proposal: (i) seeks to apply additional public interest factors beyond the legislatively mandated findings and purpose provisions of Section 3 of the Commodity Exchange Act (the CEA),[1] (ii) takes an expansive reading of the Commission's "exclusive" jurisdiction to regulate prediction markets without expressly taking into account recent US Supreme Court rulings on the major questions doctrine or balancing the long history of gambling regulation being largely left to state legislatures,[2] and (iii) minimizes risks of manipulation posed by binary option products that have been previously recognized by the Commission.[3] Moreover, administrative review of the Proposal will play out as US courts across the country continue to a weigh the threshold structural question of whether the Commission has the authority to regulate certain prediction markets under its Dodd-Frank Act swaps-related authority, a question likely to be taken up by the US Supreme Court in due course.

BACKGROUND

Enacted in 2010 as part of the Dodd-Frank Act derivative market reforms, Section 5c(c) of the CEA was amended to include a new provision under which the Commission is authorized to prohibit registered platforms from listing for trading particular types of event contracts, if the Commission determines that such contracts are contrary to the public interest.

Specifically, clause (i) of this new provision provides that:

> In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the

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> price, rate, value, or levels of a commodity described in [CEA] section 1a(2)(i)), by a [DCM] or [SEF], the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions 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.[4]

In regulatory parlance, the specific activities identified in Section 5c(c)—terrorism, war, assassination, gaming, and activities that are unlawful under federal or state law—are referred to as "Enumerated Activities."

The Commission has undertaken various efforts to clarify when certain event contracts—now widely referred to as "prediction markets"—are "contrary to the public interest." In particular, the CFTC withdrew a prior 2024 event contracts proposal several months ago,[5] and it subsequently issued an Advance Notice of Proposed Rulemaking (ANPR) on prediction markets.[6] The ANPR was extensive, asking questions about whether amendments to CFTC regulations were needed to address how the CEA's core principles should apply to prediction markets, including questions about how prediction markets resolve the outcomes of event contracts, whether event contracts have unique characteristics that make the prohibition on listing contracts that are readily susceptible to manipulation different from other listed contracts, whether event contracts traded on margin would present regulatory implications, and the factors the CFTC should consider when making a public interest determination under Section 5c(c)(5)(C) of the CEA, among many other topics. This proposed rulemaking follows this complex history for establishing a structured framework for evaluating whether certain event contracts are contrary to the public interest, as originally expressed in the CEA.

FACTORS CONSIDERED WHEN EVALUATING WHETHER A CONTRACT IS CONTRARY TO THE PUBLIC INTEREST

Under the Proposal, the CFTC would consider factors applicable to all event contracts, as well as other factors only applicable to Enumerated Activities, when evaluating whether a contract is contrary to the public interest. In making a public interest determination, the CFTC would apply a multifactor approach, with no single factor dispositive to the determination. The CFTC would consider the public interest purposes articulated in Section 3 of the CEA (i.e., hedging and price discovery), but it would also consider specific, potential harms of a contract as opposed to a broad inquiry into the public good of a contract.

Factors applicable to all event contracts would include the following:

- Price discovery and information aggregation utility—including whether the information can be used when making economic decisions—while promoting innovation and fair competition.
- Potential threats to market integrity, which would encompass considerations related to settlement integrity and information leakage and the misuse or misappropriation of confidential information.
- Compliance and self-regulatory challenges that arise from a prediction market's ability to administer the contracts, including the prediction market's dispute resolution process and adoption of guardrails against the misuse of nonpublic information (e.g., prohibition on certain categories of traders who are likely to have access to insider information from trading).

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Factors considered only with respect to specific activities would be divided into categories based on the Enumerated Activity. The CFTC identifies when an event contract involving an Enumerated Activity would be contrary to the public interest in the following manner:

- An activity that is unlawful under federal or state law would raise public interest concerns because the very fact that the activity is illegal means that it has been recognized as causing (or posing) public harm.
- An activity involving terrorism, assassination, or war would present national security risks that raise public interest concerns. These contracts could distract law enforcement and be manipulated by individuals seeking to divert attention from planned harmful events. In addition, these contracts could create misleading market signals, could be susceptible to information leakage by individuals with access to this sensitive information who may be incentivized to trade on that information in violation of a duty of confidentiality, and could be vulnerable to settlement ambiguity. Based on those stated concerns, the Commission preliminarily declared that "all event contracts involving. terrorism, assassination, and war are highly likely to be against the public interest."[7]
- Only certain games would be contrary to the public interest under the Proposal.
  - According to the CFTC, games of random chance would probably be contrary to the public interest. In contrast, sport event contracts would not be contrary to the public interest when they settle based on final scores, win-loss results, and other metrics because these contracts may provide useful information and price discovery. Critically, the Commission preliminarily determined that "political elections are not gaming" and thus presumably fall outside of the specific framework to be established by the Proposal.[8]
  - Factors indicating that the CFTC would find a sports event contract to be contrary to the public interest include whether the contracts are based on player injury, an officiants' decision (including video replay decisions and player ejections), a discrete action (such as the outcome of a specific pitch thrown by a specific pitcher), an altercation (such as fights between players), and pre-collegiate sporting events.
  - Factors indicating that the CFTC would find a sports event contract not to be contrary to the public interest include the following:
    - When an event contract includes objective and verifiable settlement data.
    - Whether the sport is subject to an established integrity infrastructure, such as a recognized governing body, published rules, and disciplinary procedures.
    - Whether an exchange has a formal information sharing agreement with the relevant sports league or governing body.

DETERMINATION THAT A CONTRACT "INVOLVES" AN ENUMERATED ACTIVITY

Pursuant to Section 5c(c)(5)(C) of the CEA (the Special Rule), the CFTC may determine that event contracts are contrary to the public interest if the contracts "involve" the Enumerated Activities. Thus, whether something "involves" an Enumerated Activity is critical to whether the Special Rule applies to an event contract. According to

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the Proposal, an event contract "involves" an Enumerated Activity if its settlement is "determined by an occurrence, extent of an occurrence, or contingency in the activity."

As described in what would be a new Appendix F to Part 40, the CFTC will apply the following factors when considering whether an event contract involves an Enumerated Activity. Given the Commission's preliminary analysis of unlawful activities and activities involving terrorism, assassination, or war, we focus on the analysis of gaming activities.

The CFTC describes gaming as "the game itself, the activity that occurs."[9] Defining this term too broadly would make the category "limitless." Pursuant to Proposed CFTC Regulation 40.11(b)(1), the term "gaming" would mean "any activity that: (i) One or more participants typically engage in for purposes of recreation or to entertain others; (ii) Is governed by rules; and (iii) Includes measurable occurrences or outcomes that depend on the participants' luck, skill, or athletic ability during the activity."[10] A game must have a measurable occurrence or outcome and depend on skill, luck, or athletic ability. According to the CFTC, gaming would include: games of chance (the example the CFTC uses is roulette), games that require skill (such as chess), and games of mixed skill and chance (such as poker).

The CFTC explains that a figure skating competition would be gaming because the skaters participate for recreation and entertainment of others, with judges evaluating their skill and athletic ability, whereas a "figure skater of the year" award would not be gaming, as its purpose is to honor the skater. The CFTC goes on to articulate the types of activities that would not be considered gaming if the Proposal is adopted, including the following:

- Contests, such as political elections (whose outcomes rely on voters' judgment) and awards like the Nobel Prize or the Academy Awards, which are determined based on judgments rather than measurable occurrences that depend on a person's skill or athletic ability.
- Other gambling activities, such as gambling on who will win an Academy Award, because the gambling does not change the fact that the award is not gaming.
- Events occurring in connection with games or happening within games, such as whether a football player will score a certain number of touchdowns in a game.

EXERCISING AUTHORITY TO MAKE PUBLIC INTEREST DETERMINATIONS

Procedural Framework for CFTC Review

The CFTC may decide to initiate a review of an event contract only when there is a basis to believe that the contract involves an Enumerated Activity and may be contrary to the public interest. The CFTC explains that it may only initiate a review when an exchange files a contract submission pursuant to Regulations 40.2 or 40.3, acknowledging that a contract may trade after being self-certified even if the CFTC subsequently initiates a review. The CFTC may request an exchange to suspend the trading of a contract that is under review.

Under the Proposal, the CFTC would need to initiate a review within 10 days after an exchange lists the contract. The determination to initiate a review would be posted on the CFTC's website, and the contract would be subject to a 90-day review that may only be extended upon the exchange's request. The determination timing triggers other deadlines, including the following:

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- Within 15 days: The Director of the Division of Market Oversight would be required to provide the exchange a written statement supporting the review.
- Within 30 days: The exchange would be permitted to submit a written response, which may include modifications to the contract terms and conditions.
- Within 60 days: The Director of the Division of Market Oversight, with the concurrence of the CFTC's general counsel, would be permitted to submit to the CFTC a written recommendation on the CFTC's determination, which would be provided to the exchange concurrently. This recommendation would be required to address the exchange's response and any proposed modifications.
- Within 70 days: The exchange may provide the CFTC a written response to the recommendation.
- Within 90 days: The CFTC may issue an order finding that the contract (or consolidated group of contracts) is contrary to the public interest.
- Within 100 days: If the CFTC has not issued an order, the exchange may list the event contract subject to the review.

CFTC Consolidated Review of Multiple Contracts

When a contract involves the same or substantially similar underlying event, the CFTC may consolidate the public interest review of these contracts. This is the case even where more than one exchange lists the contracts subject to review.

Delegation to the Director of the Division of Market Oversight

Under the Proposal, the CFTC would delegate authority for ministerial and record-development responsibilities to the Director of the Division of Market Oversight or the Director's designee. However, this delegation would not extend to the responsibilities included in proposed CFTC Regulation 40.11(f), such as determining whether to initiate a public interest review, the submission of a recommendation to the CFTC (which must be done by the director), and the issuance of a public interest determination.

WHAT IS NEXT?

Comments are due on 27 July 2026 (45 days after the Proposal was published in the *Federal Register*). Given the speed at which the CFTC is moving forward with rulemakings, those interested in commenting should begin drafting comment letters and scheduling meetings with staff as soon as possible.

FOOTNOTES

[1] 7 U.S.C. § 5; Prediction Markets; Public Interest Determinations, Release No. 9249-26 (Jun. 10, 2026), https://www.cftc.gov/PressRoom/PressReleases/9249-26 at 87-88 [hereinafter the “Proposal”].

[2] Proposal at 10–11.

[3] *Id*. at 101–06. One factor that the Commission explains would weigh against a finding that an event contract is contrary to the public interest is whether the prohibition of the event contract would cause trading activity to occur

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offshore in less transparent or less regulated markets. *Id*. at 100.

[4] 7 U.S.C. § 7a-2(c)(5)(C).

[5] 91 Fed. Reg. 5,386 (Feb. 6, 2026), https://www.cftc.gov/sites/default/files/2026/02/2026-02454a.pdf.

[6] 91 Fed. Reg. 12,516 (Mar. 16, 2026), https://www.cftc.gov/sites/default/files/2026/03/2026-05105a.pdf.

[7] Proposal at 112.

[8] *Id*. at 79.

[9] *Id*. at 228.

[10] Proposed CFTC Regulation 40.11(b)(1); Proposal at 216.

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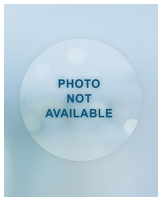
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