

ONE HUNDRED EIGHTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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September 11, 2024

The Honorable Rostin Behnam  
Chairman  
Commodity Futures Trading Commission  
1155 21st Street, NW  
Washington, DC 20581

Dear Chairman Behnam:

The Committee on the Judiciary is conducting oversight of the Commodity Futures Trading Commission's (CFTC) actions that may hinder competition in the market for event contracts and result in regulation by enforcement. Most recently, the CFTC took action to limit KalshiEx LLC's (Kalshi) ability to compete as a political prediction market platform. Kalshi is a federally registered exchange for event contracts.<sup>1</sup> Event contracts allow consumers to trade on the predicted outcome of future events.<sup>2</sup> The CFTC took action against Kalshi to prohibit certain event contracts concerning political outcomes.<sup>3</sup> The CFTC took this action against Kalshi without statutory or regulatory authority to do so.<sup>4</sup> Accordingly, to inform the Committee's oversight and potential legislative remedies, we write to request documents and information regarding the CFTC's actions against Kalshi.

On June 12, 2023, Kalshi filed a certification of certain political event contracts with the CFTC.<sup>5</sup> On June 23, 2023, the CFTC announced that it began a review of these contracts offered by Kalshi.<sup>6</sup> In an order on September 22, 2023, the CFTC declared that the relevant Kalshi contracts are "prohibited and shall not be listed or made available" because the contracts

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<sup>1</sup> 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 (Sept. 22, 2023).

<sup>2</sup> Press Release, Kalshi, Kalshi Wins CFTC Approval for Exchange to Trade Event Contracts.

<sup>3</sup> Mersinger Dissent, *supra* note 1.

<sup>4</sup> Alexander Osipovich, *Are You Ready to Bet on U.S. Elections? A Judge's Ruling Opens the Door*, WALL ST. J. (Sept. 8, 2024).

<sup>5</sup> See Letter from Christopher J. Kirkpatrick, Secretary of the Commission, CFTC to Xavier Sottile, Head of Markets, KalshiEX LLC (June 23, 2023).

<sup>6</sup> Press Release, Commodity Futures Trading Commission, CFTC Announces Review of Kalshi Congressional Control Contracts and Public Comment Period (June 23, 2023).

allegedly involved “gaming and activity that is unlawful under State law” and “are contrary to the public interest.”<sup>7</sup>

Two Commissioners, however, refused to join the CFTC’s order against Kalshi because of concerns that the CFTC was acting outside of its authority. As Commissioner Summer Mersinger explained in her dissent, Congress has not authorized the CFTC to prohibit event contracts such as Kalshi’s, despite specifically enumerating other types of event contracts in statute, and the CFTC has not promulgated any regulation that would prohibit such contracts.<sup>8</sup> Commissioner Mersinger explained that Congress could have prohibited the relevant contracts “either by explicitly enumerating it or by enumerating event contracts that involve, directly or indirectly, elections.” Commissioner Mersinger was especially concerned with the CFTC’s actions because “Congress provided the Commission with another path – a notice-and comment rulemaking – which path the Commission has failed to follow for many years now.”<sup>9</sup> Commissioner Mersinger concluded that “the analysis in the [CFTC’s] Order is inconsistent with the authority that Congress has granted [the CFTC] at best, and exceeds that authority at worst.”<sup>10</sup>

Similarly, Commissioner Caroline Pham abstained from considering the CFTC’s order because the U.S. Court of Appeals for the Fifth Circuit had specifically enjoined the CFTC from acting against a similar platform with political event contracts.<sup>11</sup> Commissioner Pham noted that the Fifth Circuit warned that the CFTC already “narrowly avoided sanctions for violating the injunction” and only avoided a sanction “because of the mercy of the court.”<sup>12</sup> In that case, the CFTC targeted PredictIt Market (PredictIt), another platform that allows people to trade on the predicted outcomes of political events.<sup>13</sup> The CFTC’s actions against PredictIt would have required all outstanding PredictIt contracts to be closed.<sup>14</sup> The court found that the CFTC’s actions were likely arbitrary and capricious and ordered a preliminary injunction to halt the CFTC’s order against PredictIt.<sup>15</sup>

On November 11, 2023, Kalshi filed a complaint in U.S. District Court for the District of Columbia challenging the CFTC’s order.<sup>16</sup> In a one-page order on September 6, 2024, the court sided with Kalshi and vacated the CFTC’s order.<sup>17</sup> On the same day, however, the CFTC filed an

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<sup>7</sup> Order, *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*, CFTC (Sept. 22, 2023).

<sup>8</sup> 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 (Sept. 22, 2023).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Statement of Commissioner Caroline D. Pham Regarding Political Event Contracts (Sept. 22, 2023).

<sup>12</sup> *Id.*

<sup>13</sup> *Clarke v. CFTC*, 74 F.4th 627 (5th Cir. 2023).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Complaint, *Kalshi v. CFTC*, No. 1:23-cv-03257-JMC (Nov. 1, 2023).

<sup>17</sup> Order, *Kalshi v. CFTC*, No. 1:23-cv-03257-JMC (Nov. 6, 2024).

emergency motion to stay the court's order.<sup>18</sup> The court granted the stay and set a hearing date for September 12, 2024, which again delayed Kalshi's ability to offer this product to consumers.<sup>19</sup>

The CFTC's order against Kalshi raises concerns that the CFTC is acting outside of its statutory and regulatory authority. The CFTC's actions also indicate the agency may be engaging in regulation by enforcement, a regulatory practice that creates uncertainty and undermines due process and fundamental fairness. The effect of the CFTC's action is to push consumers to other platforms that often operate outside of America's borders and laws.<sup>20</sup>

To investigate and conduct oversight of this issue and the CFTC's actions, the Committee respectfully requests a staff-level briefing regarding the CFTC's efforts to prevent the existence of certain prediction markets, including its investigations into PredictIt and Kalshi, and for the CFTC to provide the following documents and information:

1. All documents and communications referring or relating to the CFTC's actions against Kalshi;
2. All documents and communications referring or relating to the CFTC's work concerning political event contracts; and
3. All documents and communications referring or relating to any CFTC rulemaking that would affect political event contracts.

Please provide responses to the Committee's requests as soon as possible, but by no later than September 25, 2024, at 12:00 p.m.

Pursuant to Rule X of the Rules of the House of Representatives, the Committee is authorized to conduct oversight of and legislate on matters relating to the "judiciary and judicial proceedings," "[a]dministrative practice and procedure," and "[p]rotection of trade and commerce against unlawful restraints and monopolies."<sup>21</sup> If you have any questions about this request, please contact Committee staff at 202-225-6906. Thank you in advance for your prompt attention to this matter.

Sincerely,



Jim Jordan  
Chairman

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<sup>18</sup> Defendant Commodity Futures Trading Commission's Emergency Motion to Stay the Court's Decision Until 14 Days After the Issuance of the Forthcoming Memorandum Opinion, *Kalshi v. CFTC*, No. 1:23-cv-03257-JMC (Nov. 6, 2024).

<sup>19</sup> Marc Hochstein, *Kalshi's U.S. Election Markets Delayed Until Friday at Earliest*, CoinDesk (Sept. 9, 2024).

<sup>20</sup> See Funt, *supra* note 4.

<sup>21</sup> Rules of the House of Representatives R. X (2023).

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cc: The Honorable Jerrold L. Nadler, Ranking Member