July 27, 2026

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, D.C. 20581

Re: Prediction Markets; Public Interest Determinations - Notice of Proposed Rulemaking (June 12, 2026) RIN 3038-AF65

Lexicon Labs ("Lexicon," or "we") welcomes the opportunity to respond to the Commodity Futures Trading Commission's ("CFTC," or the "Commission") request for comment on the proposed rulemaking concerning prediction markets and public interest determinations.

Lexicon's mission is to make law legible. We operate our website at https://www.lexiconlabs.com and have been an active participant in the courts, including submission of multiple amicus briefs, most recently before the United States Court of Appeals for the Third Circuit in *KalshiEX LLC v. Flaherty*, No. 25-1922 (3d Cir. 2025).[1] Lexicon also publishes two blogs: Full Court Press ("FCP"), available at https://www.fullcourtpress.io, which is dedicated to exploring the legal implications of financial definitions; and Finance 2027 ("F27"), available at https://www.finance2027.com, which seeks to build consensus on financial definitions.

Lexicon commends the Commission for inviting public comment on this important rulemaking and is pleased to share its views. Lexicon has submitted a detailed comment letter to the CFTC on April 30, 2026 re: Prediction Markets, Advance Notice of Proposed Rulemaking, 91 Fed. Reg. 12516 (Mar. 16, 2026) RIN 3038–AF65, providing a general framework. With that comment letter serving as a useful foundation, this comment letter will provide a more targeted treatment, addressing specifically the considerations raised in the CFTC's latest rulemaking. Accordingly, this comment is organized in three sections: 1) The evolution of the interpretation of "gaming ;" 2) Off-exchange trading limitations; and 3) Other considerations.

[1] The amicus brief in *KalshiEX LLC v. Flaherty* was filed by New Finance Institute, which subsequently underwent a corporate name change to Lexicon Labs, Inc. in 2025.

I. The Evolution of the Interpretation of "Gaming"

The word "gaming" under the Special Rule created confusion from the outset. Equally importantly, the CFTC's own interpretation has undergone multiple stages.

Phase 1 - Gaming Means Gambling. All the way through 2023, the CFTC interpreted gaming to mean gambling, as evidenced by the *Nadex* and *Kalshi* orders. Thus, "gaming" did not attach to the underlying commodity; rather it implicitly invoked the public interest determination.

Phase II - Gaming Means Games + Sports + Elections. During the Kalshi litigation, the CFTC took a more limiting approach, identifying gaming as games + sports + elections. At this stage, the Commission began to transition away from its prior understanding of gambling and instead started to offer definitions grounded in state law. A natural corollary of this interpretation was a shift away from treating all contingent events as within the scope of the Special Rule.

The district court ruled accordingly: Kalshi didn't secure a legal victory because of a public-interest argument, they prevailed because the CFTC's gaming definition appeared internally inconsistent and limited the Special Rule's reach in the first place.[2]

Phase III - Gaming Means Games + Sports. Despite the parties' disagreement over whether the Special Rule reaches election contracts, there was no disagreement between Kalshi and CFTC as to whether sports event contracts were impermissible under the Special Rule during the Kalshi litigation.[3] Reflecting that shared understanding, Judge Cobb observed that "event contracts related to any of the sporting events the senator mentioned on the floor could implicate the gaming category."[4] On appeal, Kalshi continued to distinguish election contracts from sports contracts, describing contracts on sporting events as the "classic example" of contracts involving gaming, while the CFTC likewise continued to treat sports event contracts as falling within the Special Rule.[5] The point remained unchanged through oral argument.

---

[2] "The CFTC's order exceeded its statutory authority. Kalshi's contracts do not involve unlawful activity or gaming. They involve elections, which are neither." *KalshiEX LLC v. Commodity Futures Trading Comm'n*, No. 1:23-cv-03257 (D.D.C. Sept. 12, 2024), slip op. at 2.

[3] *See* Pl.'s Mem. Supp. Mot. Summ. J. at 16 (arguing that the Special Rule's "gaming" category "reaches contracts contingent on games," including "whether a certain team will win the Super Bowl," and thus functions as "a check on attempts to launder casino-style or sports gambling through the derivatives markets."), 22–23 (arguing that contracts on sporting events are "gaming" contracts and citing legislative history identifying the Super Bowl, Kentucky Derby, and Masters Golf Tournament as examples Congress intended to reach); Def.'s Cross-Mot. Summ. J. & Opp'n Pl.'s Mot. Summ. J. at 24 (arguing that Congress intended the Special Rule to encompass contracts on sporting events, including the Super Bowl, Kentucky Derby, and Masters Golf Tournament).

[4] *KalshiEX LLC v. CFTC*, 755 F. Supp. 3d 66, 89 (D.D.C. 2024). The court's reference to "the senator" is to a floor colloquy during Senate consideration of the Dodd-Frank Act.

[5] *Compare* Brief for Plaintiff-Appellee at 41–45, *KalshiEX LLC v. Commodity Futures Trading Commission*, No. 24-5205 (D.C. Cir. Nov. 15, 2024) (arguing that sports event contracts are the "classic example" of contracts involving gaming), with Brief for Appellant at 39–48, *KalshiEX LLC v. Commodity Futures Trading Commission*, No. 24-5205 (D.C. Cir. Sept. 27, 2024) (arguing that the Special Rule applies to contracts involving gaming and distinguishing election contracts from sports event contracts).

Phase IV - Gaming Still Means Games + Sports, But With a Twist. After oral argument concluded, the Commission's posture shifted. Crypto.com was the first platform (through Nadex) that initiated sports event contacts.[6] The CFTC initiated review,[7] but has not, to date, concluded it. Kalshi, too, self-certified sports event contracts.[8] The Commission did not initiate review. Then, the Commission announced the CFTC's Prediction Markets Roundtable and listed a series of "obstacles" to balanced regulation–including its own litigation positions and Kalshi's.[9] Although the CFTC later canceled the roundtable without explanation,[10] the message was unmistakable: The agency appeared prepared to move past its earlier insistence that sports-related event contracts implicated the gaming provision under the Special Rule *and* were contrary to public interest.

Now, with the proposed rulemaking, that position seems on the verge of finding its way into the rules, and the reach of the statute shrinks further. Sports event contracts remain in scope, but the vast majority of them are now treated as permissible, with only a subset–those that the Commission views as most egregious (e.g., injury contracts, officiating-outcome contracts, etc.)–subject to prohibition. The most traditional contracts society has long understood as sports gambling–moneylines, over-unders and point spreads–appear to survive. The proposed rulemaking gives the impression that a boundary is drawn somewhere, but that proposed boundary and where the boundary stood just a couple of years ago remain worlds apart.

All along, the statute has not changed, only the CFTC's interpretation has. And that interpretation has changed more in the last couple of years than it has in the 23 years that preceded them.

The Commission attempts to justify this shifting interpretation results by pointing out supposed flaws in the original statutory interpretation. In the rest of this section, Lexicon offers alternative interpretations that resolve those seemingly conflicting points cleanly.

Gambling, in the Context of Futures, is a Public Interest Inquiry under Federal Law. The Commission's earliest statutory interpretation was correct, with a qualification. As the Commission acknowledges, "(i) 'gaming' means gambling," but not because "gambling involves 'a person staking something of value upon the outcome of a game, contest, or contingent event.'" Here, the

---

[6] Certification of Commercial Economic Event Contract (Title Event) – Submission Pursuant to Commission Regulation 40.2(a), submitted to the Commodity Futures Trading Commission (Dec. 19, 2024), https://www.cftc.gov/sites/default/files/filings/ptc/24/12/ptc12192412179.pdf.
[7] Commodity Futures Trading Comm'n, CFTC's Review of Nadex Sports Contract Submissions, Release No. 9033-25 (Jan. 14, 2025), https://www.cftc.gov/PressRoom/PressReleases/9033-25.
[8] *See* Letter from Xavier Sottile, Head of Markets, KalshiEX LLC, to Sec'y of the Comm'n, Commodity Futures Trading Comm'n, *KalshiEX LLC—CFTC Regulation 40.2(a) Notification Regarding the Initial Listing of the "Will <team> win <title>?" Contract* (Jan. 22, 2025), https://www.cftc.gov/sites/default/files/filings/ptc/25/01/ptc01222514045.pdf (self-certifying Kalshi's initial sports event contracts pursuant to CFTC Rule 40.2(a))
[9] Commodity Futures Trading Comm'n, CFTC Announces Prediction Markets Roundtable, Release No. 9046-25 (Feb. 5, 2025).
[10] Dustin Gouker, *News: CFTC Cancels Prediction Markets Roundtable*, Event Horizon (Apr. 24, 2025), https://nexteventhorizon.substack.com/p/news-cftc-cancels-prediction-markets

Commission relies on an outdated state definition that traces back to the Statute of Anne and later migrated into state law. Ultimately, however, the 'contingent event' component of the definition became a federal inquiry once Congress occupied the field of futures, while states continued to retain jurisdiction over gambling games.

On a related note, the Commission's position that "... the earlier economic purpose test had been repealed by the CFMA, the Commission did not apply an economic purpose test to the contracts on movie box office receipts," adopts a form-over-substance approach. As the Commission itself admits: "However, 'in light of the comments raised by the studios, the Commission evaluated MDEX's proposed contracts to determine whether they would provide some reasonable means for managing risks associated with box office revenues' and 'found that the contracts can perform hedging and price discovery purposes' because movie industry 'profit and losses have a clear and direct relationship to box office revenues.'" That is effectively a public-interest inquiry guided by the economic purpose test.

The Special Rule Does Apply To All Event Contracts. The Commission states:

> The Nadex Order's approach also leads to illogical results. As discussed below in relation to the definition of the term "gaming," if the Special Rule's application were interpreted to depend on whether trading in an event contract is or equates to gaming, the Special Rule could potentially apply to any event contract because gaming could be interpreted to include the staking of money on a contingency.

Not quite. Lexicon agrees that "[t]he role of the Enumerated Activities in this sequence is to filter which event contracts are potentially subject to a public interest determination," but the filter does not, as the Commission suggests, give rise to an evaluation of all event contracts. If an event contract on inflation or interest rates is self-certified, the Commission can comfortably pass on discretionary review, knowing that such contracts would almost certainly be found not contrary to the public interest. Review discretion is reserved for contracts that are either too close to call without detailed analysis (such as election contracts) or others that are arguably not close at all (such as sports event contracts). Having authority over all event contracts does not mean Congress expected the CFTC to review all event contracts. Instead, it expected the Commission to use its discretion.

The Commission further states:

> Similarly, because some states prohibit the staking of money on a contingency, trading in the event contract would appear to be illegal under those laws–except that such state laws are preempted by the CEA as applied to event contracts traded on CFTC-registered entities.

The Commission already provides the correct answer here. There is no conflict. As noted above, state laws prohibiting contracts where risking money on a contingent event is deemed gambling are superseded by the CEA to the extent such risks are taken in the form of a commodity futures or swap contract.

Economic Purpose Was A Deterrent. The Commission states:

> The Commission preliminarily believes that this history demonstrates that the public interest/economic purpose test, despite its longevity, was controversial and difficult to apply. And experience showed that the public interest/economic purpose test was of limited relevance to deciding whether a futures contract should be prohibited, because no standard for finding that a futures contract does not serve an economic purpose has ever been applied to prohibit any futures contract.

Here, the Commission appears to conflate absence of evidence with evidence of absence. The fact that no futures contracts were prohibited in that period has a simpler explanation. The existence of the economic purpose test *deterred* market participants from bringing contracts without economic purpose to the CFTC. The fact that all contracts had to be approved, and self-certification was not available prior to the CFMA, also influenced those decisions.

It is no coincidence that prohibitions and near-prohibitions occurred (Nadex, ErisX, Kalshi) once DCMs became more aggressive following the repeal of Section 5(g). The Commission did exactly what it was supposed to do: Evaluate these contracts under the economic purpose test.

If Congress Meant Games, It Would Have Said Games. It is crucial to note the statutory term under the Special Rule: "Gaming," not "games." Various canons of construction indicate that Congress does not waste words. The CFTC's current rulemaking takes the statute in a direction Congress never intended; if Congress had meant "games," it would have said so. During Kalshi litigation, the CFTC itself viewed this distinction as significant–and it is.

To be fair, the discomfort that the Commission identifies warrants serious discussion. It is true that reading the Special Rule this way could be interpreted as producing an asymmetric result: Terrorism, assassination and war are activities but the gaming prong becomes a broader inquiry that carries an implied public-interest determination. But the CFTC's reading creates even bigger problems; it disregards Congress's actual word choice. And when one must choose between alternative readings, each imperfect, the interpretation that aligns with congressional intent should prevail. Congress could not possibly have legalized sports gambling through a backdoor when two other federal statutes, the Wire Act and also PASPA (now repealed), pointed in the opposite direction. The best interpretation is that Congress drafted suboptimally, mixing and matching underlying commodities that it was concerned about, with translating broader policy objectives into law. Its overarching intent is clear, however: Separate genuine futures trading that facilitates risk transfer from pure gambling. Reading the statute as the Commission does now effectively throws the baby out with the bathwater, as it eliminates a century-long effort to keep gambling away from futures markets. When two less-than-ideal interpretations collide, the one that aligns with congressional intent should prevail, which is precisely how the CFTC interpreted the Special Rule until just a couple of years ago.

Two Lanes, Not Surplusage. The rulemaking states:

> As a corollary, if one asserted that the Special Rule applied because the event contract itself was "gaming," then the terrorism, assassination and war categories would be surplusage.

Not so. DARPA was top of mind, and the specific callouts to terrorism, assassination, and war were Congress's way of alerting regulators that there is a subset of commodities–all illegal acts–that the Commission should be mindful of. Another category, gaming, may not have perfectly fit into the bulleted list, but once one recognizes that Congress understood that event contracts, (which were also prevalent in the decade leading to Dodd-Frank) could be used for gambling purposes, the drafting structure makes sense. Essentially, Congress wanted the CFTC to pay attention to two types of event contracts; 1) Those where the underlying activity itself is illegal–the bullet referencing "activity that is unlawful" in the Special Rule serves as a catch-all in this regard; and 2) Those that do not serve an economic purpose, because Congress sought to preserve the longstanding distinction between genuine risk-transfer and pure gambling.

II. Off-Exchange Trading Limitations

The CEA clearly prohibits off-exchange trading, and the Commission doesn't argue otherwise. These are some of the statements made by the Commission in that regard:

> Since its enactment in 1974, the CEA has required that futures contracts and options on futures contracts be transacted on or subject to the rules of a DCM; this is known as the exchange trading requirement.

And:

> [T]he Dodd-Frank Act required retail swap transactions (i.e., transactions not between eligible contract participants) to be entered into on a DCM.

And:

> In sum, under current law, futures contracts, options on futures contracts and retail swaps must be transacted on DCMs, and the CFTC oversees DCMs and SEFs and trading in these instruments.

In fact, the off-exchange prohibitions go even further back–all the way back to the enactment of the Grain Futures Act of 1922. The exchange-trading requirement has been the central organizing principle of federal futures regulation from the very beginning.[11] The fundamental disconnect is that Chairman Selig has publicly embraced the view that federally regulated event contracts and state sports-betting markets can coexist in parallel.[12] He reaffirmed this coexistence view when, on CNBC's *Squawk Box*, co-host Andrew Ross Sorkin asked him: "There's a question about, if you're a state, whether you should have any say… at all. What do you think?"[13] The CFTC itself has recently framed its exclusive jurisdiction as covering event-contract derivatives traded on DCMs, rather than event contracts irrespective of where they are traded.[14] The *same* complaint also alleges that, absent statutory exemptions or exceptions, commodity-derivative transactions must be conducted on exchanges designated by, or registered with, the CFTC.[15]

Those differences are not semantics. When the statute prohibits off-exchange trading activity as a matter of black-letter-law, as the CFTC itself repeatedly admits, and that position directly contradicts Chairman Selig's public statements and the Commission's litigation positions, the market is left confused.

The concern is not theoretical; it has a direct impact on whether state-regulated sports-betting schemes can coexist with the federal regime. On its face, a sports bet looks indistinguishable from a sports event contract, as multiple courts have already observed.[16] One structural distinction is often invoked: That sports-event-contract transactions are peer-to-peer, whereas sports-betting transactions are against the house. That distinction, however, does not carry any legal significance, nor does it lead to any viable interpretation: 1) First and foremost, nothing in the statutory definition of "swap" (or "excluded commodity," for that matter) draws a distinction along those lines; 2) On certain prediction market platforms, DCM-affiliated entities serve as counterparty;[17] 3) At least one

---

[11] *See generally* William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 Vand. L. Rev. 473 (1988).
[12] Chairman Selig stated that state sportsbooks and CFTC-regulated event contracts "can exist in parallel." He explained that CFTC markets operate under "a different regime" and added: "We certainly don't go into casinos to evaluate whether they are offering illegal over-the-counter swaps." Conversation with SEC Chairman Paul Atkins and CFTC Chairman Michael Selig: Future of Finance 2026, YouTube (Milken Institute Mar. 3, 2026), at 24:08, https://www.youtube.com/watch?v=5efO1AfMo0g.
[13] Chairman Selig went on to say: "To the extent it is a swap or a type of derivative that's offered over-the-counter, we still regulate that, but there are some nuances in our statute where states may have some authority in the case of things that are offered outside of the federally-regulated framework." Watch CNBC's Full Interview with CFTC Chairman Michael Selig, CNBC (Apr. 6, 2026), at 4:45, https://www.cnbc.com/video/2026/04/06/watch-cnbcas-full-interview-with-cftc-chairman-michael-selig.html.
[14] *See* Complaint ¶¶ 1, 7, 10, 82, *United States v. New York*, No. 1:26-cv-03404 (S.D.N.Y. Apr. 24, 2026), ECF No. 1 (describing the CFTC's exclusive jurisdiction over event-contract futures and swaps traded, listed, offered, or executed on federally regulated designated contract markets).
[15] *Id.* ¶ 31.
[16] *See*, e.g., *KalshiEX LLC v. Orgel*, No. 3:26-cv-00034, slip op. at 10–11 (M.D. Tenn. Feb. 19, 2026) ("In other respects, it does resemble traditional sports betting. As the defendants argue, Kalshi has marketed itself as a traditional sports betting operation. ... [F]or any sports-betting enthusiast unfamiliar with the CEA, it appears to the court that a user would find Kalshi's offerings similar, if not identical, to a sportsbook.").
[17] Dan Bernstein & Eben Novy-Williams, *Kalshi's Trading Arm Muddles "Peer-to-Peer" Claims*, Sportico (Sept. 11, 2025).

off-exchange platform offered both models side-by-side (World Sports Exchange), and this did not prevent the trial court and later the appellate court from finding Wire Act violations; and 4) The distinction implies that Betfair, a peer-to-peer betting exchange, may be just one DCM license away from operating legally in the United States, an untenable position.

Thus, the most natural conclusion consistent with the statute and case law is that state-regulated sports bets are, in fact, swaps under CFTC's jurisdiction, and if one follows the Commission's own statutory interpretation of the CEA, they cannot lawfully exist. The Commission may prefer that matter not to be litigated at this time, but non-enforcement of the statute is simply not a viable option, nor what Congress intended of the agency.

III. Other Considerations

Lexicon would like to make two additional observations.

A. Preserving Responsible Safeguards

The introduction of the self-certification process was a sea change; it allowed exchanges to go to market quickly. That said, with Dodd-Frank, a residual discretionary review authority with respect to event contracts was retained by the CFTC, as well as the ability to request a stay, an authority that market participants respected. The CFTC also had a statutory requirement to disclose its findings once it initiated review.[18] Together, these measures served as responsible safeguards in the marketplace.

Now with the proposed rulemaking, it appears that the Commission no longer deems those safeguards as necessary:

> …[T]he Commission anticipates that some prediction markets will abide by such requests, but there is no statutory provision requiring the prediction market to do so.

And:

> Proposed § 40.11(e)(1)(ii) includes a specific statement that if the Commission does not issue an order at the end of a review period, the event contracts subject to review may be, or continue to be, listed for trading and accepted for clearing and the review shall be deemed concluded. The Commission preliminarily believes that this provision would allow for a more streamlined process by not requiring that the

[18] 7 U.S.C. § 7a-2(c)(5)(C)(iv) provides: "The Commission shall take final action regarding the public interest determination not later than 90 days from the commencement of the review unless the party seeking to offer the contract or swap agrees to an extension." The implementing regulation, 17 C.F.R. § 40.11(c)(2), echoes that statutory mandate.

> Commission issue an order of approval and provide certainty in cases where the Commission does not take any action at the end of the review period.

Taken together, these proposed changes appear less directed toward improving the functioning of the event-contract review process than toward accommodating what occurred in the Crypto.com matter, where the exchange declined to honor the Commission's requested stay and the Commission never published the findings contemplated by the statute. Accordingly, we urge the Commission to preserve the existing safeguards.

B. Swaps vs. Futures

It appears the Commission is highlighting a distinction between futures and swaps, and also suggesting that event contracts can be structured as either:

> Under the plain language of the CEA, certain event contracts are implicated by the "swap" definition. An event contract may also be structured in other ways, including as a futures contract.

That demarcation alone may not necessarily have substantial consequences. The statute allows largely parallel tracks; for example, the "contingency" language in the swap definition finds its equivalent in the "excluded commodity" definition. Also, from a jurisdictional perspective, CFTC's exclusive jurisdiction covers both possibilities. Whether an event contract is labeled as a swap or future may lead to similar outcomes.

That said, we encourage the Commission to further clarify a defining boundary. Lexicon is especially interested in the Commission's views on daily fantasy sports ("DFS") offerings under the swaps-vs.-futures dichotomy. Those offerings have been largely regulated by the states under the unchecked assumption that they are games and contests, and therefore subject to state gaming rules. Lexicon disagrees with that characterization; and has long maintained that they resemble event contracts, albeit more complicated than a binary option. Undoubtedly, they resolve on the outcomes of a multiplicity of future contingent events, suggesting that they may be characterized as either swaps, or to the extent they are sufficiently differentiated from binary options, perhaps as futures-styled event contracts. Their varying payoff structures may indicate they are closer to futures than to swaps. Regardless, the DCM requirement survives:

> Because of CEA section 2(e) and the exchange trading requirement, respectively, a prediction market that offers event contracts for trading by the general public in the form of swaps or futures contracts must register with the CFTC as a DCM.

With the proliferation of sports event contracts, the question whether DFS offerings have been regulated under the wrong regime may again be tested in the judiciary. Therefore, it is paramount for the Commission to provide additional guidance on this matter.

We thank the Commission for requesting public comment on its proposed rulemaking.

Alper Ozgit
Co-founder/CEO, Lexicon Labs