

INDIAN GAMING ASSOCIATION

Rebuilding Communities Through Indian Self-Reliance

Comments in Response to Advance Notice of Proposed Rulemaking ("ANPRM"), published on March 26, 2026, in the Federal Register, Vol. 91, No. 50 p.12516

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These comments are submitted on behalf of the Indian Gaming Association in response to the Commodity Futures Trading Commission's ("CFTC") Advance Notice of Proposed Rulemaking ("ANPRM"), published on March 26, 2026, in the Federal Register, Vol. 91, No.50 p.12516. These comments are intended to convey our strong opposition to any revision of the CFTC's regulations that would purport to authorize the use of futures markets to facilitate wagering on the outcome of sporting events under the auspices of the Commodities Exchange Act ("CEA"), 7 U.S.C. § 1 et seq.

Over the past year, we have watched with growing dismay the failure of the CFTC to prohibit the exploitation of the CEA to facilitate interstate sports betting outside of a lawful state and/or tribal regulatory framework. CFTC inaction has allowed the explosion of prediction market platforms offering so-called "event contracts" based on the outcome of sporting events. The fact is that these "events contracts" are not financial instruments, they are interstate wagers and such wagers are unlawful under the CEA and its implementing regulations. Equally, they constitute illegal gambling under federal, state, and tribal law.

Worse, instead of applying its own correct interpretation of the law as reflected in its existing regulations, the CFTC, in recent months, has become an active proponent of sports betting through prediction markets, filing legal briefs opposing the enforcement of tribal and state gambling laws. Now, the CFTC has issued this ANPRM, which portends an effort to weaken the agency's existing regulations prohibiting registered entities from listing swaps that are related to "terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law."

There is no serious confusion as to the distinction between gambling and investing in the financial markets. There are only cynical, sophist commercial interests seeking a stake in the American gaming market free of a responsible legal and regulatory framework designed to protect the public interest urging the CFTC to reframe a sports wagering activity as a "sports events contract." Congress, however, has consistently reaffirmed that the role of the CFTC is to regulate markets that serve bona fide hedging and price-discovery functions that serve an inherent economic interest, not to authorize speculative gambling on the outcomes of events unrelated to economic commodities.

With the enactment of the Commodity Futures Modernization Act of 2000 ("CFMA"), derivatives markets were significantly deregulated with the goal of limiting regulation of over-the-counter

swaps and energy derivatives. The CFMA created a regulatory void that permitted the highly risky credit default swap market to flourish, which proved a key factor in the 2008 Financial Crisis. Congress stepped in to fill this void by enacting the Dodd-Frank Act of 2010, which significantly overhauled the CFTC. While Dodd-Frank did not directly restore a broad economic purpose test, it did empower the CFTC, to use public interest standards, effectively bringing back aspects of the economic purpose test for new derivatives, particularly event contracts, by requiring evaluation for hedging/commercial uses versus pure gambling. This included a special rule for CFTC review and approval of event contracts and swaps. The special rule provides that the CFTC may determine that "agreements, contracts, or transactions are contrary to the public interest if [they] involve – activity that is unlawful under any federal or state law; terrorism; assassination; war; gaming; or other similar activity determined by the Commission by rule or regulation, to be contrary to the public interest."

The CEA's legislative history clearly evidences that Congress did not intend its 2010 amendments to the CEA to encompass gambling activities on the futures market. Senator Lincoln, who drafted the amendments, stated on the floor that the provision ultimately enacted as Section 5(c)(5)(C) of the CEA was intended to 'prevent gambling through futures markets' and restrict 'event contract[s] around sporting events such as the Super Bowl.'" She added that the intent of the 2010 Dodd-Frank amendments to the CEA was "to protect the public interest from gaming contracts." 156 Cong. Rec. S5906 (2010). When Senator Feinstein asked if the intent of the legislation was to empower the CFTC "to determine that a contract is a gaming contract if the predominant use of the contract is speculative as opposed to a hedging or economic use," Senator Lincoln responded:

> That is our intent . . . [to] 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. *Id.*

The CEA's "Special Rule" provides that the CFTC may determine that contracts involving certain enumerated categories (which expressly include "gaming") are contrary to the public interest, and as a result are prohibited from being listed or traded. 7 U.S.C. § 7a-2(c)(5)(C). In particular, the "Special Rule" provides:

> (i) Event Contracts
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> 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 . . . by a designated contract market . . . , the [CFTC] may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve—
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> (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 [CFTC], by rule or regulation, to be contrary to the public interest.

(ii) Prohibition

No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity. 7 U.S.C. § 7a-2(c)(5)(C).

As noted by Senator Lincoln and under a plain reading of the law, Congress clearly intended the CEA to prohibit any event contract involving gaming as contrary to the public interest. In fact, it is questionable whether a sporting event can reasonably meet the definition of "commodities" under the CEA. It is thus questionable whether such activity is within the scope of either the CEA or the CFTC's regulatory jurisdiction. *See* 7 U.S.C. § 2(a)(1)(A) ("The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements…, and transactions involving swaps or contracts of sale of a commodity for future delivery . . . ."); 7 U.S.C. § 1a(9) (defining the term "commodity" to mean certain tangible goods like wheat, cotton, or corn); *Id.* § 1a(19)(iv) (defining the term "excluded commodity" to mean, among other things, "an occurrence, extent of an occurrence, or contingency . . . that is . . . associated with financial, commercial, or economic consequences."). Sporting events simply are not "associated with financial, commercial, or economic consequences," and, therefore, so-called Sports Contracts are not within the bounds of activity governed by the CEA. Betting on the outcome of sporting events is gambling and comes within the jurisdiction of state and tribal governments unless and until Congress declares otherwise through affirmatively enacted law. To date, it has not.

In fact, the federal Wire Act, 18 U.S.C. § 1084, provides no one may "knowingly use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . on any sporting event or contest . . . ." *Id.* § 1084(a). Courts of appeals and the U.S. Department of Justice ("DOJ") interpret the Wire Act to prohibit interstate online sports betting. Particularly pertinent from our perspective, these so-called Sports Contracts also offend IGRA by facilitating wagering on the outcome of sports events, a Class III gaming activity. Class III gaming activities on Indian lands are only lawful where such activity is: (1) authorized by a tribal ordinance or resolution; (2) located in a state where such gaming is permitted; and (3) conducted pursuant to a Tribal-State Gaming Compact. 25 U.S.C. § 2710(d)(1).

It is black letter law that the rulemaking process cannot be used to amend federal statutory law. See, *Virginia v. EPA,* 597 U.S. 697, 142 S. Ct. 2587 (2022); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291 (2000); and *Util. Air Regulatory Grp. v. EPA,* 573 U.S. 302, 134 S. Ct. 2427 (2014). Any revision to the CFTC regulations authorizing Sports Contracts would run afoul of the plain text of the CEA and its implementing regulations and disregard the plain meaning of the term "gaming," generally, and the term "sports betting," specifically, as that term

is commonly understood, which means "staking or risking . . . something of value upon the outcome of . . . a sporting event . . . upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." 31 U.S.C. § 5362(1)(A) (definition of "bet or wager" under the Unlawful Internet Gambling Enforcement Act). This is precisely what Sports Contracts purport to do.

An event contract is one that is for an allowable commodity "based upon the occurrence, extent of an occurrence, or contingency [of an event] . . . by a designated contract market or swap execution facility . . . ." 7 U.S.C. § 7a-2(c)(5)(C)(i). As such, a sports event contract is one that is based upon the occurrence or outcome of a sporting event, or any part thereof. Sports Contracts are contracts with a value dependent upon the outcome of certain sporting events. In other words, such contracts constitute sports betting.

When it adopted regulation 17 C.F.R. § 40.11(a)(1), prohibiting event contracts that "involve . . . gaming," the CFTC correctly made a Final Determination that those contracts are contrary to the public interest under 7 U.S.C. § 7a-2(c)(5)(C)(i). See 7 U.S.C. § 7a-2(c)(5)(C)(ii) ("No agreement, contract, or transaction determined by the [CFTC] to be contrary to the public interest. See 7 U.S.C. § 7a-2(c)(5)(C)(ii) ("No agreement, contract, or transaction determined by the [CFTC] to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading through a registered entity."). While such contracts clearly are contrary to the public interest, if an event contract "involves . . . gaming[,]" that contract is categorically prohibited and no further public interest determination by the CFTC is necessary under the plain meaning of the terms of the CEA and its implementing regulations.

Other than efforts by certain commercial entities to abuse the availability of event contracts under the CEA, by offering sports betting disguised as derivatives, swaps, or legitimate event contracts, nothing in the law has changed. Sports betting is what it is: gambling. Interstate or "federal" sports betting is illegal in the United States. Unauthorized and unregulated gambling is contrary to public policy and attempts to pass it off as an "investment" on the financial markets constitutes a fraud upon the public.

Online gambling raises concerns and risks that must be evaluated at the local tribal and state governmental level. Inadequately regulated online gambling that is offered on prediction markets is particularly susceptible to abuse by unscrupulous actors. This is precisely why Congress sought to exclude gaming under the CEA as a matter of public interest. On the other hand, gaming is a form of entertainment enjoyed by many Americans who find it fun and exciting. The revenues it produces, where permitted, flow directly and/or indirectly to tribal and state governments to be used for vital public purposes. Determining whether to authorize gaming activities is a question of public policy historically left to state and tribal governments which weigh and balance the costs and benefits of allowing gaming and determine the scope of permissible gaming activities and the applicable rules.

Most states legally permit some form of gaming, though two prohibit it outright as a matter of criminal law. With the enactment of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701, et seq., in 1988, most tribal governments have adopted gaming laws authorizing gaming activities within tribal jurisdictions. Of these, many have entered gaming compacts with state governments pursuant to IGRA, which allow for what is statutorily referred to as Class III gaming

activities. Class III gaming encompasses a broad array of gaming activities from slot machines to card and table games to wagering on racing and sports events. Through such gaming compacts, tribal and state governments negotiate not only the scope of gaming permitted, but the regulatory structure and standards that apply to such gaming activities.

In weighing and balancing the costs and benefits of gaming, the key consideration is the public interest and how best to protect it from the potential harms and vulnerabilities associated with online gambling. Tribal governments, like state governments, have invested heavily in regulatory systems to monitor, audit, and enforce compliance with laws, regulations, and internal control systems as a means not only of safeguarding tribal gaming revenues, but to prevent unlawful practices harmful to the public interest, including safeguards designed to protect consumers. Licensing and background requirements are designed to prevent infiltration by criminal elements. Gaming regulations go beyond operational procedures, they address gambling addiction, problem gaming, the adjudication of patron complaints, and the prevention of cheating and money laundering. Such rules, regulations, processes, and procedures are designed to facilitate integrity in the conduct of gaming, mitigate potential threats and harms, and to protect the public interest through the deployment of robust regulation.

Indian Country has worked hard to build a tribal gaming industry that is not only prosperous, but which plays by the rules, acknowledges, respects, and protects the public interest, and actively shields itself from criminal infiltration, criminal activities, and money laundering through robust regulation. Sports betting on the futures market is vulnerable to all the harms commonly associated with gambling with virtually none of the protections provided under tribal, federal (IGRA), and state regulatory frameworks.

The anonymity associated with trading on the predictions market alone makes it vulnerable to money laundering and corruption. Add to that the self-certification allowed to registered entities and the lack of a regulatory framework specific to gaming, and the potential for corrupt practices is obvious. Already there have been numerous scandals revealing the vulnerabilities of the predictions markets to abuse, corruption, and corrupt practices from insider trading to market manipulation to outright fraud. When it comes to wagering, there is a cogent and longstanding public policy basis for excluding gambling activities from listing and trading on the predictions markets. Gambling is not a financial investment and calling it something else does not change its fundamental character nor its need for a strong, active regulatory framework to protect its integrity.

Proponents of the use of so-called "Sports Contracts" under the auspices of the CEA seek to conduct sports betting free of the costs and responsibilities of a responsible, well-regulated legal framework. Sports betting dressed up as investments on the prediction markets under the CEA is a fiction fabricated by commercial interests as an end run around responsible state and tribal regulation of sports betting activities and a means to by-pass public policies restricting, regulating, or prohibiting sports betting. Furthermore, Sports Contracts directly violate the Commodity Exchange Act, and the plain language of the CFTC's implementing regulations because they involve gaming, violate state, tribal, and federal laws, and are contrary to the public interest. For these reasons, the Indian Gaming Association opposes any change to the CFTC's regulations that would permit events contracts to facilitate gaming activities under the CEA.

To adopt a regulation that classifies sports betting as a derivative, event contract, swap or other financial instrument not only stretches the reach of the CFTC far beyond what Congress intended in the CEA, it would undermine federal Indian law and policy, encroach upon the legally protected rights and interests of American Indian and Alaska Native tribal governments, and encroach upon the inherent sovereignty of tribal governments. It would not only constitute an improper intrusion on the sovereignty of tribal governments, but it would also intrude upon state sovereignty as well.

The Indian Gaming Association strongly urges the CFTC to affirm its current interpretation of the CEA and clarify that Sports Contracts are prohibited from being listed or made available for clearing or trading. Trading of Sports Contracts is gambling. It violates state, tribal, and federal law and is contrary to public policy. Allowing Sports Contracts to be listed and traded interferes with the sovereign right of tribal and state governments to exercise their police power to regulate gaming within their respective jurisdictions. This right is fundamental to the authority of state and tribal governments to regulate or even prohibit activities deemed contrary by state and tribal governments to the public interest.

The CFTC is being pressed by commercial interests to reconsider its prior public interest determination so as to permit sports betting via so-called events contracts under the CEA. Worse, the CFTC has done little to resist notwithstanding that its allowance of this activity contravenes tribal and state interests and intrudes upon the sovereignty of both tribal and state governments to exercise their police powers within their respective jurisdictions consistent with principles of American federalism.

In sum, we urge the CFTC to maintain and enforce the CEA Special Rule and its regulations and affirm that Sports Contracts are prohibited from listing and trading on financial markets pursuant to the CEA.



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