VIA ELECTRONIC SUBMISSION

Michael S. Selig
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Prediction Markets, RIN 3038-AF65, 91 Fed. Reg. 12516

Dear Chairman Selig,

The Yuhaaviatam of San Manuel Nation, also known as the San Manuel Band of Mission Indians (referred to herein as the "Nation"), appreciates the opportunity to comment on the Commodity Futures Trading Commission's (hereinafter the "Commission") Advance Notice of Proposed Rulemaking ("ANPRM") regarding Prediction Markets published in the Federal Register on March 16, 2026.

Since at least 1891, the Nation has maintained a government-to-government relationship with the federal government as a recognized sovereign tribal nation. The Nation's ancestral territory includes more than 8.5 million acres in San Bernardino, Kern, Los Angeles, and Riverside Counties of southern California. Its ancestral territory covers the San Bernardino Mountains, valleys, and the high desert areas. Citizens of the Nation are descendants of the ancient Yuhaaviatam Clan of Maara'yam, which were later named Serrano Indians (Serrano means highlander) by Spanish explorers whose incursions into Yuhaaviatam territory began around 1769.

Today, the Nation operates a tribal government as well as a gaming enterprise. The Nation relies on that gaming enterprise to fund governmental operations and vital programs for its Tribal Citizens. As a sovereign government, the Nation is responsible for all infrastructure on its Tribal lands, including roads, sewer, waste management and emergency response services such as a fire department and EMT. The Nation's gaming enterprise also provides direct and indirect benefits to the surrounding community through philanthropy, direct investment, and jobs and economic development. The Nation is one of the largest employers in San Bernardino County, employing close to 8,000 people from the surrounding community and contributing over $450 million to charitable causes and revenue sharing agreements with the state and local governments over the past two decades. The Nation takes seriously any threat to that gaming enterprise, and any incursion into its and other tribes' exclusive right to operate Class III gaming on its lands, including the unprecedented position that CFTC regulatory authority displaces state and tribal authority over sports betting and other event contracts related to gaming.

In the Nation's view, there are three flaws in the ANPRM that make the notice an inappropriate framework for the development of new regulations. First, the CFTC has not

adequately consulted with tribes and states concerning matters in the ANPRM that directly implicate their sovereign authorities, rights, and interests, and the opportunity to submit comments in response to the ANPRM is not a substitute for such consultation. Second, the ANPRM is premised on the erroneous position that the CFTC has exclusive jurisdiction over every contract posted for trade on designated contract markets ("DCMs"). The CFTC seems to believe that its jurisdiction can be defined (and subsequently, redefined) by the choices of the financial community it claims to regulate in the name of "innovation" and not the laws enacted by Congress conferring its authority or the intent behind such laws. See CFTC Release No. 9194-26 ("This begins the process of new rulemaking grounded in a rational and coherent interpretation of the Commodity Exchange Act, while reassuring the American people that the CFTC will exercise its exclusive jurisdiction over prediction markets."). Whether Congress gave the CFTC jurisdiction, much less exclusive jurisdiction, over prediction market activities that have nothing to do with the purpose of the Commodities Exchange Act ("CEA") and the mission of the CFTC is a major question that is not answered by a portion of a statutory definition included in the 2010 Dodd Frank Act or any other part of the CEA. Third, the scope of CFTC's jurisdiction, and the assessment of matters such as the public interest in trading on DCMs must consider tribal and state interests and regulatory determinations by sovereign tribal and state governments. The CFTC does not have carte blanche to expand its regulatory authority to fit the apparent desire of the prediction markets to "trade on anything"[1]—even if it had the administrative capacity to exercise such authority.

Additionally, the ANPRM offers no reason to alter the CFTC's existing regulation prohibiting DCMs from listing any contract that "involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law." 17 C.F.R. § 40.11(a)(1).

1. Failure to consult with other sovereigns.

The Administrative Conference of the United States ("ACUS") recently recommended that "[a]gencies generally should consult with state, local, and tribal officials as early as feasible and throughout the process of developing, issuing, and implementing regulatory policies and actions."[2] The ACUS recommendation was clear that consultation is different from commenting on proposals: "Although state, local, and tribal governments may participate in regulatory policymaking through notice-and-comment rulemaking and similar processes, those processes are not a substitute for direct consultation between governments."[3]

[1] https://kalshi.com/sign-up.

[2] Admin. Conf. of the U.S., Recommendation 2025-2, *Consultation with State, Local, and Tribal Governments in Regulatory Policymaking*, 90 Fed. Reg. 27515, 27519 (June 27, 2025).

[3] *Id.* at 27517.

Consultation meets obligations that are distinct from the interests of regulated parties in being heard in a notice and comment process. "Consultation with state and local governments promotes values of cooperative federalism. The relationship between the federal government and state and local governments is rooted in the nation's traditions and reflected in the Constitution's creation of a federal system. Within this scheme of constitutional federalism, there has long been an expectation that the federal government engage with state and local governments on regulatory policymaking and implementation."[4] Likewise, "[c]onsultation with tribal governments reflects the unique government-to-government relationship between tribes and the United States and the federal policy of promoting tribal self-determination."[5] In addition to the express obligations of executive agencies to consult with tribes under Executive Order 13175, "tribal consultation is consistent with the 'unique trust responsibility of the United States to protect and support Indian tribes and Indians' and the 'duty of the federal government to promote tribal self-determination regarding governmental authority and economic development.'"[6] Accordingly, agencies must consult with tribal officials early in developing regulations and other policy actions when such actions have substantial direct effects on tribes. Moreover, such consultation upholds the U.S. trust responsibility to tribes and respects the government-to-government relationship between our sovereigns. The ANPRM will have a substantial direct effect on tribes and states and their respective gaming operations. Tribes and states have decades of combined knowledge, experience and expertise in regulating betting activities. To issue a regulation on this topic without meaningful consultation violates EO 13175, and the government-to-government relationship between the U.S. and tribes, and states rights. Those obligations extend to independent agencies like CFTC. Similarly, the obligations of federalism apply to independent agencies no less than to agencies directly covered by the consultation duties in Executive Order 13132.

The ACUS also explained that in the context of rulemaking, consultation with state and tribal officials "normally should precede the issuance of a notice of proposed rulemaking."[7] The CFTC is well aware that the scope of its regulatory authority over prediction markets and, in particular, over sports betting on those markets, has federalism or tribal implications.[8] Yet the

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4 *Id.*

5 *Id.*

6 *Id.* (quoting Indian Trust Asset Reform Act, 25 U.S.C. §§ 5601, 5602). *See also* Cong. Research Service, *Federal-Tribal Consultation: Background and Issues for Congress* (June 12, 2024).

7 *Id.*

8 The CFTC filed an amicus brief in the case *North American Derivatives Exchange Inc. v. Nevada* in which both States and Tribes have asserted that CFTC exclusive authority over event

CFTC did not consult with tribes or states regarding those significant implications for state and tribal regulatory authority.

2. Prejudgment of the scope of CFTC exclusive jurisdiction.

The ANPRM reads as if the issues described therein are purely matters for the CFTC to address as a matter of agency policy discretion, rather than a contested claim to regulatory authority that would displace state and tribal regulation. *See, e.g.,* ANPRM, 91 Fed Reg. at 12517 (asserting "that the event contracts listed on CFTC-registered DCMs and SEFs are swaps or futures contracts subject to the jurisdiction of the CFTC"). That is consistent with the press release issued along with the ANPRM which describes it as the beginning of a rulemaking process to exercise the CFTC's claimed "exclusive jurisdiction over prediction markets."[9] It seems that the failure to consult with state and tribal sovereigns may have contributed to the mistaken assumption that Congress tucked a regulatory elephant into the statutory mousehole of a definition. But understood in the context of the CEA as a whole, the portion of the definition of "swap" to include a contract "that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence" does not extend to the vast range of sports betting contracts currently offered on prediction markets, and which comprise a very large percentage of the total amount being wagered on those markets.

The jurisdictional claim over prediction markets seems to be either that anything listed on a DCM is in fact within the CFTC's jurisdiction, or that Congress gave the CFTC jurisdiction over "information aggregation vehicles," regardless of whether those vehicles would advance any of the purposes of the CEA. Neither is true. Treating the CFTC's jurisdiction as coextensive with whatever is offered on DCMs would be at best circular. Worse, because the DCMs can self-certify contracts, it would mean that self-certifications by interested parties would define the CFTC's jurisdiction. But analysis of the CFTC's jurisdiction must begin with the CEA as a whole, and the specific definitions of swaps and futures referred to in the ANPRM as authorizing trading of *some* prediction market contracts must be understood in their statutory context. Even the ANPRM carefully states that prediction market contracts "may" fit those definitions, not that any such

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contracts for sporting events and casino style gambling would have federalism and tribal implications.

[9] Press Release, Commodity Futures Trading Comm'n, Release No. 9194-26: CFTC Seeks Public Comment on Advanced Notice of Proposed Rulemaking Relating to Prediction Market (Mar. 12, 1026), available at https://www.cftc.gov/PressRoom/PressReleases/9194-26.

contract will. 91 Fed. Reg. 12517; *see id.* ("[E]vent contracts can fall within multiple subsections of the CEA's definition of ''swap.'").

3. Failure to take state and tribal sovereign interests into account.

Not only is it legally erroneous to wish the entire body of state and tribal regulation away, it is also impossible to devise a sound system for exercising whatever regulatory authority CFTC has over prediction markets without taking the state and tribal systems into account. "It is well settled that an agency's action is arbitrary and capricious if it "entirely fail[s] to consider an important aspect of the problem" before it. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Ohio v. EPA*, 603 U.S. 279, 293 (2024) ("An agency cannot simply ignore an important aspect of the problem." (citation modified)); *Affirmed Energy, LLC v. FERC*, 166 F.4th 1070, 1086 (D.C. Cir. 2026)

Both Congress and the Supreme Court have recognized the states' historic power to control gambling, including betting on sports, within their borders. Indeed, even when congress sought to ban most sports betting in the United States, it attempted to do so by utilizing state law to accomplish its goal. Rather than passing a federal prohibition of sports betting, Congress instead relied on the indirect method of commanding (most) states to prohibit sports betting under the Professional and Amateur Sports Protection Act of 1992 ("PASPA"). When the Supreme Court struck PASPA down in 2018, it noted a "coherent federal policy" to "respect the policy choices of each State on the controversial issue of gambling." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 484 (2018).[10] Yet construing the CEA to confer exclusive jurisdiction on the CFTC to regulate sports betting would defy that federal policy. Moreover, it would mean that Congress had actually preempted the very state law prohibitions PASPA relied on in 2010, eight years before *Murphy*, but without any party to the case or the Court having noticed.

Congress speaks clearly when it intends to enact substantial changes to the law. If the definition of swap included in the 2010 Dodd-Frank Act did not signal the preemption of all state sports betting law to the Supreme Court in 2018, there is simply no basis for reading that definition so expansively today. *Murphy* freed the states to make their own choices about whether to allow

[10] Federal laws addressing gambling generally piggyback on state law: "Under 18 U.S.C. § 1955, operating a gambling business violates federal law only if that conduct is illegal under state or local law. Similarly, 18 U.S.C. § 1953, which criminalizes the interstate transmission of wagering paraphernalia, and 18 U.S.C. § 1084, which outlaws the interstate transmission of information that assists in the placing of a bet on a sporting event, apply only if the underlying gambling is illegal under state law. See also 18 U.S.C. § 1952 (making it illegal to travel in interstate commerce to further a gambling business that is illegal under applicable state law)." *Murphy*, 584 U.S. at 484.

sports betting and how to regulate it. It did not create jurisdiction in the CFTC to override all of those state choices.

The 2010 definition of swap did not make every "event contract" a swap that could be traded on a DCM. The specific language referring to contracts for "any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence," must be read in the context of a list of similar items, all of which refer to exchanges for interests in commodities or currencies with real economic value. 7 U.S.C. § 1a(47)(A). The statutory provision granting the CFTC jurisdiction over "transactions involving swaps," 7 U.S.C. § 2(a)(1)(A), also provides, "[e]xcept as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State," which precludes reading "swap" so broadly that the CFTC's jurisdiction would limit the long-recognized authority of states to regulate sports betting. The definition must also be understood in the context of Congress' finding that "[t]he transactions subject to this chapter are entered into regularly in interstate and international commerce and are affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities." 7 U.S.C. § 5(a). Event contracts that are not affected with that national public interest are not transactions subject to the CFTC's jurisdiction under the CEA. All of the contextual cues within the CEA preclude reading the definition of "swap" so broadly that it would eclipse the very state authority the Supreme Court so recently acknowledged in *Murphy*, even without invoking the strong presumption against preemption of state law.

Likewise, courts read federal statutes to avoid implied repeal of other statutes. Yet attributing to the "swap" definition exclusive CFTC jurisdiction over sports betting would displace *tribal* and National Indian Gaming Commission jurisdiction over Class III gaming, including sports betting, on tribal lands. 25 U.S.C. § 2710(d).

Although the prediction markets have at times suggested in litigation that state and tribal regulation of sports betting can coexist with CFTC jurisdiction, that suggestion is not consistent with the CEA. If the CFTC takes the position that all sports wagers are swaps, then pursuant to section 2(e) of the CEA, sports wagers may only be made on a DCM. We understand that the CFTC and many prediction markets have attempted to wave away this concern by distinguishing sports bets on a DCM from sports bets at a state regulated sports book by claiming that because there is no house taking a stake in the wager on a DCM, it is distinct from the type of sports betting states regulate. There is nothing in the definition of "swap," however, that depends on whether the sports betting contract involves a "house" or a direct trade with another bettor. In fact, many forms of

state and tribally regulated gaming do not involve a "house." In parimutuel betting on horse races for example, all bets on a particular race are pooled together. Odds on the race are determined by the bets placed, and the pool is shared among those that correctly predict the outcome of the race after the track takes its commission, commonly referred to as a "takeaway." It is unclear why this would be considered a state regulated bet when made at a horse track and a federally regulated contract when self-certified by a DCM. It is the same activity, and a broad reading of the CEA to include it in the definition of "swap" would prohibit it from being made off of a DCM. And the CFTC's jurisdiction cannot be defined purely in terms of whether the contract is listed on a DCM—that would be circular.

4. Failure to explain why existing regulations should be changed.

The ANPRM does not discuss the substance of the existing regulation implementing the "Special Rule" the CFTC adopted soon after Congress enacted the Special Rule.[11] That regulation categorically prohibits listing any contract "that involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law." [cite former CFTC Officials CA9 amicus brief agreeing that the prohibition is categorical]. The combined use of three broad terms— "involve," "relate to" and "reference"— places all sports betting off-limits, because any sports betting contract will involve, relate to and reference "gaming." The Commission also noted but reserved exercise of its authority under the Special Rule to prohibit listing other categories of contracts.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Env't Def. Fund v. United States Env't Prot. Agency*, 124 F.4th 1, 15 (D.C. Cir. 2024) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016)). "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from

[11] Although not discussed in the ANPRM, CFTC counsel stated during oral arguments before the 9th Circuit Court of Appeals that the CFTC is considering clarifying the meaning of the Special Rule. Counsel also confirmed that the ANPRM does not address the special rule or regulation 40.11 "by name," but stated that "it is obviously included in the general nature of the questions that we asked for comment on." Any change to the blanket prohibition against listing certain contracts, however, would be a significant policy and regulatory change and should not require the public to infer from a long list of questions that the CFTC is considering making a major policy shift. Despite this lack of clear indication that the CFTC is considering changes to the rule, CFTC counsel also informed the court that in developing this new rule, "obviously our goal would be to move quickly because these markets are quickly developing." This further suggests that the CFTC has already determined its course of action without directly referencing the special rule and before the comment period for the ANPRM has closed.

a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course, the agency must show that there are good reasons for the new policy.*" F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (citation omitted). Yet the ANPRM disregards the substance of the existing rule and fails to address whether there is any reason for changing it. Part B of the ANPRM mentions the statutory Special Rule but omits any discussion of the regulation the CFTC promptly issued to implement it. Acknowledgment of the current regulation must be the starting point.

As Chair of the CFTC you have opined in various settings that the CFTC is not a "merits" regulator,[12] meaning that the Commission should not be deciding what kinds of contracts parties may enter into on prediction markets. Brief of Amici Curiae Former Officials and Experts, *North American Derivative Exchange v. State of Nevada*, No. 25-7187, at 15 ("The governing CFTC regulation provides that, across the board, contracts that "involve," "relate to," or "reference" the aforementioned activities—war, terrorism, gaming, etc.—are against the public interest and cannot be approved."). This misguided view that the Commission's role is limited to policing the integrity of transactions, not their subject matter, is reflected in the ANPRM's focus in Part A on "Core Principles" concerned with the integrity rather than the "merits" of transactions. But that position is at odds with the Special Rule, which requires the CFTC to consider the public interest and identifies certain categories of transactions that are presumptively not in the public interest. By refusing to enforce the Special Rule the Commission undermines its own mission to promote the integrity, resilience, and vibrancy of the U.S. derivatives market through sound regulation, yielding its regulatory powers to private, non-federal entities and essentially, reducing itself to a document archive for DCM filings. If, as you claim, the CEA granted the CFTC exclusive jurisdiction over regulation of event contracts, then you must also police DCM compliance with the Core Principles, including exercising the Commission's authority to review contracts under the Special Rule and prohibiting such contracts from trade.

With regard to contracts involving "gaming," no public interest determination could be complete without considering state and tribal regulation. First, even if—contrary to above—the CFTC had the authority to permit nationwide sports betting, the decisions of state and tribal governments on whether sports betting should be prohibited outright or should be allowed only to persons over the age of 21 or otherwise regulated to mitigate harm, must be considered in a public interest assessment. Second, the public interest assessment necessarily includes the effect sports betting through DCMs has on state and tribal revenue collected from regulated sports betting which

[12] Declan Harty, "'Cowboy': Michael Selig, a top Trump Wall Street regulator, comes out swinging, Politico, April 12, 2026 ("I'm not a merit-based regulator."), available at https://www.politico.com/news/2026/04/12/michael-selig-prediction-markets-00865239.

as explained above provides direct financial benefits to tribal, local and state communities. Third, in considering the weight assigned to an interest in recreational wagering, the Commission must consider the fact that some states and tribes do not permit sports betting as a matter of public policy. Fundamentally, the question is whether there is a demonstrable public interest in permitting sports betting in places (states and tribal lands) where it is not permitted, to persons who are not allowed to bet in the state or on tribal lands, and under conditions different from those imposed by states and tribes. The interest of prediction markets in revenue from sports betting is not a public interest, because that has nothing to do with hedging or price discovery of real-world assets.

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We thank the Commission for providing the opportunity to comment on the ANPRM and welcome the opportunity to discuss further if the Commission has any questions regarding our submission. More importantly, we urge the Commission to take immediate steps to remedy its failure to engage in meaningful consultation with tribes and states on this topic before taking any further action on this proposed rulemaking or any future action related to event contracts that implicate state and tribal sovereignty.

Sincerely,

Lynn R. Valbuena

Lynn R. Valbuena
Chairwoman
Yuhaaviatam of San Manuel Nation