Comment on Prediction Markets

Amenability to a Market as the Right Question Under CEA Section 5c(c)(5)(C)

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Introduction

This comment responds to the Commission's Advance Notice of Proposed Rulemaking on prediction markets, 91 Fed. Reg. 12516 (Mar. 16, 2026) ("ANPRM"). It is organized around three questions in the ANPRM's Public Interest block: Question 7, which asks what factors the Commission should consider in making a public interest determination under CEA Section 5c(c)(5)(C); Question 8, which asks how the public interests set out in CEA Section 3 should inform that determination; and Question 9, which asks whether elements of the pre-2000 "economic purpose" test should be applied. Question 10 is a more specific version of Question 8 and is addressed within the same framework. Other ANPRM questions — including Questions 15, 19(a), 19(b), 19(f), 20, 24, and 25 — are addressed where relevant.

The argument has three steps. First, the Commission should not treat "gambling" as the operative regulatory category for the Section 5c(c)(5)(C) public interest determination. The word does not bear principled content that can guide regulatory action. Second, the right question is whether the underlying activity is amenable to a market — whether it admits of the kind of differentiated lawful judgment that markets aggregate into a price. That question has a principled answer, and that answer is rooted in what CEA Section 3(a) identifies as the substantive purposes of CEA-regulated markets. Third, reviving elements of the pre-2000 economic purpose test would re-narrow the inquiry in the way the 2000 statutory reform rejected and would elevate one of the two functions Section 3(a) recognizes above the other.

Applied to sports event contracts, this framework yields a clear answer. Sports outcomes admit of meaningful lawful edge. They are amenable to market treatment in the same structural sense

as the activities underlying every other category of CFTC-regulated derivative. The classification of sports event contracts as "gaming" under Section 5c(c)(5)(C), which the 2010 Feinstein-Lincoln colloquy establishes and this comment does not contest, opens the second-step inquiry but does not resolve it. The Commission's task is to exercise the discretion Congress delegated, informed by current facts and by the substantive purposes Section 3 identifies.

This comment does not address the questions concerning Core Principles operations (Questions 1–6), insurance comparisons (Question 12), specific listed activities other than gaming (Questions 16–18), participant demographics or responsible gaming standards as elements of the public interest determination (Questions 19(d) and 19(e)), procedural timing details (Questions 23, 26–28), the classification of event contracts as swaps or futures (Questions 33–37), or cost-benefit, antitrust, and Regulatory Flexibility Act issues (Questions 38–40). It also does not address Questions 29, 30, 31, and 32, which concern inside information and manipulation susceptibility; those issues involve distinct analytical frameworks and are the subject of a separate comment submission. Silence on the questions not addressed here is a matter of scope, not position.

Part One. The Right Frame Is Amenability to a Market, Not Gambling

Question 7 asks what factors the Commission should consider in making a public interest determination under Section 5c(c)(5)(C). The first thing to say in answer is what the Commission should not consider: it should not treat the colloquial or moral vocabulary of "gambling" as if it picked out a regulatory category that could carry the weight of the determination. Public debate about prediction markets often proceeds as though the application of that label settled the question — as though, once an activity is identified as gambling, it follows that the activity is illegitimate, socially harmful, or properly viewed with regulatory suspicion. That framing is mistaken at its foundation, and adopting it would cause the Commission to ask the wrong question.

The framing is mistaken because "gambling" has no principled content that can do regulatory work. The word operates in colloquial, moral, and jurisdictional registers that pick out different activities, reflect different judgments, and resist reduction to any single structural feature. Every

candidate definition of gambling either sweeps in activities nobody treats as gambling or fails to capture activities everyone does.

Consider the candidates. If gambling is staking value on an uncertain outcome, then every investment is gambling, every insurance contract is gambling, every commercial decision exposed to future demand is gambling, and every futures and options position is gambling. The definition picks out essentially all economic activity that involves the future. If gambling is the predominance of chance over skill, the definition fails against poker and sports betting — both of which involve substantial skill and are universally treated as gambling — and sweeps in commodity trading, insurance underwriting, and ordinary business planning, none of which are. If gambling is zero-sum transfer, it captures the sportsbook wager but also captures every derivatives contract and every option. If gambling is risk creation rather than risk transfer, the definition does not track state gambling law and sweeps in every speculative position in every market. If gambling is whatever has historically been called gambling, the word is not a principle at all but a record of past labels, many of them grounded in moral judgment or institutional happenstance rather than in any structural feature of the activity.

The point is not that the word is meaningless in ordinary speech. The point is that it cannot bear regulatory weight. It cannot tell a regulator where to draw a line, because it does not itself draw a line. Using "gambling" as the organizing concept for the Section 5c(c)(5)(C) public interest determination is therefore a conceptual dead end. It sounds like a principle. It functions like an intuition.

Question 19(a) asks specifically whether characteristics such as "an entertainment purpose, or an element of chance" distinguish gaming from other activities. They do not, at least not in any way that supplies a principled regulatory criterion. Entertainment is a feature of equity trading apps, of sports broadcasting, of news consumption, of countless activities the Commission does not regulate as gambling. An element of chance is a feature of every uncertain future event, including the events underlying the agricultural, energy, financial, and weather contracts the Commission has long supervised. Neither characteristic, alone or in combination, isolates a class of activities for which market treatment is incoherent. They isolate a class of activities about which observers may have moral or aesthetic intuitions — which is a different thing.

If the colloquial and moral vocabulary of gambling cannot do the work, what should the Commission ask instead? The right question is whether the underlying activity is amenable to a market. That question has a principled answer, and the answer requires understanding what a market is and what it does.

Part Two. What Markets Are For and How Section 3 Informs the Determination

Question 8 asks how the public interests set out in CEA Section 3 should inform the Commission's public interest determination under Section 5c(c)(5)(C). Question 10, more specifically, asks what role event contracts play in "managing and assuming price risks, discovering prices, or disseminating pricing information" as contemplated by Section 3(a), and how those considerations should inform the Section 5c(c)(5)(C) determination. The answers are connected. Section 3(a) is not just background — it is the source of the substantive content the Commission needs in order to exercise its public interest discretion in a principled way.

A market exists because people disagree. They disagree because one of them has information the other does not. They disagree because they have analyzed the same information and reached different conclusions. They disagree because they value the same thing differently — because their commercial exposures are different, their time horizons are different, their tolerances are different. A market is the institutional form that lets them transact across those disagreements. It provides the mechanism by which two parties with different views about an outcome can meet, exchange, and settle. And it aggregates the resulting pattern of transactions into a price — a single number that reflects, in condensed form, the weighted judgment of everyone who traded. That price is then available to everyone else: to participants deciding what to do about their own exposures, to observers assessing the probability of the underlying outcome, to later market participants who want to know what the current consensus looks like.

That account is not a theoretical construction. It is the substantive content of CEA Section 3(a), which provides that the transactions subject to the Act "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). Two functions are recognized: risk management through hedging and price discovery through aggregation of differentiated participant judgment. Either alone is a sufficient public interest. Together they describe the operational role of CEA-regulated markets. This framing is not an agency gloss on the statute. Section 108 of the Commodity Futures Modernization Act of 2000 amended CEA Section 3 to codify these findings in their current form, and the accompanying House Report confirms that this two-function account reflects Congress's considered statement of what CEA-regulated markets are for. See H.R. Rep. No. 106-711, pt. 1 (2000). The Core Principles for designated contract markets operationalize both functions — requiring exchanges to support hedging through contract design and position management, and to protect price discovery through trading rules, market surveillance, and transparency requirements. See 7 U.S.C. § 7(d); 17 CFR Part 38.

The ANPRM itself, in its opening substantive description of prediction markets, frames them in the same terms. Quoting the Commission's 2008 Concept Release, the ANPRM describes prediction markets as functioning as "information aggregation vehicles" whose prices reflect the aggregate beliefs of market participants about whether the underlying events will occur. 91 Fed. Reg. at 12517 (quoting Concept Release on Appropriate Regulatory Treatment of Event Contracts, 73 Fed. Reg. 25669, 25669 (May 7, 2008)). That description captures exactly what Section 3(a) recognizes as a public interest served by CEA-regulated markets: the discovery and dissemination of pricing information through the aggregation of differentiated participant views.

With this framework in place, the question Section 5c(c)(5)(C) asks the Commission becomes tractable. The Commission must determine whether a particular event contract is contrary to the public interest. The public interests in view, as Section 3(a) makes explicit, are the public interests in risk management and price discovery. A contract through which those functions can operate — a contract whose underlying activity admits of the differentiated lawful judgment that hedgers and speculators bring to the market, and whose institutional form supports the aggregation of that judgment into a usable price — is a contract that serves the public interests Section 3 identifies. A contract whose underlying activity does not admit of differentiated lawful judgment, or whose institutional form does not aggregate that judgment into a price, is a contract for which those public interests cannot be served regardless of contract design.

That is the framework Question 8 invites and that the analytical content of Section 3(a) supplies. The factors the Commission should consider in making a public interest determination under Section 5c(c)(5)(C), as Question 7 asks, are the factors that determine whether the proposed contract is amenable to market treatment in the substantive sense Section 3(a) describes. Two factors are central: whether the underlying activity admits of meaningful lawful edge — differentiated views that participants can lawfully form on the basis of information, analysis, or position — and whether the proposed contract provides the institutional features through which the aggregation of those views into a price is realized.

Edge identifies the structural condition under which the price discovery function can operate. For a market to aggregate differentiated participant judgment, participants must have differentiated judgment to contribute. That means the activity must admit of analysis, interpretation, or information-processing that produces views that differ across participants on some defensible basis. The clearest contrast is with activities characterized by pure information symmetry. A roulette spin does not admit of meaningful edge. Every participant knows, or can readily compute, the probability of the ball landing on a given color or number. No analysis, interpretation, or modeling produces a better view than any other participant's. A dice throw is the same. A lottery draw is the same. A market organized around such an event would generate prices, but those prices would not aggregate differentiated judgment — they would reflect only the happenstance of who took which side. The price discovery function recognized in Section 3(a) cannot operate where there is no differentiated judgment to aggregate.

Almost every other activity the Commission supervises lies on the other side of that line. Equity prices aggregate disagreement about future corporate performance. Interest rate and SOFR futures aggregate disagreement about future monetary policy and rate paths. Weather derivatives aggregate disagreement about future weather. Commodity futures aggregate disagreement about future supply and demand. VIX futures aggregate disagreement about future volatility. Bitcoin futures aggregate disagreement about future cryptocurrency prices. Equity index futures aggregate disagreement about the future values of broad market measures. Each of these contracts performs price discovery in the Section 3(a) sense, and each does so without requiring an underlying physical cash market. Where a cash market does exist, the discovered price may be used downstream as a reference — a function the Commission has described as "price

basing." See CFTC Glossary. But price basing is a downstream application, not the price discovery function itself. The Commission's significant price discovery contract framework, see 7 U.S.C. § 2(h)(7), identifies when downstream price-basing has become significant enough to warrant enhanced oversight. It does not define price discovery. Many DCM contracts that perform price discovery have no cash-market referent at all.

Sports event contracts fit this framework. Sports outcomes admit of extensive differentiated lawful analysis. The relevant variables — team quality, individual player performance, injury status, matchup dynamics, usage patterns, coaching tendencies, game scripts, pace, officiating, weather, travel, rest — are the subject of a deep analytical ecosystem. Professional analysts, statistical modelers, former players and coaches, sports journalists, and sophisticated participants develop differentiated views. Those views can be wrong, and often are, but they are the product of work that some participants do better than others, and the difference in quality of analysis is persistent, identifiable, and reflected in long-run performance. When participants with such differentiated lawful views come to a market, trade on their views, and interact through a common mechanism, the resulting price aggregates those views. That is price discovery in the Section 3(a) sense. The mechanism is the same one the Commission already supervises across the rest of its derivatives universe.

Question 10's second clause asks specifically about hedging. Hedging is one of the two functions Section 3(a) recognizes, and it bears on the public interest determination both directly (where commercial hedgers participate, the risk management function operates) and indirectly (the presence or absence of commercial hedgers is sometimes treated as a proxy for legitimacy, an inference the next Part addresses). Sports outcomes do generate real commercial exposures. Stadium concessionaires, sports bars and restaurants, sportswear retailers, broadcasters with viewership-dependent advertising inventory, fantasy sports operators, hospitality and tourism businesses, and other firms have meaningful commercial exposures to sports outcomes. To the extent the Commission considers the availability of natural hedging participation, that consideration should be informed by the actual commercial landscape. But under the framework Section 3(a) describes, the price discovery function is sufficient on its own to ground market treatment. Hedging is one of two co-equal functions, not a precondition for the other.

Part Three. Elements of the Pre-2000 Economic Purpose Test Should Not Be Revived

Question 9 asks whether elements of the pre-2000 "economic purpose" test should be applied as part of the Commission's public interest determination under Section 5c(c)(5)(C). The answer is no. The test would re-narrow the inquiry in the way the 2000 statutory reform rejected, would elevate one of the two functions Section 3(a) recognizes above the other, and would substitute an agency-administered commercial-purpose assessment for the market-based determinations Congress put in its place.

The economic purpose test, as it operated under the pre-2000 CEA, required a showing that a contract served hedging or other commercial functions. Congress repealed that test in 2000, as part of the Commodity Futures Modernization Act, and replaced it with the framework now centered on the Core Principles and on the substantive purposes Section 3 identifies. Section 5c(c)(5)(C) does not contain an economic purpose requirement. Dodd-Frank did not reenact one. The legislative history of the post-2000 framework reflects a deliberate choice to move away from ex ante gating requirements based on commercial-purpose findings and toward a regime in which the market itself, supervised through the Core Principles, provides the relevant validation.

Reading the Section 5c(c)(5)(C) public interest determination to revive elements of the economic purpose test would undo that choice. It would also distort the framework Section 3(a) describes. Section 3(a) recognizes risk management and price discovery as co-equal public interests served by CEA-regulated markets. An economic purpose test centered on hedging or commercial-use considerations would elevate the first of those functions above the second, treating contracts whose principal value is the discovery of price as suspect or invalid because they do not also serve a commercial-hedging purpose. That elevation has no foundation in the statutory text. Section 3(a) lists the two functions in the disjunctive — "managing and assuming price risks, discovering prices, or disseminating pricing information" — and the structure of the Act treats both as public interests the framework is designed to serve.

A version of this objection sometimes appears in the form of a hedging-symmetry requirement: the proposition that markets exist because natural buyers and natural sellers with opposing real-world exposures come together to transfer risk, and that contracts lacking such symmetric commercial structure lack legitimacy. The Feinstein-Lincoln colloquy reflected a version of this view when Senator Lincoln observed that sports event contracts "would not serve any real

commercial purpose." 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010). The view fails on its own terms, and it fails empirically and structurally.

It fails on its own terms because, as developed above, Section 3(a) recognizes price discovery as a function co-equal with risk management. A hedging-symmetry requirement leaves the price discovery function with no independent role to play. That is not a plausible reading of the statute Congress enacted in 2000 and left undisturbed in 2010.

It fails empirically because, in essentially every major futures market the Commission supervises, commercial hedging represents a small fraction of total activity. The overwhelming majority of volume is between speculators taking differentiated views. That has been true for decades, across agricultural, energy, metals, rate, equity index, and currency contracts, and it is visible in the Commission's own Commitments of Traders data. The markets the hedging-symmetry view treats as paradigmatic are markets in which natural commercial participants are vastly outnumbered by speculators bringing differentiated lawful judgment. If commercial symmetry were actually required for market function, those markets would not function as they do. Edge — not commercial hedging symmetry — is what makes modern derivatives markets work.

It fails structurally because many modern derivatives markets, including markets no one seriously treats as illegitimate, have no symmetric natural commercial participants at all. VIX futures are an obvious example. There is no class of commercial actors whose business creates a natural short position in expected equity volatility. VIX futures exist and function because participants have differentiated views about future volatility and can express those views through trading. Weather derivatives in their early years presented the same pattern: thin commercial participation, market function driven by differentiated judgment about weather outcomes. Bitcoin futures have no wheat-farmer-and-miller structure. SOFR futures are overwhelmingly populated by financial participants trading differentiated views on interest rates. Equity index futures operate largely through speculative and portfolio-management flow. Each of these markets functions because edge is present and the price discovery function is doing its work.

Even if one were to accept the hedging-symmetry framing on its own terms, sports event contracts would still satisfy it. As noted in Part Two, sports outcomes generate meaningful

commercial exposures across stadium-adjacent businesses, media and broadcasting, merchandising, hospitality, and other sectors. The premise that sports lack natural commercial participants confuses the absence of a wheat-farmer-and-miller dyad with the absence of commercial exposure. Real businesses hold real exposures to sports outcomes.

The Feinstein-Lincoln colloquy's observation about "real commercial purpose," considered in context, was a policy statement about the perceived utility of sports event contracts in the regulatory environment as it then existed. It was not a statutory determination, was not codified into Section 5c(c)(5)(C) or any other provision, and was not framed as a legal test. Congress, having considered the language Senator Lincoln offered, chose not to translate that policy preference into the statute. Reading Section 5c(c)(5)(C) to import the economic purpose test under a different name — whether through the colloquy's vocabulary, through a hedging-symmetry requirement, or through any other mechanism — would override Congress's decision not to encode that test.

Part Four. Edge Is Necessary but Not Sufficient

The framework developed above identifies meaningful lawful edge as the structural feature that makes an activity amenable to market treatment. A natural objection is that edge alone is not enough — that activities like poker, sportsbook wagering, and blackjack admit of edge but are not markets, and that the criterion therefore proves too much. The objection clarifies, rather than undermines, the framework.

Poker admits of substantial skill; good players consistently beat weaker players over meaningful sample sizes. Sportsbook wagering admits of edge; sophisticated bettors profit over time against bookmaker lines. Card counting in blackjack admits of edge. Each of these activities involves the kind of differentiated lawful judgment the framework identifies. None of them is a market in the relevant sense. They are contests, bookmaking operations, and casino games.

The answer is that edge is necessary for market capability but not sufficient to make any given venue a market. An activity that admits of edge can be organized in many institutional forms, and only some of those forms are markets. A poker table aggregates skill among participants, but it does not aggregate differentiated judgment into a common price open to the public on market terms. A sportsbook sets lines and takes the other side of wagers as a commercial counterparty; it

does not aggregate views into a market-clearing price through two-sided quotation. A blackjack table pits players against the house on standardized odds. Edge identifies the class of activities that can be eligible for market treatment. The institutional features of the venue — aggregation into a common price, two-sided quotation, standardized contracts, clearing, surveillance — determine whether a particular venue in fact provides it. The Core Principles framework describes those features. Edge tells the Commission whether the underlying activity can support market treatment. The institutional features tell the Commission whether a particular venue provides it.

A further refinement is important. The relevant kind of edge must be lawful. If the only available edge comes from theft, breach of duty, misuse of confidential information, or direct manipulation of the event, then the activity does not admit of meaningful edge in the sense relevant here. Markets are designed to process lawful analytical, informational, and interpretive advantages. They are not designed to legitimate advantages that the law forbids. The lawfulness requirement explains why the framework does not endorse every setting in which someone can profit. It draws the line between lawful judgment that markets can aggregate and unlawful conduct that enforcement authority must prevent. Specific issues concerning inside information and manipulation susceptibility raise distinct analytical questions and are addressed in a separate comment submission.

Part Five. Classification Under Section 5c(c)(5)(C) Does Not Resolve the Public Interest Determination

Section 5c(c)(5)(C) has a two-step structure. The first step is classification: whether an event contract "involves" one of the five enumerated activities, including gaming. The second step is determination: whether, given that classification, the Commission should determine that the contract is contrary to the public interest. The two steps are distinct. Question 15, which asks what factors the Commission should consider in determining the scope of the listed activities, and Question 25, which asks what "involve" means, both bear on the first step. Question 7 — the question this comment treats as the spine — bears on the second.

On the classification question, this comment does not contest that sports event contracts fall within the term "gaming" as used in Section 5c(c)(5)(C). The 2010 Feinstein-Lincoln colloquy establishes that classification: Senator Feinstein asked Senator Lincoln whether the Commission

would have authority to determine that a contract is a "gaming" contract if its predominant use was speculative, and Senator Lincoln answered that such was the intent, illustrating with reference to contracts on the Super Bowl, the Kentucky Derby, and the Masters Golf Tournament. 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010). On the classification question, the colloquy is highly probative and is treated as conclusive for purposes of this comment.

Question 19(a) asks what sources should inform the Commission's determination of the scope of "gaming." As Part One developed, the colloquial and moral vocabulary of gambling does not supply a workable boundary, but the colloquy itself supplies a workable answer to the classification question for the activities at issue here. Sports event contracts are within the scope of "gaming" as Section 5c(c)(5)(C) uses that term. Question 19(b) asks how the Commission should distinguish among types of contests — sports competitions, award competitions, and others. Under the framework developed above, the relevant question for the public interest determination is not what kind of contest underlies the contract but whether the activity admits of differentiated lawful judgment that a market can aggregate. That criterion does not draw lines between sports and other contests categorically; it draws lines based on whether the structural features of the underlying activity support market treatment. Question 19(f), which asks how various types of gaming event contracts differ from one another, points in the same direction: differences should be evaluated on the substantive features that determine amenability to market treatment, not on subject-matter categorization.

That brings the analysis to the second step. Classification opens the public-interest inquiry. It does not resolve it. The statute establishes that the Commission "may determine" — not "shall determine" — that an event contract involving an enumerated activity is contrary to the public interest. The discretionary verb is significant. Congress had the option, if it had wished, to prohibit any of the five enumerated categories outright by statute. It knew the categories existed; it listed them. It chose instead to delegate the public-interest determination to the Commission, with a procedural framework and a ninety-day time limit. Delegation is the mechanism Congress uses when it wants an agency to bring expert judgment to bear on questions whose right answer may depend on conditions Congress cannot itself predict or evaluate. The delegation in Section 5c(c)(5)(C) is such a mechanism. Its existence means the Commission's task at the second step is not to apply a fixed congressional preference but to exercise the judgment Congress assigned it.

The framework developed in Parts One through Three supplies the substantive content of that exercise. The factors the Commission should consider, as Question 7 asks, are the factors that determine whether the underlying activity is amenable to market treatment in the substantive sense Section 3(a) describes — whether the activity admits of meaningful lawful edge, and whether the proposed contract provides the institutional features through which differentiated judgment is aggregated into a price. Sports event contracts satisfy that framework. The classification of those contracts as "gaming" under the first step does not change that conclusion. It triggers the Commission's authority to make a public interest determination; the substantive determination, made on the merits, is that contracts on activities amenable to market treatment are not properly treated as contrary to the public interest merely because they fall within an enumerated category.

Part Six. Present Facts and the 2010 Legislative History

The Feinstein-Lincoln colloquy plays an important role in the Commission's consideration of these questions and merits direct attention. Its weight differs across the questions it bears on.

On classification, as Part Five notes, the colloquy is highly probative and is treated as conclusive for purposes of this comment. On the second-step public-interest determination, the colloquy carries different weight. Senator Lincoln's statement that sports event contracts "would not serve any real commercial purpose" and "would be used solely for gambling" was a substantive policy judgment about the public interest, expressed in 2010 by a senator who was one of the provision's authors. It is entitled to respectful consideration. But it is not statutory text, and it reflects a particular factual and regulatory environment. In 2010, federal law under the Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704, broadly prohibited state authorization of sports wagering. Sports wagering existed in limited forms in a small number of jurisdictions. The premise behind the policy judgment was that an approved sports event contract on a CFTC-regulated exchange would represent an unusual federal path for activity that was otherwise broadly prohibited.

That factual predicate no longer obtains. In 2018, the Supreme Court's decision in Murphy v. NCAA, 584 U.S. 453 (2018), invalidated PASPA. In the years since, thirty-nine states and the District of Columbia have authorized some form of sports wagering, most through

state-regulated sportsbook operators subject to state gaming authority. Sports wagering is now a lawful, widely conducted, state-regulated activity in most jurisdictions. In 2026, a sports event contract on a CFTC-regulated exchange does not represent a federal accommodation of otherwise-prohibited conduct. It represents a structural choice about the institutional form in which federally supervised sports-related market activity is conducted.

The broader legislative and regulatory record points in the same direction. In 2007 and 2008, during a period of severe commodity-price volatility, Congress closely examined whether speculative participation was distorting price discovery in CEA-regulated markets. See, e.g., Hearing to Review the Source of Dramatic Movements in Commodity Markets (Agriculture and Energy): A Change in Market Fundamentals or Influence of Institutional Investors?, Hearing Before the Subcomm. on General Farm Commodities and Risk Management of the H. Comm. on Agriculture, 110th Cong. (2008). In those hearings, the Commission testified that "all futures markets are anticipatory" and that traders acting on differing views about future prices are what generate the anticipatory price signal those markets are designed to produce. Id. (testimony of John Fenton, Director of Market Surveillance, CFTC). Congress then legislated. Dodd-Frank addressed specific abuses by closing the Enron loophole, expanding position-limit authority, bringing swap dealers inside the regulatory perimeter, and increasing reporting and transparency. But it did not reject speculative participation as such. Nor did it disturb the two-function framework in Section 3(a). See CRS Report R41398, The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title VII, Derivatives. The proposition that regulated markets can coherently aggregate differentiated participant views into price is not a novel claim. Congress has examined it; the Commission has defended it; the modern regulatory framework has been built around it. In the fifteen years since, the scale of institutional and speculative participation in CEA-regulated markets has grown substantially, the price discovery function has continued to operate, and the concerns raised in 2007 and 2008 have not been borne out in any structural sense. A determination under Section 5c(c)(5)(C) that treated the aggregation of differentiated participant judgment as presumptively illegitimate would run against that framework, not with it.

That is why Congress's delegation matters. If Congress had wanted to freeze 2010 policy preferences into statutory text, it could have done so. It did not. It delegated the public-interest determination to the Commission. That means the Commission is expected to apply current

judgment to current facts. Legislative history can illuminate what Congress was concerned about in 2010. It does not require the Commission to pretend that the world has not changed since then.

Part Seven. Implications for the Commission's Approach

Two implications follow for how the Commission should structure the public interest determination. They respond to Questions 13, 20, and 24 of the ANPRM.

First, the Commission should not adopt categorical prohibitions for broad classes of contracts, and it should read Section 5c(c)(5)(C)(i)(VI) — the residual category for "other similar activity" determined by rule to be contrary to the public interest — narrowly. Question 24 asks whether elements of the public interest determination can be made with respect to a category of event contracts rather than a specific event contract. The statutory structure points toward contract-specific review. Section 5c(c)(5)(C)(i) authorizes determinations "in connection with the listing" of contracts. The ninety-day time limit in Section 5c(c)(5)(C)(iv) presumes the determination is made in connection with a specific listing rather than as a categorical pre-emptive ruling. A framework that classified types of contracts as per se contrary to the public interest would substitute rulemaking for the contract-specific determination the statute describes. Where the Commission concludes that recurring issues warrant general guidance, it can supply that guidance through interpretation and through precedent developed in specific determinations. That approach preserves the flexibility Congress wrote into the statute. Question 20 asks what factors should inform the Commission's use of the residual clause (VI). The answer follows from the same structural reading: clause (VI) should be read as a narrow flexibility provision for activities genuinely similar to the enumerated five, not as a general invitation to create new categorical prohibitions.

Second, contracts that satisfy the framework developed above — contracts whose underlying activity admits of meaningful lawful edge and whose institutional form supports the aggregation of differentiated judgment into price — should be evaluated under the existing Core Principles framework, contract by contract. Question 13 asks why or why not it would be appropriate for the Commission to propose changes to its regulations related to the public interest determination. The answer is that targeted changes giving structural form to the framework above would clarify the substantive content of the discretionary determination Congress delegated, while leaving the

Core Principles framework to do the contract-specific supervisory work it was designed to do. The proposed regulatory text in the next Part offers one form those changes could take.

Part Eight. Proposed Regulatory Text

The following proposed amendments to Regulation 40.11 would give effect to the framework developed above. They are offered as illustrative; the specific drafting can be refined. The principles are that the public interest determination under Section 5c(c)(5)(C) requires both a classification step and a determination step, that the determination step should be guided by whether the underlying activity is amenable to market treatment in the sense Section 3(a) describes, and that the Commission should make its determinations on the basis of current facts.

Proposed new Regulation 40.11(d) (Public Interest Determination):

> *(1) In making a determination under CEA Section 5c(c)(5)(C)(i) that an agreement, contract, or transaction is contrary to the public interest, the Commission shall conduct a two-step inquiry. First, the Commission shall determine whether the agreement, contract, or transaction involves one of the activities enumerated in CEA Section 5c(c)(5)(C)(i)(I) through (VI). Second, if the agreement, contract, or transaction involves an enumerated activity, the Commission shall determine whether, as applied to that specific agreement, contract, or transaction, listing or clearing would be contrary to the public interest.*
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> *(2) In conducting the second-step determination, the Commission shall consider as a threshold matter whether the underlying activity is amenable to market treatment in the sense described in CEA Section 3. For purposes of this paragraph, an activity is amenable to market treatment where it admits of meaningful lawful edge — that is, where participants may lawfully bring differentiated analysis, information, interpretation, or judgment to bear on the outcome in a way that can be expressed through price — and where the proposed agreement, contract, or transaction provides the institutional features through which the aggregation of differentiated participant judgment into a tradable price is realized. Where the underlying activity is not amenable to market treatment in*

this sense, the Commission shall determine that the agreement, contract, or transaction is contrary to the public interest. Where the underlying activity is amenable to market treatment, the Commission's determination shall be based on the specific features of the agreement, contract, or transaction, evaluated in light of the considerations set forth in CEA Section 3 and the applicable Core Principles, rather than on the category of activity alone.

(3) In conducting any determination under this section, the Commission shall consider the factual and regulatory environment as it exists at the time of the determination.

Paragraph (1) codifies the two-step structure implicit in the statute and ensures that classification under the enumerated categories does not, by itself, resolve the public-interest inquiry. Paragraph (2) identifies amenability to market treatment, tested by meaningful lawful edge and supported by appropriate institutional features, as the threshold consideration in the second-step determination, and ties that consideration to the substantive purposes Section 3 identifies. Paragraph (3) confirms that the Commission's determinations are to be made on the basis of current facts — a principle implicit in the statutory structure but worth making explicit to forestall reliance on historical policy statements as though they were current determinations.

This proposal does not amend Regulation 40.11(a), which implements the enumerated prohibitions in CEA Section 5c(c)(5)(C). It adds a structural provision governing how the Commission's determinations under that authority are conducted. The Commission's existing Core Principles framework and anti-manipulation authority remain unchanged and continue to apply to prediction markets as they apply to all other DCM-listed contracts.

Part Nine. Conclusion

This comment has organized its analysis around Questions 7, 8, and 9 of the ANPRM. The central claim is that the right factors for the Commission's public interest determination under Section 5c(c)(5)(C) are the factors that determine whether the underlying activity is amenable to market treatment in the substantive sense CEA Section 3(a) describes; that the colloquial and moral vocabulary of "gambling" does not supply a principled regulatory criterion and should not be treated as if it did; and that elements of the pre-2000 economic purpose test should not be

revived because doing so would re-narrow the inquiry in the way 2000 statutory reform rejected and would elevate one of the two functions Section 3(a) recognizes above the other. Sports event contracts satisfy the resulting framework. The 2010 classification of those contracts as "gaming" under the first step of Section 5c(c)(5)(C) is established by the colloquy and is not contested here; the second-step public-interest determination is a separate question that must be made using present judgment and present facts. The existing Core Principles framework remains the right place to address downstream questions about contract design, surveillance, and integrity.

I appreciate the Commission's attention to this submission and am available for further engagement on the matters addressed here.