TESTIMONY

OF

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BEFORE THE

HOUSE COMMITTEE ON AGRICULTURE

SUBCOMMITTEE ON COMMODITY MARKETS, DIGITAL ASSETS, AND RURAL DEVELOPMENT

Examining Customer Protections and Market Integrity in Sports Event Prediction Markets

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Good morning Chairman Johnson, Ranking Member Davis, and Members of the Subcommittee. I am Rob Schwartz, a Partner in the Commodities & Derivatives Practice at Morgan, Lewis & Bockius. Before joining Morgan Lewis last year, I served at the Commodity Futures Trading Commission (CFTC) for thirteen years, including as its General Counsel.

During that time, I was privileged to be involved in most major issues that came before the agency. Over the last several years of my tenure, beginning in around 2020, that included the Commission's regulation of prediction markets and event contracts as interest in that space began to grow. Now in private practice, much of my work is in this area, and I spend a lot of time thinking, speaking, and writing about how the Commodity Exchange Act (CEA) applies to those markets.

Thank you for the opportunity to appear before you to support your work.

The views I share are my own and do not represent those of Morgan Lewis, my colleagues, our clients, or any other person or organization.

The controversy over whether prediction markets are legitimate derivatives trading platforms or simply new venues for recreational gambling is, in a sense, uncharted territory. In particular, exchange trading of contracts based on sports events is barely a year and a half old. But in a more fundamental sense, we have been here before, many times, literally over the course of centuries.

- In 1688, Joseph de la Vega, a Dutch merchant, author, and poet, wrote that the Amsterdam Stock Exchange, where futures and options were traded, was "a gambling hell." He described trading as "a game"; called brokers "card-sharpers"; and deemed speculators "skillful gamblers" who "put up wheels of fortune."[1] De la Vega was also a trader on the exchange. And in the same pages, he explained how to use futures and options to hedge commercial risk.[2]

- At around the same time, vibrant markets for rice futures developed in and around Osaka, Japan. The Tokugawa shogunate saw little merit in the activity and, in 1705, shut down a market run by House Yodoya, among other reasons because it regarded the market as a gambling den. But twenty-five years later, the shogunate designated the Dojima Rice Exchange as the first officially recognized futures market in Japan.[3]

- Our experience in the United States has been similar. In the 19th century, states commonly prohibited futures as a form of gambling. In 1867, police stormed onto the floor of the Chicago Board of Trade and arrested seven members for violating the gambling laws of Illinois.[4] And in 1892, both houses of Congress passed legislation to prohibit futures trading at the federal level—but before the bills could be reconciled, Congress adjourned.[5] Wheat gained two cents per bushel.[6]

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[1] Joseph de la Vega, Confusion de Confusiones, at 5, 12, 16 (Hermann Kellenbenz trans., Harvard Univ. Grad. Sch. of Bus. Admin. 1957).

[2] Id. at 8.

[3] Ulrike Schaede, Forwards and Futures in Tokugawa-Period Japan, 13 Journal of Banking and Finance 487, 494-95 (1989).

[4] Charles H. Taylor, History of the Board of Trade of the City of Chicago, at 352-53 (1917).

[5] Cedric B. Cowing, Populists, Plungers, and Progressives, at 258 (Princeton Univ. Press 1965).

[6] John H. Stassen, The Commodity Exchange Act in Perspective, 39 Wash. & Lee L. Rev. 825, 827-28 (1982).

In the 20th century, the tide turned. Courts and Congress increasingly began to see the value of the futures industry. In 1905, Justice Holmes called it "an extraordinary and unlikely proposition that the dealings which give its character to the great market for future sales in this country are to be regarded as mere wagers."[7] That was the same Chicago Board of Trade. Not long after, Congress passed the first comprehensive federal legislation on the subject, the Future Trading Act of 1921 followed by the Grain Futures Act of 1922.[8] In the latter of those, Congress declared that futures "are affected with a national public interest" in hedging against business risk and in what today we would call "price discovery."[9]

In pursuit of that national interest, Congress throughout the 20th century repeatedly expanded federal jurisdiction over futures and options, culminating in the Commodity Futures Trading Commission Act of 1974, which created the CFTC and made its jurisdiction over commodity futures and options "exclusive."[10] Thirty-six years later, the Dodd-Frank Act expanded the agency's exclusive jurisdiction to include exchange-traded swaps.[11]

The definition of "swap" is expansive,[12] and as a result so is the agency's jurisdiction. Event contracts, broadly defined, are among the dozens listed in the statute along with credit-index swaps, energy swaps, weather swaps, emissions swaps, and many others. Another provision is a forward-looking catchall that sweeps in "any … transaction that is, or in the future becomes, commonly known to the trade as a swap."[13] The statute is agnostic as to whether the subject is a farm product, a benchmark, election results, or most anything else. You often hear quoted in prediction-market litigation Justice Scalia's observation that Congress does not "hide elephants in mouseholes."[14] But this statute is no mousehole.

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[7] Bd. of Trade of the City of Chicago v. Christie Grain & Stock Co., 198 U.S. 236, 249 (1905).

[8] Future Trading Act of 1921, ch. 86, 42 Stat. 187 (Aug. 24, 1921), invalidated by Hill v. Wallace, 259 U.S. 44 (1922); Grain Futures Act of 1922, Pub. L. No. 67-331, ch. 369, 42 Stat. 998 (Sept. 21, 1922).

[9] Grain Futures Act of 1922 § 3.

[10] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 201(b), 88 Stat. 1389, 1395 (1974).

[11] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 722(a), 124 Stat. 1376, 1672 (2010).

[12] 7 U.S.C. § 1a(47)(A).

[13] Id. § 1a(47)(A)(ii), (iv).

[14] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

Statutory interpretation is a legal issue. It is important to keep it separate from the policy issue. People of good faith are questioning the wisdom of permitting sports event contracts to trade under the jurisdiction of the CFTC. That is a perfectly normal policy dispute. The key, though, is that Congress has channeled that type of disagreement to the CFTC. Not to the courts, not to the 50 states, and, without further action by Congress, not to any other decisionmaker.

The CFTC has the tools it needs under the CEA to implement the policy it selects. It has powerful authority to disallow exchanges from listing problematic contracts. Dodd-Frank authorized the agency to outright prohibit an exchange from listing a contract that involves “gaming” if that contract violates the public interest.[15] Part of what is animating the controversy today is that the CFTC has not done so here. What it has done is propose rules that in practice may limit the kinds of sports contracts that can be listed.[16] The comment period is open. Other witnesses on this panel will be vocal. And we’ll see where the Commission lands when it adopts a final rule. If the agency stumbles, then there is a judicial remedy, and policing an agency’s rulemaking is an appropriate role for the courts.

Finally of course, Congress itself can prohibit contracts that involve any subject matter to which it objects. It famously did so for onions in 1958 and box-office receipts in 2010.[17] If Congress today believes that exchanges should not offer contracts based on sports events, or politics, or anything else, it should amend the CEA and require the CFTC to carry out its mission accordingly.

I thank the Subcommittee for its work and for the opportunity to assist in any way that I can.

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[15] 7 U.S.C. § 5c(c)(5)(C)(i)-(ii).

[16] Prediction Markets; Public Interest Determinations, 91 Fed. Reg. 35806 (Jun. 12, 2026).

[17] 7 U.S.C. § 13-1(a).