

CFTC Moves to Reinforce Federal Authority over Event Contracts as New Jersey Seeks Supreme Court Review

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On October 9, 2026, the Commodity Futures Trading Commission (“CFTC”) announced two related actions drawing a distinction between federally regulated event contracts and traditional gambling products: [a proposal](#) to expressly include event contracts in the definition of “swap” under the Commodity Exchange Act (the “Inclusion Proposal”) and [an interim final rule](#) excluding qualifying “casino-style gambling products” (the “Gambling Exclusion”).

The actions respond directly to arguments in the ongoing [federal-state dispute](#) over event contracts. The State of New Jersey’s petition for Supreme Court review of the legality of federally regulated prediction markets that do not comply with state gambling laws remains pending after a split between the U.S. Court of Appeals for the Third Circuit and the Sixth and Ninth Circuits. Federally recognized tribes have also brought litigation alleging that sports event contracts offered on tribal lands violate the Indian Gaming Regulatory Act. In response to a [recent CFTC proposal](#) with respect to certain event contracts, forty states and the District of Columbia [submitted a comment](#) arguing that sports event contracts are “indistinguishable from traditional sports betting.” The Inclusion Proposal and Gambling Exclusion seek to reinforce the CFTC’s position that certain event contracts fall within its exclusive jurisdiction. They do not resolve whether classifying a sports event contract as a swap preempts state gambling laws or displaces tribal gaming authority under the Indian Gaming Regulatory Act.

What Is Changing

The Inclusion Proposal would expressly include event contracts, including those based on sports, political, cultural and weather-related events, within the definition of “swap.” The CFTC characterizes the proposal as a clarification of existing law. It would not reclassify event contracts structured as futures or instruments subject to SEC jurisdiction, including security-based swaps.

The CFTC offers several grounds for such clarification. It argues that event contracts are commonly known to the derivatives trade as swaps, may qualify as binary options and may provide for payments contingent on events associated with potential financial, economic or commercial consequences. The CFTC’s explanation in the release is significant to the pending appellate litigation because it reads “potential” broadly enough to include consequences that may not occur immediately or ultimately materialize.

Beyond its reading of the existing statutory definition of “swap”, the CFTC invokes Congress’s delegation granted in the Dodd-Frank Act to “further define” swaps. If adopted, the proposal would expressly bring covered event contracts within that definition, giving the agency and market operators an additional regulatory basis to cite in litigation in support of their position. Courts would still have to determine whether the rule falls within the scope of Congress’s delegation.

The Gambling Exclusion adds a two-part test to CFTC Rule 1.3. If a transaction satisfies both components, it would be excluded from the definition of “swap.”

- **Provider test.** The provider must be licensed or otherwise authorized to offer gaming or gambling products or accept wagers under state law or the law of a federally recognized Indian tribe pursuant to the Indian Gaming Regulatory Act, must act within the scope of that authorization and such transaction must be regulated as gaming or gambling under applicable state or tribal law.
- **Product test.** The transaction must not trade on a board of trade, organized exchange, swap execution facility or other market in which trades are executed multilaterally or are subject to individual negotiation.

Traditional wagers, casino games and other licensed games of chance are expressly excluded from the definition of “swap” if both conditions are met. The CFTC cautions that failing the exclusion does not, by itself, make a product a swap; further analysis of the facts and circumstances would be required.

Litigation Context

As we [previously discussed](#), the Ninth Circuit held on August 28 that Kalshi, a designated contract market (“DCM”), was unlikely to establish that its sports event contracts qualified as swaps under the Commodity Exchange Act’s statutory definition. The [Sixth Circuit](#) reached a similar conclusion on September 25. Those decisions conflict with the Third Circuit’s April 6 decision upholding a preliminary injunction against New Jersey regulators. New Jersey filed its [certiorari petition](#) on September 2; Kalshi’s response is due November 9. The Supreme Court has not yet agreed to hear the case and the CFTC’s actions expressly respond to the conflicting appellate interpretations of the statutory swap definition. The CFTC’s reasoning may be cited in the pending litigation, but the Inclusion Proposal itself does not change the governing law. If a final rule takes effect while litigation remains pending, a reviewing court could consider its implications. However, the applicability or validity of any such rule would not be automatic.

One of New Jersey’s central arguments is that treating sports event contracts as swaps would threaten state authority over sports gambling. Gaming industry participants have raised a related concern that ordinary sportsbook wagers by retail customers might also be treated as unlawful off-exchange swaps. The Gambling Exclusion directly responds to that concern by expressly excluding qualifying sportsbook wagers from the “swap” definition, following the Third Circuit’s suggestion that the agencies could use their definitional authority to distinguish traditional gambling from swaps.

The Sixth Circuit also independently held that, even assuming that sports event contracts were swaps, the Commodity Exchange Act would not expressly or impliedly preempt Ohio’s or Tennessee’s gambling laws. New Jersey’s petition advances a similar preemption argument. Accordingly, a rule establishing swap status would not, by itself, resolve the preemption dispute.

Practical Implications and Next Steps

Classifying an event contract as a swap does not establish that it may lawfully be listed or traded. Neither the Inclusion Proposal nor the Gambling Exclusion amends [Rule 40.11](#), which the Ninth Circuit read as prohibiting the listing of Kalshi’s sports event contracts. The CFTC’s separate proposal to amend Rule 40.11, as well as its statutory authority to prohibit certain event contracts that it determines are contrary to the public interest, therefore remain relevant.

Market participants should assess each event contract's swap classification under existing law and, if adopted, the Inclusion Proposal, applicable listing restrictions and whether it may be offered and accessed in relevant jurisdictions. The announcement by the CFTC of the Inclusion Proposal and Gambling Exclusion should not be treated as nationwide clearance for event contracts; pending litigation and applicable court orders remain relevant.

Comments on the Inclusion Proposal and the Gambling Exclusion are due 30 days after their respective Federal Register publications. The Gambling Exclusion takes effect upon its publication; the Inclusion Proposal does not itself amend the regulatory text.

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