

## STATES' BIG GAMBLE ON SPORTS BETTING

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### I. INTRODUCTION

*Murphy v. NCAA*<sup>1</sup> kicked off a new era in sports betting in the United States, with many states authorizing sports betting in various forms, seemingly without regard to potential preemption by the Commodity Exchange Act (“CEA”)<sup>2</sup> and related Commodity Futures Trading Commission (“CFTC” or “Commission”) regulations. As of December 31, 2020, eighteen states and the District of Columbia have officially legalized sports betting.<sup>3</sup> This group includes Nevada, Delaware, Montana, and Oregon, all of which already had some form of sports betting prior to the ruling.<sup>4</sup> These state markets continue to

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<sup>1</sup> *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

<sup>2</sup> 7 U.S.C. §§ 1–23.

<sup>3</sup> COMMERCIAL GAMING REVENUE TRACKER, AM. GAMING ASS’N 5 (2021), <https://www.americangaming.org/wp-content/uploads/2021/02/Q4-Email-PDF.pdf>.

<sup>4</sup> See generally *Online Gaming and Sports Betting in the United States*, AM. BAR ASS’N BUS. L. SECTION (Sept. 13, 2010), [https://www.americanbar.org/groups/business\\_law/resources/materials/2019/annual\\_materials/online\\_gaming/](https://www.americanbar.org/groups/business_law/resources/materials/2019/annual_materials/online_gaming/) (stating that PASPA expressly excluded from its reach pari-mutuel sports betting—horse racing, dog racing, and jai alai—and grandfathered in those states that already had some form of authorized sports gambling on their books, specifically not prohibiting them from continuing to regulate and authorize those preexisting operations. This state-by-state carveout resulted in the federal authorization of licensed sports betting pools in Nevada and sports lotteries, such as parlays, in Oregon, Delaware, and Montana).

grow, increasing in 2020 by sixty-five percent and sixty-nine percent year over year in revenue and in handle (money in wagers), respectively.<sup>5</sup> In 2020, the state-legalized sports gaming handle totaled \$21.5 billion, while revenue totaled \$1.5 billion, “despite widespread sportsbook shutdowns and an abbreviated calendar of major sporting events.”<sup>6</sup>

Additionally, some gambling enterprises are expanding beyond sports into other event betting. In 2019, the Division of Gaming Enforcement in New Jersey allowed licensed sportsbook operators to accept bets on the winners of Academy Award categories, including Best Picture and Best Supporting Actor.<sup>7</sup> In 2020, the Indiana Gaming Commission followed suit.<sup>8</sup>

This article examines various sections of the CEA and related CFTC regulations,<sup>9</sup> and explains that the Commission may have jurisdiction over some traditional sports bets because such bets can be viewed as binary, other options, or other types of swaps. These bets may also constitute event contracts if they are listed on or cleared by a CFTC-registered entity.

Section I lays down the basics of the *Murphy* decision and its significance for state sports gambling. Section II details the interplay between the Unlawful Internet Gambling Enforcement Act (“UIGEA”) and the CEA. Section III summarizes the various court-developed theories under which federal law preempts state law. The section then examines how the CEA and CFTC regulations might expressly and/or implicitly preempt state sports betting regulation, including through a discussion of various CEA sections providing the CFTC authority over particular commodity interests<sup>10</sup> and, in some cases, limiting their availability to the public. Section IV highlights several CFTC-jurisdictional commodity interests that sports bets resemble or may constitute and the related CEA/CFTC regulatory scheme, shedding further light on the basis for the possible federal preemption of state sports betting. Section V discusses some potential approaches that the CFTC might take in response to the proliferation of state-authorized sports betting and the legal underpinnings for those potential approaches. Section VI discusses private rights of action under the CEA.

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<sup>5</sup> AM. GAMING ASS’N, *supra* note 3, at 4.

<sup>6</sup> *Id.*

<sup>7</sup> Richard Morgan, *You Can Now Place Legal Bets on the Oscars in New Jersey*, N.Y. POST (Feb. 11, 2019), <https://nypost.com/2019/02/11/you-can-now-place-legal-bets-on-the-oscars-in-new-jersey/>.

<sup>8</sup> Brandon Smith, *Indiana Gaming Commission Authorizes Bets on Academy Awards*, IND. PUBLIC MEDIA (Jan. 23, 2020), <https://indianapublicmedia.org/news/indiana-gaming-commission-authorizes-bets-on-academy-awards.php>.

<sup>9</sup> 17 C.F.R. §§ 1–199 (2020).

<sup>10</sup> *See* 17 C.F.R. § 1.3 (defining “commodity interest”).

## II. MURPHY V. NCAA

### A. Summary

In *Murphy v. NCAA*, the Supreme Court held that 28 U.S.C § 3702(1) of the Professional and Amateur Sports Protection Act (“PASPA”), which generally made it unlawful for a state to authorize sports gambling schemes, “violate[d] the anticommandeering rule” and was therefore unconstitutional.<sup>11</sup> At issue in *Murphy* was a 2014 New Jersey law repealing provisions of a then-existing law that prohibited certain sports gambling.<sup>12</sup> The Court explained that “the anticommandeering principle is simple and basic,”<sup>13</sup> and that “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts.”<sup>14</sup> As a result of *Murphy*, states appear to be proceeding under the assumption that they can authorize sports gambling and it is federally legal unless Congress acts to specifically prohibit sports gambling. That is not necessarily so, for the reasons that follow.

### B. Significance

*Murphy* does not remove sports gambling from the reach of all federal regulation. The Supreme Court explained in *Murphy* that, although federal law generally trumps state and local law, that concept is not unlimited. The Court first stated that the Supremacy Clause of the U.S. Constitution provides that “federal law is the ‘supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding[.]’”<sup>15</sup> which means that “when federal and state law conflict, federal law prevails and state law is preempted.”<sup>16</sup> The Court added, however, that “preemption is based on a federal law that regulates the conduct of private actors, not the States.”<sup>17</sup> Thus, although the Court held that § 3702(1) of PASPA violated principles of federalism (specifically, the anticommandeering rule) by seeking to regulate the states rather than private actors (such as by prohibiting the states from permitting sports gambling), the Court said in dicta that if Congress had instead passed a law directly prohibiting sports gambling, such law would have preempted state laws permitting gambling: “Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act.”<sup>18</sup> Therefore, if a sports bet is a form

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<sup>11</sup> *Murphy*, 138 S. Ct. at 1478.

<sup>12</sup> *Id.* at 1472.

<sup>13</sup> *Id.* at 1476.

<sup>14</sup> *Id.* at 1477 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

<sup>15</sup> *Id.* at 1476 (citing U.S. CONST. art. VI, cl. 2).

<sup>16</sup> *Id.* at 1476.

<sup>17</sup> *Id.* at 1481.

<sup>18</sup> *Id.* at 1484 (emphasis added).

of a swap,<sup>19</sup> several sections of the CEA apply. For example, CEA § 2(e)<sup>20</sup>—which prohibits most individuals (those who are not “eligible contract participants” (“ECPs”))<sup>21</sup> from entering swaps other than on or subject to the rules of a designated contract market (“DCM”)—arguably preempts state laws to the contrary. It follows that state laws that permit sports gambling by non-ECPs in the form of a swap conflict with CEA § 2(e) and thus may be preempted by it.

The Supreme Court indicated that Congress could preempt state sports gambling regulation by regulating such activity directly.<sup>22</sup> While the CEA § 2(e) prohibition on non-ECPs engaging in swaps can hardly be considered direct federal regulation of sports gambling, it *is* direct federal regulation of swap agreements, contracts, or transactions involving non-ECPs. Thus, to the extent that state-authorized sports bets constitute swaps, such transactions may violate federal law. In other words, CEA § 2(e) may preempt the application of any state law that permits sports gambling constituting swaps with non-ECPs entered other than on or subject to the rules of a DCM. If sports bets are “event contracts,” options, or leveraged “retail commodity transactions,” they may violate other CEA provisions and/or CFTC regulations.

### III. THE INTERPLAY BETWEEN THE CEA AND UIGEA

Although this article does not include a comprehensive treatment of federal gambling law, a brief mention of the UIGEA is warranted. The UIGEA prohibits any person “engaged in the business of betting or wagering” from knowingly accepting various common forms of payment in connection with the participation of another person in “unlawful Internet gambling.”<sup>23</sup> It also broadly defines “unlawful Internet gambling” as:

[T]o place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in

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<sup>19</sup> 7 U.S.C. § 1a(47) (defines the term “swap”).

<sup>20</sup> 7 U.S.C. § 2(e).

<sup>21</sup> The term “eligible contract participant” is defined in 7 U.S.C. § 1a(18)(A)(xi) and generally excludes individuals other than, acting for his or her own account:

[A]n individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of—  
(I) \$10,000,000; or  
(II) \$5,000,000 and who enters into the agreement, contract, or transaction in order to hedge an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual[.]

<sup>22</sup> Murphy, 138 S. Ct. at 1484 (stating that “Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act.”).

<sup>23</sup> 31 U.S.C. § 5363.

part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.<sup>24</sup>

The UIGEA defines a “bet or wager” broadly as a person “staking or risking . . . something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome[.]”<sup>25</sup>

However, the UIGEA excludes the following (“the UIGEA Exclusions”) from the “bet or wager” definition:

- (ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act;
- (iii) any over-the-counter derivative instrument;
- (iv) any other transaction that—
  - (I) is excluded or exempt from regulation under the Commodity Exchange Act; or
  - (II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934[.]<sup>26</sup>

The creation of the UIGEA Exclusions in a federal gambling statute appears to indicate that Congress recognized that sports bets bear more than a passing resemblance to financial products that are regulated by the CFTC (or excluded or exempt from such regulation by the terms of clause (iv) of the UIGEA Exclusions) and sought to ensure the preeminence of the CFTC regulatory scheme for derivatives over other federal and state regulation, even when that scheme called for an exclusion or exemption.<sup>27</sup> Thus, while it may seem odd to someone unfamiliar with UIGEA for the CEA to possibly apply to sports betting, Congress has recognized for many years the potential overlap between sports betting and financial products that are (or would be, but for a

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<sup>24</sup> 31 U.S.C. § 5362(10)(A).

<sup>25</sup> 31 U.S.C. § 5362(1)(A).

<sup>26</sup> 31 U.S.C. § 5362(1)(E).

<sup>27</sup> This appears to have included the over-the-counter derivatives mentioned in clause (ii) of the UIGEA Exclusions at the time the UIGEA was enacted in 2006. *See generally* Commodity Futures Modernization Act of 2000 (CFMA), Pub. L. No. 106-554, 114 Stat. 2763A, and the swap exemption in Part 35 of the CFTC’s rules, as in effect in 2006.

congressional or CFTC exclusion or exemption) subject to the CEA/CFTC regulation.<sup>28</sup>

Notwithstanding this potential overlap, the CFTC has not focused its attention on sports betting because the states and/or other federal law generally prohibited it, except for certain activity grandfathered in by PASPA at the time of its enactment.<sup>29</sup> Consequently, the CFTC has not sued any casinos, horse tracks, etc. in the United States expressly permitted under PASPA, notwithstanding that: (1) sports bets may be characterized as binary options; (2) the CFTC has asserted in a federal district court complaint that binary options are swaps;<sup>30</sup> and (3) CEA § 2(e) makes it illegal for a non-ECP to enter into a swap other than on, or subject to the rules of, a DCM.

Now that PASPA has been repealed, however, and state-authorized gambling has taken off, the CFTC may consider the possibility that sports betting in its many forms, not just on CFTC-regulated registered entities, may still be prohibited by the CEA/CFTC regulation, regardless of state laws that authorize it.

#### IV. FEDERAL PREEMPTION OF STATE LAW

##### A. *Brief Overview of Preemption Doctrine*

The basis of the preemption of state law by federal law is the United States Constitution's Supremacy Clause, which provides that "the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>31</sup> The doctrine generally provides that federal law supersedes conflicting state laws. However, even when a statute contains an express preemption provision, "that does not immediately end the inquiry because the question of the substance and scope of Congress's displacement of state law still remains."<sup>32</sup> Accordingly, the inquiry next turns to whether federal

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<sup>28</sup> See 31 U.S.C. § 5362(1)(E); see also CEA § 12(e)(2) (repealed 2000) (preempting state gaming and bucket shop laws with respect to specified activity); see, e.g., John T. Holden & Ryan M. Rodenberg, *Modern Day Bucket Shops? Fantasy Sports and Illegal Exchanges*, 6 TEX. A&M L. REV. 619 (2019) (demonstrating that some scholars have also been aware of the potential overlap for some time).

<sup>29</sup> See 28 U.S.C. § 3704 (stating PASPA's unlawful sports gambling prohibition does not apply to various activities including certain casinos and animal racing).

<sup>30</sup> See Complaint at 10, 30, *Commodity Futures Trading Comm'n v. Yukom Commc'ns Ltd.*, No. 19-CV-05416 (N.D. Ill. Aug. 12, 2019) (asserting that "[t]he binary option transactions offered by the Yukom Enterprise are swaps, as defined by the [CEA]" and listing prongs (i) to (iii) of the CEA's swap definition (CEA § 1a(47)(A)(i)-(iii)).

<sup>31</sup> U.S. CONST., art. VI, § 2.

<sup>32</sup> See *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008).

law has impliedly preempted state law when its structure and purpose implicitly reflect Congress's preemptive intent.

There are two subcategories of implied preemption: "field preemption" and "conflict preemption." Field preemption occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or when states attempt to regulate a field where there is clearly a dominant federal interest.<sup>33</sup> Conflict preemption occurs when compliance with both federal and state regulations is an impossibility ("impossibility preemption"),<sup>34</sup> or when state law poses an "obstacle" to the accomplishment of the "full purposes and objectives" of Congress ("obstacle preemption").<sup>35</sup> However, as the Seventh Circuit has pointed out, the lines separating various types of preemption are sometimes unclear.<sup>36</sup>

The Supreme Court has employed a presumption against preemption, with certain exceptions. In a 2016 case, the Court stated, "that where there is an express preemption provision, it would not invoke any presumption against preemption, but rather would focus on the plain wording of the preemption provision, which necessarily contains the best evidence of Congress's preemptive intent."<sup>37</sup> Importantly, the Court has noted that express preemption does not foreclose implied preemption<sup>38</sup> and explained that express preemption provisions do not obviate the need for analysis of an individual statute's preemptive effect.<sup>39</sup> Thus, even though CEA § 12(e)(2) is an express preemption provision, that alone does not end the preemption analysis of the CEA versus states sports betting.

#### B. Preemption under the CEA

The CFTC recognized in a 2008 concept release that its regulatory regime and the CEA might preempt state gaming laws.<sup>40</sup> The scope of what the

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<sup>33</sup> *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

<sup>34</sup> *Fla Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

<sup>35</sup> *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941).

<sup>36</sup> *See Am. Agric. Movement, Inc. v. Bd. of Trade of Chi.*, 977 F.2d 1147, 1154 n.2 (7th Cir. 1992) (lines between express, field, and conflict preemption are not always clear-cut); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (stating that "[b]y referring to these three categories, we should not be taken to mean that they are rigidly distinct.").

<sup>37</sup> *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).

<sup>38</sup> *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995).

<sup>39</sup> *Id.* at 289.

<sup>40</sup> *See* Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 Fed. Reg. No. 89 (May 7, 2008) ("2008 Event Contract Concept Release") (asking at 25,673 "[w]hat are the implications of possibly preempting state gaming laws with respect to event contracts and markets that are treated as Commission-regulated or exempted transactions[]" and at 25,670 "[h]ow should the Commission address the potential gaming aspects of some event contracts and the possible pre-emption of state gaming laws?").

CFTC was considering in the 2008 Event Contract Concept Release<sup>41</sup> was broader than the term as used in CEA § 5c(c)(5)(C) (i.e., event contracts listed for trading or cleared by CFTC-regulated registered entities). The implication is that the CEA and the CFTC's regulatory regime might preempt state gaming laws not only with respect to CEA § 5c(c)(5)(C) event contracts, but also with respect to sports betting more broadly.

The CEA contains at least three provisions broadly relevant to the CEA's preemptive effect (although only one expressly uses the word "preempt"): CEA §§ 2(a)(1)(A) (granting the CFTC exclusive jurisdiction over, among other things, accounts, agreements and transactions involving swaps or futures traded on any market), 4c(b) (granting the CFTC plenary authority over option transactions), and 12(e) (stating expressly what the CEA does (§ 12(e)(2)) and does not (§ 12(e)(1)) preempt, including with respect to state law).

*i. Express Preemption under the CEA § 12(e)*

CEA § 12(e) expressly addresses whether the CEA preempts other federal and state laws in the context of specific transactions. On its face, it appears that § 12(e) does not support various elements of the CEA/CFTC regulatory scheme preempting state gaming laws. However, when viewed in the proper context, including consideration of other CEA sections, the opposite may be true with respect to transactions that are commodity interests.

*a. CEA § 12(e)(1)*

CEA § 12(e)(1) states:

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<sup>41</sup> In the 2008 Event Contract Concept Release, the CFTC described event contracts, "for ease of reference and to avoid classification issues," as financial agreements offered by markets commonly referred to as event, prediction, or information markets that:

[A]re neither dependent on, nor do they necessarily relate to, market prices or broad-based measures of economic or commercial activity.[] Rather, event contracts may be based on eventualities and measures as varied as the world's population in the year 2050, the results of political elections, or the outcome of particular entertainment events.

*Id.* at 25,669. The CFTC distinguished such contracts from more traditional contracts, adding that "[t]he term event contract is not intended to encompass contracts that generate trading prices that predictably correlate with market prices or broad-based measures of economic or commercial activity, or contracts which substantially replicate other commodity derivatives contracts, such as binary options on exchange rates or the price of crude oil[.]" which the agency declared "are unambiguously subject to CFTC regulation." *Id.*



- (1) Nothing in this Act shall supersede or preempt—
- (A) criminal prosecution under any Federal criminal statute;
  - (B) the application of any Federal or State statute (except as provided in paragraph (2)), including any rule or regulation thereunder, to any transaction in or involving any commodity, product, right, service, or interest—
    - (i) that is not conducted on or subject to the rules of a registered entity or exempt board of trade;
    - (ii) (except as otherwise specified by the Commission by rule or regulation) that is not conducted on or subject to the rules of any board of trade, exchange, or market located outside the United States, its territories or possessions; or
    - (iii) that is not subject to regulation by the Commission under section 4c or 19; or (C) the application of any Federal or State statute, including any rule or regulation thereunder, to any person required to be registered or designated under this Act who shall fail or refuse to obtain such registration or designation.

Given that no sport gaming businesses appear to be registered or designated under the CEA, many people may wonder if CEA § 12(e)(1) offers some reprieve from the CEA for these businesses. This likely would be a mistake, given that the non-CEA preemption situations enumerated in § 12(e)(1) are quite limited and that many sports bets may be both options and swaps.

The Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>42</sup> amended CEA § 2(d) to provide that the only CEA sections that apply to swaps are those listed as such in CEA § 2(d); CEA § 12(e)(1) *is not* among them. As a result, to the extent that CEA § 12(e)(1) would otherwise not expressly preempt state regulation affecting a swap, CEA preemption of such state regulation is still possible under other CEA sections (e.g., § 2(a)(1)(A) or § 2(e)).<sup>43</sup>

Also, the impact of CEA § 12(e)(1) is limited: it is generally thought to provide states with merely concurrent jurisdiction,<sup>44</sup> thus preserving any

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<sup>42</sup> Dodd-Frank Act, Pub. L. 111-203, § 124 Stat. 1376, 1747–48 (2010).

<sup>43</sup> In contrast, per 7 U.S.C. § 2(d), 7 U.S.C. § 16(e)(2) does apply to swaps. Thus, to the extent that § 7 U.S.C. 16(e)(2) preempts state gaming or bucket shop prohibitions or regulations without specifically referring to swaps, that preemption also applies to swaps fitting within the parameters of § 7 U.S.C. 12(e)(2).

<sup>44</sup> See Barry Taylor-Brill, *Cracking the Preemption Code: The New Model for OTC Derivatives*, 13 VA. L. & BUS. REV. 1, 5 (2019) (explaining that CEA § 12(e) provides the states with concurrent jurisdiction).

applicable conflict preemption<sup>45</sup> (in addition to express preemption under § 12(e)(2)).<sup>46</sup>

*b. CEA § 12(e)(2)*

CEA § 12(e)(2)<sup>47</sup> specifies that the CEA preempts state and local gaming and bucket shop laws<sup>48</sup> with respect to several enumerated transactions that are excluded or exempted from the CEA.<sup>49</sup> Although § 12(e)(2) on its face seems oddly underinclusive regarding the scope of the CEA's preemption of state gaming laws,<sup>50</sup> the CEA's preemptive effect is quite broad in that regard. It would be strange if the CEA did not preempt state and local gaming laws applicable to swaps falling outside the expressly preempted categories listed in CEA § 12(e)(2), given the extremely broad and detailed CFTC oversight regime applicable to swaps that Congress enacted in Dodd-Frank.<sup>51</sup> One way to look at this is that, in the heat of the legislative process, Congress simply neglected to add to CEA § 12(e)(2) suitable new preemption provisions related to swaps to reflect the new CFTC swap oversight regime.<sup>52</sup>

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<sup>45</sup> See, e.g., 7 U.S.C. § 2(c)(2)(D); 7 U.S.C. § 6c(b).

<sup>46</sup> See *Mallen v. Merrill Lynch Futures, Inc.*, 623 F. Supp. 203, 204 (N.D. Ga. 1985) (discussing CEA § 12(e)(1) and finding that the CEA does not preempt recovery under state common-law theories in absence of conflict between state and federal statutory schemes). See also *Stuber v. Hill* 170 F. Supp. 2d 1146, 1151 (D. Kan. 2001) (referencing *Mallen v. Merrill Lynch Futures, Inc.* for holding that the CEA does not preempt recovery under state common-law theories in absence of conflict).

<sup>47</sup> 7 U.S.C. § 16 (e)(2).

<sup>48</sup> For a discussion of the history of state anti-bucket shop statutes and the CEA, see Kevin T. Van Wart, *Preemption and the Commodity Exchange Act*, 58 CHI.-KENT L. REV. 657, 670 (1982).

<sup>49</sup> An express preemption provision, such as 7 U.S.C. § 16(e)(2), is arguably necessary as a legal basis for preemption because the case for implicit preemption may be weak in the case of a federal regulatory vacuum (i.e., where the CEA or the CFTC has excluded or exempted agreements, contracts, and transactions from the CEA/CFTC regulation). Without 7 U.S.C. § 16(e)(2), state law arguably would apply in such situations, which could undermine the Congressional or CFTC intent behind the exclusion or exemption.

<sup>50</sup> 7 U.S.C. § 16(e)(2) expressly preempts state and local gaming laws only in cases where certain products or trading venues are *excluded* from the CEA without also expressly preempting state law as to commodity interests described by CEA § 2(a)(1)(A) or § 4c(b).

<sup>51</sup> It would be similarly odd for § 4c(b) not to preempt state and local gaming laws, to the extent they are options, given the CFTC's plenary options authority. See *infra* Section IV.B.ii.b and note 163.

<sup>52</sup> 7 U.S.C. § 16(e)(2)(A) and 7 U.S.C. § 2(e) (The fact that § 16(e)(2)(A) preempts State and local gaming and bucket shop laws with respect to transactions executed on an electronic trading facility excluded from the CEA under 7 U.S.C. § 2(e)

Also, CEA § 12(e)(2) is on the list (in CEA § 2(d)) of CEA sections that apply to swaps. Thus, CEA § 12(e)(2) should at least preempt state and local gaming laws applicable to swaps within the categories enumerated therein.

No court has determined what, if any, preemption the CEA is afforded over gaming swaps yet. But given that the presence of an express preemption provision in a statute is not the end of the preemption analysis,<sup>53</sup> one might expect a court considering the scope of the CEA's preemptive effect with respect to state and local sports gaming regulation would include an implied preemption analysis in addition to considering CEA § 12(e)(2).

*ii. Implied Preemption under CEA §§ 2(a)(1)(A) and 4c(b)*

*a. CEA § 2(a)(1)(A)*

CEA § 2(a)(1)(A) confers exclusive jurisdiction on the CFTC, with limited exceptions, with respect to futures, options, and swaps traded on DCM,<sup>54</sup> swap execution facility ("SEF"),<sup>55</sup> or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to CEA § 19. Section 2(a)(1)(A) also states that—except for the foregoing exclusive jurisdiction language—nothing in CEA § 2 supersedes or limits the

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supports this view: prior to Dodd-Frank, 7 U.S.C. § 2(e) provided an exclusion related to electronic trading facilities, which are no longer mentioned, instead rendering it unlawful for non-ECPs to enter into swaps other than on or subject to the rules of a DCM. There is no mention in 7 U.S.C. § 16(e)(2) of any preemptive effect on State and local gaming and bucket shop laws of the new swap regulatory regime introduced by Dodd-Frank. It would be odd for Congress to introduce such a pervasive regime only to have states upend it by permitting transactions prohibited by the new regime).

<sup>53</sup> See *supra* Section IV.A (briefly discussing the Supreme Court's preemption case law).

<sup>54</sup> A DCM, defined in 17 C.F.R. § 1.3 and also known as a "futures exchange," is a "board of trade" designated as a contract market by the CFTC. A "board of trade," is defined in 7 U.S.C. § 1a(6) as an "organized exchange or other trading facility." Those terms, in turn, are defined in 7 U.S.C. §§ 1a(37) and (51).

<sup>55</sup> A SEF is defined in 7 U.S.C. § 1a(50) as:

[A] trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—(A) facilitates the execution of swaps between persons; and (B) is not a designated contract market.

jurisdiction of the SEC or other regulatory authorities under federal or state laws nor restricts them from carrying out their responsibilities under such laws.<sup>56</sup>

Depending on how a gambling business is organized and operates, it may fall within one or more of the DCM, SEF, or board of trade definitions. Even if a gambling business does not fall within any of the foregoing defined terms, it still may constitute an exchange or market, which are broader terms than any of the others. Thus, to the extent that swaps, futures, or options are traded on a DCM, SEF, or any other platform, state law would appear to be preempted by the CFTC's exclusive jurisdiction.<sup>57</sup>

*b. CEA § 4c(b)*

CEA § 4c(b), the CFTC's plenary options authority, states:

No person shall offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity regulated under this Act which is of the character of, or is commonly known to the trade as, an "option" . . . contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe.

CFTC Rule 32.2 makes it unlawful to engage in any transaction in interstate commerce that is a commodity option transaction unless it is conducted in compliance with all applicable CEA and CFTC swap authority, unless the transaction meets the terms of the trade option exemption ("TOE") in CFTC Rule 32.3. Due to its physical settlement requirement (which is impossible for typical binary options) and requirements regarding permitted option offerors and offerees, it is very unlikely that the TOE would cover binary options. Thus, if sports betting transactions are options, state law would appear to be preempted

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<sup>56</sup> 7 U.S.C. § 2(a)(1)(A).

<sup>57</sup> A sports gambling business might also be a futures commission merchant ("FCM"). An FCM is defined in 7 U.S.C. § 1a(28). 7 U.S.C. § 6d requires FCMs to register with the CFTC. FCMs are subject to extensive regulation under the U.S.C. and CFTC rules. The CFTC has charged several "prediction market" and binary options market operators over the years for failure to register as FCMs. *See, e.g.*, Press Release, Commodity Futures Trading Commission, CFTC Charges "Prediction Market" Proprietor Banc de Binary with Violating the CFTC's Off-Exchange Options Trading Ban and Operating as an Unregistered Futures Commission Merchant (June 6, 2013), <https://www.cftc.gov/PressRoom/PressReleases/6602-13>; Press Release, Commodity Futures Trading Commission, CFTC Orders Principal of Binary Options Trading Firm to Pay \$200,000 for Illegal Off-Exchange Trading and Registration Violations (July 29, 2019), <https://www.cftc.gov/PressRoom/PressReleases/7985-19>.

by virtue of (1) CEA § 4c(b) and CFTC Rule 32.2 and/or (2) the fact that options are generally swaps,<sup>58</sup> the prohibition in CEA § 2(e) on non-ECPs entering into swaps,<sup>59</sup> and the fact that most members of the general public are not ECPs.<sup>60</sup>

C. *Implied Preemption under the CEA*

i. *Field Preemption*

As discussed above, even if express preemption does not completely displace state regulation, that does not end the inquiry under the Supreme Court's preemption jurisprudence because implied preemption may apply.<sup>61</sup> Under the implied preemption doctrine, a state gaming law that regulates swaps may be preempted because Congress has occupied the field of swaps regulation through the comprehensive CFTC swap oversight regime in Subtitle A (Regulation of Over-the-Counter Swaps Markets) of Title VII of Dodd-Frank, which the CFTC has implemented.<sup>62</sup>

ii. *Conflict Preemption*

Alternatively, state gaming law may present an implied conflict with the CFTC's swap regulatory regime because it could be viewed as an obstacle to accomplishing congressional objectives in enacting Dodd-Frank. In other words, any state law permitting sports bets with non-ECPs may be preempted by the CEA when such sports bets constitute swaps, futures, or options because the permissive state law would undermine the federal policy, embodied in, as applicable, CEA §§ 2(a)(1)(A), 2(e), and 4c(b), as well as CFTC Rule 32.2 banning such transactions with non-ECPs other than on a DCM.

D. *Court Cases Addressing Preemption under the CEA*

Courts have addressed preemption in the context of the CEA more than once with respect to futures, although not specifically in the context of sports betting. In *American Agriculture Movement, Inc v. Board of Trade of City of Chicago*, the court determined that "Congress intended to preempt some, but not all, state laws that bear upon the various aspects of commodity futures trading . . . [including] [w]hen application of state law would directly affect

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<sup>58</sup> See, e.g., 7 U.S.C. § 1a(47)(A)(i).

<sup>59</sup> See *supra* Section II.B.

<sup>60</sup> *Id.*

<sup>61</sup> *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 98 (1992) (explaining that preemption may be either express or implied).

<sup>62</sup> See *supra* Section IV.A discussing when field preemption may apply. See also Barry Taylor-Brill, *Cracking the Preemption Code: The New Model for OTC Derivatives*, 13 VA. L. & BUS. REV. at 11 (stating that Title VII of the Dodd-Frank Act essentially occupied the field of swaps regulation, leaving the CFTC as its sole occupant-in-charge).

trading on or the operation of a futures market.”<sup>63</sup> In a more recent ruling, the court in *Effex Capital, LLC v. National Futures Association* noted that the CEA’s structure “evinced a comprehensive regulatory scheme and that the legislative history of the Commodity Futures Trading Commission Act of 1974 suggested that a catalyst for the significant amendments to the Commodity Exchange Act was a fear that, without increased federal regulation, the states would regulate the futures markets to a chaotic effect.”<sup>64</sup>

*E. Legislative History of CEA 12(e)*

The House Agriculture Committee explained the purpose and rationale for CEA § 12(e)(1) in detail in a report related to the Futures Trading Act of 1982. Essentially, Congress felt that the CFTC could not adequately police off-exchange commodities activities and addressed this concern by encouraging states to be more “involved in actions against those who offer fraudulent off-exchange investments and in policing transactions outside those preserved exclusively for the jurisdiction of the CFTC.”<sup>65</sup> Ultimately, Congress passed CEA § 12(e)(1) understanding that it reflected the “Committee’s intention that the resources of the CFTC and State officials should be used *together* to clean up the continuing problem of off-exchange commodity frauds.”<sup>66</sup>

Given Congress’s clear intent that the CFTC and states should concurrently exercise jurisdiction over the subject matter covered by CEA § 12(e)(1), it would be ironic for a court to apply CEA § 12(e)(1)—the “open season” provision<sup>67</sup>—to shield market participants from the CEA. Therefore, market participants should be cautioned against reading CEA § 12(e)(1) as an opt out from the CFTC’s regulations by failing to trade on an exchange or obtain CFTC registration or designation.

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<sup>63</sup> *Am. Agric. Movement, Inc. v. Bd. of Trade of Chi.*, 977 F.2d 1147, 1155–56 (7th Cir. 1992).

<sup>64</sup> *Effex Cap., LLC v. Nat’l Futures Ass’n*, 933 F.3d 882, 894 (7th Cir. 2019).

<sup>65</sup> H.R. REP. NO. 97-565, pt. 1, at 44 (1982).

<sup>66</sup> *Id.* (emphasis added).

<sup>67</sup> *Id.* (“[Then-CFTC] Chairman Philip Johnson characterized the provision as an “open season” on such activities, and the Committee concurs.”).

V. CFTC-REGULATED PRODUCTS THAT SPORTS BETS MAY  
CONSTITUTE, POTENTIALLY LEADING TO FEDERAL  
PREEMPTION OF STATE LAWS THAT PERMIT SPORTS  
GAMBLING

A. *Event Contracts*

i. *Relevant CEA Provisions*

CEA § 5c(c)(5)(C)(i) provides:

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 (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i)) . . . by a designated contract market or swap execution facility, the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve . . . gaming[.]

CEA § 5c(c)(5)(C)(ii) states that “[n]o 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.”<sup>68</sup>

The reference to “1a(2)(i)” is nonsensical because neither CEA § 1a(2)(i) nor CEA § 1a(2) appear in the definition of “appropriate Federal banking agency.” The authors believe that Congress instead meant to refer to CEA § 1a(19)(i), a reading consistent with CEA § 5c(c)(5)(C)(i)’s focus on excluded commodities.<sup>69</sup>

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<sup>68</sup> 7 U.S.C. § 7a-2(c)(5)(C)(ii).

<sup>69</sup> 7 U.S.C. § 7a-2(c)(5)(C)(i) refers to excluded commodities “based upon *the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i))*” (emphasis added). 7 U.S.C. § 1a(19) defines the term “excluded commodity” as any one of the items listed in four categories. 7 U.S.C. § 1a(19)(i) is the first category and is comprised of the following items: “an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure[.]” 7 U.S.C. § 1a(19)(iv) is the fourth category and is comprised, in relevant part, of the following: “an occurrence, extent of an *occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i) [of 7 U.S.C. § 1a(19)]*” (emphasis added).

However, the excluded commodity definition in CEA § 1a(19)<sup>70</sup> appears to have its own interpretive difficulties that could significantly impact sports betting event contracts. The excluded commodity definition's clause (iv) states that it covers occurrences "*other than* a change in the price, rate, value, or level of a commodity *not described in* clause (i) [of the excluded commodity definition]"<sup>71</sup> (the "§ 1a(19) Carveout"). On its face, this double-negative qualifier means that the scope of a clause (iv)-excluded commodity is limited to the enumerated categories of changes *in* CEA § 1a(19)(A)(i) *commodities alone*. In other words, if a commodity is not listed in clause (i), the occurrence, extent of an occurrence, or contingency related to a change in its price, rate, value, or level cannot be an excluded commodity under clause (iv). It would be odd if changes in price, rate, value, or level constituted the universe of changes that could occur with respect to clause (i) commodities given the following: (1) the Commission's focus in the 2008 Event Contract Concept Release on event contracts outside the traditional futures contract underliers described in clause (i); (2) Congress's similar focus in CEA § 5c(c)(5)(C); and (3) the fact that the only clause of the excluded commodity definition that such commodities would seem to logically fall into is clause (iv).

An alternative interpretation of the § 1a(19) Carveout is that the word "not" should be read out of it. Reading language out of a statute is disfavored in statutory interpretation, but the CFTC has taken a similar approach at least once before.<sup>72</sup> Interpreting the word "not" in the § 1a(19) Carveout as a mistake would

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Other than the "not" in § 1a(19)(iv), the italicized language from 7 U.S.C. § 1a(19)(iv) and 7 U.S.C. § 7a-2(c)(5)(C)(i) is almost identical. Because of that similarity, the fact that the commodities listed in 7 U.S.C. § 1a(19)(i) are commodities that have traditionally underlay futures contracts, and that the 2008 Event Contract Concept Release was published just two years before Congress added 7 U.S.C. § 7a-2(c)(5)(C)(i) to the CEA, the authors believe that the reference in 7 U.S.C. § 7a-2(c)(5)(C)(i) to "[7 U.S.C. §] 1a(2)(i)" intended to refer to 7 U.S.C. § 1a(19)(i). *See also* David E. Aron and Matthew Jones, *The CFTC's Characterization of Virtual Currencies as Commodities: Implications under the Commodity Exchange Act and CFTC Regulations*, FUTURES & DERIVATIVES L. REP. at 31, n.131 (May 2018) (stating that "the most logical interpretation is that the reference was intended to be a reference to the first prong of the excluded commodity definition (i.e., 7 U.S.C. § 1a(19)(i)), thereby carving out of the 'event contract' definition contracts with events based on the excluded commodities listed in that prong.").

<sup>70</sup> 7 U.S.C. § 1a(19)(iv) (clause (iv) of the excluded commodity definition in 7 U.S.C. § 1a(19) is an element of the gaming event contract prohibition in CFTC Rule 40.11(a)).

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,258 (Aug. 13, 2012) [hereinafter Swap Adopting Release] (characterizing ambiguity in the CEA as a "scrivener's error[,] and interpreting changes to the CEA contrary to one plain meaning because "[t]he CFTC believes that Congress



mean that all types of occurrences, extent of occurrences, and contingencies of all types would be excluded commodities under prong (iv) of the excluded commodity definition, except for the set of occurrences, extent of occurrences, and contingencies related to a change in the price, rate, value, or level of a prong (i)-excluded commodity. This seems more consistent with congressional and CFTC intent toward event contracts than the result discussed in the preceding paragraph.

A third interpretation of the § 1a(19) Carveout is that it does not apply to certain event contracts that Congress and the CFTC intended for CEA § 5c(c)(5)(C) and Rule 40.11(a) to capture. Under this interpretation, if an occurrence, extent of an occurrence, or contingency does not constitute a change in price, rate, value, or level, it does not matter whether the commodity experiencing the change is described in clauses (i)-(iv). Since that change would not be a change in price, rate, value, or level, it would not be covered by the carveout and could be an excluded commodity under prong (iv). Under this view, two celebrities marrying does not seem on its face to be within the carveout because such an occurrence does not seem to be a change in price, rate, value, or level. Similarly, the occurrence of an athlete not playing in a game due to injury would also not seem to be a price, rate, value, or level change and, therefore, apparently could be an excluded commodity (and the type of event that Congress may have not wanted people to profit from).

*ii. Relevant CFTC Regulations*

Based in part on the authority provided in CEA § 5c(c)(5)(C)(i), on July 19, 2011, the CFTC adopted final rules governing, among other things, the listing and clearing of new contracts by registered entities,<sup>73</sup> including Rule 40.11(a)(1), which states:

[A] registered entity shall not list for trading or accept for clearing on or through the registered entity any of the following: (1) An agreement, contract, transaction, or swap based upon an excluded commodity, as defined in Section 1a(19)(iv) of the Act, that involves, relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law[.]<sup>74</sup>

In the Registered Entities Adopting Release, the Commission stated that it “ha[s] determined to prohibit contracts based upon activities enumerated in

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did not intend the swap definition to overrule and effectively repeal another provision of the CEA in such an oblique fashion.”)

<sup>73</sup> See Provisions Common to Registered Entities, 76 Fed. Reg. 44,799 (July 27, 2011) [hereinafter Registered Entities Adopting Release].

<sup>74</sup> 17 C.F.R. § 40.11(a)(1).

Section 745 of Dodd-Frank”<sup>75</sup> and that “its prohibition of certain ‘gaming’ contracts is consistent with Congress’s intent to ‘prevent gambling through the futures markets’ and to ‘protect the public interest from gaming . . . .’”<sup>76</sup> Therefore, unless the CFTC withdraws Rule 40.11(a), neither a DCM nor a SEF can list a sports betting contract that “involves, relates to, or references . . . gaming[.]”

Instead of providing further clarification, the Commission noted that a registered entity may receive a definitive resolution of any question concerning the applicability of the prohibition in CFTC Rule 40.11(a)(1) on listing gaming or other event contracts by submitting a particular product for approval.<sup>77</sup>

*a. What is a “Financial, Commercial, or Economic Consequence” in the Context of Rule 40.11(a)?*

Rule 40.11(a) bans “[a]n agreement, contract, transaction, or swap based upon an excluded commodity, as defined in [CEA §] . . . 1a(19)(iv)[,],” which is the “excluded commodity” definition.<sup>78</sup> In addition to the excluded commodity definition’s clause (iv) parenthetical, one required element of that definition is that the occurrence, extent of an occurrence, or contingency in question is “associated with a financial, commercial, or economic consequence.”<sup>79</sup> This requirement leads one to question whether sports bets have such consequences. Because the language of prong (ii) of the swap definition (CEA § 1a(47)(A)(ii))

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<sup>75</sup> Registered Entities Adopting Release, *supra* note 73, at 44,785 (citing 156 Cong. Rec. S5906 (July 15, 2010) [hereinafter Lincoln-Feinstein Colloquy] (Senator Feinstein responding to Senator Lincoln), <https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf>).

<sup>76</sup> *Id.* at 44,786 (citing Lincoln-Feinstein Colloquy). Lincoln-Feinstein Colloquy states the following at S5906-07:

[T]he Commission needs the power to, and should, 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.

<sup>77</sup> See Registered Entities Adopting Release, *supra* note 73, at 44,785 (“The Commission would like to note that registered entities may receive a definitive resolution of any questions concerning the applicability of § 40.11(a)(1) by submitting a particular product for Commission approval under § 40.3.”)

<sup>78</sup> 17 CFR § 40.11(a)(1).

<sup>79</sup> 7 U.S.C. § 1a(19)(iv)(II).

is so similar to the language of CEA § 1a(19)(iv),<sup>80</sup> we discuss potential answers to that question below in Section IV.B.1.

*b. What is “Gaming in the Context of Rule 40.11(a)?*

Several state statutes link the terms “gaming” or “gambling” to betting on games. For example, an Illinois statute provides that “[a] person commits gambling when he . . . makes a wager upon the result of any game, contest, or any political nomination, appointment[,] or election . . . .”<sup>81</sup> Gambling is primarily a matter of state law, but there are federal gambling-related statutes as well, such as the UIGEA.

As discussed above in Section II, under the UIGEA, it is unlawful for a gambling business to accept payment for illegal Internet gambling.<sup>82</sup> That statute contains a definition of “bet or wager,” which means (with certain exclusions) “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome[.]”<sup>83</sup> If an agreement, contract, transaction, or swap based on CEA § 1a(19)(iv) involves, relates to, or references “gaming,” it cannot currently be listed for trading by a DCM or SEF (or cleared by a CFTC-registered DCO). “Gaming,” however, is not defined in either the CEA or CFTC regulations.

*c. Prior CFTC Consideration and Analysis of Event Contracts and “Gaming”*

*1. Concept Release on the Appropriate Regulatory Treatment of Event Contracts*

In 2008, the CFTC issued the 2008 Event Contract Concept Release, which discussed the CFTC’s jurisdiction over three main types of event contracts, categorized as those based on (1) narrow commercial measures and events; (2) certain environmental measures and events; and (3) general measures and events.<sup>84</sup> It also raised three general questions: (1) whether event contracts

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<sup>80</sup> Compare the relevant text of 7 U.S.C. § 1a(19)(iv) (“an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is . . . (II) associated with a financial, commercial, or economic consequence.”) to 7 U.S.C. § 1a(47)(A)(ii) (“any purchase, sale, payment, or delivery . . . 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.”).

<sup>81</sup> 720 ILL. COMP. STAT. ANN. § 5/28-1 (West 2019).

<sup>82</sup> 31 U.S.C. § 5363 (2006).

<sup>83</sup> 31 U.S.C. § 5362(1)(A) (2006).

<sup>84</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25,671.

are within the CFTC's jurisdiction; (2) if CFTC jurisdictional, should exemptions or exclusions apply; and (3) how should the CFTC address the potential gaming aspects of some event contracts and the possible preemption of state gaming laws?<sup>85</sup>

The CFTC also stated that “[a] significant number of event contracts are structured as all-or-nothing binary transactions commonly described as binary options,”<sup>86</sup> and that event contracts “have been based on a wide variety of interests including the results of presidential elections, the accomplishment of certain scientific advances, world population levels, the adoption of particular pieces of legislation, the outcome of corporate product sales, the declaration of war and the length of celebrity marriages.”<sup>87</sup>

The Commission further suggested, for purposes of its discussion, that event contracts could be categorized based on: (1) narrow commercial measures and events; (2) certain environmental measures and events; or (3) general measures and events.<sup>88</sup>

The Commission explained that some event contracts reflected narrow commercial measures or events and explained those concepts:

Narrow commercial measures quantify and reflect the rate, value, or level of particularized commercial activity, such as a specific farmer's crop yield. Narrow commercial events, on the other hand, are events that might, in and of themselves, have commercial implications, such as changes in corporate officers or corporate asset purchases.<sup>89</sup>

These narrow commercial events appear related to a specific entity's interests, which could be analogous to sports-related events, such as a team's performance or a specific athlete's on-field achievements (for example, scoring a touchdown). While some may find it odd to view the outcome of a sporting event as having commercial implications, others seem to disagree.<sup>90</sup>

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<sup>85</sup> *Id.* at 25,670.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 25,671.

<sup>89</sup> *Id.*

<sup>90</sup> *See* Public Statement, CFTC, Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts (Mar. 25, 2021) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiujffPwujxAhXNMVkfHQThAxMQFnoECAcQAA&url=https%3A%2F%2Fwww.cftc.gov%2FPressRoom%2FSpeechesTestimony%2Fquintenzstatement032521&usg=AOvVaw1fR1tqeGgI2n0ahCOdN0Uh> [hereinafter Quintenz ErisX Statement] (explaining that “[s]ince *practically any event has at least a minimal financial, commercial, or economic consequence*, all events are commodities.”) (emphasis added).

In contrast, the Commission explained that “general measures and events” include political and entertainment measures and events that do not quantify the rate, value, or level of any commercial or environmental activity.<sup>91</sup> In making this observation, the Commission stated that these general measures and events do not “reflect” a commercial or environmental event, and noted that, consequently, futures contracts on such general measures and events are ineligible to be listed on DCMs, because they do not satisfy the economic purpose test under former CEA § 5(g).<sup>92</sup>

The Commission also noted that, unlike the interests that event contracts cover, the interests that other futures contracts cover “have been viewed by Commission staff as having generally-accepted and predictable financial, commercial or economic consequences.”<sup>93</sup> That is to say the Commission distinguished event contracts from other futures contracts that cover “measures and occurrences that reasonably could be expected to correlate to market prices or other broad-based commercial or economic measures or activities.”<sup>94</sup>

Today’s Commission could also take the view that event contracts do not have “generally-accepted and predictable financial, commercial or economic consequences,” and interpret that to mean that the payout trigger on a sports bet (i.e., the relevant occurrence, extent of an occurrence, or contingency mentioned in CEA § 5c(c)(5)(C)) is *not* associated with the financial, commercial, or economic consequence required by § 5c(c)(5)(C). That would mean that sports bets would not be event contracts, making them ineligible to be banned under Rule 40.11(a) from being listed or cleared by a registered entity. However, not everyone agrees that general event contracts are not associated with a financial, commercial, or economic consequence.<sup>95</sup>

In the 2008 Event Contract Concept Release, the Commission solicited comment on “What calculations, analyses, variables and factors would be appropriate in determining whether the impact of an occurrence or contingency

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<sup>91</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25,671.

<sup>92</sup> *Id.* at 25,672 (“Accordingly, while futures contracts that failed the economic purpose test were prohibited from trading on futures exchanges and thus illegal because of the on-exchange trading requirement [set forth in CEA § 4(a)], they (and any instrument with identical terms) remained futures contracts, fully subject to the Commission’s jurisdiction.”). The economic purpose test is derived from an unadopted version of former CEA § 5(g). Congress instead adopted the Senate’s broader version of § 5(g) that included a “public interest” standard.

<sup>93</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25,671.

<sup>94</sup> *Id.*

<sup>95</sup> *See* Statement, Bart Chilton, Comm’r, Commodities Futures Trading Comm’n, Dissent from Approval of Media Derivatives Exchange’s Opening Weekend Motion Picture Revenue Futures and Binary Option Contracts (June 14, 2010), <https://www.cftc.gov/sites/default/files/idc/groups/public/@otherif/documents/ifdocs/mdexdissentingchilton061410.pdf> (illustrating that the “commodity” definition is too expansive by providing the example that whether a certain movie star dies or becomes disabled “could have economic consequences . . .”).

will result in a financial, commercial or economic consequence that is identified in [the excluded commodity definition in ] [CEA] Section 1a[.]” That issue still resonates today.<sup>96</sup>

## 2. *Media Derivatives’ Movie Box Office Contracts*

In regard to the same event contracts discussed in the 2008 Event Contract Concept Release, the CFTC’s statement on Media Derivatives, Inc.’s movie box office contracts (the “MDEX Statement”) appears to have raised congressional concerns.<sup>97</sup> The statement caused some to think that the Commission would permit gambling, which potentially led Congress to expressly grant the CFTC the authority (in the form of CEA § 5c(c)(5)(C)) to prohibit event contracts if the Commission determined such contracts to be contrary to public interest.<sup>98</sup>

In the MDEX Statement, the Commission determined that box office revenue was a commodity, noting that under the Commission’s DCM contract listing review process, a contract would be approved if it was based on a commodity and not readily susceptible to manipulation.<sup>99</sup> However, then-Commissioner Chilton disagreed and argued that the Commission should have denied the box office revenue futures contract on public interest grounds or else the Commission could “approve terrorism contracts or contracts on whether a certain movie star will die . . . .”<sup>100</sup> Congress apparently agreed with Commissioner Chilton<sup>101</sup> and passed Dodd-Frank § 721(a)(4), thereby amending the “commodity” definition in CEA § 1a(9) to expressly exclude motion picture box office receipts, joining onions as the only things expressly excluded from

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<sup>96</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25,673.

<sup>97</sup> See generally Statement, Comm’n, Commodities Future Trade Comm’n, Statement of the Commission approving MDEX (June 14, 2010), <http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/mdexcommissionstatement061410.pdf>.

<sup>98</sup> See Shaun Raviv, *Box Office Bomb: The Short Life of Popcorn Prediction Markets*, THE RINGER (Nov. 15, 2018, 6:30 AM), <https://www.theringer.com/movies/2018/11/15/18091620/box-office-futures-dodd-frank-mpaa-recession>.

<sup>99</sup> See generally Statement, Comm’n, Commodities Future Trade Comm’n, Statement of the Commission approving MDEX 2 (June 14, 2010), <http://www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/mdexcommissionstatement061410.pdf>.

<sup>100</sup> Chilton, *supra* note 95, at 2.

<sup>101</sup> Raviv, *supra* note 98, at 11–15 (reporting that the Movie Pictures Association of America stated the movie box office revenue contracts would only serve people who wanted to gamble and that Representative Kurt Schrader of Oregon equated movie box office revenue contracts to gambling).

the commodity definition.<sup>102</sup> Congress also added CEA § 5c(c)(5)(C), empowering the CFTC to deny, on public interest grounds, the types of contracts Commissioner Chilton disapproved.

### 3. NADEX Political Event Contracts

The CTFC analyzed whether political event derivative contracts (“political event contracts” or “PECs”) that NADEX (a DCM) sought to list for trading were consistent with CEA § 5c(c)(5)(C) and Commission Regulation 40.11(a)(1), and issued an order prohibiting NADEX from listing its PECs because they were deemed contrary to the public interest.<sup>103</sup> The Commission found that a PEC enabling “betting” on elections is forbidden under various state laws and that several state gambling definitions for “bet” and “wager” specifically include political events, which constituted “gaming” contracts.<sup>104</sup> The Commission further cited the definition of “bet or wager” from the UIGEA, which defines the term as “the staking or risking by any person of something of value upon the outcome of a contest of others,” for the proposition that:

[T]aking a position in a [PEC] fits the plain meaning of a person staking “something of value upon a contest of others,” as the [PECs] are all premised either directly (in the case of the presidential [PECs]) or indirectly (in the cases of the House and Senate majority control [PECs]) on the outcome of a contest between electoral candidates[.]<sup>105</sup>

Accordingly, the CFTC found that NADEX’s PECs involve gaming within the meaning of CEA § 5c(c)(5)(C)(i)(V) and Commission Regulation 40.11(a)(1). Further, the Commission found that the PECs “could not reasonably

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<sup>102</sup> Relatedly, Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1672, amended 7 U.S.C. § 13-1(a) to prohibit box office receipts (“or any index, measure, value, or data related to such receipts”) futures contracts from being traded on or subject to the rules of any board of trade in the United States. Onion futures were already subject to this prohibition.

<sup>103</sup> See U.S. COMMODITY FUTURES TRADING COMM’N, *Order Prohibiting the Listing or Trading of Political Event Contracts*, COMMODITIES FUTURE TRADING COMM’N (Apr. 2, 2012), <https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf> (2012). The self-certified contracts included: a Democratic Majority in the U.S. House of Representatives Binary Contract; a Republican Majority in the U.S. House of Representatives Binary Contract; a Democratic Majority in the U.S. Senate Binary Contract; a Republican Majority in the U.S. Senate Binary Contract; and ten U.S. Presidency Binary Contracts.

<sup>104</sup> *Id.* at 2–3.

<sup>105</sup> *Id.* at 3 (internal citation omitted).

be expected to be used for hedging purposes[,]”<sup>106</sup> but could be used to adversely affect election outcomes and were contrary to the public interest as contemplated by CEA § 5c(c)(5)(C).<sup>107</sup> Based on these findings, the CFTC ordered NADEX not to list or trade the PECs.<sup>108</sup>

#### 4. *ErisX NFL Event Contracts*

Another DCM, Eris Exchange, LLC (“ErisX”), has tested the Rule 40.11(a) waters with the CFTC more recently, self-certifying three futures contracts related to National Football League games (the “Football Futures”): a moneyline contract (based on the outright winner of a football game), a point spread contract, and an over/under contract.<sup>109</sup> ErisX’s attempted self-certification prompted one commissioner to issue a statement supporting some pathway to list gaming contracts.<sup>110</sup> ErisX contended that its Football Futures “do not constitute ‘gaming[,]’” and do not allow market participants to gamble, explaining that it designed the Football Futures “specifically to meet the hedging needs of commercial market participants.”<sup>111</sup> ErisX sought to distinguish its Football Futures as outside the application of CFTC Rule 40.11(a)’s authority to prohibit gaming event contracts by focusing on the Registered Entities Adopting Release’s observation that Rule 40.11(a) is consistent with Congress’s intent to

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 4.

<sup>108</sup> *Id.*

<sup>109</sup> See Press Release, Commodities Future Trading Comm’n, CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC (Dec. 23, 2020), <https://cftc.gov/PressRoom/PressReleases/8345-20>.

<sup>110</sup> See Public Statement, Brian D. Quintenz, Comm’r, Commodities Future Trading Comm’n, Statement on ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given Sunday in the Futures Market (Mar. 25, 2021), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiujffPwujxAhXNMVkJFHQThAxMQFnoECACQAA&url=https%3A%2F%2Fwww.cftc.gov%2FPressRoom%2FSpeechesTestimony%2Fquintenzstatement032521&usg=AOvVaw1fR1tqeGgI2n0ahCOdN0Uh> [hereinafter Quintenz ErisX Statement] (stating “I don’t opine today whether the ErisX NFL contracts should ultimately be allowed or prohibited because I don’t believe the Commission currently has a constitutional or valid process to evaluate them. The issues here are bigger than ErisX’s contracts; the statute is unconstitutional, the regulation is invalid, and even without those issues, there were flaws in the Order that made it arbitrary and capricious”).

<sup>111</sup> See Letter from ErisX to Commodities Future Trading Comm’n, CFTC Rule 40.2(a) Certification[] Notification Regarding the Initial Listing of Eris Exchange RSBIX NFL Futures (Eris Exchange Submission #2020-11E) 1, 7 (Dec. 14, 2020), <https://www.erisx.com/wp-content/uploads/2020/12/ErisX-Draft-Self-Certification-RSBIX-Sports-Futures-Dec-14-2020.pdf>.



prevent gambling through the futures markets.<sup>112</sup> Rather than simply allowing the Football Futures to trade pursuant to the self-certification, the CFTC did the following: (1) notified ErisX on December 23, 2020 that it was commencing a ninety-day review of the Football Futures;<sup>113</sup> (2) requested “that ErisX suspend any listing and trading of its proposed [Football Futures] during the . . . [ninety]-day review period”;<sup>114</sup> and (3) requested public comment on several questions related to the ErisX Football Contracts, the first of which was, “Do any of these contracts involve, relate to, or reference gaming as described in Commission regulation 40.11(a)(1)?”<sup>115</sup>

Before the Commission could issue an order<sup>116</sup> presumably denying<sup>117</sup> these contracts, ErisX withdrew the certification. Thus, the order was never made public (“Unissued ErisX Order”). However, Commissioner Quintenz felt “compelled to release [a] statement to bring transparency to [the] debate and process” behind this proposed order and, accordingly, provided a summary of his reasoning.<sup>118</sup> The Quintenz ErisX Statement discussed the proposed order and the Commissioner’s objections to the order’s analysis.<sup>119</sup> The Commissioner raised constitutional concerns with CEA § 5c(c)(5)(C)(i) and Administrative

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<sup>112</sup> See *id.* at 7 (citing “Congress’s intent to ‘prevent gambling through the futures markets’” and “‘to protect the public interest from gaming and other event[] contracts’” and a colloquy between Senators Lincoln and Feinstein “emphasiz[ing] that the Commission ‘needs the power to, and should, prevent derivatives . . . that are contrary to the public interest because they exist predominantly to enable gambling through . . . event contracts’”).

<sup>113</sup> See Letter from Commodities Future Trading Comm’n to ErisX, Notification of Commodity Futures Trading Commission (“CFTC” or Commission) Commencement of 90-Day Review of Proposed Football Futures (Dec. 23, 2020), <https://www.cftc.gov/sites/default/files/filings/documents/2020/orgdcmerissignedletter201223.pdf>.

<sup>114</sup> *Id.*

<sup>115</sup> See Questions on the Eris Exchange, LLC (“ErisX”) RSBIX NFL Futures Contracts for Public Comment, <https://www.cftc.gov/sites/default/files/filings/documents/2020/orgdcmerisquestionre201223.pdf>.

<sup>116</sup> 17 CFR § 40.11 (2021) (requiring the Commission to issue an order approving or disapproving a contract subject to a ninety-day review under § 40.11(c)).

<sup>117</sup> See Quintenz, *supra* note 110 (revealing that “Commission staff proposed an Order that found the ErisX NFL contracts involved gaming, were prohibited by regulation, and were also contrary to the public interest. This proposed Order . . . was circulated to the Commission for a vote . . . .” Notably, “[j]ust hours before this voting process could conclude, and likely in anticipation of the Order’s approval by the Commission, ErisX decided to withdraw their certification, preventing the Order from being . . . considered by the Commission . . .”).

<sup>118</sup> *Id.*

<sup>119</sup> See Statement of Commissioner Brian D. Quintenz ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given Sunday in the Futures Market, *supra* note 110.

Procedure Act concerns with Commission Rule 40.11(a), and considered the proposed order arbitrary in its determination.<sup>120</sup>

It is unclear whether Commissioner Quintenz supports listing gaming contracts, because his statement focused on broader issues. The Quintenz ErisX Statement also provided a partial summary of the Unissued ErisX Order. Commissioner Quintenz explained, according to the Unissued ErisX Order, the term “gaming” includes gambling and sports wagering, and “(1) the ‘record in this matter does not establish that the ErisX NFL event contracts have a hedging utility’”<sup>121</sup> and (2) the contracts are “contrary to the public interest because they ‘could potentially promote sports gambling through the derivatives markets.’”<sup>122</sup>

Commissioner Berkovitz provided a statement summarizing his legal basis for supporting the Unissued ErisX Order, as well as his views on the “gaming” definition and the CFTC’s approach to the public interest test. He wrote that “a contract that is structured identically to gaming contracts, labelled with the same terms as gaming contracts, and designed with a purpose to hedge

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* Another objection Commissioner Quintenz voiced regarding the Unissued ErisX Order was that “[t]he Order used legislative history to reinstitute the economic purpose test that the Commission used to determine whether a contract was contrary to public interest prior to that test’s removal from the CEA by the CFMA[.]” (internal quotation marks removed). *But see* Statement of Commissioner Dan M. Berkovitz related to Review of ErisX Certification of NFL Future Contracts, COMMODITY FUTURES TRADING COMM’N (Apr. 7, 2021), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement040721> at n.17 (stating that in the Commission’s 2012 NADEX Order, which prohibited the listing or trading of political event contracts, the Commission determined that:

[T]he legislative history of CEA Section 5c(C)(5)(C) indicates Congress’s intent to restore, for the purposes of that provision, the economic purpose test that was used by the Commission to determine whether a contract was contrary to the public interest pursuant to CEA Section 5(g) prior to its deletion by the [CFMA].

Commissioner Berkovitz appears to have been referencing the language in the NADEX Order stating that PECs “could not reasonably be expected to be used for hedging purposes.” In the Matter of the Self-Certification by North American Derivatives Exchange, Inc., of Political Event Derivatives Contracts and Related Rule Amendments under Part 40 of the Regulations of the Commodity Futures Trading Commission, Order Prohibiting the Listing or Trading of Political Event Contracts, *supra* note 103, at 3. *See supra* Section V.A.ii.c.iii.

<sup>122</sup> Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given *Sunday in the Futures Market*, *supra* note 110.

gaming contracts ‘involves’ gaming.”<sup>123</sup> Commissioner Berkovitz also stated that, “[b]ecause in many states sports betting is now legal . . . , it would not be ‘contrary to the public interest’ for the Commission to permit the listing of sports event contracts . . . used to hedge commercial risks . . .” arising from legal, sports betting-related commerce.<sup>124</sup> Thus, Commissioner Berkovitz appears to support some revisions to Commission Rule 40.11(a).<sup>125</sup>

### B. Swaps

An agreement, contract, or transaction is a swap if it falls within any one of the six categories of the “swap” definition in CEA § 1a(47)(A), unless the agreement, contract, or transaction is excluded from the definition by CEA § 1a(47)(B) or has been interpreted or defined by the CFTC as not being a swap.<sup>126</sup> Although sports bets could be analyzed under any of the prongs of the swap definition (only one of which needs to be satisfied for an agreement, contract, or transaction to be a swap), we focus on two of those prongs here: the “event prong” and the “options prong.”

#### i. Event Prong

CEA § 1a(49)(A)(ii) defines as a swap any agreement, contract, or transaction “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[.]” This language is similar to that of CEA § 5c(c)(5)(C)(i), which grants the CFTC

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<sup>123</sup> Statement of Commissioner Dan M. Berkovitz related to Review of ErisX Certification of NFL Future Contracts, *supra* note 121. Given that an event contract must only involve, relate to, or reference gaming to be prohibited under CFTC Rule 40.11(a), such contract can easily run afoul of Rule 40.11(a), even if it does not itself constitute gaming.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (“The Commission should permit a DCM to list contracts involving sports events where a DCM demonstrates that such contracts have an economic purpose and hedging utility related to such commercial activity”).

<sup>126</sup> 7 U.S.C. § 1a(47) (2019). *See also* Pub. L. No. 111-203, § 712(d)(1), (4) (respectively, require that: “the [CFTC] and the [SEC] . . . shall further define the term[] ‘swap’”; and

Any interpretation of, or guidance by either Commission regarding, a provision of this title, shall be effective only if issued jointly by the [CFTC] and the [SEC], after consultation with the Board of Governors, if this title requires the [CFTC] and the [SEC] to issue joint regulations to implement the provision).

authority to prohibit specified event contracts from being listed or cleared by a registered entity.

More specifically, the first part of this prong (i.e., a payment dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event) would seem to clearly encompass sports betting of all kinds. The second part of this prong (a potential financial, commercial, or economic consequence) may or may not also be met. Commissioner Quintenz, for example, has opined that “practically any event has at least a minimal financial, commercial, or economic consequence.”<sup>127</sup> Former Commissioner Chilton has said that whether a certain movie star dies or becomes disabled “could have economic consequences[.]”<sup>128</sup>

By contrast, in the 2008 Event Contract Concept Release, the Commission compared event contracts unfavorably (as to the existence of a financial, commercial, or economic consequence) to even DCM-listed futures and options *with payout terms based on interests other than price-based interests*. According to the Commission, “[w]hile not strictly price-based, the interests underlying [the latter] have been viewed by Commission staff as having generally accepted and predictable financial, commercial or economic consequences . . . unlike the interests that event contracts cover.”<sup>129</sup>

If the current Commission agrees with the 2008 Commission in thinking event contracts have generally accepted and predictable financial, commercial, or economic consequences, and conclude that such tenuous consequences do not satisfy the second part of the event prong, then sports betting event contracts would not be swaps under the event prong. Even if some sport gaming contracts do not meet the “event prong” definition, they may still be swaps under one of the other prongs of the “swap” definition.

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<sup>127</sup> Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given Sunday in the Futures Market, *supra* note 110.

<sup>128</sup> Chilton, *supra* note 95 at 2.

<sup>129</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25,671 (emphasis added).

ii. *Binary and Other Options*

The CFTC<sup>130</sup> and various courts<sup>131</sup> have held that binary options are options, or otherwise treated them as such. CEA § 1a(49)(A)(i) defines a swap as an agreement, contract, or transaction:

[T]hat is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind[.]

a. *CFTC v. Trade Exchange Network Ltd.*

Prior to Dodd-Frank, the court in *CFTC v. Trade Exchange Network Ltd.* found that event contracts were binary options for purposes of CEA § 4c(b).<sup>132</sup> The court explained:

The contracts offered on [www.intrade.com](http://www.intrade.com) meet the characteristics of what are known to the trade as “binary options.” Binary options are options with discontinuous payoffs. A simple example of a binary option is a cash-or-nothing call. This pays off nothing if the asset price ends up below the strike price at time T and pays a fixed amount, Q, if it ends up above the strike price. . . . A cash-or-nothing put is defined analogously to a cash-or-nothing call. It pays off Q if

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<sup>130</sup> See Trade Exchange Network, CFTC No. 05-14, 1, (Sept. 29, 2005) (“The . . . [CFTC] has reason to believe that the Trade Exchange Network [] has violated Section 4c(b) of the [CEA] . . .”). The CFTC argued that Intrade continued to offer and execute binary options trades by U.S.-based customers, such as predictions about future acts of war “(e.g., ‘U.S. to conduct overt military action against North Korea before midnight ET on 31 Dec 2011’).” Complaint at 8, *CFTC v. Trade Exchange Network Ltd.*, 2012 WL 5897587 (D.D.C. Nov. 26, 2012). Binary options are legally offered at a limited number of DCMs in the United States and seem to be rife with fraud. See, e.g., CFTC/SEC Investor Alert: Binary Options and Fraud,

[https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/fraudadv\\_binaryoptions.html](https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/fraudadv_binaryoptions.html)).

<sup>131</sup> See *CFTC v. Harrison Kantor et al.*, Case No. 2:18-cv-02247-SJF-ARL at 12 (E.D.N.Y. Oct. 23, 2019) (concluding that defendants’ binary options violated a CEA provision and a related CFTC regulation related to commodity options); *CFTC v. Vision Fin. Partners, LLC*, 190 F. Supp. 3d 1126, 1130 (S.D. Fla. 2016) (holding that binary options are commodity options within the meaning of 7 U.S.C. § 4c(b)).

<sup>132</sup> *CFTC v. Trade Exch. Network Ltd.*, 117 F. Supp. 3d 29, 35 (D.D.C. 2015).

the asset price is below the strike price and nothing if it is above the strike price.<sup>133</sup>

The court also noted that these event contracts are known as options in industry practice and resemble some NADEX binary options for economic events.<sup>134</sup>

The court did not have the opportunity to address sport event contracts specifically because Trade Exchange Network Ltd. (“TEN”) had stopped offering them to U.S. customers.<sup>135</sup> Nevertheless, the court’s analysis appears to support the Commission’s view in its prior 2005 consent agreement claiming that TEN violated CEA § 4c(b) in relation to the sale of event options, presumably including the applicable sport event options traded on TEN’s websites.<sup>136</sup> The court’s reasoning may also support treating sports bets as binary options that fall into the options prong of the “swap” definition.<sup>137</sup> Following the TEN-Intrade settlement, the CFTC brought and settled a number of cases involving binary options trading.<sup>138</sup>

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<sup>133</sup> *Id.* at 35–36.

<sup>134</sup> Being known to the trade as an option is an element of the option definition in 7 U.S.C. § 1a(36). Being known to the trade as a swap is an element of prong (iv) of the swap definition in 7 U.S.C. § 1a(47)(A)(iv). Given that various options are swaps under the definition in 7 U.S.C. § 1a(47)(A)(i), being known in industry practice as options may also meet the swap definition under prong (vi). *See* 7 U.S.C. § 1a(47)(A)(vi) (“any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v) [of the CEA’s swap definition]”).

<sup>135</sup> *See* CFTC v. Trade Exch. Network Ltd., 117 F. Supp. 3d. at 38 (stating “on or about February 28, 2007, TEN deconsolidated into three separate entities in order to ‘separate TEN’s non-sports prediction markets from its sports markets’ and TEN ‘transferred its non-sports prediction markets and technology-related intellectual property to Intrade.’” (internal citation omitted)). *See also* Daniel Oboyle, *Sports Exchange Tradesports to Return to US Market*, IGB NORTH AMERICA (Dec. 5, 2019), <https://www.igbnorthamerica.com/sports-exchange-tradesports-to-return-to-us-market/> (stating that the original Tradesports closed in 2008, and “relaunched as a fantasy exchange product, which was [designed to be] legal in the US.”).

<sup>136</sup> CFTC v. Trade Exch. Network Ltd., 117 F. Supp. 3d. at 38 (stating that the “contracts (including 420 contracts concerning the hurricane season and 491 contracts about New York City snowfall) and 2,444 contracts regarding U.S. economic numbers are commodity options under the Act”).

<sup>137</sup> TEN owned and operated internet-based trading platforms, including Tradesports, which offered typical sports contracts such as an over under on the NCAA Final Four Michigan State versus North Carolina. *See* TRADESPORTS (Apr. 1, 2005), <http://tradesports.com>

[<https://web.archive.org/web/20050401083417/http://www.tradesports.com/>].

<sup>138</sup> *See, e.g.*, Settlement order, In re Glenn Olson, CFTC Docket No. 21-05 (Apr. 6, 2021); Complaint, CFTC v. Davis, Case No. 3:19-cv-2140 (N.D. Ohio, W. Div.) (Sept. 17, 2019) (alleging the defendant fraudulently solicited and accepted payment

*b. Sports Bets*

Numerous sports bets can be characterized as options, often as binary options with two possible payouts depending on the outcome.<sup>139</sup> For example, a bet on whether a team will win and a bet on whether a team will win by a certain number of points each have two possible outcomes. Other sports bets may be structured to have more than two possible payout amounts, such as (1) a fixed or variable payout if a bet is in the money, no payout if it is out of the money other than as a result of a tie game, and a return of the amount bet in the event of a tie; or (2) a variable payout that increases with an increase in the number of yards a running back gains in a football game, as an example.

Notwithstanding the foregoing, a sports bet may not be a swap under prong (i) of the swap definition, which requires that the agreement, contract, or transaction in question be “for the purchase or sale, or based on the value, of” the underlier.<sup>140</sup> Because a sports bet on the outcome of a game, a point spread, or an over/under is not “for the purchase or sale of” the game outcome (such as putting aside misconduct such as point shaving or throwing the game), a sports bet seems unlikely to be a swap based on the plain language in CEA § 1a(47)(A)(i) noting an option “for the purchase or sale of” an item listed under that prong.

Thus, to fall within the option prong, a sports bet would need to be “a put, call, cap, floor, collar, or similar option of any kind that is . . . based on the value of” one of the items listed in the prong (e.g., a rate, commodity, index, quantitative measure, or other financial or economic interest of any kind).<sup>141</sup> If

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from customers to trade off-exchange binary options); Settlement Order, Curtis Dalton, CFTC Docket No. 19-17 (July 19, 2019) (settlement order); Press Release, CFTC, CFTC Filed Enforcement Actions Against Two Affiliate Marketers for Binary Options Fraud, Release No. 8047-19 (Oct. 7, 2019) (a pair of enforcement actions); Press Release, CFTC, CFTC Charges Multiple Forex and Binary Options Dealers with Registration Violations, Release No. 7785-18 (Sept. 14, 2018) (settling charges against eight unregistered entities and eight unregistered individuals).

<sup>139</sup> Although we have focused on binary options, which are common in sports betting, other options may also fall within the option prong of the “swap” definition under 7 U.S.C. § 1a(47)(A)(i), including options with more than two outcomes, such as a bet that has a “push” as a third option. An option is defined broadly in 7 U.S.C. § 1a(36) as “an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an ‘option’, ‘privilege’, ‘indemnity’, ‘bid’, ‘offer’, ‘put’, ‘call’, ‘advance guaranty’, or ‘decline guaranty[.]’” See also the definition of “Commodity option transaction; commodity option” in CFTC Rule 1.3(hh), the core of which is substantively the same as the 7 U.S.C § 1a(36) “option” definition, but elements of which on their face, at least, are both broader (i.e., the “or is held out to be” language) and narrower (i.e., the “in interstate commerce” and “and which is subject to regulation under . . . [CFTC regulations]” qualifying language).

<sup>140</sup> 7 U.S.C. § 1a(47)(A)(i).

<sup>141</sup> *Id.*

the word “value” in the option prong means “monetary worth” for purposes of the swap definition’s option prong<sup>142</sup>—as opposed to a numerical quantity that is assigned or is determined by calculation or measurement—<sup>143</sup> a sports bet posing a “yes” or “no” answer is arguably not based on a value, with the result that such sports bet may not be a swap under CEA § 1a(47)(A)(i).<sup>144</sup>

Even if sports bets are not swaps under prong (i) of the swap definition, they may be swaps under prong (vi), which defines a swap as “any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v).”<sup>145</sup> For example, even if a binary option triggered by the Cubs winning the 2022 World Series would not be a swap under prong (i), its binary option nature may be viewed as a permutation of an option that is a swap under prongs (i) and (vi), rendering the Cubs World Series bet a swap.

### C. Options: CEA § 4c(b)

CFTC Rule 32.2 makes it unlawful to engage in any interstate commerce transaction that is a commodity option transaction unless it is conducted in compliance with CEA provisions and all applicable CFTC authority, otherwise

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<sup>142</sup> See, e.g., *Value*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/value> (last visited Oct. 4, 2021).

<sup>143</sup> *Id.*

<sup>144</sup> Prior to the Dodd-Frank Act, the CFTC’s regulation of binary options was based on the off-exchange options ban in Regulation 32.1. That regulation was repealed after the enactment of Dodd-Frank on the premise that all commodity options, including binary options, are swaps and, per CFTC Rule 32.2, are now subject to the same regulations as swaps, unless they satisfy the terms of the TOE in Rule 32.3 (which requires physical settlement of the option and that the offeree be a commercial market participant, making the TOE inapplicable to typical sports bets). Rule 32.2 states:

[I]t shall be unlawful for any person or group of persons to offer to enter into, enter into, confirm the execution of, maintain a position in, or otherwise conduct activity related to any transaction in interstate commerce that is a commodity option transaction, unless:

(a) Such transaction is conducted in compliance with and subject to the provisions of the Act, including any Commission rule, regulation, or order thereunder, otherwise applicable to any other swap; or

(b) [complies with the trade option exemption].

See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Swap Adopting Release, *supra* note 72, at 48,236 (stating that “commodity options are swaps under the statutory swaps definition”).

<sup>145</sup> 7 U.S.C. § 1a(47)(A)(vi).



applicable to any swap, subject to the TOE, which likely is inapplicable to typical sports bets.<sup>146</sup> Thus, if the CFTC considered sports bets to be options, the Commission could potentially use its CEA § 4c(b) plenary options authority to amend Rule 32.2 to allow sports gambling to exist legally under the CEA.<sup>147</sup>

D. CEA § 2(c)(2)(D)

Even if a sports bet is not treated as a swap or futures contract, CEA § 2(c)(2)(D)(i) and (iii) still may make it unlawful to enter, or offer to enter, into a sports bet off a permitted exchange with a non-ECP if the sports bet is a leveraged or margined transaction or is financed by, or on behalf of, the offeror or counterparty.<sup>148</sup> Although this provision has not been applied to gambling in an enforcement action, it is possible that the bet versus potential winnings could be viewed as leverage or margin within the meaning of CEA § 2(c)(2)(D).

If the bet wins, the bettor receives the winnings, plus their initial stake back. The bet could be viewed as leveraged within the meaning of CEA § 2(c)(2)(D) in that the bet may control a much larger position, particularly if there are long odds. For example, if the odds are 20-1 and the bettor must put up only \$5 to win \$100, it resembles the amount of leverage in a futures contract.<sup>149</sup> Structurally, a bet looks like an automatically exercised option with the premium (here, the bet) fully paid. The only distinction, however, is that the bet is returned to the winning bettor, whereas option sellers typically keep option premiums, regardless of whether the option is exercised.

There is an exception to the general prohibition in CEA § 2(c)(2)(D)(i) for transactions in which the commodity in question is “actually delivered” within twenty-eight days of the transaction.<sup>150</sup> Although the concept of actual delivery has been applied to intangibles, such as cryptocurrency,<sup>151</sup> it seems

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<sup>146</sup> The TOE is likely inapplicable because (1) most bettors are unlikely to be ECPs and (2) sports bets are cash settled, not physically settled. *See* 17 C.F.R. § 32.3(a)(1) and (3), respectively.

<sup>147</sup> This could take many forms, including sports betting possibly being subject to state sports betting regulatory schemes, based on the “under such terms and conditions as the Commission shall prescribe” language in 7 U.S.C. § 6c(b).

<sup>148</sup> 7 U.S.C. § 2(c)(2)(D)(i) and (iii).

<sup>149</sup> *See e.g.*, CME Group Inc., *Introduction to Futures Margin: Know What's Needed*, CME GROUP, <https://www.cmegroup.com/education/courses/introduction-to-futures/margin-know-what-is-needed.html> (last visited Oct. 11, 2021) (“Futures margin generally represents a smaller percentage of the notional value of the contract, typically 3–12% per futures contract as opposed to up to 50% of the face value of securities purchased on margin.”).

<sup>150</sup> *See* Commodity Exchange Act, 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa) (2019) (“This subparagraph shall not apply to a contract of sale that—(aa) results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation based upon the typical commercial practice in cash or spot markets for the commodity involved”).

<sup>151</sup> *See* 85 Fed. Reg. 37,737 (June 24, 2020).

unlikely that the CFTC would stretch the concept further by applying it to the cash settlement of a bet.

## VI. POTENTIAL CFTC APPROACHES TO SPORTS BETTING

If the CFTC concluded that prohibiting sports betting is neither required nor warranted under the CEA, there are several ways it can permit sports betting, including amending its rules or providing interpretive guidance, exemptions, and no-action relief.<sup>152</sup> In the 2008 Event Contract Concept Release—before Dodd-Frank explicitly empowered the CFTC to prohibit gaming event contracts on DCMs and SEFs—the Commission sought comment on whether, “[i]f event contracts are within the Commission’s jurisdiction, should there be exemptions or exclusions applied to them . . . .”<sup>153</sup> Although the CFTC did not address sports gaming specifically in the 2008 Event Contract Concept Release, it did say that “[e]vent contracts have been based on a wide variety of interests,” and asked how it should “address the potential gaming aspects of some event contracts and the possible pre-emption of state gaming laws.”<sup>154</sup> Thus, permitting sports betting in some form does not seem out of the question for the CFTC.

### A. *Maintain the Status Quo*

The Commission could decide to maintain the status quo given the Rule 40.11(a) restrictions on registered entities listing and clearing gaming event contracts, ErisX’s unsuccessful attempt to list Football Futures, and the uncertainty surrounding sports bets wagered other than on a DCM. This seems unlikely over the long term based on Commissioner Berkovitz’s openness to gaming event contracts under the right circumstances<sup>155</sup> and Commissioner Quintenz’s views on the flaws of Rule 40.11(a) and its statutory underpinnings.<sup>156</sup>

### B. *Regulate Sports Betting*

The CFTC may permit sports swaps and/or event contract markets by revising its regulations to permit sports betting either under its oversight or even under state law, with states that have legalized sports betting. Commissioner Berkovitz noted that the sports betting landscape is dramatically different from

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<sup>152</sup> The CFTC could also issue a policy statement, which it has several times in the past. *See, e.g.*, 78 Fed. Reg. 45,291 (July 26, 2013) (cross-border application of CEA swap provisions); Policy Statement Concerning Swap Transactions, 54 Fed. Reg. 30,694 (July 21, 1989).

<sup>153</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25, 670.

<sup>154</sup> *Id.*

<sup>155</sup> Statement of Commissioner Dan M. Berkovitz related to Review of ErisX Certification of NFL Future Contracts, *supra* note 121, at 5.

<sup>156</sup> *See generally* Quintenz ErisX Statement, *supra* note 110, at 10.

when the Commission promulgated Regulation 40.11.<sup>157</sup> He also suggested that it “would not be ‘contrary to the public interest’ for the Commission to permit the listing of sports event contracts if an exchange can demonstrate that the contracts will be used to hedge commercial risks arising from lawful commercial activity related to sports betting.”<sup>158</sup>

The CFTC could decide to permit sports bets in a few ways beyond swaps between ECP counterparties. For example, the CFTC may determine that the underlier for a sports swap does not meet the commercial consequence requirement for purposes of the excluded commodity definition.<sup>159</sup> If the underlying commodity (e.g., an underlying sporting event-related occurrence) is not an excluded commodity, then CEA § 5c(c)(5)(C)(ii) and Rule 40.11(a) would not apply, resulting in no restriction on DCMs listing (and DCOs clearing) futures sports bets. In that regard, it is plausible that the CFTC may determine that there is no commercial consequence associated with a variety of sports bets, including popular Super Bowl prop bets such as who wins the coin toss.

Arguably, some sports outcomes have no direct, predictable, or meaningful financial, economic, or commercial consequences, particularly when compared to a bet on a decrease in GDP or an increase in unemployment, as examples. In the 2008 Event Contract Concept Release, the Commission suggested that “general events, such as whether a [c]onstitutional amendment will be adopted or whether two celebrities will decide to marry, can be described as events that do not reflect the occurrence of any commercial or environmental event.”<sup>160</sup> The Commission contrasted these event contracts with others that “have been viewed as measures and occurrences that reasonably could be expected to correlate to market prices or other broad-based commercial or economic measures or activities.”<sup>161</sup> The Commission also requested comment

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<sup>157</sup> See Statement of Commissioner Dan M. Berkovitz related to Review of ErisX Certification of NFL Future Contracts, *supra* note 121, at 3 (“in many states sports betting is now legal”). In that regard, as of Oct. 25, 2021, sports betting is legal and operational in thirty states and the District of Columbia, and legal but not yet operational in three states. See *Interactive Map: Sports Betting in the U.S.*, AM. GAMING ASS’N, <https://www.americangaming.org/research/state-gaming-map/> (last visited Dec. 27, 2021).

<sup>158</sup> *Id.*

<sup>159</sup> The CFTC also or instead could determine that the underlier for a sports swap falls within the 7 U.S.C. § 1a(19) Carveout within the excluded commodity definition.

<sup>160</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25,671. *But see* Statement of Commissioner Brian D. Quintenz ErisX RSBIX NFL Contracts and Certain Event Contracts: Any Given Sunday in the Futures Market, *supra* note 110, at 2 (“practically any event has at least a minimal financial, commercial, or economic consequence”); Commissioner Bart Chilton, Dissent from Approval of Media Derivatives Exchange’s Opening Weekend Motion Picture Revenue Futures and Binary Option Contracts 2 (June 14, 2010) (stating that whether a certain movie star dies or becomes disabled “could have economic consequences.”).

<sup>161</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25,671.

on “[w]hat calculations, analyses, variables and factors would be appropriate in determining whether the impact of an occurrence or contingency will result in a financial, commercial or economic consequence that is identified in . . . [the excluded commodity definition].”<sup>162</sup> To date, the Commission has not definitively answered these questions.<sup>163</sup>

Another way that the CFTC could decide to permit sports bets beyond swaps between ECP counterparties would be to revise or withdraw Rule 40.11(a) to permit sports gaming event contracts. This would enable the agency to avoid determining that a sports bet does not have “a potential financial, economic, or commercial consequence” and thus fall outside Rule 40.11(a). However, the Commission would need to provide some justification for revising or withdrawing the rule to comply with the Administrative Procedure Act. Justifications might include the changing federal and state legal framework related to sports betting and attitudes from both Congress and the general public on sports betting becoming more favorable.<sup>164</sup>

### C. CEA § 4c(b)

As discussed, the CFTC and various courts have held that binary options are options, or otherwise treated them as such.<sup>165</sup> Thus, if the CFTC considered sports bets to constitute binary options, it could potentially use its CEA § 4c(b) plenary options authority to permit sports gambling to exist legally. There is potential conflict between the CFTC’s plenary options authority under CEA § 4c(b) and its obligations under Dodd-Frank § 712(d). Under Dodd-Frank, the CFTC and SEC are obligated to further define the term “swap” jointly, in consultation with the Federal Reserve Board.<sup>166</sup> Although the CFTC and SEC have already further defined the term swap in the Swap Adopting Release, it is unclear whether this action effectively satisfies the CFTC’s obligations under Dodd-Frank and frees the Commission to use CEA § 4c(b) without the SEC’s input. The CFTC has stated, both jointly with the SEC and in a separate rulemaking, that options are swaps.<sup>167</sup> But the CFTC has also observed that:

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<sup>162</sup> *Id.* at 25,673. 7 U.S.C. § 1a(19) defines the term “excluded commodity” as any one of the items listed in four categories.

<sup>163</sup> At the same time, at least one current and one former Senator likely expected that at least certain sport event contracts fell into the excluded commodity definition. *See supra* note 81.

<sup>164</sup> *See* Michael Ricciardelli, *Nat’l Poll: 80% of Americans Support Legalized Sports Betting*, THE SETON HALL SPORTS POLL (Oct. 10, 2019), <http://blogs.shu.edu/sportspoll/2019/10/10/natl-poll-80-of-americans-support-legalized-sports-betting/> (“Americans have embraced legalized betting on sports, bolstered by a Supreme Court ruling that okayed a state-by-state determination.”).

<sup>165</sup> *See supra* notes 130 and 131.

<sup>166</sup> Pub. L. No. 111-203, § 712(d)(1).

<sup>167</sup> *See* 77 Fed. Reg. 48,236 (Aug. 13, 2012) (“commodity options are swaps under the statutory swaps definition[.]”); Commodity Options, 82 Fed. Reg. 25,320,

“while the Dodd-Frank Act included numerous amendments to the CEA, the plenary options authority provision in CEA section 4c(b) was not amended . . . .”<sup>168</sup>

There is a similar potential conflict between the CFTC’s plenary options authority under CEA § 4c(b) and Dodd-Frank § 712(d)(4). Dodd-Frank § 712(d)(4) states that any interpretation of, or guidance by, either the CFTC or SEC regarding a provision of Title VII of Dodd-Frank “shall be effective only if issued jointly by the [CFTC] and the [SEC]” after consultation with the Federal Reserve Board in cases where Title VII requires both the CFTC and SEC to issue joint regulations to implement the provision. Arguably, any interpretation or guidance by the CFTC dealing with whether sports bets are options or other swaps would implicate Dodd-Frank § 712(d)(4).

If instead, without any interpretation or definition, the CFTC simply proceeded under CEA § 4c(b) to grant relief to sports bets that are binary or other types of options, it may be able to avoid entanglement in Dodd-Frank § 712(d). It may be difficult, however, to grant such relief without establishing the parameters of sports bets subject to relief, and to discern whether that would constitute guidance or if granting relief under § 4c(b) would inherently be defining sports bets as options, thus implicating Dodd-Frank § 712(d)(1).

#### D. CEA § 4(c) Order

The purpose of § 4(c) is “to promote responsible economic or financial innovation and fair competition.”<sup>169</sup> The CFTC could potentially exempt sports betting pursuant to § 4(c) of the CEA from the requirements in §§ 2(e) and 5c(c)(5)(C).<sup>170</sup> Section 4(c) confers exemptive authority on the CFTC with respect to the provisions of the CEA, with certain specified exceptions that do

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25,322 (Apr. 27, 2012) (“Options Adopting Release”) (“the Dodd-Frank Act includes a definition of swap that encompasses commodity options”).

<sup>168</sup> *Id.*

<sup>169</sup> 7 USCA § 7(e)(2). See *Dissenting Statement of Commissioner Rostin Behnam on the Exemption from Derivatives Clearing Organization Registration*, COMMODITY FUTURES TRADING COMM’N (July 11, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement071119> (citing House Conference Report 102–978, 1992 U.S.C.C.A.N. 3179, 3213 for the proposition that, “In enacting section 4(c), Congress noted that the purpose of the provision ‘is to give to the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.’”).

<sup>170</sup> In the 2008 Event Contract Concept Release, the CFTC noted that it could use its CEA § 4(c) exemptive authority to “to establish a set of regulatory provisions applicable to a defined class of products,” and asked in question 17 whether that would be appropriate. 2008 Event Contract Concept Release, *supra* note 40, at 25,673.

not include §§ 2(e) and 5c.<sup>171</sup> However, there are some swap requirements from which § 4(c) does not allow the CFTC to provide exemptions—such as §§ 2(a)(13) (real-time reporting), 4r (regulatory reporting) and 4s (swap dealer requirements)—so those would still apply, making it onerous (but not impossible) to operate a retail business.

In granting an exemption under § 4(c), the CFTC must find the exemption consistent with the public interest and the purposes of the CEA<sup>172</sup> and that the exempted contracts be entered into by “appropriate persons.”<sup>173</sup> If the CFTC were to use its exemptive authority, state laws would be preempted pursuant to CEA § 12(e)(2)(B). However, the CFTC could conceivably condition an exemption from CEA § 2(e) on the applicable parties’ compliance with state laws regulating sports betting, including any licensing requirements. Further, the CFTC could rely on this state law compliance condition as part of its determination that the exemption is consistent with the public interests and the purposes of the CEA, and that members of the general public are “appropriate persons.”<sup>174</sup> Alternatively, an exemption from § 5c(c)(5)(C) (and related CFTC regulations, such as Rule 40.11(a)) would allow DCMs to list sports betting contracts.

One benefit that the Commission has in using CEA § 4(c) is “the discretion to grant an exemption to certain classes of transactions without having to make a determination that such transactions are subject to the Act in the first

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<sup>171</sup> 7 U.S.C. § 2(c)(2)(D) (leveraged retail commodity transactions) also are not excepted, so if there was a concern that sports bets were prohibited by 7 U.S.C. § 2(c)(2)(D), the CFTC could grant § 6(c) relief from § 2(c)(2)(D).

<sup>172</sup> 7 U.S.C. § 6(c)(2)(A). *But see* 2008 Event Contract Concept Release, *supra* note 40, at 25,672 (“As demonstrated by the [Iowa Electronic Markets (“IEM”)], innovative event markets have the capacity to facilitate the discovery of information, and thereby provide potential benefits to the public.”). The IEM is discussed *infra* in Section V.F.

<sup>173</sup> 7 U.S.C. § 6(c)(2)(B)(ii).

<sup>174</sup> *See* 7 U.S.C. § 6(c)(2) (listing determinations that the CFTC must make as a condition of issuing a § 6(c) exemption); 7 U.S.C. § 6(c)(3)(K) (defining “appropriate persons” as such persons not listed in 7 U.S.C. § 6(c)(3)). *But see* David Aron & Alexander Kane, *Federal Regulation Could Sweeten the Sports Betting Pot*, BLOOMBERG LAW (June 9, 2020), <https://news.bloomberglaw.com/banking-law/insight-federal-regulation-could-sweeten-the-sports-betting-pot> (giving examples of how sport gaming businesses take advantage of customers), (stating that states’ rules make it “extremely difficult for new online operators to offer competitive products”); 7 U.S.C. § 19(b) (requiring that “[t]he Commission shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of [the CEA], as well as the policies and purposes [thereof] . . . in issuing any order or adopting any Commission rule or regulation (including any exemption under section 6(c) or 6c(b)) . . .”).

instance.”<sup>175</sup> Using § 4(c) may<sup>176</sup> also have the salutary effect of not needing to work jointly with the SEC to issue relevant rules pursuant to Dodd-Frank § 712(d)(1), or an interpretation pursuant to Dodd-Frank § 712(d)(4).<sup>177</sup> Obviously, one agency can move more quickly than two can, though “quickly” is a relative term when it comes to federal agencies, even relatively nimbler ones like the CFTC.

*E. Joint “Consumer Contracts” Interpretation with the SEC Pursuant to Dodd-Frank § 712(d)(4)*

In the Swap Adopting Release, the CFTC and the SEC provided an interpretation stating that specified consumer agreements, contracts, and transactions entered into by consumers primarily for personal, family, or household purposes are not swaps (“Consumer Interpretation”).<sup>178</sup> The Consumer Interpretation was partly in response to comments on the advance notice of proposed rulemaking,<sup>179</sup> which preceded the proposal leading to the Swap Adopting Release, pointing out “a number of areas in which a broad reading of the swap . . . [definition] could cover certain consumer . . . arrangements that historically have not been considered swaps . . . .”<sup>180</sup> The Commissions also observed that the Consumer Interpretation was not intended to be an exhaustive list and “there may be other, similar types of . . . transactions that also should not be considered to be swaps.”<sup>181</sup> Thus, any transaction type not in the Consumer Interpretation must be evaluated based on its facts and circumstances, and the parties to such transactions may seek an interpretation from the Commissions.<sup>182</sup>

However, the Commissions added that, “[i]n determining whether similar types of . . . transactions entered into by consumers . . . are swaps[,]” they would consider the following factors “that are common to the [specifically excluded] consumer . . . transactions”: (1) a lack of payment obligations severable from the transaction; (2) an absence of trading on an organized market

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<sup>175</sup> 2008 Event Contract Concept Release, *supra* note 40, at 25,672.

<sup>176</sup> See also Section V.C. for a discussion about the tension between 7 U.S.C. § 6(b) and Pub. L. No. 111-203, § 712(d)(1), (4). There may be a similar tension between those Dodd-Frank provisions and 7 U.S.C. § 6(c).

<sup>177</sup> See Pub. L. No. 111-203, § 712(d)(1), (4). If the CFTC issues relief from the CEA without first determining what type of products events contracts are, or whether these contracts are subject to the CEA, that would seem to permit the CFTC to sidestep the requirement to issue rules with the SEC.

<sup>178</sup> See Swap Adopting Release, *supra* note 72, at 48,246–47. These included consumer options to buy or sell property and interest rate locks related to completed mortgages.

<sup>179</sup> Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 51,429 (Aug. 20, 2010).

<sup>180</sup> See Swap Adopting Release, *supra* note 72, at 48,246.

<sup>181</sup> *Id.* at 48,247.

<sup>182</sup> Swap Adopting Release, *supra* note 72, at 48,248.

or over-the-counter; and (3) the involvement of an asset of which the consumer is the owner or beneficiary or is buying or of a service provided, or to be provided, by or to the consumer.<sup>183</sup>

It seems unlikely that the CFTC or SEC would consider sports betting to be a service provided, or to be provided, by or to the consumer within the meaning of the Consumer Interpretation. There has been a preemption provision in the CEA related to state gambling and bucket shop laws for years due to a concern that CFTC-regulated futures contracts or products which the CFTC exempted from regulation would otherwise be banned by state law. Up until *Murphy*, most states prohibited gambling. Given longstanding industry concern that swaps could be considered futures, it is unlikely that sports betting would be considered arrangements “that historically have not been considered swaps” within the meaning of the Consumer Interpretation. Nevertheless, due to its open-ended facts and circumstance reference, the Consumer Interpretation is a potential vehicle for the CFTC to use in providing relief to the sports gaming industry.

#### F. Staff No-Action Letter

The CFTC staff sometimes issues a no-action letter (“NAL”) when an action or failure to act would be unlawful but there is some overriding policy reason that leads the staff to issue a NAL anyway. The CFTC staff could issue a NAL<sup>184</sup> stating that the staff of the relevant division(s) would not recommend that the CFTC take enforcement action based on state-authorized sports or event betting.<sup>185</sup>

Although the CFTC staff has issued NALs in the past to permit limited event contract trading, it has not permitted open season on sports betting via a NAL to the entire industry. The staff *has*, however, issued a number of industry-wide NALs applicable to broad categories of regulated entities and market participants, so it does not seem out of the question for sports betting.<sup>186</sup> In 1993,

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<sup>183</sup> *Id.* at 48,247.

<sup>184</sup> 17 C.F.R. § 140.99(a)(2) states that a NAL is “a written statement issued by the staff of a Division of the Commission or of the Office of the General Counsel that it will not recommend enforcement action to the Commission for failure to comply with a specific provision of the Act or of a Commission rule, regulation or order if a proposed transaction is completed or a proposed activity is conducted . . . .” A NAL “binds only the issuing Division or the Office of the General Counsel, as applicable, and not the Commission or other Commission staff.” *Id.* Furthermore, “[o]nly the [b]eneficiary[, and not third parties] may rely upon the no-action letter.” *Id.*

<sup>185</sup> The CFTC considered exactly that in the 2008 Event Contract Concept Release, *supra* note 40, at 25,673 (asking “[i]s the issuance of staff no-action relief, such as the relief issued to the IEM, an appropriate or preferable means for establishing regulatory certainty for event contracts and markets?”).

<sup>186</sup> *See, e.g.*, CFTC No-Action Letter, CFTCLTR No. 20-39, 2020 WL 7013381 (Nov. 24, 2020); CFTC No-Action Letter, CFTCLTR No. 20-42, 2020 WL 7258889



staff issued a NAL to IEM, an electronic trading facility that functions as an experimental and academic program, to list various event contracts, subject to conditions and limitations.<sup>187</sup> The letter's relief extends to IEM contracts based on political elections, economic indicators, and certain currency exchange rates. In 2014, CFTC staff issued a NAL to the Victoria University of Wellington, New Zealand,<sup>188</sup> permitting it to "to operate a not-for-profit market for event contracts, and to offer event contracts to U.S. persons, without registration as a DCM, foreign board of trade, or SEF, and without registration of its operators."<sup>189</sup>

## VII. PRIVATE RIGHTS OF ACTION

Even if the CFTC does not bring a sports betting-related enforcement action, sports gaming businesses may be liable if an individual brings a private right of action claiming that the sports gaming business violated the CEA and caused actual damages. CEA § 22(a) provides that "[a]ny person (other than a registered entity or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting" from the purchase or sale of a swap, among other things. Additionally, private lawsuits may highlight the need for more aggressive CFTC regulation<sup>190</sup> and prompt the CFTC to bring its own enforcement action.

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(Dec. 4, 2020); CFTC No-Action Letter, CFTCLTR No. 19-08, 2019 WL 1571306 (Apr. 5, 2019) (related to Brexit); CFTC No-Action Letter, CFTCLTR No. 19-26, 2019 WL 7040373 (Dec. 17, 2019) (LIBOR transition).

<sup>187</sup> CFTC No-Action Letter, CFTCLTR No. 93-66, 1993 WL 595741 (June 18, 1993), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/93-66.pdf>.

<sup>188</sup> CFTC No-Action Letter, CFTCLTR No. 14-130, 2014 WL 5499971 (Oct. 29, 2014), <https://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/14-130.pdf>.

<sup>189</sup> See Press Release, CFTC, CFTC Staff Provides No-Action Relief for Victoria University of Wellington, New Zealand, to Operate a Not-For-Profit Market for Event Contracts and to Offer Event Contracts to U.S. Persons, Release No. 7047-14 (October 29, 2014), <https://www.cftc.gov/PressRoom/PressReleases/7047-14>.

<sup>190</sup> See David Aron & Alexander Kane, *Federal Regulation Could Sweeten the Sports Betting Pot*, BLOOMBERG LAW (June 9, 2020), <https://news.bloomberglaw.com/banking-law/insight-federal-regulation-could-sweeten-the-sports-betting-pot> (giving examples of how sport gaming businesses take advantage of customers).

## VIII. CONCLUSION

To date, the CFTC has not sued any state-authorized sports betting businesses in the United States since *Murphy*, notwithstanding that: (1) sports bets may be characterized as options or other types of swaps, each of which are regulated by the CFTC and unavailable (legally) to non-ECPs other than on, or subject to the rules of, a DCM; and (2) the CFTC has pursued a number of offshore binary options businesses, and some with U.S. operations, that are not registered with the CFTC and that offer binary options to non-ECP U.S. persons.<sup>191</sup> Moreover, at least one CFTC Commissioner has stated publicly that he is open to CFTC-sanctioned sports betting under the right circumstances.<sup>192</sup> Therefore, it will be interesting to see how the CFTC will decide to treat state-licensed sports betting businesses in the future, especially given that only three years ago, the Supreme Court opened the door for states to legalize sports betting, which has the potential to generate significant tax revenue.<sup>193</sup>

Given the popularity of sports betting among the general public and Commissioner Berkovitz's views that sports betting should be permitted on

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<sup>191</sup> See, e.g., Complaint, *Commodity Futures Trading Comm'n v. Jared J. Davis*, Case No. 3:19-cv-2140 (N.D. OH, Western Division), ECF No. 1 (alleging Davis fraudulently solicited and accepted payment from customers to trade off-exchange binary options); Settlement Order, *In re Curtis Dalton*, CFTC No. 19-17, 2019 WL 3491961 (July 19, 2019) (settlement related to Dalton allegedly offering to enter into, entering into, and confirming the execution of illegal off-exchange binary options); Press Release, CFTC, CFTC Filed Enforcement Actions Against Two Affiliate Marketers for Binary Options Fraud, Release No. 8047-19 (Oct. 7, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8047-19> (describing a pair of enforcement actions against two affiliate marketers, David Sechovich and Peter Szatmari, for creating and disseminating fraudulent solicitations to open and fund retail binary options trading); Press Release, CFTC, CFTC Charges Multiple Forex and Binary Options Dealers with Registration Violations, Release No. 7785-18 (Sept. 14, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7785-18> (describing an order settling charges against eight unregistered entities and eight unregistered individuals that offered binary options to retail investors).

<sup>192</sup> See Statement of Commissioner Dan M. Berkovitz related to Review of ErisX Certification of NFL Future Contracts, *supra* note 121, at 1.

<sup>193</sup> See *Legal US Sports Betting Revenue, Handle and Tax Totals Since PASPA Repeal*, SPORTS HANDLE, <https://sportshandle.com/sports-betting-revenue/> (last visited Sept. 27, 2021) (listing total state tax revenue sports from sports gambling since *Murphy v. NCAA* as \$614,789,646). *But see* Jackson Brainerd, *The Early Bets Are In: Is Sports Betting Paying Off?*, NAT'L CONFERENCE OF STATE LEGISLATURES (Mar. 1, 2021), <https://www.ncsl.org/research/fiscal-policy/the-early-bets-are-in-is-sports-betting-paying-off.aspx> ("States looking to close budget gaps with sports betting revenue may be disappointed, especially as more and more states legalize and take their slice of the market").

CFTC-regulated DCMs under appropriate circumstances,<sup>194</sup> the authors believe it is likely that the CFTC will permit sports betting products subject to its regulation in some form.

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<sup>194</sup> See, e.g., Emma Newburger, *Schumer Proposes Federal Legislation to Decriminalize Marijuana*, CNBC (July 14, 2021, 12:51 PM), <https://www.cnbc.com/2021/07/14/schumer-proposes-federal-legislation-to-decriminalize-marijuana-.html>. One cannot help but notice the parallel dichotomies between the federal and state approaches to marijuana and sports betting.