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THE END OF THE WILD WEST? PREDICTION MARKETS MEET THE CFTC

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Introduction

Prediction markets, platforms that permit trading on the outcome of future events, have reached the proverbial Rubicon. Once viewed as niche informational tools or quasi-academic experiments, these markets have expanded rapidly since the 2024 US elections into products attracting real capital, mainstream attention, and now, sustained regulatory scrutiny. Recent federal court decisions and public statements by senior officials at the Commodity Futures Trading Commission ("CFTC") strongly suggest that many prediction market event contracts will be treated as swaps under the Commodity Exchange Act (the "Act").

This shift matters. Classification under the federal commodities regime carries significant consequences: exclusive federal jurisdiction, preemption of certain state gaming laws, heightened enforcement authority, and the potential for private litigation by market participants. It amplifies long-standing debates about prediction markets. Namely, are they socially useful forecasting mechanisms or mere gambling devices? And it gives rise to new conversations about how they should be regulated. This paper examines how we arrived here, why recent litigation has accelerated the reckoning, and what market participants and institutional investors should understand as the legal perimeter around prediction markets tightens.

Background

Prediction markets allow participants to buy and sell contracts tied to the occurrence of defined future events such as election outcomes, economic indicators, sporting results, or even the weather in Manhattan on a given day. Proponents argue that prediction markets can aggregate dispersed information and provide useful forecasting signals to policymakers and businesses. Indeed, they contend that prices in these markets reflect the collective assessment of the probability of events. Information on who is likely to win an election, how soon a conflict will be resolved, or what the price of oil may be in the future could be very useful to individuals and organizations, especially governments forecasting worst-case scenarios. Critics have countered that many of these markets are simply gambling, pointing to the prevalence of markets on sporting events, which have limited to no social or economic utility.

This debate is not new; it has been going on for over two decades. In parallel over the year, other online markets specifically designed for gambling have exploded both in the US and abroad. Historically, the legal status of prediction markets has been unsettled, with overlapping concerns arising under state gaming laws and federal commodities regulation.

But the US presidential election in 2024, when commentators frequently followed prediction markets as a barometer of the race, was a shot in the arm for prediction markets. The debate has not changed, but what is new now is scale, liquidity, and visibility. Recent litigation has accelerated the clarification of this regulatory framework, particularly with respect to whether prediction market event contracts fall within the federal commodities regime or whether states can regulate such markets.

Implications of the Third Circuit Opinion on Kalshi

One of the most prominent prediction market operators, KalshiEX LLC ("Kalshi"), recently sought to enjoin the New Jersey Division of Gaming Enforcement ("NJDG") from applying state gaming laws to Kalshi's sports-related event contracts. The District Court granted an injunction, and NJDG appealed. On April 6, 2026, the US Court of Appeals for the Third Circuit (the "Court") decided in favor of Kalshi and affirmed the lower court decision (the "Opinion").[1] There have been other similar decisions, including involving Kalshi,[2] and the New York Attorney General commenced actions on April 21, 2026, against two crypto exchanges -accusing them of operating prediction markets in contravention of state laws - but the Opinion is currently significant as being at the Circuit Court level.

Significantly, the Court held that event contracts likely fit within the definition of swaps under the Act as modified by the Dodd-Frank Act. Because of this, the Court found that the CFTC would have exclusive jurisdiction to regulate such event contracts. Furthermore, the Court decided that Kalshi was likely to prevail in its arguments that state regulation of event contracts on sporting events is preempted by federal law. For this reason, the Court granted the preliminary injunction. While the decision leaves room for further judicial review and is technically a decision only on the injunction and not the actual merits, its reasoning may influence how courts and regulators analyze similar products going forward (but time will tell how the other federal circuits[3] or the Supreme Court will grapple with these questions).

The most consequential implication of the court's reasoning is that event contracts are swaps under the Act. Swaps are the legal chameleons of financial instruments: they take on the regulatory character of their underlying subjects. A swap on a security is a security, while a swap on a commodity is a commodity. Once event contracts fall into this category as a commodity, they are pulled squarely into the Act's full regulatory and liability framework. The Opinion could therefore serve as a basis for private class actions under federal law involving prediction markets. Plaintiffs would not be limited to antitrust theories. The Act expressly creates a private right of action for any person who purchased or sold a swap where the violation constitutes manipulation of the price of the swap or the price of the underlying commodity. For example, in an alleged class action involving Tether (a stablecoin designed to maintain a 1:1 parity with the US dollar), a federal court permitted plaintiffs to pursue claims alleging that defendants issued unbacked stablecoins and used them to artificially simulate demand and price support, thereby inflating crypto-commodity prices.[4]

A similar theory could readily arise in prediction markets. These markets are uniquely susceptible to intentional distortion by actors with direct control over outcomes, creating classic manipulation of fact patterns with unusually straightforward causation. A sports team that engages in points shaving to influence a prediction market tied to point spreads is an obvious example. So, too, is a market structured around a performative event—for instance, a contract based on how many times a particular artist will say a specific word during a concert—where the subject of the market secretly takes a position and then acts to influence the outcome. Once framed as swaps, such conduct looks far less like mischief and far more like actionable manipulation. This is the foundation for a raft of private class actions under the commodities laws.

Government Regulation of Insider Trading in Prediction Markets

Another area of potential enforcement and litigation risk involves trading on prediction markets using misappropriated material nonpublic information. During an April 2026 speech,[5] David I. Miller, Director of Enforcement at the CFTC, bluntly stated, "There is a myth in the mainstream media and social media that insider trading doesn't apply in the prediction markets. That is wrong." He emphasized that—while there was ongoing litigation—the CFTC's view "is that [prediction markets] and other event contracts are swaps" and that the Act's "anti-fraud provisions apply with full force to swaps." However, Miller cautioned that although "this is only about misappropriated information" as "you are absolutely entitled to trade on [material non-public information] that you rightfully own," the CFTC is looking at situations where someone was in breach of a duty of trust and confidence owed to the source of the information. Indeed, he even cited the so-called "Eddie Murphy Rule,"[6] which prohibits anyone knowingly trading on stolen government information, a reminder that novelty of format does not diminish the seriousness of misuse.

It is thus not surprising that on April 23, 2026, the US attorney's office for the Southern District of New York revealed an indictment against a US Army soldier alleging that the soldier misappropriated classified government information about the US military operation to capture Venezuelan leader Nicolas Maduro to make more than $400,000 on a prediction market. Similarly, on April 30, the US Senate unanimously passed a rule that prohibited its members from trading in prediction markets. This followed Kalshi's April 22nd announcement that it had fined and suspended two candidates running in primaries for the House of Representatives and one candidate in a Senate primary for trading in their own races.

Direct, private claims by purchasers of swaps against those engaging in insider trading in prediction markets might be more difficult, as purchases of swaps actually lower the price of the other side of the contract. And plaintiff attorneys tend to view claims under §20A of the Securities Exchange Act for liability to contemporaneous traders for insider trading as the white whale, given how infrequently such claims are successful, due to the extreme difficulty of proving who exactly bought or sold those shares. But evidence of insider trading can still play a significant role in establishing scienter in commodities fraud or manipulation actions. As a result, insider trading will feature prominently in future private disputes involving prediction markets.

Conclusion

Recent court decisions and regulatory signals leave little room for ambiguity: prediction markets are increasingly being analyzed - and regulated - within the framework of federal commodities law. If event contracts are swaps, then the Commodity Exchange Act follows, bringing with it federal preemption, robust enforcement authority, and meaningful exposure to private litigation grounded in manipulation and fraud theories.

For institutional investors and sophisticated market participants, the implications are practical and immediate. Market design, information controls, employee trading policies, and counterparty diligence will matter as much as forecasting accuracy. Assumptions that insider trading and manipulation doctrines do not apply in this context are no longer tenable, and participants who continue to rely on them do so at increasing risk.

In sum, prediction markets may still produce valuable information signals, but they are no longer operating at the margins of financial regulation. Their next phase of development will be defined not by experimentation or enthusiasm, but by how well participants adapt to the compliance, enforcement, and litigation realities of the federal commodities regime. And whatever the future realities for institutional investors, rest assured, ISS SCAS will continue to monitor developments.

[1] KalshiEX LLC v. Flaherty et al., No. 25-1922 (3d. Cir. 2026).

*[2] See, e.g., KalshiEX LLC v. Orgel et al., No. 3:26-cv-00034, 2036 WL 4747860, (M.D. Tenn. Feb. 19, 2026); Blue Lake Rancheria v. Kalshi Inc., No. 3:25-cv-6162, 2025 WL 3141202, at *7 (N.D. Cal. Nov. 10, 2025).*

[3] Critically, an appeal is pending in the Ninth Circuit in KalshiEX, LLC, v. Hendrick, et al., No. 25-7516.

[4] In re: Tether and Bitfinex Crypto Asset Litigation, No. 19-cv-9235 (KPF), at ECF No. 182 (S.D.N.Y., Sept. 28, 2021).

[5] Remarks at NYU Law School, March 31, 2026, available at https://www.cftc.gov/PressRoom/SpeechesTestimony/opamiller1

[6] The rule received the moniker because it foreclosed actions that Murphy's character, Billy Ray Valentine (not Murphy himself, one of the funniest actors of all time), undertook in the movie Trading Places involving trading using advance knowledge about an upcoming government orange crop report. So, probably it should be known as the "Billy Ray Rule."