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Comments on Interim Final Rule, "Further Definition of 'Swap' To Exclude Casino-Style Gambling Products," RIN 3038-AF81

Dear Commissioner Selig,

Maryland, Kentucky, Ohio, Nevada, New Jersey, New York, Utah, Tennessee, and 35 other States and the District of Columbia respectfully submit the following comments on the Interim Final Rule, "Further Definition of 'Swap' to Exclude Casino-Style Gambling Products," RIN 3038-AF81, 91 Fed. Reg. 65,969 ("IFR").

The IFR is arbitrary and capricious, procedurally defective, and in excess of the Commission's statutory authority. While the Commission correctly identifies that (1) swaps should not include products traditionally regulated by the States; and (2) that States traditionally regulate gambling products; the IFR creates a false distinction in limiting its exclusion only to what it terms "casino-style" wagering, incorrectly claiming that States only regulate bilateral transactions between a wagerer and the "house."

Gambling has never been limited to house-backed games. Nor have States' police powers been so limited in reach. States have prohibited or strictly regulated any system or method of wagering. These methods include not just "casino-style" games, but also numerous systems where bettors wager against each other (not the house). Federal law, which respects States' policy choices over gambling, also does not limit gambling to "casino-style" games, but includes all

methods and systems. The Commission's assertion that gambling is limited to house-backed games is simply false.

This false dichotomy is inconsistent with the IFR's own reasoning, past CFTC guidance dating back to the enactment of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, and recent court decisions interpreting the "swap" definition. As a result, if state-regulated gambling products can be "swaps," this rulemaking criminalizes any state-regulated, off-DCM multilateral gambling, including horse racing.

In addition, the IFR fails to consider that traditional gambling products are potential vices effectively addressed by state law, not swaps under the CEA. Compulsive gambling is a mental health disorder that can increase risk of suicide, ruin household finances, and cause many other harms to the health and welfare of a state's residents. While state laws directly address these harms, the CEA does not. Nor do gambling products have the characteristics of a derivative. The IFR fails to consider these issues.

Finally, the IFR is both procedurally defective and exceeds the Commission's statutory authority. The Commission has not identified a valid "good cause" to issue the rule, lacks a quorum, and has not promulgated the rule jointly with the SEC in consultation with other required agencies.

I. THE INTERIM FINAL RULE IS CORRECT THAT STATES TRADITIONALLY REGULATE GAMBLING

The Commission notes correctly that "gambling is traditionally State-regulated." 91 Fed. Reg. at 65,974. Indeed, longstanding Supreme Court precedent recognizes that "[t]he suppression of gambling is concededly within the police powers of a state." *Ah Sin v. Wittman*, 198 U.S. 500, 505-06 (1905). Through those police powers, States exercise their sovereign authority to promote the "health, welfare, safety, and morals" of their citizens. *Johnson v. Collins Ent. Co.*, 199 F.3d 710, 720 (4th Cir. 1999) (citing *Chicago & Alton R.R. Co. v. Tranbarger,* 238 U.S. 67, 77 (1915)). In particular, "[g]ambling has been recognized as a potentially harmful 'vice activity,' such that States have a recognized interest in reducing 'the social costs associated with' it." *KalshiEX LLC v. Martin*, 793 F.Supp.3d 667, 677 (D. Md. 2025) (citation omitted). Thus, "[i]t is well recognized that regulating gambling is at the core of the state's residual powers as a sovereign in our constitutional scheme." *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 302 (4th Cir. 2009). Specifically, "legalization of sports gambling requires an important policy choice" to be made by States on the "controversial subject" absent express Congressional action regulating it. *Murphy v. NCAA*, 584 U.S. 453, 486 (2018).

As the *Murphy* court recognized, "Americans have never been of one mind about gambling, and attitudes have swung back and forth." *Id.* at 458. Since colonial times, States have both banned and permitted gambling. For example, in the 1600s, Massachusetts and Pennsylvania enacted idleness laws barring people from possessing cards, dice, or other gambling devices. George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 UNLV Gaming Rsch. & Rev. J. 65, 66 (1996), https://perma.cc/QY6T-A4U9. By the 1700s, New Jersey, New Hampshire, and the Northwest Territory had followed suit. *Id.*; *see also Mills-Jennings of Ohio, Inc. v. Dep't of*

Liquor Control, 70 Ohio St. 2d 95, 99 (1982). New York similarly outlawed gambling, then referred to as "lotteries." *See Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 N.Y.2d 801, 825-830 (2003) (Smith, J., concurring in part) (history of New York's anti-gaming laws). Some colonies permitted certain forms of gambling. For example, Maryland has regulated horse racing since the 18th Century. *Legislators' Guide to Commercial Gambling in Maryland*, Department of Legislative Services, Office of Policy Analysis (December 2023) at 7.

States largely banned gambling by the end of the 19th Century but began to gradually loosen restrictions beginning in the 1920s and 1930s. *Murphy*, 584 U.S. at 458. For example, Michigan, which had banned betting on horse racing in 1819, legalized the practice in 1933. *Churchill Downs Tech. Initiatives Co. v. Michigan Gaming Control Bd.*, 162 F.4th 631, 635 (6th Cir. 2025) (citing An Act to Prevent Horse Racing, Laws of the Territory of Michigan (Detroit: Sheldon & Reed, 1820), § 1 (Oct. 12, 1819); House Fiscal Agency, *Fiscal Focus: Horse Racing in Michigan—A Primer*, at 2 (June 2017)). By midcentury, Nevada had passed the Gaming Control Act of 1949 to permit some sports betting. *See* Jennifer Carleton et al., *Nevada*, *in* THE GAMBLING LAW REVIEW 147, 147-48 (Carl Rohsler ed., 2016). Several counties in southern Maryland authorized the operation of slot machines, but the State banned this practice in 1968, replacing it with a state lottery established in 1972 by constitutional amendment and legislative action. *Legislators' Guide to Commercial Gambling in Maryland* at 4. Also in the 1970s, Ohio started state-conducted lotteries and legalized bingo gambling. *Mills-Jennings of Ohio*, 70 Ohio St. 2d at 101. Perhaps most famously, in 1976 New Jersey amended its constitution and enacted the Casino Control Act to permit and regulate gambling in Atlantic City. *Murphy*, 584 U.S. at 459; N.J. Const. art. IV, §7, ¶2(D); N.J. Stat. Ann. §§5:12-1 to -233 (2026). Finally, Montana, Delaware, and Oregon hosted sports lotteries or allowed sports pools. *Murphy*, 584 U.S. at 462.

In the 21st Century, some States have further loosened restrictions. For example, about 15 years ago, Maryland and Ohio began to allow casino gaming. *Legislators' Guide to Commercial Gambling in Maryland* at 25-26; Ohio Const. art. XV, §6(C). And once the Supreme Court invalidated under the anticommandeering doctrine the Professional and Amateur Sports Protection Act that barred States from authorizing sports wagering, Maryland, New York, Ohio, and several other States legalized sports wagering. Md. Code Ann., State Gov't §§ 9-1E-01 to -17 (2026); N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 1367 (Sports Wagering), 1367-a (Mobile Sports Wagering) (2026); Ohio Rev. Code Ann. §§ 3775.01–.99 (2026); Ark. Const. amend. 100, §§ 1–8; Ariz. Rev. Stat. Ann. §§ 5-1301 et seq. (2026); Ind. Code §§ 4-38-1-1 to -11-1 (2026); Iowa Code §§ 99F.1 to .20 (2026); R.I. Gen. Laws §§ 42-61.2-1 to -16 (2026).

Currently, some form of gambling is permitted in 48 States. *See* Am. Gaming Ass'n, State of the States 2025: The AGA Analysis of the Commercial Casino Industry, at 12–13 (May 13, 2025), perma.cc/J27S-WLSB. The types of gambling allowed depend on the policy choices made democratically through each state legislature to promote the health and welfare of its citizens. Some States ban gambling altogether. *See* Haw. Rev. Stat. § 712-1223 (2026); Utah Code Ann. § 76-9-1401 (2026). Others permit certain types of gambling on Native American lands. Wash. Rev. Code § 9.46.0364 (2026); Wis. Const. art. IV, § 24(1), Wis. Stat. Ann. § 14.035 (2026). Finally, others permit gambling under strict regulations. *See, e.g.,* Nev. Rev. Stat. Ann. § 463.0129 (2026) (stating that Nevada's gaming industry is vital but must be strictly controlled); N.J. Stat. Ann. § 5:12-1 (2026) (detailing New Jersey's stringent public policy constraints on casino gaming); Md.

Code Ann., State Gov't § 9-1A-02 (2026) (delegating regulatory authority over casino gaming), § 9-1E-03 (incorporating § 9-1A-02 into Maryland's sports wagering law); Ohio Rev. Code Ann. § 3772.02 (2026) (creating Ohio's statutory framework for casino control). At its core, State gambling regulation has embodied federalism as a quintessential example of States operating as laboratories of democracy. *See New State Ice Co. v. Libemann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

II. FEDERAL LAW RESPECTS STATES' SOVEREIGN DECISIONS OVER GAMBLING

Federal gambling statutes establish a coherent policy of respecting States' traditional authority to regulate gaming within their borders. At the turn of the 19th Century, the Supreme Court reasoned that Congress must ensure that interstate commerce is not used to circumvent a State's right to regulate gambling within its own border. *See Champion v. Ames*, 188 U.S. 321, 356 (1903). Over one-hundred years later, the Court recognized that federal gambling statutes "implement a coherent federal policy" and "respect the policy choices of the people of each State on the controversial issue of gambling." *Murphy*, 584 U.S. at 484. Several examples illustrate this approach.

After States began to loosen gambling restrictions in the 1920s and 1930s, Congress began to prohibit certain gambling conduct except when legal in a particular State. The Gambling Ships Act of 1949 prohibits the operation of gambling on American vessels, but only insofar as the vessel is "not within the jurisdiction of any State." 18 U.S.C. § 1082(a). Similarly, the Johnson Act, originally enacted in 1951 and amended in 1962 and 1992, prohibits the interstate transportation of "any gambling device" except when doing so is "lawful" under State law. 15 U.S.C. § 1172(a). The pattern of prohibiting interstate gaming while respecting States' sovereign decisions about intrastate gambling continued throughout the 20th Century.

The 1961 Wire Act prohibits the use of wire communications to transmit sports wagers across state lines. 18 U.S.C. § 1084. Specifically, the Act prohibits the interstate transmission of (1) "bets or wagers" and (2) "information assisting in the placing of bets or wagers" that are "on any sporting event or contest." *Id.* The Act does provide a safe harbor for news reporting of sports events or contests and for "transmission of information assisting in the placing of bets or wagers on a sporting event" between two States or foreign countries where such betting is legal. *Id.* To be clear, the safe harbor does not allow the interstate transmission of sports wagers themselves, even if such wagers are legal in both States; in such circumstances it only allows the transmission of information assisting in the placing of the wagers. *See* H.R. Rep. 87-967, 1961 U.S.C.C.A.N. 2631, 2632-33; *United States v. Lyons*, 740 F.3d 702, 713 (1st Cir. 2014); *United States v. Cohen*, 260 F.3d 68, 75 (2d Cir. 2001); *United States v Ross*, 1999 WL 782749, at *3 (S.D.N.Y. Sept. 16, 1999). As such, the Wire Act criminalizes interstate sports wagering subject to a narrow safe harbor for certain information. Thus, while the Wire Act provides a blanket prohibition on interstate sports wagers, it respects States' choices to legalize sports wagering within their own borders.

Near the time of the CFTC's creation, the Illegal Gambling Business Act of 1970 (amended in 1986, 1994, and 2014) created federal crimes out of certain gambling that was illegal under state law. 18 U.S.C. § 1955. The statute transforms state gambling violations into federal crimes when

five or more people manage a gambling business that is illegal under state law and runs continuously for more than 30 days or makes more than $2,000 in any single day. *Id*. Through this Act, Congress chose to amplify States' decisions regarding illegal gambling.

Just after the CFTC's creation, in 1978, Congress enacted the Interstate Horseracing Act (IHA), which addresses "the limited area of interstate off-track wagering on horseraces." 15 U.S.C. § 3001(a). The IHA expressly affirms that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." *Id.* Congress limited interstate off-track wagering to places where such betting was legal in both the transmitting and receiving State. *Id.* § 3002(3).

The 1988 Indian Gaming Regulatory Act (IGRA) allows gaming contracts on tribal lands in States with legal gambling. 25 U.S.C. § 2710(d)(1). IGRA codified tribes' "exclusive right to regulate gaming activity on Indian lands." 25 U.S.C. § 2702. Under IGRA, tribes are authorized to negotiate compacts with States to regulate "Class III gaming." *Id.* § 2710(d)(3)(A). That authority, however, is limited to "a State that permits such gaming." 25 U.S.C. § 2710(d)(1)(B).

Finally, the Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006 prohibits businesses from knowingly accepting payments in connection with "unlawful Internet gambling" and excludes from this definition any transaction "conducted on or subject to the rules of a registered entity or exempt board of trade under the" CEA. 31 U.S.C. § 5362(D)(ii). This exclusion, however, is subject to the statute's Rule of Construction which provides that "[n]o provision" of UIGEA "shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." *Id*. Thus, while UIGEA excludes CEA-regulated transactions, it also does not alter existing federal or state gambling laws, meaning that these gambling laws still apply even if gambling contracts appear on a CEA-regulated exchange.

The Commission likewise affirms Congress' respect for the States' sovereignty over gambling within their borders. The IFR notes "there is no indication that 'Congress intended to include [gambling products] in the swap . . . definition.'" 91 Fed. Reg. at 65,973 (alterations in original). Citing the Wire Act, the IFR acknowledges that "Congress has long recognized a distinction between gambling products and derivatives contracts" and that "when Congress adopted the 'swap' definition, it did so against a background of other federal statutory provisions regulating sports gambling, and the Commission does not presume Congress to have impliedly repealed those provisions." *Id.* The IFR thus takes a clear position that federal law respects state gaming laws regulating or even prohibiting various types of gambling.

III. THE IFR IS INCORRECT THAT FEDERAL AND STATE GAMBLING LAW IS LIMITED TO HOUSE-BASED GAMES.

The IFR incorrectly describes gambling products as "typically conducted as bilateral transactions between a casino or bookkeeper (a 'house')." 91 Fed. Reg. at 65,972. The sole source cited for this proposition is a 2004 economics paper analyzing the market structure for sports books. *Id*. n.42 (citing Steven D. Levitt, *Why Are Gambling Markets Organised So Differently from Financial Markets?* 114 Econ. J. 223, 223 (2004)). The article examined a single season's

worth of National Football League wagering data from one online sports book. *See* Steven D. Levitt, *Why Are Gambling Markets Organised So Differently from Financial Markets?* 114 Econ. J. 223, 229 (2004). It made no attempt to examine and categorize the nature or structure of gambling products writ large or even describe what a "typical" gambling product looks like. Nor does it cite a single source that does so. It cannot form the basis of a claim about the "typical" gambling product.

Gambling products traditionally regulated by States include more than just house-based, bilateral transactions. Instead, they include any method or system of wagering. The gambling regulatory scheme does not distinguish a product's legality based on whether the wager is house based. In fact, all these transactions, whether traded on a DCM, sportsbook, or otherwise, constitute bilateral contracts, whether through a futures commission merchant, clearing arrangement with a designated clearing organization, or by agreement with a sportsbook. Further, traditional gambling includes systems that do not solely involve a "house" such as exchange wagers, parimutuel wagering, and percentage games. As described below, in each of these systems, an organization facilitates gamblers wagering against each other. The widespread existence of these systems demonstrates that the Commission's limitation of traditional gambling to house-based games is simply false.

A. STATE GAMBLING LAWS INCLUDE ANY METHOD OR SYSTEM OF WAGERING

Numerous States' laws do not define gambling as solely house-based but rather include all methods of gambling. In Nevada, "gaming" and "gambling" are synonymous to include "any game played with . . . equipment or any mechanical or electronic device or machine for money . . . or any representative of value." Nev. Rev. Stat. Ann. § 463.0153 (2025); *accord, e.g.,* Ga. Code Ann. § 16–12–21(a)(1) (2026) ("A person commits the offense of gambling when he makes a bet upon the partial or final result of any game or contest or upon the performance of any participant in such game or contest."); Tex. Penal Code Ann. § 47.02(a) (2025) ("A person commits an offense of gambling if he: (1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest''); Va. Code Ann. § 18.2-325(1) (2026) ("Illegal gambling means the making, placing, or receipt of any bet or wager of money or other consideration or thing of value, made in exchange for a chance to win a prize, stake, or other consideration or thing of value, dependent upon the result of any game, contest, or any other event the outcome of which is uncertain or a matter of chance.").

Maryland defines "sports wagering" as "the business of accepting wagers on any sporting event by any system or method of wagering." Md. Code Ann., State Gov't § 9-1E-01(j) (2026). Other States are similar. *See, e.g.,* 230 Ill. Comp. Stat. Ann. 45/25-10 (2026) ("by any system or method of wagering"); Ohio Rev. Code Ann. § 3775.01(O) (2026) ("any system or method of wagering"); Nev. Rev. Stat. Ann. § 463.0193 (2025) (including in "gaming" a "sports pool," which is "the business of accepting wagers on sporting events or other events by any system or method of wagering."); N.J. Stat. Ann. § 5:12A-10 (2026) (defining "sports pool" as "the business of accepting wagers on any sports event by any system or method of wagering"); N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1367(1)(x) (2026) ("by any system or method of wagering").

Utah and Hawaii ban all forms of gambling regardless of the wagering system or method used. *See* Utah Code Ann. § 76-9-1401 (2026) (gambling means "a return or risking anything of value upon the outcome of a contest, game, gaming scheme, or gaming device" if the outcome "is based on an element of chance[.]"); Haw. Rev. Stat. § 712-1223 (2026).

In addition, over half the country prohibits gambling on elections in some form, with no distinction made between whether the bets are made against a bookkeeper or some other method of wagering. *E.g.,* Md. Code Ann., Elec. Law § 16-902 (2026) (prohibiting "a bet or wager on the outcome of an election held under this article"); N.Y. Const. Art. II § 3 (same); Wis. Stat. Ann. § 6.03 (2026) (same); National Conference of State Legislatures, *Betting on Elections*, (Aug. 21, 2026), https://www.ncsl.org/elections-and-campaigns/betting-on-elections (surveying State laws).

Across jurisdictions, state statutory frameworks consistently reach beyond house-based establishments to encompass any system, device, or medium used to place a wager.

B. States Expressly Regulate Systems Where Bettors Wager Against Each Other

States traditionally regulate not only bilateral or house-based gambling, but also systems that facilitate bets among gamblers. Examples include exchange wagering, peer-to-peer wagering, parimutuel wagering, percentage games, lotteries, and pools.

"Exchange wagering" is when a "bettor wagers with or against another bettor through a sports wagering licensee." COMAR 36.10.01.02.B(24) (2026); *see also, e.g.,* Ariz. Rev. Stat. Ann. § 5-1301 (2026) ("exchange wagering"); 230 Ill. Comp. Stat. Ann. 45/25-10 (2026) ("exchange wagering"); Mass. Gen. Laws ch. 23N, § 3 (2026) ("exchange wagering"); Mich. Comp. Laws Ann. § 432.403(bb) (2026) ("exchange betting"); N.J. Stat. Ann. § 5:5-170 (2026) ("exchange wagering"); Ohio Rev. Code Ann. § 3775.01(O) (2026) ("exchange wagering"). Similarly, "peer-to-peer" wagering involves users betting directly against each other. Mass. Gen. Laws ch. 23N, § 3 (2026).

Parimutuel wagering is most commonly associated with horse racing. The IHA defines parimutuel wagering as "any system whereby wagers with respect to the outcome of a horserace are placed" in a wagering pool operated by a licensed individual and "in which the participants are wagering with each other and not against the operator." 15 U.S.C. § 002(13); *accord, e.g.,* Md. Code Ann., Bus. Reg. § 11-101 (2026); N.J. Stat. Ann. § 5:5-129 (2026). In many States, parimutuel wagering is the only legal form of gambling on horse racing. *See, e.g.,* Md. Code Ann., Bus. Reg. § 11-801 (2026); Ark. Const. amend. XLVI; Del. Const. Art. 2, § 17; Idaho Const. art. III, § 20; Kan. Const. art. XV, § 3b; Minn. Const. art. X, § 8; Mo. Const. art. III, § 39(c); Neb. Const. art. III, § 24; Ohio Const., art. XV, § 6; Wis. Const. art. IV, § 24; Mont. Code Ann. § 23-4-301.

"Percentage games" occur "where patrons wager against each other" and the sponsoring organization receives a percentage of the wagers, including poker, panguingue, and similar games. *Hughes Prop., Inc. v. State*, 680 P.2d 970, 971 (Nev. 1984). Other States host sports lotteries and sports pools, which are other methods to wager without a house or bilaterial arrangement. Del.

Code Ann. tit. 29, § 48259 (2026); Mont. Code Ann. § 23-5-501 to -513 (2025); Or. Rev. Stat. Ann. § 461.543 (2026). And some States explicitly prohibit pools and bookmaking on elections. *See* Iowa Code § 725.10 (2026); R.I. Gen. Laws § 11-19-14 (2026).

Each of these traditional methods of gambling generally involve "market-set prices through the interaction of bids or offers placed on a central orderbook, not prices unilaterally dictated by a 'house'." 91 Fed. Reg. at 65,973. The licensees only "earn profit by charging transaction fees when a trade occurs." *Id.* at 65,974.

These laws all illustrate that States traditionally regulate a multitude of gambling products beyond bilateral "casino-style" systems. These products are well defined and categorized across numerous States. It is therefore simply incorrect for the Commission to describe the "typical" gambling product as house based. State-regulated gambling always explicitly has included products where gamblers wager against each other.

C. Federal Law Is Not Limited to "Casino-Style" Bets

Federal law regulating gambling also does not limit its definition of gambling solely to house-based wagering. For example, the Wire Act prohibits interstate transmission of "bets or wagers" on "any sporting event or contest." It does not distinguish between bilateral, "house-based" wagers and other forms of wagering. The Wire Act is clear in its prohibition of interstate sports wagering – full stop. It did not seek to only rein in "casino-style" wagering. IGRA does describe different types of gambling, of which house-backed gambling is but one category. 25 C.F.R. § 502.4. "Class III gaming" includes "any house banking game" as one distinct category with "sports betting and parimutuel wagering" as a separate category. Through IGRA, federal law unequivocally includes gambling systems where bettors wager against each other, not the house.

The Commission is incorrect to contend that Dodd-Frank's Special Rule split "casino-style gambling" from all other forms of gambling. *See* 91 Fed. Reg. at 65,974; 7 U.S.C. § 7a-2(c)(5)(C). Nothing in the CEA suggests this arbitrary split. The Act and the regulation implementing the Special Rule simply say "gaming." *See* 7 U.S.C. § 7a-2(c)(5)(C); 17 C.F.R. § 40.11. Neither does the Special Rule supply any contextual clues to suggest it intends the narrowed definition advanced here by the Commission. Nothing other than the traditional understanding of gaming as defined in federal and state gambling law could be suggested. The Commission arbitrarily conjures the term "casino-style" out of thin air and attempts to inject it into the Special Rule through this IFR.

These examples demonstrate existing gambling regulation is not limited to "casino-style" wagering, but include all methods and systems of gambling, including various systems that facilitate betting among wagerers and not against the house. The Commission's attempt to limit the scope of "traditional gambling" or States' historic police powers to house-based wagering is simply incorrect. This false distinction underlies the IFR's rationale for excluding so-called "casino-style" products from the definition of swap and has no basis in law or fact.

IV. THE IFR'S LIMITATION TO "CASINO-STYLE" WAGERS IS INCONSISTENT IN NUMEROUS RESPECTS

By relying on the false "casino-style" gambling construct, the IFR is arbitrary and capricious in several ways. An agency rule is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). First, it is internally inconsistent and unintelligible. Second, it is inconsistent with past agency action. Third, the IFR ignores recent court decisions that did not make such a distinction. Finally, if state-regulated gambling was a "swap," the IFR would criminalize off-DCM multilateral wagers between bettors, such as horse racing.

A. INTERNAL CONSISTENCY

The IFR is clear that the swap definition should not apply to gambling products. The Commission notes that "the 'swap' definition generally should not apply where a product has a longstanding history of being subject to a distinct regulatory framework." 91 Fed. Reg. at 65,974. As a prime example, the Commission refers to insurance products and consumer transactions as "traditionally [] subject to a distinct regulatory framework governed by State law." *Id.* at 65,973. The Commission even recognizes that, like insurance, gambling products have historically been subject to state regulatory frameworks. *Id.* And they are not commonly known as "swaps." *Id.* at 65,974. Finally, the Commission affirms that (1) "there is no indication that 'Congress intended to include [gambling products] in the swap . . . definition"; (2) "Congress has long recognized a distinction between gambling products and derivatives contracts" and; (3) Other federal laws regulate gambling and Congress did not "impliedly repeal those provisions." *Id.* at 65,973. All these points are true.

But given States' historic regulation of all methods and system of gambling, the Commission acts arbitrarily and capriciously by claiming that states and federal gambling laws only traditionally regulate "casino style" gambling, a new term the IFR invents. As described in sections I-III above, gambling products have long been subject to state regulatory regimes no matter the method or system of wagering, and many States explicitly regulate wagers between bettors. Federal gambling law is similarly tailored. The Commission has no basis to exclude only a subset of gambling products from the swap definition, just as it would have no basis to only exclude only a subset of insurance products or consumer transactions. If swaps do not include products traditionally regulated by States, and States traditionally regulate gambling products, then all gambling products are not swaps, no matter whether they are house-backed or not.

B. PAST AGENCY ACTIONS

"When an agency changes course," the Supreme Court has said, "it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *DHS v. Regents of the Univ. of Calif.*, 591 U.S. 1, 30 (2020) (quotation omitted). To

"ignore such matters" is to act arbitrarily. *Id.* (quotation omitted). As a part of Dodd-Frank, Congress created the Special Rule to "prevent gambling through futures markets," specifically sports wagering. *See* 7 U.S.C. § 7a-2(c)(5)(C); 156 Cong. Rec. S5906–07 (daily ed. July 15, 2010). Shortly after Dodd-Frank's enactment, the Commission promulgated Rule 40.11, which banned gaming contracts from CFTC-regulated exchanges. *See* 17 C.F.R. § 40.11; *KalshiEX, LLC v. Assad*, 190 F.4th 1098, 1106 (9th Cir. 2026). Rule 40.11 signaled the Commission's clear intent to keep all gambling products off CFTC-regulated exchanges. The Commission, jointly with the SEC, further defined swaps to exclude consumer products not historically known as such. 77 Fed. Reg. 48,208, 48,246–50 (Aug. 13, 2012). This Rule further clarifies that traditional gambling products, which "involve a service provided to the consumer as entertainment," are not swaps. *See KalshiEX, LLC v. Hendrick*, 817 F. Supp. 3d 1014, 1029 (D. Nev. 2025), *aff'd in part and remanded sub nom. KalshiEX, LLC v. Assad*, 190 F.4th 1098 (9th Cir. 2026). Finally, in 2024, the CFTC proposed an event contract rule to further define "gaming" to exclude all state-regulated gambling products. *See* 89 Fed. Reg. 48,974 ("2024 NPRM"). The IFR's limited exclusion only for house-based wagering is inconsistent with all these prior agency actions. The agency can maintain consistency only by expanding its exclusion to include all state-regulated gambling.

In addition, the IFR fails to address numerous considerations present in the 2024 NPRM. That proposal drew directly on relevant state and federal statutory definitions of gambling, the legislative history of Dodd-Frank, and the scope of the CFTC's remit compared to other regulators. *Id.* at 48,975, 48,979-80. That NPRM further evaluated the contracts' commercial hedging or price-basing utility, susceptibility to manipulation, and harm to retail investors and markets. *Id.* at 48,982-83. By failing to address these considerations, the IFR is also arbitrary and capricious because it is inconsistent with and ignores prior agency considerations without explanation.

C. RECENT COURT DECISIONS INTERPRETING "SWAP"

In reviewing prediction markets, the federal courts of appeals have analyzed the statutory definition of "swap" without drawing a distinction between wagers placed against a house and wagers matched between peers. In *KalshiEX, LLC v. Assad*, Kalshi specifically presented the exact market-structure argument now adopted by the IFR, asserting that its platform differs from traditional sportsbooks because it is not a "house" counterparty, does not set odds, and operates a peer-to-peer orderbook. 190 F.4th at 1114 (9th Cir. 2026). The Ninth Circuit flatly rejected this argument as "distinctions without differences" that have "no connection to the statutory definition of 'swap,'" observing that "[t]he CEA's definition of swap does not exclude a 'contract, agreement, or transaction' if the counterparty is a casino or sportsbook." *Id*. Reaffirming this functional approach in *Blue Lake Rancheria v. Kalshi, Inc.*, the Ninth Circuit reiterated that "[t]he substance of the sports event contracts offered on Kalshi's DCM is sports gambling, regardless of whether Kalshi calls them swaps," holding that "Kalshi may reshuffle the cards, but it cannot change the hand: Its sports event contracts are class III gaming. 191 F.4th 1071, 1083 (9th Cir. 2026). Similarly, in *KalshiEX LLC v. Schuler*, the Sixth Circuit held that sports event contracts are not swaps because they lack inherent economic consequences and rejected Kalshi's attempt to differentiate exchange wagers from off-exchange betting, concluding that "nothing in the statutory definition of a swap draws a distinction based on whether the instrument is tradable" or traded on an exchange. 2026 WL 2884087, at *15 (6th Cir. Sept. 25, 2026).

Even the Third Circuit's decision in *KalshiEX, LLC v. Flaherty*—the sole appellate ruling finding sports event contracts to be swaps—offers no support for the CFTC's house-versus-exchange dichotomy. The *Flaherty* majority based its holding entirely on a broad textual interpretation of whether an event outcome can be "associated with a potential financial, economic, or commercial consequence" under § 1a(47)(A)(ii). 172 F.4th 220, 227–28 (3d Cir. 2026). The Third Circuit did not rely on any distinction between wagering against a house versus wagering against peers to define swaps or find preemption; it treated prediction market sports contracts as wagers on event contingencies regardless of whether bets were placed against a house or against other bettors.

Federal district courts across the country have similarly evaluated prediction markets without relying on a "house" versus "peer-to-peer" distinction to define swaps or determine preemption. In *KalshiEX LLC v. Martin*, the District of Maryland noted that state law explicitly regulates "exchange wagers"—defined as wagers placed with or against another bettor through a licensee—as part of Maryland's comprehensive sports wagering framework. 793 F. Supp. 3d 667, 674 (D. Md. 2025). In *KalshiEX LLC v. Bird*, the Southern District of Iowa acknowledged Kalshi's peer-to-peer exchange mechanics but held that equating sports outcomes with financial swaps produces results "no sensible person could have intended," rejecting the notion that exchange trading converts a sports wager into a federal swap. No. 4:26-CV-00109-SHL-HCA, 2026 WL 2691009, at *10 (S.D. Iowa Sept. 8, 2026) (citations omitted). Likewise, in *QCX LLC v. Nessel*, the Western District of Michigan thoroughly analyzed the CFTC's arguments regarding exchange trading and tradability, holding that "the definition of swap cannot turn on whether the transaction occurred on a designated market," because under CEA § 2(e), swaps must be identifiable as swaps regardless of the trading venue. No. 1:26-CV-710, 2026 WL 1895958, at *8 (W.D. Mich. June 17, 2026).

Even those district courts that initially concluded sports event contracts qualified as swaps did not base their rulings on a distinction between house wagers and peer-to-peer exchange wagers. In *Coinbase Financial Markets, Inc. v. Raoul*, the Northern District of Illinois found that sports event contracts met the literal text of § 1a(47)(A)(ii), but treated prediction market exchange wagers and traditional sportsbook betting as functionally identical financial wagers on outcomes, observing that both "reduce financial exposure" or allow speculation in the exact same manner. No. 1:25-CV-15406, 2026 WL 2969682, at *11 (N.D. Ill. Oct. 2, 2026). Similarly, in *KalshiEX LLC v. Orgel*, the Middle District of Tennessee acknowledged Kalshi's orderbook mechanics where "gamblers bet against each other, rather than the house," but derived its swap finding entirely from the statutory text of § 1a(47)(A)(ii) rather than assigning weight to the peer-to-peer structure. No. 3:26-CV-00034, 2026 WL 474869, at *5 (M.D. Tenn. Feb. 19, 2026), *vacated and remanded sub nom. KalshiEX LLC v. Schuler*, No. 26-3196, 2026 WL 2884087 (6th Cir. Sept. 25, 2026). Across all district court litigation, no court has endorsed the IFR's distinction between house-based gambling and wagers between bettors.

Finally, the Southern District of New York already has criticized the IFR directly, noting that under the statute, house-backed sports betting "involve exactly the same sort of 'financial, economic or commercial consequences'" claimed under sports event contracts because "traditional bets ARE 'sports events contracts.'" No. 1:26-cv-06676-CM, at *23 (S.D. N.Y. Nov. 10, 2026). As the court reasoned: "Who is on the other side of the bet is simply not a difference that makes a

difference. It is impossible to escape the conclusion that traditional casino-style betting transactions would be swaps if we were to accept [the Commission's] preferred construction of the term – no matter that the Commission says not so." *Id.*

This unbroken line of judicial precedent establishes that the statutory definition of "swap" in § 1a(47) does not depend on the mechanics of contract execution. The Commission's attempt to construct a "Product Test" in 17 C.F.R. § 1.3(7) based on tradability and multilateral execution is an attempt to rewrite the statute. 91 Fed. Reg. at 65,975-76. As the Sixth Circuit explained in *Schuler*, "nothing in the statutory definition of a swap draws a distinction based on whether the instrument is tradable," and the instrument's terms—not its trading venue—determine whether it is a swap. *Schuler*, 2026 WL 2884087 at *15. Moreover, using execution venue to define a swap turns CEA § 2(e) on its head: § 2(e) makes it a felony to trade swaps off exchange; it does not transform non-swaps into swaps simply because they are listed on an exchange. *See* 7 U.S.C. § 2(e). By ignoring these numerous court decisions, the IFR is both arbitrary and capricious in its inconsistency with the statutory definition and ultra vires to the extent the Commission attempts to rewrite the statute rather than further define it.

D. CRIMINALIZATION OF OFF-EXCHANGE MULTILATERAL WAGERS

The IFR only excludes gambling products from the definition of swap if they are offered by a licensed entity and not traded in a "market in which trades are executed multilaterally." 91 Fed. Reg. at 65,979. As a result, any system or method that facilitates bets among wagers, even if the contractual obligations only run bilaterally, like exchange wagering, parimutuel wagering, percentage wagering, peer-to-peer wagering, pools, etc., is still potentially a "swap" according to the IFR. And if these traditional gambling products are swaps under the IFR, they must be traded on CFTC-regulated exchanges. *See* 7 U.S.C. § 2(e). Although the IFR arbitrarily excludes certain casino games, pools, and lotteries, the remainder of these multilateral methods must now trade on DCMs. Any operators that register only with state regulators would be subject to CFTC enforcement.

By way of example, this criminalization would have drastic consequences for horse racing. As noted above, horse race betting utilizes parimutuel wagering, a form of multilateral betting.[1] Under this IFR's (and accompanying NPRM's) reasoning, horse racing tracks across the country are now currently operating criminal enterprises. These effects are particularly acute in Maryland, a State with a long history of horse racing and home to the Preakness Stakes, the second leg of the Triple Crown. Such results are absurd.

V. GAMBLING PRODUCTS ARE POTENTIAL VICES REGULATED BY STATES THAT DO NOT BELONG ON DERIVATIVES MARKETS

States' historic police power over traditional gambling protects the public health, financial markets, and the integrity of games and elections. The IFR fails to consider these factors. Bilateral, house-based transactions do not have a unique effect on the public welfare such that only they

[1] For these same reasons, and as described in Section III.B. and noted above in Section IV.A., the IFR is also incongruent with the Interstate Horseracing Act.

should be excluded from the Commission's further definition of swaps when all other forms of state-regulated gambling are not. Rather, state gambling regulation writ large "has been highly effective for consumers, states, tribes and the legal gaming industry." National Conference of State Legislatures, *NCSL Urges Congress to Address Unregulated Sports Betting via Prediction Markets* (Jan. 29, 2026), https://www.ncsl.org/resources/details/ncsl-urges-congress-to-address-unregulated-sports-betting-via-prediction-markets. In contrast, permitting these products to exist on derivatives markets causes public harm.

A. Gambling Products Can Adversely Affect Public Health, Financial Stability, and the Integrity of Games and Elections

1. Public Health

Compulsive gambling presents serious public health concerns. "Gambling disorder is described alongside substance use disorders in both the Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM 5), and the International Classification of Diseases, eleventh revision (ICD 11)." World Health Organization, *Gambling Fact Sheet* (Dec. 2, 2024), https://perma.cc/69AC-5KT5. Like substance abuse, "[g]ambling disorder severely impacts the affected individual's daily life and is considered to be a major public health issue" that "may be a risk factor for suicidal behavior." Adonay Kidane et al., *Suicide and attempted suicide in gambling disorder—results from a nationwide case-control study* (Mar. 31, 2025), https://pubmed.ncbi.nlm.nih.gov/40215800/. Excess gambling is correlated with increased risk of suicide, divorce, and homelessness. The National Gambling Impact Study Commission, Final Report, *Chapter 7: Gambling's Impacts on People and Places*, 7-24–28 (1999), https://perma.cc/BC2P-CQC4; *see also* Matt Stone, *Risk of Gambling Addiction Up 30%*, 21-WFMJ (Feb. 16, 2025), https://perma.cc/76KG-5ZGS. Compulsive gamblers can even place gambling over their loved ones' health. *See* Erin Gottsacker, *A statewide telehealth service is changing the game for Ohioans with gambling addictions*, Ohio Newsroom (Nov. 18, 2024), perma.cc/E4ZU-U3MN.

As even the Supreme Court has acknowledged, gambling, and in particular sports gambling, is both attractive and addictive especially to young adults. *Murphy* at 460 (citing Nat. Gambling Impact Study Comm'n, Final Report, at 3-10 (1999); Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5, 7 (1992). One study estimates that "gambling disorder could affect . . . 8.9% of the adults and 16.3% of the adolescents who gamble using sports betting products." Heather Wardle et al., *The Lancet Public Health Comm'n on Gambling*, 9 Lancet Publ. Health Comm'ns e950–e994, e951 (Nov. 2024), https://perma.cc/FU4V-QGBW. Another study suggests that nearly one in every five people between the ages of 18 and 24 is at high risk of a gambling problem. *See* Lia Nower et al., *The Prevalence of Online and Land-Based Gambling in New Jersey*, Rutgers University: Center for Gambling Studies, at 33 (2023), https://perma.cc/V3KH-BPHC. These young people have a "much higher lifetime risk of developing a gambling problem." *See* Nat'l Gambling Impact Study Comm'n, Final Report at 4-12. They "face an elevated risk of gambling harms," and "[t]he effect is especially potent among sports fans." Wardle, *The Lancet Public Health Comm'n on Gambling* at e954.

2. FINANCIAL STABILITY

Gambling too often ravages household finances. People gamble to the point of financial ruin. *See* Kelly Kennedy, *'I didn't care who was playing': Has the legalization of sports betting impacted problem gambling in Ohio?*, Cleveland 19 News (July 18, 2024), https://perma.cc/JG9G-P7QT. In particular, sports betting results in "more financial instability as households run-up credit card balances and more frequently overdraw their bank accounts." Baker et al., *Gambling Away Stability: Sports Betting's Impact on Vulnerable Households* at 2–3 (Oct. 21, 2024), https://perma.cc/4SF5-VGZH. "Sports bettors are more than twice as likely as non-bettors to have overdrawn their bank account, and those issues are more pronounced among financially constrained households." Weston Blasi, *Here are all the ways sports gambling is hurting bettors' finances*, MarketWatch (Nov. 5, 2024), https://perma.cc/D8B6-966N.

Gambling siphons funds from retail investments, and selling gambling products on financial markets only confuses these markets with entertainment vehicles, harming both the marketplace and its participants. "Increased online sports betting substitutes for risky investments," and that "significantly reduces net deposits to brokerage accounts." Baker et al., *Gambling Away Stability: Sports Betting's Impact on Vulnerable Households* at 2 (Oct. 31, 2024), https://perma.cc/4SF5-VGZH. As the Commission noted previously:

> permitting [gambling] contracts to trade as financial instruments on financial markets could raise broad investor protection concerns by conflating gambling and financial instruments in a manner that could particularly create confusion and risk for retail market participants. Among other things, it could improperly signal to certain retail investors that these contracts are instruments to be used for investment purposes—and it could signal to others that derivative markets are appropriate venues for retail market participants to trade for entertainment purposes, which could minimize, for those investors, unique characteristics and risks of trading, more generally, in derivative markets.

89 Fed. Reg. at 48,982. If the Commission now ignores its prior concerns, it will now ironically be implementing Dodd-Frank to harm financial stability.

3. INTEGRITY OF GAMES AND ELECTIONS

Finally, gambling has previously "corrupted and seriously damaged the reputation of professional and amateur sports." *Murphy*, 584 U.S. at 460. Again, as the Supreme Court acknowledged, the fixing of the 1919 World Series threatened baseball's status as the nation's pastime, and the college basketball scandals of the 1950s nearly killed college basketball. *Id.* at 460 n17 (citing E. Asinof, *Eight Men Out: The Black Sox and the 1919 World Series* 5, 198–199 (1963); S. Cohen, *The Game They Played* 183–238 (1977); C. Rosen, *Scandals of '51: How the Gamblers Almost Killed College Basketball* (1978)).

In fact, college basketball scandals are why interstate sports betting is illegal. The Wire Act was considered on the heels of the 1961 College Basketball scandal, where at least 31 players from 22 colleges fixed games and led to the permanent end of the Dixie Classic Tournament. *See* Albert J. Figone, Cheating the Spread: Gamblers, Point Shavers, and Game Fixers in College Football and Basketball 108 (2012); Charley Rosen, The Wizard of Odds: How Jack Molinas Almost Destroyed the Game of Basketball (2002). The Wire Act was subsequently enacted as part of a larger legislative package sponsored by then-Attorney General Robert F. Kennedy to curb the ills of organized gambling and crime. *Id.* at 2633-34. As the five sports leagues (NCAA, NBA, NFL, NHL, MLB) told Congress in 2009: "Nearly 50 years ago, Attorney General Robert Kennedy proposed legislation that criminalized interstate sports wagering. Enacted as the 1961 Wire Act, this unambiguous ban has been the bedrock of federal sports betting policy." Ryan Rodenberg, *The Wire Act of 1961: When the Internet Met the 'Bedrock' Federal Sports Betting Law*, SportsHandle (March 2, 2018), https://tinyurl.com/3mkz64ph.

The Commission has previously reasoned that both sports and election wagering can encourage manipulation. As the Commission noted in 2024, "in many instances, a particular individual or group of individuals may be able to influence an occurrence in connection with a contest or game." 2024 NPRM at 48,982. Moreover, election wagering "raise[s] unique additional public interest concerns relating to election integrity and the perception of election integrity." *Id.* at 48,983.

All these harms are important considerations that the IFR fails to address.

B. State Gambling Laws Are Tailored to Mitigate These Harms

To address these harms, some States have chosen to prohibit gambling while others have chosen to regulate it. For example, Maryland has significant regulatory requirements regarding responsible gaming to ensure that those conducting sports wagering do not prey on individuals suffering from compulsive gaming. These requirements include prohibiting licensees from serving persons who place themselves on a voluntary gambling exclusion list. Md. Code Ann., State Gov't § 9-1A-24(e)(3)-(4), § 9-1E-11(a)(7) (2026). Licensees must also allow consumers to limit deposits, wagers, losses, time spent, and periodic notifications regarding betting activity. COMAR 36.10.14.04(A)(1)–(6), (N), (O) (2026). Furthermore, licensees must display resource information for consumers, such as the nationally supported 1-800-GAMBLER phone number. Md. Code Ann., State Gov't § 9-1A-33, § 9-1E-04(b)(6) (2026). In addition, Maryland protects young adults by limiting casino gambling and sports wagering to persons over 21. *Id.* at § 9-1A-24(c). The State requires gaming and sports wagering operators to verify patron identity, age, eligibility, and physical location before allowing account creation. *Id.* at § 9-1A-24(c), (e); § 9-1E-11(a)(1)-(&), (b)(1)(i)–(ii). Maryland strictly regulates gambling by casinos and sports wagering licensees. *Id.* at § 9-1A-04(d), § 9-1A-24(d), § 9-1E-04(b)(10). It protects amateur athletics by banning wagers on certain events such as high-school sports. *Id.* at § 9-1E-01(i)(2)(i). Finally, licensees must also go through extensive background checks, detailed financial assessments, and thorough integrity and suitability due diligence prior to obtaining a license. *Id.* at § 9-1A-07, § 9-1A-08, § 9-1E-03.

Other States have similar requirements. For example, Michigan limits sports betting to those over 21 years old, has a voluntary exclusion list, and prohibits improper sports-betting

practices. Mich. Comp. Laws § 432.410-12 (2026). New Jersey also requires participants to be 21 and has age-verification requirements, requires licensees to conspicuously post information about resources for problem gamblers, establishes safeguards against improper betting practices, prohibits wagers on college sports taking place in New Jersey or involving New Jersey college teams, and requires reporting of suspicious activity. N.J. Const. art. IV, § 7, ¶ 2(D); N.J. Stat. Ann. §§ 5:12-119, 5:12A-10 to -11, -13(a)(11) (2026); N.J. Admin. Code §§ 13:69N-1.6 to -1.12, 13:69O-1.2(b) (2026). Ohio requires companies to establish that they can responsibly facilitate gambling and has a voluntary exclusion program. Ohio Rev. Code Ann. §§ 3775.09(A)–(B); 3775.02(B)(11); § 3775.13(C)(1) (2026). Nevada has an age-21 requirement, requires that licensees allow consumers to set deposit limits and conspicuously display information about responsible-gaming resources, requires comprehensive investigation processes for all licensee applications, and prohibits sports wagers by owners, coaches, players, and officials. Nev. Rev. Stat. Ann. §§ 463.170, .350 (2025); Nev. Gaming Comm'n Reg. 5.225(18)(a)–(b), 22.1205 (2026). New York similarly restricts sports wagering to those 21 and over. N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 1367(1)(j), (1)(r)(x). New York further prohibits advertisements depicting a person under 21 engaging in gaming and advertising sports wagering on college campuses. N.Y. Racing, Pari-Mutuel Wagering and Breeding Law §§ 1363(2)(c); 5329.37(e)(4) (2026). Tennessee has similar laws. *See* Tenn. Code Ann. §§ 4-49-117 (2026) (license requirement), -119 (exclusion list licensee requirements).

C. GAMBLING PRODUCTS CURRENTLY ON DCMS PROMOTE THESE HARMS

DCMs currently offering sports wagers actively target vulnerable young adults who, as shown above, are more susceptible to addictive behavior and adverse outcomes. *See* Katherine Long et al., *Is This Insider Information? The Prediction Market Bets Driving a Campus Frenzy*, Wall Street Journal, (Mar. 5, 2026), https://perma.cc/E4QB-M7VH; *see also* Responsible Gambling Counsel, *Gambling & Young Adults*, https://perma.cc/Q4JL-XJRM (finding that players 18–20 years old are "significantly more likely to have chased their losses and bet more than they could afford in the past"). Specifically, a recent report from Citizens Bank found that almost a quarter of Kalshi's users are under the age of 25, compared to just 7% for sportsbooks that are following state regulations. *See* Jordan Bender, *Prediction Markets vs. Sports Betting; Market Dynamics, ROI by Cohorts, and Competitive Implications*, Citizens Bank Industry update (Mar. 23, 2026), https://perma.cc/9UYC-8A26. DCMs offering illegal gambling are engaged in predatory behavior.

DCMs' traditional gambling products are exploiting the public no differently than any other unlicensed gambling operation. Some prediction markets appear to be designed for a handful of professional traders to take advantage of others. As the Wall Street Journal recently uncovered, just 0.1 percent of accounts on Polymarket obtain 67 percent of the profits while more than 70 percent of users lose money, with the least successful 10 percent losing an average of $4,000 each. Similarly, Kalshi acknowledges that there are 2.9 unprofitable users for each profitable one. This profitable minority consists of professional traders that serve as "market makers," and Kalshi and Polymarket both acknowledge paying some market makers to provide liquidity. Some professional traders acknowledge that the "easiest money is going to be in sports [wagering]" because it attracts compulsive gamblers, in addition to acknowledging that "a large number of casual traders just bet 'yes' on what they hope will happen," and the presence of "long shot bias"

where bettors overvalue unlikely events because they are driven by excitement. Alexandra Citrin-Safadi, *Why Almost Everyone Loses – Except a Few Sharks – on Prediction Markets*, WALL STREET JOURNAL (May 3, 2026), https://tinyurl.com/5n6ap8um; *see also* Pat Akey, et al., *Who Wins and Who Loses In Prediction Markets? Evidence from Polymarket* (June 12. 2026), https://tinyurl.com/yr68z4sz (finding that the top 1 percent of users with positive PnL capture 76.5 percent of profits). The Commission has failed to consider the impact of these findings.

These findings suggest that traditional gambling products currently trading on DCMs are not governed by underlying market fundamentals, but rather thrive on market failures, in particular information asymmetries exploited by subsidized professional traders that prey on most traders' cognitive biases and propensity for gambling addiction. These gambling products thus differ starkly from securities, commodity futures markets, or even the first non-profit prediction markets operated for research purposes. Univ. of Iowa, CFTC No-Action Letter No. 92-04a, 1992 WL 12661997 (Feb. 5, 1992); Univ. of Iowa, CFTC No-Action Letter No. 93-66, 1993 WL 595758 (June 18, 1993). Rather, the presence of traditional gambling on DCMs turns these financial markets into nothing more than gambling dens used primarily for a few sharks to manipulate others – the type of harms squarely within States' historic police powers to regulate gambling and not appropriate for financial markets.

VI. THE COMMODITY EXCHANGE ACT'S FRAMEWORK IS INCONSISTENT WITH ALL GAMBLING PRODUCTS

"The Commission is not a gaming regulator." 89 Fed. Reg. at 48,982-83. "The CEA and Commission regulations are focused on regulating financial instruments and markets, and do not include provisions aimed at protecting against gambling-specific risks and concerns, including customer protection concerns inherent to gambling." *Id.* at 48,983. Thus, as the Commission itself has noted, gambling products are outside its primary regulatory remit. The CEA has no provisions to address the public welfare concerns associated with traditional gambling products, but States have addressed these harms through prohibition or strict regulatory requirements. The Commission has not addressed its prior reasoning in this IFR and has failed to consider that its framework cannot address the harms associated with gambling products.

Moreover, gambling products lack the fundamental characteristics of a derivative. As noted by numerous courts and a contemporaneously filed companion letter, gambling products do not meet the definition of "swaps." *See Assad*, 190 F.4th at 1114; *Blue Lake Rancheria,* 191 F.4th at 1083; *Schuler*, No. 26-3196, 2026 WL 2884087, at *15; *Martin*, 793 F. Supp. 3d at 674; *Bird*, No. 4:26-CV-00109-SHL-HCA, 2026 WL 2691009, at *10; *Nessel*, No. 1:26-CV-710, 2026 WL 1895958, at *8; Ohio Office of the Attorney General, Comments related to the notice regarding Further Definition of "Swap" – Inclusions, Docket No. CFTC-2026-21377, 91 Fed. Reg. 66,022 (Nov. 18, 2026). "[H]istorically, the Commission has evaluated whether a contract is contrary to the public interest with reference to the contract's commercial hedging or price-basing utility." 89 Fed. Reg. at 48,978. Such an approach is consistent with legislative history. *Id.* at 48,979. But traditional gambling products cannot reasonably be expected to be "used for hedging and/ or price basing on more than an occasional basis." *Id.* at 48,982. In addition, the Commission previously noted that such products "have no underlying cash market with bona fide economic transactions to provide directly correlated price forming information." *Id.* at 48,982. Instead, "price forming

information is either nonexistent, or driven by informational sources that are unregulated, have opaque underlying processes and procedures, and may not follow scientifically reliable methodologies" in contrast to "the informational sources used for pricing the vast majority of commodities underlying Commission-regulated derivatives contracts (e.g., government issued crop forecasts, weather forecasts, federal government economic data, market-derived supply and demand metrics for commodities, market-based interest rate curves). *Id.* Gambling products, even when they are multilateral, differ sharply from derivatives.

As such, the IFR does not comply with § 15(a) factors. The IFRs limited exclusions do not protect market participants or the public. It would conflate gambling and financial instruments in a manner that could particularly create confusion and risk for retail market participants and subjects the public to gambling harms the CFTC is not structured to address. Financial integrity of futures markets is harmed by the presence of traditional gambling on DCMs when, as noted above, traditional gambling products siphon funds away from retail brokerage accounts. Nor do these products promote price discovery when no underlying market exists for sports wagers, elections, and cultural wagers.

Consequently, the presence of any traditional gambling on DCMs hurts the public and is incongruent with the CEA. Bilateral "casino-style" wagering is not unique in its potential harms. No rational claim can be made that betting against the house affects the public interest differently than wagering against a fellow bettor.

VII. THE IFR IS PROCEDURALLY DEFECTIVE AND IN EXCESS OF STATUTORY AUTHORITY

A. THE COMMISSION LACKS GOOD CAUSE TO ISSUE THE IFR

Notice and comment is excused only for good cause – *e.g.*, "in emergency situations" or "where delay could result in serious harm." *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012) (citation omitted). Courts have limited "serious harm" to the "context of threats or safety concerns." *See Illinois Bankers Assoc. v. Raoul*, 834 F.Supp.3d 773, 786 (N.D. Ill. 2026) (collecting cases). The very case relied on by the Commission rejected "potential economic harm" in the wake of the COVID-19 pandemic as a reason for good cause, noting that emergencies "generally involved situations with imminent threats to national security, public safety, or the environment." *Itserve Alliance, Inc. v. Scalia*, No. 20-14604 (SRC), 2020 WL 7074391, at *5 (D. N.J. Dec. 3, 2020). Here, the Commission provides no indication of any such "life-or-death circumstances." *See* 834 F. Supp. at 786.

As *Scalia* criticized, the cases cited by the Commission invoke potential economic harm only in the context of a court invalidating prior agency regulations or guidelines. 2020 WL 7074391 at *5. These circumstances are not present here. The IFR only *excludes* certain contracts from CFTC regulation. Any potential harm would be inflicted by the CFTC itself asserting that "casino-style" gambling was a "swap" when, as several courts have noted, certain state-regulated gambling is not a "swap." *See, e.g., Assad*, 190 F.4th at 1120 (9th Cir. 2026); *Schuler*, 2026 WL 2884087, at *16 (6th Cir. Sept. 25, 2026). Regardless, "agencies cannot manufacture their own emergencies to invoke the good cause exception." *Illinois Bankers Assoc.*, 834 F. Supp. at 786.

Indeed, the Commission has not manufactured an emergency because the IFR states that it would "not change the legal rights or obligations of market participants." 91 Fed. Reg. 65,969, 65,978. Any assertions of harm are merely unsupported speculation, and the IFR has nothing to do with the invalidation of prior agency action.

B. THE COMMISSION LACKS A QUORUM

The CEA creates a five-member commission, yet right now, the CFTC has only one member – Commissioner Selig. The CEA does not expressly include a quorum clause, but the statute suggests that there needs to be at least more than one commissioner: it states that "[a] vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission." 7 U.S.C. § 2(a)(3). The use of "remaining Commissioners" plural suggests that one commissioner alone is not enough. In any event, if the statute were completely silent, the common-law default would apply: a majority of the body is a quorum. *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183-184 (1967).

C. THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY

The CFTC invoked three statutes as providing the authority for the IFR: 15 U.S.C. § 8302(d)(1), 15 U.S.C. § 8321(a)(2), and 15 U.S.C. § 8321(b). None supports the IFR.

1. 15 U.S.C. § 8302(d)(1)

This statute allows the CFTC *and* the SEC, "in consultation with" the Board of the Federal Reserve, to "further define" "swap." Section 8302(d)(4) expressly states that when a provision requires joint regulation, the rulemaking "shall be effective only if issued jointly by the [CFTC] and the [SEC]." And Section 8302(a)(1) states that, "before commencing any rulemaking . . . regarding swaps," the CFTC must satisfy various consultation requirements with the SEC "and the prudential regulators," which include the Board, the FDIC, the Farm Credit Administration, the Federal Housing Finance Agency, and the Office of the Comptroller of the Currency. *See* 7 U.S.C. § 1a(39).

Here, the CFTC simply asserted in a footnote that the SEC "joins" in the rulemaking. That is not sufficient for joint rulemaking: In ordinary joint rulemakings, "the agencies develop[] a single, common rule," and each "agency publishe[s] identical versions of the rule in its respective section of the Code of Federal Regulations." *E.g., Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 721 (D.C. Cir. 2016). Indeed, that is what the CFTC and SEC did when they jointly promulgated the rule in 2012 further defining swap. *See* 77 Fed. Reg. 48,208. The CFTC did not do that here.

The CFTC also asserted in a footnote that it consulted the Board by sharing the rulemaking. But merely sharing a proposed rule is not "consultation," as that contemplates "two-way communication." *Mullin v. Doe*, 609 U.S. 324, 365 (2026) (Kagan, J., dissenting); *see California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011) (similar). Further, the CFTC does not say that it consulted with the Board *before* commencing rulemaking, and it does not mention the other regulators at all.

2. 15 U.S.C. § 8321(a)(2)

This statute authorizes the CFTC to "adopt a rule to define" "any other term included in an amendment to the [CEA] made by this subtitle." The relevant subtitle added the definition of "swap" to the CEA, so on its face, this statute could be read to allow the CFTC to define swap without the participation of any other agency. But that reading flies in the face of the longstanding principle that when there are two provisions that arguably touch on the same topic, the more specific provision controls over the more general one. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Congress provided a provision that is expressly about further defining swap, 15 U.S.C. § 8302(d)(1), so that is the provision that should apply, not the more general provision. As noted, the CFTC followed that more specific provision in 2012. The specific-over-the-general principle has particular force here because the more specific provision has joint rulemaking and consultation requirements that the general provision does not. It cannot be that Congress set forth detailed rulemaking requirements on this exact subject, yet the agency can evade them through this general provision.

3. 15 U.S.C. § 8321(b)

This statute authorizes the CFTC alone to "adopt a rule to further define the term[] 'swap'" "[t]o include transactions and entities that have been structured to evade" the regulation of swap markets. This section is facially inapplicable here: the IFR *excludes* only "casino-style" bets and seeks *not* to regulate them. Further, no serious contention can be made that "casino-style" gambling (or any state-regulated gambling) was structured to evade the CEA; the premise has always been that such bets fall outside the Act altogether.

VIII. CONCLUSION

The IFR rests on a legal fiction. Neither the text of the CEA nor judicial precedent supports splitting gambling products into federal "swaps" and state "casino" wagers based on whether a bet is matched against a peer or placed against a house. By attempting to carve out "casino-style" house bets while ignoring all other state-regulated systems and methods, the IFR constructs a false dichotomy that harms markets and the public, all without following proper procedure and acting in excess of its statutory authority.

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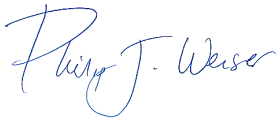
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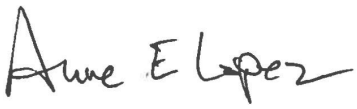
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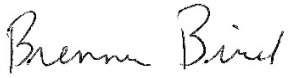
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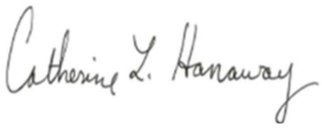
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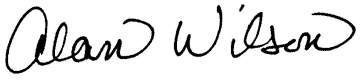
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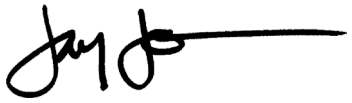
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