

## The Feds Don't Want You Betting on Elections

*Regulators shut down an online market for futures contracts related to political outcomes.*

*By Donald L. Luskin*

In The Commodity Futures Trading Commission has moved to shut down PredictIt, an online marketplace for futures contracts on the outcomes of political events, effective Feb. 15, 2023. This is a blow to investors in these contracts, such as those on the presidential election of 2024, who are left uncertain as to how their positions will be unwound. And it's a blow to the public at large, because political futures have proven to have better predictive power than polls.

Say you wanted to invest based on your prediction that a Republican will be elected president in 2024. Right now, you could buy a "Yes Republican" PredictIt contract for 56 cents. If a Republican is elected, your contract will settle at \$1, and you'll have a profit of 44 cents for each contract you bought. If a Republican isn't elected, the contract will settle at zero and you will lose your 56-cent investment.

Investors are prohibited from staking more than \$850 in any contract. This and other investor protections were enshrined in a "no-action letter" issued by the CFTC on Oct. 24, 2014, allowing PredictIt to operate. Since then, PredictIt has listed contracts on more than 29,000 political events and served more than 175,000 investors.

Yet on Aug. 4, 2022, the CFTC **withdrew** the no-action letter and ordered PredictIt to close in February. The reason? Only that it "has not operated its market in compliance with the terms" of the letter. There was nothing more specific than that, giving PredictIt no way to address the issue and stay open.

There also wasn't a word—from an agency that exists to protect investors—about how to liquidate fairly 75 open contracts expiring after February 2023 and apportion gains and losses among their almost 15,000 holders.

PredictIt officials guess that the CFTC's objection is the scope of contracts offered. In the 2014 letter, permissible scope is defined to "include" contracts on presidential primaries, the popular and electoral vote, vice-presidential nominees and congressional control.

"Include" is the key word here. It isn't "limited to." The enumerated examples would seem to leave the door open to other events, such as gubernatorial elections, Supreme Court nominations and whether President Biden will resign. Such a variety of contracts have been "included" for most of PredictIt's eight-year life, with only a tiny number of CFTC objections.

One perhaps significant objection came in early 2020, when PredictIt listed a contract on whether the World Health Organization would declare Covid-19 a pandemic. According to John

Phillips, chief executive of Aristotle, the firm that operates PredictIt, the CFTC telephoned to complain about that contract, saying it was in poor taste. The contract had already expired.

Later in 2020, when President Trump was promising speedy development of Covid vaccines, PredictIt reached out to the CFTC to see if there would be objection to a contract on whether the first jab would be approved by the U.S. government before the presidential election. The commission said no—PredictIt could not issue such a contract—and would give no reason.

At the same time, the commission complained about PredictIt contracts on how many tweets Mr. Trump would post over various periods. So PredictIt discontinued these contracts, though they had been popular. At that point it seemed as though the commission's objections were an expansion of its own regulatory scope, from investor protection to guardian of good taste in political discourse.

Those incidents had a chilling effect on contract innovation, with PredictIt self-censoring and introducing only conventional election contracts as needed. There matters stood for almost two years, until in June the CFTC telephoned PredictIt and ordered it to shut down immediately. Only strenuous pleadings got the execution date moved to February 2023. Nothing came from the CFTC in writing until the no-action letter was withdrawn in August.

What changed? PredictIt says nothing did. The CFTC has refused to respond to PredictIt's inquiries. The five-member commission is now made up **entirely of Biden's appointees**.

Aristotle and several individual PredictIt investors have **filed a lawsuit** seeking declaratory judgment and injunctive relief in federal court in Texas. The plaintiffs argue that the CFTC hasn't provided any specific reasons for the shutdown in writing so the decision is arbitrary and capricious and thus prohibited under the Administrative Procedure Act. The plaintiffs seek an injunction to allow existing contracts to play out until their natural conclusion. This would protect investors.

**The CFTC argues** that there is nothing for the court to rule on, because there is no "final agency action" here—only the withdrawal of a no-action letter. The commission says it needs to provide no reasons—it's merely exercising "prosecutorial discretion." Its demand to liquidate all positions, the CFTC says, is merely a suggestion for what PredictIt "should" do, as though a diktat from a regulator is nothing more than friendly advice.

Most Kafkaesque is the CFTC's claim that the withdrawal of its no-action letter need not result in the end of PredictIt. It could simply apply to be regulated as a designated contract market, a type of commodity contract exchange that the CFTC permits to operate. The commission seems to have forgotten **its April 2012 order** that prohibits such markets from listing election contracts. Kalshi, a new exchange in event-related futures contracts, **petitioned** the CFTC in July for relief from the 2012 order, which would allow it for the first time to list such contracts on election results. Kalshi expected a decision from the commission last week, but it hasn't come, with **reports** of a divide between staff and the commissioners. If the Biden CFTC turns down Kalshi after shutting PredictIt, it will be saying it wishes to exterminate financial markets in political opinions.

That would be unfortunate for liberty. If investors can express their opinions on the future prices of corn and pork bellies, surely the First Amendment also protects their ability to do the same on elections and other political matters. It's a matter of free speech that you can put your money where your mouth is.

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