



December 29, 2020

VIA Electronic Submission and Email

Mr. Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

**Re: Commodity Futures Trading Commission Rule 40.11
Review of Proposed RSBIX NFL Futures Contracts**

Dear Mr. Kirkpatrick:

ErisX appreciates the opportunity to submit this letter in response to the Commodity Futures Trading Commission's ("CFTC" or "**Commission**") request for public comment on the RSBIX NFL futures contracts that the Eris Exchange self-certified on December 15, 2020 ("**RSBIX Self-Certification**"). We support the Commission's decision to solicit public comment on these innovative futures contracts. As the Commission has long understood, the history of the futures markets started with the need for businesses to hedge risks unique to their commercial operations. The purpose of the RSBIX NFL futures contracts is to provide a mechanism for commercial enterprises to hedge risk that is unique to their businesses.

In developing the RSBIX futures contracts, ErisX carefully considered the Commission's prohibition of any event contract that "relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law."¹ As set forth in the RSBIX Self-Certification, the parameters of the RSBIX NFL futures contracts demonstrate that they do not relate to or reference "gaming." On the contrary, they relate to athletic competition, sports team performance and the like – which are not themselves gaming activities, and not based on wagers (*i.e.*, gambling). Nonetheless, we note that Licensed Sportsbook activities are expressly lawful in the states in which they operate (*i.e.*, under the laws of 25 states and the District of Columbia) and that lawful activity, conducted within the state, is not unlawful in another state.

For the benefit of the Commission and the public, ErisX provides responses below to the specific questions the Commission raised in its solicitation of public comment.

¹ See CFTC Rule 40.11(a)(1).

About ErisX

ErisX operates a CFTC-registered designated contract market (DCM) and derivatives clearing organization (DCO). ErisX's management team is composed of experienced industry practitioners and includes senior industry leaders with backgrounds and operating experience spanning multiple regulated asset classes and global jurisdictions. ErisX's investors represent a diverse group of industry participants, including broker-dealers and futures commission merchants, regulated exchange operators, professional trading firms and market makers.

The RSBIX NFL Futures Contracts

The RSBIX NFL futures contracts will be fully collateralized, financially settled contracts that settle based upon the outcome of a particular sporting event. The contracts will be based upon the outright winner of a sporting event (*i.e.*, the "moneyline"), the "winner" of a game after adjusting the final score by a predetermined number of points (*i.e.*, the "point spread"), and the total points scored by both teams (*i.e.*, the "over-under"). The economic purpose for the RSBIX NFL futures contracts is to provide a mechanism for Licensed Sportsbooks, Vendors and Stadium Owners (all as defined below) to hedge the substantial commercial risks that they incur in operating their businesses. Those risks are directly tied to the outcome of sporting events.

Importantly, only Licensed Sportsbooks, Vendors and Stadium Owners that have a demonstrated need to hedge financial exposure associated with their commercial businesses are eligible to trade the RSBIX NFL futures contracts. ErisX also will authorize designated market makers to trade the products for the purpose of providing necessary liquidity. All Licensed Sportsbooks, Vendors, Stadium Owners and market makers must meet the definition of an eligible contract participant under the Commodity Exchange Act and the Commission's implementing regulations. Lastly, individuals or entities that do not meet the above criteria are not eligible to trade the RSBIX NFL futures contracts.

For the benefit of the public, below is a condensed summary of the financial risks that Licensed Sportsbooks, Vendors and Stadium Owners face, and how the RSBIX NFL futures contracts will help these businesses to hedge their commercial risk. A more complete discussion can be found in the RSBIX Self-Certification.

Licensed Sportsbooks – Hedging Risk

Licensed Sportsbooks accept sports wagers from customers, and are licensed to do so in one of twenty-five States or the District of Columbia ("**Licensed Sportsbook**"). Contrary to popular belief, Licensed Sportsbooks do not seek to profit based upon the outcome of sporting events. Rather, they strive to run a balanced book with approximately equal wagers on either side of an outcome. A balanced book allows the Licensed Sportsbook to earn revenue through the collection of fees rather than through the outcome of a sporting event.

Although Licensed Sportsbooks seek to operate a balanced book, several factors may contribute to an imbalanced book. For example, because a Licensed Sportsbook can only accept wagers from in-state residents, there may be a geographic bias that favors a particular outcome.² Although a Licensed Sportsbook can adjust the odds of an outcome to try to incentivize offsetting interest to balance its book, a Licensed Sportsbook can only adjust the odds so much before customer wagers are incentivized to shift to alternatives offering more attractive odds.

The RSBIX NFL futures contracts will allow a Licensed Sportsbook to hedge the exposure associated with an imbalanced book. For example, if the majority of customers for a Licensed Sportsbook in New Jersey are New York Giants fans who desire to place wagers backing the Giants, this will create risk imbalance. Under this scenario, the Licensed Sportsbook could trade the RSBIX NFL futures contract to hedge the financial exposure associated with the imbalance.

Vendors and Stadium Owners – Hedging Risk

Vendors that sell goods, food, beverages, and services at and to sports stadiums and arenas (“**Vendors**”) along with the owners of sports stadiums and arenas (“**Stadium Owners**”) also incur significant commercial risk associated with the outcome of a sporting event. Vendors earn revenue by selling goods, food, beverages, and services to persons who attend games. Similarly, Stadium Owners earn revenue primarily through ticket sales and other goods and services sold at the stadium. Because a team that is performing well (*i.e.*, winning games) generally draws larger crowds relative to a team performing poorly, a team’s win-loss record creates financial risk for Vendors and Stadium Owners. Furthermore, a team’s win-loss record dictates whether the team makes the playoffs and, therefore, is eligible to host additional games. For the same reason, a team’s win-loss record also dictates whether Vendors can sell goods, food, beverages and services, and Stadium Owners can sell tickets and services at such additional games.

Sporting event contracts will allow a Vendor and Stadium Owner to hedge the variable revenues the business may, or may not, earn because attendance at games is correlated to a team’s win-loss record.

Question 1: Do any of these contracts involve, relate to, or reference gaming as described in Commission regulation 40.11(a)(1)?

As set forth in the RSBIX Self-Certification, the RSBIX NFL futures contracts do not involve, relate to, or reference gaming as set forth in CFTC Rule 40.11(a)(1).³ The legislative and regulatory history of the prohibition of “gaming” contracts indicates Congress and the

² See RSBIX Self-Certification at 1.A (pages 2-3) *citing* 18 U.S.C. § 1084 (“Wire Act”), which requires that each Licensed Sportsbook confine its operations within a single State.

³ See RSBIX Self-Certification at 2.A (pages 6-8).

Commission sought to “prevent gambling through the futures markets.”⁴ In discussing the Commission’s authority to prevent trading that is contrary to the public interest, Senator Dianne Feinstein noted that the statutory “public interest” standard was defined broadly so that the CFTC may consider the extent to which a proposed derivative contract would be used predominantly by speculators or participants not having a commercial or hedging interest.⁵ Senator Feinstein further stressed the importance of the Commission having the “power to determine that a contract is a gaming contract **if the predominant use of the contract is speculative as opposed to a hedging or economic use[.]**”⁶

The RSBIX NFL futures contracts do not allow market participants to gamble through the futures markets. Rather, the purpose of these contracts is to provide a mechanism for lawful businesses to hedge legitimate commercial exposure. As noted above, ErisX limits trading in the RSBIX NFL futures contracts to Licensed Sportsbooks, Vendors and Stadium Owners that are hedging commercial risk along with designated market makers. This means that ErisX does not make the RSBIX NFL futures contracts available to persons seeking to speculate in these products. The limits on participants eligible to trade the RSBIX NFL futures contracts help ensure that the contracts serve a hedging purpose and do not enable non-commercial parties to gamble on sports outcomes. To use an example, a Licensed Sportsbook could execute a RSBIX NFL futures contract to hedge its economic risk exposure to a sporting event, but a member of the public could not execute a RSBIX NFL futures contract to place a wager on the outcome of a sporting event. Therefore, by definition, the RSBIX NFL futures do not enable, involve, relate to or reference “gambling through the futures markets.”⁷

ErisX also notes that the focus of the RSBIX NFL futures contracts is hedging commercial exposure and does not relate to “gaming” simply because Licensed Sportsbooks accept wagers from their customers. The RSBIX NFL futures contracts are based on the athletic competition, sports team performance and the like – which are not themselves gaming activities. In other words, the settlement of the futures contract is based upon the outcome of an event, and is not based upon wagers (*i.e.*, gambling).

Question 2: Do any of these contracts involve, relate to, or reference “an activity that is unlawful under any State or Federal law” as described in Commission regulation 40.11(a)(1)?

The RSBIX NFL futures contracts do not involve, relate to, or reference an activity that is unlawful under any State or Federal law as described in Commission regulation 40.11(a)(1). The

⁴ See *Provisions Common to Registered Entities*, 76 Fed. Reg. 44776, 44785-6 (July 27, 2011) citing Congressional Record—Senate, S5906, footnote 34 (July 15, 2010).

⁵ Congressional Record – Senate, S5906 (July 15, 2010).

⁶ *Id.* (Emphasis added.) Then-Senator Blanche Lincoln confirmed Sen. Feinstein’s view, using sporting event contracts as an example of what **then** would be prohibited since, **at the time**, because there was no lawful sports-betting industry outside of Nevada, those contracts “would not serve any real commercial purpose.” *Id.* That is manifestly no longer the case. See *Id.*

⁷ *Provisions, supra*, at 44785-6.

participants eligible to trade these products involve Licensed Sportsbooks, Vendors, Stadium Owners and designated market makers, each of which conduct lawful businesses pursuant to State and federal law.⁸ Furthermore, as set forth in the RSBIX Self-Certification, “Licensed Sportsbooks” are limited to sportsbooks licensed by a State, Indian tribe (vested with the authority to regulate gaming by Federal law (the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*) and State compact), or the District of Columbia.

For the avoidance of doubt, ErisX notes that the event underlying the RSBIX NFL futures contracts, a game of football, is not an unlawful activity.

Question 3: ErisX has proposed to restrict participation in the futures contracts. If such contracts are determined to involve, relate to, or reference gaming or an activity that is unlawful under any State or Federal law, are ErisX’s proposed participation restrictions relevant to the Commission’s determination of whether one or more of the contracts serve an economic purpose and thus may impact the Commission’s determination on whether such contracts are contrary to the public interest? If so, how should such restrictions impact the Commission’s determination of whether one or more of the contracts serve an economic interest and thus may impact the Commission’s determination on whether such contracts are contrary to the public interest?

ErisX respectfully submits that this question is misdirected. ErisX’s proposed restrictions on which persons will be eligible to trade RSBIX NFL futures contracts is directly relevant to the question of whether “such contracts . . . involve, relate to, or reference gaming or an activity that is unlawful under any State or Federal law.” The participant limitations are also directly relevant to whether the contracts are contrary to the public interest. The limitations on types of participants and the requirement to engage in hedging activity collectively ensure that the economic purpose for the contracts is to hedge commercial exposure rather than to enable non-commercial persons to “gamb[le] through the futures markets” (*i.e.*, gaming).

Therefore, the Commission should consider all the facts and circumstances relevant to the RSBIX NFL futures contracts including the terms of the contracts and the participant limitations when evaluating whether the contracts involve, relate to, or reference gaming or an activity that is unlawful under any State or Federal law. Similarly, the Commission should consider the contracts and participant limitations together when evaluating whether the contract is contrary to the public interest. As explained in this letter and the RSBIX Self-Certification, the combined considerations demonstrate that the RSBIX NFL futures contracts do not involve, relate to, or reference gaming or an activity that is unlawful under any State or Federal law, and are not contrary to the public interest.

⁸ As noted in Section 1.A of the RSBIX Self-Certification (page 2), the 26 jurisdictions that already have authorized licensed (state or tribal) sports betting are Arkansas, Colorado, Delaware, the District of Columbia, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, Washington and West Virginia.

Question 4: In determining whether any of these contracts falls under the prohibition pursuant to Commission regulation 40.11(a)(1) as an activity that is unlawful under any State or Federal law, to what extent should the Commission be influenced by whether all states' laws permit gaming (including sports gaming), and/or by the prohibition of interstate betting under Federal law?

The Commission should focus on the actual business enterprise and the laws applicable to the business when it assesses whether the business is unlawful under any State or Federal law. For example, a Licensed Sportsbook located in New Jersey that complies with applicable State and Federal law is not unlawful under "any State or Federal law." ErisX notes that the Licensed Sportsbooks eligible to trade the RSBIX NFL futures contracts will be conducting lawful businesses pursuant to the laws of the jurisdictions in which they are licensed, and Federal law.

ErisX urges the Commission to avoid an unnecessarily restrictive reading of CFTC Rule 40.11. Any assessment of whether the business is unlawful pursuant to CFTC 40.11 should necessarily be limited to the laws that apply to the business. Using the above example of a Licensed Sportsbook in New Jersey, the fact that the Licensed Sportsbook could not theoretically operate its business in Maine is not relevant to whether the actual business operation of the Licensed Sportsbook is unlawful. Furthermore, ErisX is unaware of any policy rationale as to why the Commission should consider laws that do not apply to a business when assessing whether the business is unlawful.

Question 5: Could the trading of these contracts that involve sports gaming create incentives to influence the outcome of a sporting event or other outcomes related to sporting events? What mechanisms would be available to the Commission or to the DCM to surveil for, and guard against, manipulation of these contracts through manipulation of sporting events or other outcomes related to sporting events?

ErisX believes that the RSBIX NFL futures contracts do not create added incentive to influence the outcome of a sporting event or other outcomes related to sport events. Furthermore, the National Football League does not object to ErisX listing these contracts, which further supports the notion that the RSBIX NFL futures contracts should not impact the integrity of sporting events.

On the topic of trading the RSBIX NFL futures contracts, as noted above, Licensed Sportsbooks, Vendors and Stadium Owners can only trade the contracts for the purpose of hedging their commercial business. ErisX expects that the ability for commercial market participants to hedge exposure should reduce the incentive to influence an outcome because hedging activity is designed to make a participant indifferent to a particular outcome. Furthermore, market-makers profit from the spread between their sales and purchases, so they too are indifferent as to the outcome of an event or whether futures prices increase or decrease. Consequently, both groups of permitted participants should not have an incentive to influence the outcome. As a DCM and self-regulatory-organization, ErisX has the capability to surveil for and confirm that these businesses are engaging in hedging and market-making activity as opposed to speculative activity.

In terms of the broader potential to influence the outcome of sporting events, as noted in the RSBIX Self-Certification, Licensed Sportsbooks and state regulators have in place stringent monitoring and game integrity measures. Licensed Sportsbooks are also considered financial institutions for purposes of the Bank Secrecy Act and PATRIOT Act anti-money laundering and suspicious activity reporting obligations.⁹ Furthermore, there are independent organizations that specifically focus on monitoring and deterring cheating and manipulation in sports. For instance, the Sports Wagering Integrity Monitoring Association (SWIMA) is a not-for-profit organization designed to detect and discourage fraud and other illegal or unethical activity related to betting on sporting events in the United States. SWIMA is a multi-jurisdictional entity that works in partnership with its member gaming operators; Federal, State and tribal regulators and law enforcement; and other various stakeholders involved in sports wagering in the United States. In addition, sports leagues have in place mechanisms, including policies and procedures to protect the integrity of the games.

Question 6: What factors should the Commission consider in determining whether these contracts are “contrary to the public interest”?

The analysis of whether a contract is “contrary to the public interest” should hinge on the economic purpose of the contract, the so-called “economic purpose test.” According to the Commission, “the economic purpose test requires a board of trade to demonstrate that transactions for future delivery in a commodity are, or reasonably can be expected to be, quoted and disseminated for price basing, or utilized as a means of hedging against possible loss through fluctuations in price.”¹⁰ The RSBIX NFL futures contracts provide a means for Licensed Sportsbooks, Vendors and Stadium Owners to hedge risks that directly impact their lawful businesses. That is, these businesses face economic gain/loss that are directly correlated to the outcome of sporting events. Furthermore, the activities of these businesses are permitted pursuant to State and Federal law, and therefore, should be presumed to be in the public interest.¹¹ The ability to make the futures markets available for lawful businesses to hedge their commercial exposure is at the core of the Commodity Exchange Act and the mission of the Commission, and thus, should be presumed to be in the public interest.

ErisX also notes that the hedging purpose of RSBIX NFL futures contracts is significantly different from the 2012 Order regarding political event futures contracts in which the Commission determined that the economic consequences of a political election were too

⁹ See 31 U.S.C. 5312(a)(2).

¹⁰ See In the Matter of the Self-Certification by North American Derivatives Exchange, Inc., (Order Prohibiting the Listing or Trading of Political Event Contracts), Comm. Fut. L.P. 32148 (CCH), 2012 WL 12347216 (Apr. 2, 2012) (“**2012 Order**”).

¹¹ See, e.g., *Sullivan v. Nassau Cty. Interim Fin. Auth.*, 959 F.3d 54, 66 (2d Cir. 2020) (noting the general presumption that “a passed law is valid and done in the public interest”); and *Nebbia v. People of New York*, 291 U.S. 502, 537, 54 S. Ct. 505, 516 (1934) (“[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects . . . , including the prices to be charged for the products or commodities it sells. So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”) (emphasis added).

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unpredictable and remote for a political event contract to serve a hedging purpose. By contrast, the RSBIX NFL Futures contracts provide an economically rational mechanism for Licensed Sportsbooks, Vendors and Stadium Owners to hedge the tangible, readily foreseeable and direct financial consequences that they face in connection with conducting their lawful business.

Conclusion

ErisX appreciates the opportunity to provide public comment further supporting the lawfulness of our innovative RSBIX NFL futures contracts. Hopefully, our comments and responses to the Commission's questions will help the Commission and the public understand the compelling commercial need for these contracts, and how they are consistent with the Commodity Exchange Act, and the CFTC's implementing regulations. We look forward to a productive dialogue with the Commission, Staff, and the public.

Sincerely,

/s/ Thomas Chippas

Thomas Chippas

CEO