January 22, 2021

VIA Electronic Submission

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 (Industry Filing 20-004)

Dear Mr. Kirkpatrick:

I am writing in response to the Commission's request for comment regarding the proposed Eris Exchange, LLC ("ErisX"), RSBIX NFL Futures Contracts, which seek to introduce trading in contracts related to the outcome of certain sporting events. My comments will address the utility of such contracts in meeting the commercial hedging needs of this sector of commerce.

In recent times, two important trends have emerged in the evolution of futures markets and how they are regulated, trends that have expanded opportunities for commercial entities to utilize the financial markets to meet their risk management needs. The first, is the expansion of the universe of CFTC approved commodity-related instruments to serve the needs of commercial users, beginning more than a century ago in the agricultural sector with the creation of plain vanilla futures and options for agricultural commodities, and more recently in the financial sector, with the introduction of financial and security-related futures and derivatives. The second is the recognition of the importance of innovative new tools in meeting the risk-management needs of commercial entities, and the importance of adjusting regulation to meet those needs. *See e.g., The Hedging Definition and the Use of Financial Futures and Options: Problems and Recommendations for Reform,* Report of the Financial Products Advisory Committee of the Commodity Futures Trading Commission (June 15, 1987) (recommending that the CFTC amend various rules and revise its definition of hedging to allow the use of futures and options for risk-management purposes).

In contrast to these developments, the Commission historically has taken a more restrictive stance towards the establishment of markets and financial instruments for certain events, and for prediction markets in general, notwithstanding their utility in meeting the risk-management needs of certain sectors of the economy that currently are not well served by financial markets. While there has always been considerable debate as to the economic utility of such markets, the Commission has focused more on monitoring them for failing to comply with its contract designation requirements than in fostering their development. Given the express bias of the Commodity Exchange Act against gaming, this attitude is understandable, but the Commission should also recognize, as one scholar has put it, that "[t]he plain text of laws restricting gaming, commodities futures trading, and securities exchanges fits prediction markets badly,"[1] and further, that the application of such laws to such prediction markets can end up "doing more harm than good."[2] This is especially so where counterparties in the legal sports betting sector desire to shift tailored risks between them through futures and other derivatives.

Applying a restrictive view here is neither called for nor necessary for two reasons. First, unlike previous event or prediction contracts that were offered to U.S. investors without the benefit of compliance with the CEA's contract designation, the proposed contracts pose no such challenge to the integrity of the Commission's regulatory system, as ErisX formally seeks designation for its contracts under the Commission's rules. Second, in contrast with contracts that in the past were offered primarily to facilitate speculation by the general public for certain events or outcomes, the contracts offered by ErisX serve a legitimate economic purpose—to meet the hedging needs of commercial market participants in this sector, which include sportsbooks, stadium and arena owners, vendors, and other affected sports industry entities—so that they can manage their underlying economic, commercial, and financial risks.

Although the ErisX contracts raise an issue as to whether they are suitable for trading in light of their association with sport event gaming, that should neither trouble the Commission in its review nor impede their approval. That is because, while the underlying "commodity" involves placing bets by the trading public on the outcome of sporting events, the futures contracts offered by ErisX do not. Further, unlike traditional futures regulated by the Commission, these contracts will be accompanied by strict eligibility requirements for participation, and equally limited restrictions on their permissible use. Such participation and hedging restrictions are akin to the kind of restrictions imposed in the past on activities occurring on what was known as "exempt boards of trade," and are more closely associated today with the kinds of protections and restrictions that are placed on swaps transactions by the Dodd-Frank Act.

We should be mindful of the fact that one of the most important functions of futures markets is to serve those who desire to shift unwanted risk from themselves to other market participants who are willing to take that risk on. As discussed above, that is exactly the purpose and the intended function of these contracts. As one of the comment letters has aptly noted, the proposed contracts "provide a financial markets solution to hedging" the financial risks associated with operating what is now the legal business of licensed sportsbooking.[3]

Here, the benefits will accrue not only to those operating directly in the sports gaming industry by allowing them to manage betting imbalances in a less volatile manner, but also to the local economy that is intertwined with sporting events, which like those operating directly in the

---

[1] Tom W. Bell, *Prediction Markets for Promoting the Progress the of Science and the Useful Arts*, 14 Geo. Mason L. Rev. 37, 60 (2006) (observing that the statutes and regulations against gambling and gaming "arose in response to quite different transactions, long before anyone had even conceived of prediction markets.").

[2] *Id.*

[3] Comment Letter by Susquehanna International Group, LLP, re: CFTC Rule 40.1 l(c) Review and Comment Period, *Proposed RSBIX NFL Futures Contracts* (Industry Filing 20-004) (January 14, 2021).

sporting sector, is subject to financial windfalls and wipeouts depending on the win/loss record of home sports teams. Indeed, the economic consequences associated with the outcome of sporting events, as one commentator has noted, include "increases or decreases in restaurant receipts, subsequent advertising rates in local markets, or sales of particular types of merchandise."[4] Finally, the benefits accrue to end users themselves in terms of cost savings passed through by sportsbooks able to operate in a more efficient manner.

Accordingly, in considering whether to approved these contracts, the Commission should focus on the bigger picture—the need to provide an effective hedging and risk management tool for a nascent industry. Rather than viewing its decision here as one involving whether to permit a questionable activity, the Commission should view it instead as an opportunity to provide an emerging commercial sector with access to traditional financial risk management tools that other sectors of the economy currently enjoy.

Finally, the one thing that the Commission should avoid is the temptation to apply current standards pertaining to events markets too literally and too strictly, and, thus, prevent those operating in this nascent industry the opportunity to manage their financial risks. In approaching its important decision here, the Commission should, in the words of a past commissioner, "be very circumspect about the impact [its] policies can have on markets and their vital utility to the public."[5]

Sincerely,

Robert Zwirb
Former Counsel to CFTC Chairman (1988-1992) and Commissioner (2002-2006)

---

[4] Paul Architzel, *Event Markets Evolve: Legal Certainty Needed, Futures Industry Magazine*, at 50-53 (March/April 2006).

[5] Remarks of Sharon Brown-Hruska, Commissioner, CFTC, *The Functions of Derivative Markets and the Role of the Market Regulator*, 2006 Planalystics GasBuyer Client Conference, May 18, 2006 (noting that events markets that rely upon "the price discovery function that markets typically perform so well" may "also provide a hedging function like futures markets and should be similarly regulated").