



January 28, 2021

Christopher Kirkpatrick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581
<https://comments.cftc.gov/PublicComments/CommentForm.aspx?id=5203>

Re: CFTC Review of RSBIX NFL Futures Contracts Proposed by Eris
Exchange, LLC

Dear Mr. Kirkpatrick:

Thank you for the opportunity to respond to the Commodity Futures Trading Commission (“CFTC” or “Commission”) “Questions on the Eris Exchange, LLC (“ErisX”) RSBIX NFL [National Football League] Futures Contracts for Public Comment.”¹

The Eris Exchange has the name of the Greek goddess of discord, mother of famine, murder, fights, lies, and ruin;² she rolled a golden apple into a wedding feast and set off the Trojan War.³ The name is appropriate. Sports gambling and illegal sports bookmaking are foundational tools for organized crime.⁴ Eris claims that access to its NFL contracts will be limited, but there is no effective way to stop the allowed participants from acting as undisclosed agents or nominees for gambling retail participants and illegal sports betting bookmakers. Reducing risks through hedging enhances the ability of any business to succeed. Giving illegal bookmakers, known as

¹ CFTC, Release Number 8345-20, *CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC*, Dec. 23, 2020, avail. at <https://www.cftc.gov/PressRoom/PressReleases/8345-20>.

² Hesiod, *Theogony*, 225-32.

³ “The Judgment of Paris,” famously painted many times.

⁴ “For the last century and a half, gambling has been the cornerstone of organized crime, providing both power and capital” Prof. Gary Potter, *Criminal Organizations: Vice, Racketeering and Politics in an American City*, p. 72 (1994). See also Peter Ferentzy & Nigel Turner, *Gambling and organized crime- a review of the literature*, 23 *Journal of Gambling Issues* 111 (2009), avail. at <http://jgi.camh.net/index.php/jgi/article/view/3812/3828>; Kevin B. Kinnee, *Practical Gambling Investigation Techniques*, ch. 1 (Elsevier 1992).

“bookies,” a futures contract to layoff their risks likewise would enhance their ability to succeed. Therefore, authorizing these instruments would help criminals succeed, and along with that criminal success inflict upon the public more of all of the harms that accompany illegal gambling, including money laundering, loan sharking, extortion, and broken families. This result would be contrary to the public interest.

The CFTC’s numbered questions with regards to the Eris’s RSBIX NFL futures contracts are set forth below with my responses.

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

Yes, all these contracts do so.

When it promulgated 17 C.F. R. §40.11, the CFTC noted “that its prohibition of certain ‘gaming’ contracts is consistent with Congress’s intent to ‘prevent gambling through the futures markets’ and to ‘protect the public interest from gaming and other events contracts.’ ... [the Congressional Record] emphasized that *the Commission* ‘needs the power to, and *should, prevent* derivatives contracts that are *contrary to the public interest because* they exist predominantly to *enable gambling* through supposed event contracts.’”⁵ The legal standard is not whether gambling or gaming is illegal; rather gaming, period- “involves, relates to, *or* references ... gaming”.

That these contracts involve, relate to, *and* reference sports gambling is clear in their very names - Eris’s proposed contracts are called “moneyline,”⁶ “point spread,”⁷ and “over/under”⁸ - terms of sports gambling and in fact the three main types of illegal sports bets.⁹ “Bookies.com” reports that “Moneyline betting is the purest form of wagering.”¹⁰

⁵ CFTC, *Final Rule, Provisions Common to Registered Entities*, 76 Fed. Reg. 44776 at 44786 col. 1 (Jul. 27, 2011) (emphasis supplied).

⁶ According to Sports Interaction Insights, *Moneyline Betting Explained*, “A moneyline bet is one of the easiest kinds of bets you can make at a sportsbook.”, avail. at <https://news.sportsinteraction.com/guide/moneyline-betting-explained>; see also Jack Moore, *The Complete Book of Sports Betting: A New No-Nonsense Approach to Sports Gambling* p. 36 (1996).

⁷ E.g., Bookies.com, *Point Spread Betting Explained*, May 27, 2020, avail. at <https://bookies.com/guides/what-is-point-spread-betting>; see also Jack Moore, *The Complete Book of Sports Betting: A New No-Nonsense Approach to Sports Gambling* p. 38 (1996) (“in the standard point-spread bet, assuming balance, the bookmaker will always retain the vig. There is no element of chance. In the case of money odds, however, the same number of units bet on each side will only lead to a vig for the bookmaker when the underdog wins. ... Before you start feeling sorry for the bookmaker, you should understand that there is a baseball line given out every day of the baseball season and it is the very rare day when all the winning teams were also the money-odds favorites.”).

⁸ E.g., Bookies.com, *Understanding Over/Under Betting For Sports Bettors*, (May 28, 2020) (“In NFL betting, the Over/Under is the most popular way to wager on totals, with lines set for every game on Sunday and in prime time for Monday Night Football and Thursday Night Football.”) avail. at <https://bookies.com/guides/how-to-do-over-under-betting>; NFLbetting.net, *How the Over/Under Works in the NFL*, avail. at <https://www.nflbetting.net/guide/over-under/>.

⁹ See Appendix A, “Sports Wagering Primer” in Prof. Koleman S. Strumpf, Dept. of Economics, Univ. of N.C., Chapel Hill, *Illegal Sports Bookmakers* (Feb. 2003) avail. at <http://users.wfu.edu/strumpks/papers/Bookie4b.pdf>.

Furthermore, according to the National Football League, football is a “game.”¹¹ “In the United States, football – both college and pro – is the gambler’s favorite sport.”¹²

Therefore, the Eris NFL futures contracts clearly involve, relate to, *and* reference gaming, and, in each instance, both gambling and the game of football. In its December 14, 2020, letter to the CFTC,¹³ Eris “certifies that the listing of the Contracts complies with the Act and the rules thereunder.” Eris’s certification appears false on its face.

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)?

Yes. All of these contracts involve, relate to, *and* reference sports gambling, an activity that is unlawful in about half of the United States.¹⁴ The decline in enforcement of anti-gambling laws¹⁵ does not make illegal gambling any less illegal. The American Gaming Association estimated that more than \$150 billion is unlawfully wagered every year on sports gambling in the United States.¹⁶

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?

¹⁰ Bookies.com, *Moneyline Betting* (May 26, 2020), avail. at <https://bookies.com/guides/how-to-bet-the-moneyline>.

¹¹ <https://www.nfl.com/>.

¹² James Jeffries as told to Charles Oliver, *The Book on Bookies: An Inside Look at a Successful Sports Gambling Operation*, p. 6 (Paladin Press 2000).

¹³ avail. at <http://www.cftc.gov/filings/ptc/ptc121520erisdcm003.pdf>.

¹⁴ See Law360, *Sports & Betting Legislation to Watch in 2021* (Jan. 3, 2021), avail. at <https://www.law360.com/articles/1336733/sports-betting-legislation-to-watch-in-2021>; American Gaming Association, *Illegal Sports Betting*, avail. at <https://www.americangaming.org/illegal-sports-betting/>; CBS Sports, *Wanna bet? Here’s where all 50 states stand on the legalization of sports gambling More than half the country has begun the process of legalizing sports betting* (Nov. 4, 2020), avail. at <https://www.cbssports.com/general/news/wanna-bet-heres-where-all-50-states-stand-on-the-legalization-of-sports-gambling/>; Roger Foley, *Illegal Bookmaking*, avail. at <https://www.rpfoley.com/illegal-bookmaking-and-illegal-bookmaking-on-a-pari-mutuel-facil.html>.

¹⁵ See, e.g., Cabot & Faiss, *Sports Gambling in the Cyberspace Era*, 5 *Chapman Law Review* 1, 8-9 (2002) avail. at https://chapman.edu/law/_files/publications/CLR-5-anthony-cabot-robert-faiss.pdf.

¹⁶ Robert Shawhan, *Legalizing Federal Sports Gambling*, 40 *Hastings Comm. & Ent. Jav Journal* 41 at 43 (2018).

No, the purported restrictions are irrelevant. The restrictions do not change whether any of the proposed contracts “involves, relates to, *or* references ... gaming.” In any case, the participant restrictions are effectively unenforceable by the CFTC, as the CFTC would have to rely on Eris, which has already shown itself dishonest with the CFTC by its false certification of compliance with CFTC rules. Even if the participant restrictions were enforceable, each of the restricted participants then would need to be policed to prevent them from acting as undisclosed agents or nominees for ineligible participants.

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?*

None at all. Article IV §1 of the U.S. Constitution requires that “Full Faith and Credit shall be given in each State to the public Acts ... of *every other* State.” The CFTC may not ignore the laws of *any* state that make sports betting illegal.

Even in states that have legalized sports gambling, there is and still will be illegal sports gambling,¹⁷ which these contracts would encourage, against the public interest, were the CFTC to approve them.

Finally, the standard of 17 C.F.R. §40.11(a)(1) is “gaming”, not “illegal gaming,” so, even if gambling was legal in every state, the contracts would still be prohibited under 17 C.F.R. §40.11(a)(1).

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?*

Yes, trading of these contracts would create incentives to influence the outcome of sporting events. Players could be bribed by holders of positions in these contracts to throw games, which gamblers have done.¹⁸ NFL team players, game fixers, and bookies

¹⁷ See, e.g., Wall Street Journal, *Your Neighborhood Sports Bookie Isn't Going Anywhere* (Jun 26, 2018), avail. at <https://www.wsj.com/articles/your-neighborhood-sports-bookie-isnt-going-anywhere-1530029329>; Chicago Tribune, *Will local bookies survive when legal sports betting comes to Illinois? The odds look good* (Jun. 18, 2019) avail. at <https://www.chicagotribune.com/news/ct-met-illinois-sports-betting-bookies-20190611-story.html>; SportsHandle, *Q&A: Here's How a Local Bookie Really Operates: Myths and Reality* (Feb. 28, 2018), avail. at <https://sportshandle.com/how-local-bookie-works-operates-myths-reality-interview/>.

¹⁸ e.g., in 1919, eight of the Chicago White Sox solicited bribes from gamblers to throw the 1919 World Series in what is called the “the Black Sox Scandal.” See Chicago Tribune, *1919 Black Sox: 5 misconceptions about the scandal* (Oct. 2, 2019), avail. at <https://www.chicagotribune.com/sports/white-sox/ct-cb-chicago-white-sox-black-sox-1919-world-series-20191002-bsusjrxo5ba7fifgarmg3mzgwmm->

could hold positions through “eligible” participants acting as undisclosed agents or nominees, and even without that occurring, the eligible participants would have economic incentives to bribe players to achieve payoffs. There are no adequate surveillance mechanisms available to the CFTC. There are many sports gambling scandals,¹⁹ and the CFTC should not offer up the futures markets as a venue for future scandals. Failure to detect a major future scandal using the Eris contracts could lead to public outcry, fairly or unfairly, against the CFTC. The CFTC should not risk its hard-won reputation by exposing itself to such corruption and scandal. Such a scandal could taint all futures contracts, which some already decry as disguised gambling,²⁰ potentially leading to reactive changes in law that could deprive legitimate, lawful businesses from access to futures markets, a result that would be contrary to the public interest.

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

As noted above, sports gambling and illegal sports bookmaking are foundational tools for organized crime. Organized crime uses sports gambling to build other illegal activities, including money laundering,²¹ extortion, game-fixing, usury,²² and

story.html; Encyclopedia Britannica, *Black Sox Scandal*.

¹⁹ E.g., John M. Dowd, Report to the Commissioner, In the Matter of Pete Edward Rose, Manager, Cincinnati Reds Baseball Club, Office of the Commissioner, Major League Baseball (May 9, 1989), avail. at https://www.baseball-almanac.com/players/p_rose0.shtml and <https://web.archive.org/web/20160625220526/http://www.thedowdreport.com/report.pdf>; Appendix A: Gambling Incidents and Scandals in College Sports, in *Special Report: Sprots and Gambling a Good Mix? I Wouldn't Bet On It*, 8 Marquette Sports Law Journal 401, 424 (1998).

²⁰ See, e.g., Prof. Jerry Markham, *Regulation of Derivative Financial Instruments*, 25 Seton Hall Law Review 1 (1994); Garrett Baldwin, *Where Trading Meets Gambling*, Futures Magazine (Aug. 15, 2015), avail. at <http://www.futuresmag.com/2015/08/15/where-gambling-meets-trading>. Cf. Note, *Back to the Future[s]: A Critical Look at the Film Futures Ban*, 29 Cardozo Arts & Ent. Law Journal 179, 201-02 (2001). See also Les Blumenthal, *Wall Street's a Casino, So Maybe State Gambling Laws Apply*, McClatchy Newspapers, (Nov. 29, 2009) (Sen. Maria Cantwell “going for their [top CFTC officials] jugular” to repeal federal pre-emption of state gambling laws in the Commodity Futures Modernization Act), avail. at <http://www.mcclatchydc.com/2009/11/29/79543/wall-streets-a-casino-so-maybe.html> [unenacted H.R. 2454, Waxman-Markey §355(b) would have rescinded federal preemption of state anti-bucket shop and anti-gaming laws for credit-default swaps]; Committee Hearings, House of Representatives, Committee on Oversight and Government Reform, *The Financial Crisis and the Role of Federal Regulators* (Oct. 23, 2008) prelim. tr. at 41:954-56 (Sen. Davis: allowing credit default swaps market “basically legalized gambling”); CFTC Chairman J. Christopher Giancarlo Response to [Pope Francis] Bollettino [on CDS as gambling on the failures of others] (Jul. 21, 2018), avail. at <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarloresponsetobollettino072118>.

²¹ E.g., Law360, *Ex-JPMorgan Manager Cops to Laundering \$50M for Crime Op* (Nov. 26, 2013), avail. at <https://www.law360.com/articles/491612/ex-jpmorgan-manager-cops-to-laundering-50m-for-crime-op>. For bookies, “access to large amounts of cash on short notice is essential.” Ronald Goldstock, *The Prosecutor as Problem Solver* in Kelly et al., *Handbook of Organized Crime in the United States* p. 444 (1994).

²² FBI, *Illegal Sports Betting*, avail. at <https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/illegal-sports-betting>: “Illegal sports betting has real consequences for people who place and receive wagers—and for the safety of the American public. Organized crime groups often run illegal gambling operations. These groups often use the money made from illegal gambling to fund other criminal activities, like the trafficking of humans, drugs, and weapons. These operations may also be involved in tax evasion and money laundering. One of the FBI’s priorities is to investigate organized crime groups that operate illegal sports betting operations and disrupt and dismantle their activities. Besides possibly funding

corruption,²³ and to infiltrate and control legitimate businesses.²⁴ Gambling causes social harm.²⁵

The availability of hedging instruments, including those traded in public futures markets, is an essential business tool for businesses needing to mitigate risks.²⁶ By Section 745 of the Dodd-Frank Act, as implemented in part by 17 C.F.R. §40.11(a), the CFTC is restricted in making such tools available “because”²⁷ doing so could help those involved in terrorism, gaming, and illegal activity. The standard of the rule and the law is not whether the company trading the instrument is itself involved in the illegal activity; it is whether there is any involvement with, relationship to, or reference of those activities **by the instrument**. The CFTC does not need to show that the trader is engaged in the illegal activity. The standard includes that the contract could hedge that illegal activity.

If a futures exchange offered a contract in suicide bomb vests and told the CFTC, “it’s no problem, terrorists aren’t eligible to trade them,” whether or not the exchange succeeded in keeping the terrorists from trading through eligible participants acting as undisclosed agents, terrorists would be helped by establishment of a liquid market and market price for suicide bomb vests.

That is what the Eris contracts would do for organized crime. It would give illegal bookies a futures contract to layoff their risks by using the futures markets for layoff betting.²⁸ Just as the ability to hedge promotes the stability of legitimate

organized crime activities, people who place wagers with illegal sports betting operations may be at risk of extortion and violence, which bookmakers may use to collect debts.”

²³ “In the back of every bookmaker’s mind is the question of how to make money and not go to jail or, worse, lose it to the IRS, Bookmakers have developed many creative ways to limit these changes of being investigated by trying to hook certain groups of people. By compromising a person who is in an important profession, the bookmaker can, in the end, own this person.” Kevin B. Kinnee, *Practical Gambling Investigation Techniques*, p. 36 (Elsevier 1992). While with the Indianapolis Police Department, Detective Kinnee “conduct[ed] over 700 investigations from vice/narcotics, property recovery, major case gambling operations, murder for hire and in-dept organized crime investigations.” http://www.police-writers.com/kevin_kinnee.html.

²⁴ Kevin B. Kinnee, *Practical Gambling Investigation Techniques*, p. 6 (Elsevier 1992). Mr. Kinnee’s diagram illustration is dramatized in the “Bust Out” episode 23 of HBO’s *The Sopranos* (2000).

²⁵ E.g., National Academy of Sciences, Committee on the Social and Economic Impact of Pathological Gambling, Committee on Law and Justice, Commission on Behavioral and Social Sciences and Education, National Research Council, *Pathological Gambling* (National Academy Press 1999), avail. at <https://www.ncbi.nlm.nih.gov/books/n/nap6329/pdf/>; Latvala, Lintonen & Konu, *Public health effects of gambling – debate on a conceptual model*, BMC Public Health (Aug. 9, 2019), avail. at <https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/s12889-019-7391-z.pdf>; Mary Heineman, *A comparison: The treatment of wives of alcoholics with the treatment of wives of pathological gamblers*, 3 *Journal of Gambling Behavior* 27 (1987), avail. at <https://link.springer.com/article/10.1007/BF01087475>.

²⁶ Thomas A. Hieronymus, *The Economics of Futures Trading* (Commodity Research Bureau, 1971); Teweles & Jones, *The Futures Game* (McGraw-Hill, 2nd ed. 1987); Jack D. Schwager, Schwager on Futures: *Fundamental Analysis* (1995); CFTC, *Final Rule, Position Limits for Derivatives*, 86 Fed. Reg. 3236 at *passim* (Jan. 14, 2021); CFTC Chairman J. Christopher Giancarlo Response to Bollettino (Jul. 21, 2018), avail. at <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarloresponsetobollettino072118>.

²⁷ CFTC, *Final Rule, Provisions Common to Registered Entities*, 76 Fed. Reg. 44776 at 44786 n. 35 (Jul. 27, 2011).

²⁸ Morris Ploscowe, *New Approaches to Gambling, Prostitution and Organized Crime*, 38 *Notre Dame*

businesses, the ability to hedge will promote the financial stability and economic success of these illegal businesses. Authorizing these instruments would help criminals, and increase all of the harms that accompany illegal gambling and organized crime becoming more profitable by the criminals' ability to hedge the risks of engaging in illegal gambling. This is contrary to the public interest and therefore prohibited under 17 C.F.R. §40.11(a)(2).

Conclusion

For the reasons set forth above, the CFTC should deny certification of the Eris NFL gambling futures contracts, and investigate all companies and individuals who may have violated applicable law and CFTC rules in connection with Eris's conduct in this matter. The CFTC should consider that the contempt Eris has shown for CFTC rules in its self-certification of these contracts could indicate contempt for other CFTC rules.

Yours truly,



Jeremy D. Weinstein

cc: Congressman Mark DeSaulnier
Financial Times

Law Review 654, 655-56 (1963) ("Lay-off Betting. Every bookmaker from time to time gets more action on a particular horse or a particular sporting event that he can handle. The losses, in case the bettor wins, may be too great for the individual bookmaker. Like any businessman, therefore, the bookmaker tries to reinsure himself against large losses through the mechanics of lay-off betting. The risks of too great losses are spread through several layers of the bookmaking hierarchy. The top echelons of the hierarchy may take an additional step to insure themselves against too large losses. They may at the last minute bet substantial sums on the horse on which they have large bets (this is so-called comeback money). In this way, if a horse wins, they will have considerable moneys from the track with which to pay off bettors.").