Mr. Christopher J. Kirkpatrick
January 28, 2021

The New Sports Economy Institute

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

Re: Commodity Futures Trading Commission Rule 40.11 Review of Proposed RSBIX NFL Futures Contracts (Industry Filing 20-004)

The New Sports Economy Institute ("NSEI," or "we"), a 501(c)(3) non-profit organization welcomes the opportunity to respond to the Commodity Futures Trading Commission's ("CFTC," or the "Commission") request for comment on the three RSBIX NFL Futures Contracts proposed by Eris Exchange, LLC ("ErisX"): Moneyline Futures, Point Spread Futures and Over/Under Futures.

NSEI's mission is to transform society through sports by 1) promoting sports investing; 2) building a stronger economy with stronger ethics; 3) to bring financial literacy to the masses through sports initiatives. NSEI operates its principal website at www.thenewsportseconomy.org. NSEI has been an active participant in the courts and has submitted multiple amicus briefs, including one to the Supreme Court of the United States in *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. ___ (2018). NSEI is also actively participating in public policy discussions. Among other things, NSEI submitted a comment letter to the SEC on its concept release re: Harmonization of Securities Offering Exemptions. In January 2021, NSEI started issuing a newsletter at the intersection of sports, money and law called Full Court Press, which can be found at www.thefcpblog.com. Finally, NSEI is operating an educational sports trading platform called AllSportsMarket®, where investors can trade their favorite teams and earn dividends when their teams win.

NSEI is affiliated with a for-profit company that shares the common mission of transforming society through sports: Crystal World Holdings, Inc. ("CWH"). In executing on that mission, NSEI's focus is on financial literacy education, thought leadership and public policy discussions, while CWH focuses on a related goal: making sports an asset class. To CWH's best knowledge, CWH was the first commercial entity that has developed a sports-based financial product destined for CFTC jurisdiction in the United States, patent pending in several countries: SportsRiskIndex® ("SRI"). SRI is an index developed by CWH that tracks revenue generation capabilities of sports franchises. An index for each sports franchise is produced through a variety of commercial factors such as attendance and TV ratings. SRI futures, also developed by CWH are cash-settled futures contracts that settle based on the SRI. CWH has been granted a patent in China for the SRI.

CWH, together with the United States Futures Exchange ("USFE"), its designated contract market ("DCM") partner at the time, was in discussions with CFTC regarding the SRI as early as 2008. While CWH was ultimately not able to bring that product to the market at the time (through its DCM), because USFE had to shut down for financial reasons in the midst of the 2008 recession, we believe the process equipped us to provide unique perspectives on this matter. Similar to NSEI, CWH is also an active participant in policy discussions; for example, a CWH subsidiary submitted a comment letter to the CFTC's concept release re: appropriate regulatory treatment of event contracts in 2008.[1] Starting January 2021, CWH started a weekly newsletter at the intersection of sports and money, called the SportsFolio Journal, available at www.thesportsfoliojournal.com. Finally, CWH recently started operating a legal analysis and insights segment on the Thinkific platform under the Full Court Press Legends brand.[2]

NSEI commends the Commission on inviting the public to comment on ErisX RSBIX NFL futures contracts and is pleased to share its views on the specific questions posed by the Commission.

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

At the outset, we'd like to note that the proper adjudication of the issues surrounding ErisX's submission necessitates properly defining the terms "gaming" and "gambling." NSEI believes that there exists both genuine and intentional conflation of these terms by various industry participants, which, in turn, has significant jurisdictional implications. More specifically, the lack of consensus as to how "gaming" and "gambling" are defined results in substantial uncertainty regarding the boundaries of States' rights versus the federal government's in the gambling space.

[1] Available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/frcomment/08-004c023.pdf.
[2] Available at https://fullcourtpresslegends.thinkific.com.

How significant are the definitional issues? The excerpt below is literally the opening paragraph of a book titled *Gaming Law in a Nutshell*.[3]

> *Technically, there are distinctions in the common law among gambling, gaming, lotteries and wagers, and the distinctions have important differences in the eyes of the law. The entire field should be called "gambling," although it is understandable why the more genteel word "gaming" is used. However, care must be taken in using that term, since "gaming" also can mean children's video games or merely one form of gambling, i.e. where a patron goes to a location like a casino to participate in a gambling game.*

The authors of *Gaming Law in a Nutshell* wanted to settle the matter right away on the first page in a 413-page treatment. Definitions absolutely matter. They acknowledged that gaming and gambling are not synonyms. They recognized that gambling can happen in multiple ways and gaming is but one form of gambling.

NSEI submitted an amicus brief to the Supreme Court of the United States in *Murphy v. National Collegiate Athletic Association*, No. 16-476, 584 U.S. ___ (2018), and took the exact same position.[4] In it, NSEI argued that the position that gambling falls under the States' police power and, thus, sports gambling is a matter to be regulated by the states, is wrong. We noted that the argument that gambling is reserved to the states is ultimately based on the false premise that "gambling" and "gaming" are the same. As articulated in the excerpt above and demonstrated further below, they are not the same. The definitions of gaming and gambling require more context. On that note, NSEI also believes that dictionary definitions are generally insufficient and one has to look beyond such definitions and evaluate the terms within a broader context.

NSEI defines gambling as follows: Chance games and entertainment claims.[5] Thus, determining whether an activity is gambling is essentially a two-step process.

Step 1: Determine whether the activity is a game or a claim.

Step 2a: If the activity is a game, measure where the game lies on the skill vs. chance spectrum. If enough skill exists (however that boundary may be defined by the relevant law), the activity is not gambling.

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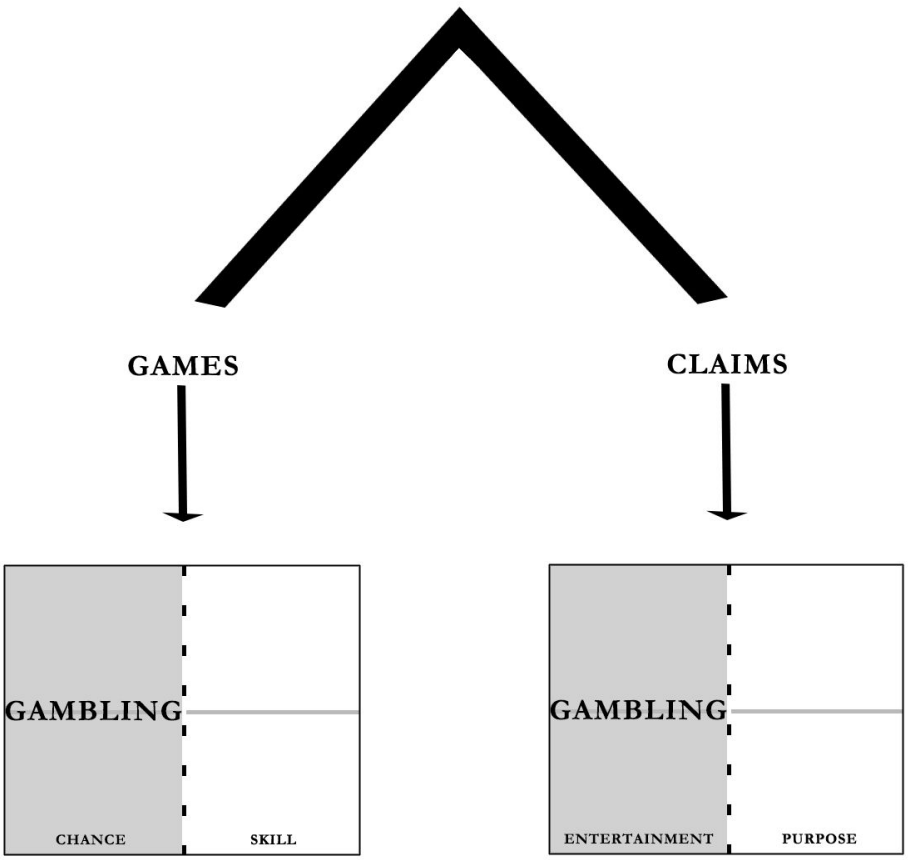
[3] Walter T. Champion, Jr. and I. Nelson Rose, Gaming Law in a Nutshell, Thomson Reuters (2012). I. Nelson Rose is widely considered an authority on the subject and trademarked the term Gambling and the Law®.
[4] NSEI's amicus brief is available at:
https://fb6a780b-e5f2-49ad-b8e6-81a322e95837.filesusr.com/ugd/8497cc_f3778115d0bb4f6fb661070ff3cec963.pdf
[5] To the extent lotteries can be considered as chance games, this definition would encompass lotteries; otherwise, it would exclude them. In any event, the definitional considerations around lotteries are not relevant for the purposes of this comment.

Step 2b: If the activity is a claim, measure where the claim lies on the entertainment vs. purpose spectrum. If there exists sufficient valid economic purpose, the activity is not gambling.

The following figure depicts this two-step process visually:

Figure 1: Gambling Determination for Games and Claims



Under games[6], more skill means the characterization is moving away from gambling and once it is determined the level of skill crosses the boundary, it ceases to be gambling. It is true that it is not always easy to agree on where that boundary lies; a complicating factor is that the states themselves apply different standards as to what constitutes "sufficient" skill. Still, this has been the test for games for a long time and some subjectivity is inevitable.

At one end of the spectrum, chess is considered a pure skill game, therefore not gambling. Roulette lies at the other end of the spectrum as a pure chance game, therefore it is gambling. These are edge cases where finding consensus is rather straightforward. Poker is arguably somewhere in the middle, and reasonable people can disagree whether it is a game of skill or game of chance, which has resulted in never-ending arguments and a substantial body of case law.

A claim is a contract that is settled based on contingent events. Not all derivatives contracts can be characterized as claims, e.g. a forward contract is generally not considered to be a claim. However, we strongly believe that *all* claims are potential derivative contracts that fall under the Commission's jurisdiction. If these contracts are considered to serve the public interest, they should be regulated by the Commission, and they can only be traded on venues regulated by the Commission. If they don't, the listing and trading of these contracts should be prohibited by the Commission.

Derivative contracts that are regulated by the Commission serve the public interest by serving a useful purpose: hedging/risk management and/or price discovery. Such products lie at the purpose end of the spectrum. In fact, that is the reason why they are regulated by the Commission in the first place; they wouldn't be approved by the Commission for listing and trading had the Commission concluded that not enough valid economic purpose exists. At the other extreme of the spectrum lies sports betting contracts, a pure entertainment vehicle that does not satisfy any valid economic purpose.[7] These are the edge cases on the entertainment-purpose spectrum where finding consensus is rather straightforward. Naturally, the entertainment-purpose spectrum also has some claims that lie somewhere close to the boundary. If they cross the boundary to the purpose end of the spectrum, they cease to be gambling and can be listed and traded on a CFTC-regulated venue. Arguably, box office futures contracts fit the bill; they were approved by the Commission with a 3-2 vote, before ultimately being outlawed by Congress. The fact that there were lengthy discussions and the vote was close, points to the approximate location of the box office futures on the spectrum.

The Commission's question makes implicit reference to the Dodd-Frank Act, which President Obama signed into law on July 21, 2010, following the biggest economic crisis since the Great Depression. As such, it reflected a cautious approach by Congress. The Commission itself was

[6] For the purposes of this comment, we use the words "game" and "contest" interchangeably.
[7] The Commission took the exact same view in the "Designation Memorandum of Hedgestreet, Inc.," from the Division of Market Oversight to the Commodity Futures Trading Commission, dated, February 10, 2004, available at https://www.cftc.gov/sites/default/files/files/opa/opahedgestreetdesignationmemo021704.pdf (footnote 3). It noted: "HedgeStreet has stated, however, that it intends to list only contracts that have a legitimate economic purpose and does not intend to list for trading contracts based on terrorist activity or gambling activities, such as the outcome of sporting events."

concerned with the event contracts and issued a concept release on the appropriate regulatory treatment of event contracts on May 7, 2008.[8] Congress' conclusions were already being considered by the Commission, for example the Commission asked specific questions around terrorism in its concept release.

One shortcoming of the Dodd-Frank Act is that the word "gaming" is not defined. Essentially, Congress itself seems to have resorted to the "more genteel" term "gaming," leaving the question open as to what it meant by gaming. Since the statute is not very helpful in resolving this uncertainty, both legislative history and historical context become quite relevant.

From a legislative history perspective, there is strong support that Congress was worried about gambling, not gaming, as evidenced by the following exchange:[9]

> *Mrs. FEINSTEIN. It is very important to restore CFTC's authority to prevent trading that is contrary to the public interest. As you know, the Commodity Exchange Act required CFTC to prevent trading in futures contracts that were "contrary to the public interest" from 1974 to 2000. But the Commodity Futures Modernization Act of 2000 stripped the CFTC of this authority, at the urging of industry. Since 2000, derivatives traders have bet billions of dollars on derivatives contracts that served no commercial purpose at all and often threaten the public interest.*
>
> *I am glad the Senator is restoring this authority to the CFTC. I hope it was the Senator's intent, as the author of this provision, to define "public interest" 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. Will CFTC have 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?*
>
> *Mrs. LINCOLN. That is our intent. 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."* ***It would be quite easy to construct an "event contract" around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling.*** *(emphasis added).*[10]

[8] As mentioned above, CWH submitted a detailed comment to the Commission through its operating subsidiary at the time.

[9] Congressional Record, Proceedings and Debates of the 111th Congress, 2nd Session, Senate, July 15, 2010, available at https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf.

[10] As far as we can tell, this is the relevant congressional exchange on sports-based event contracts in its entirety. The CEO of ErisX submitted a comment to the Commission (see, infra, footnote 13) in which he seems to be suggesting that the attitude toward sports-based event contracts was a result of sports betting being only legal in Nevada at the time (footnote 6 in the ErisX comment). NSEI was not able to locate that comment in the congressional record, and it does not appear the extent of legalization was a factor considered by Congress. Assuming we did not inadvertently miss it, we conclude that the statement by ErisX is at best misleading, and at worst an intentional misrepresentation.

The exchange that happened literally seconds after is equally illustrative.

> *Mrs. FEINSTEIN. And does the Senator agree that this provision will also empower the Commission to prevent trading in contracts that may serve a limited commercial function but threaten the public good by allowing some to profit from events that threaten our national security?*
>
> *Mrs. LINCOLN. I do. National security threats, such as a terrorist attack, war, or hijacking pose a real commercial risk to many businesses in America, but a futures contract that allowed people to hedge that risk would also involve betting on the likelihood of events that threaten our national security. That would be contrary to the public interest.*
>
> *Mrs. FEINSTEIN. I thank the Senator for including this provision. No one should profit by speculating on the likelihood of a terrorist attack. Firms facing financial risk posed by threats to our national security may take out insurance, but they should not buy a derivative. A futures market is for hedging. It is not an insurance market.*

This exchange essentially covers the terrorism, assassination and war prongs of the provision. While there is a difference between these types of events that are unlawful and sporting events that are lawful, Congress in each case considered them contrary to the public interest. Critically, Congress acknowledged that commercial risk exists with respect to national security matters; Congress just concluded that insurance, rather than derivatives markets would be better suited to manage that risk. On the other hand, Congress saw no real commercial purpose in contracts that settle based upon game outcomes, and inserted the "gaming" prong of the provision into the law for precisely that reason. Thus, the Dodd-Frank Act covers at least two different fact patterns: risks that may be better managed via other mechanisms and risks that do not exist in the first place.

In NSEI's opinion, there is simply no other way to read the "gaming" prong of the provision. Legislative history clearly shows that Congress made explicit references to phrases such as terrorist attack, war, and hijacking and the letter of the law almost perfectly matches those concepts: terrorism, war and assassination. The other issue discussed in Congress, literally seconds before the national security matters, contained references to event contracts around the Super Bowl and other sporting events. Congress specifically noted that those contracts "would be used solely for gambling."

Any alternative reading is simply implausible. Congress could have not possibly meant video games. The video gaming industry became a substantial business that involves genuine commercial risks. In fact, the economics of the video game industry is quite similar to the movie industry in the sense that it is hard to predict which title will be a blockbuster. A few winners produce substantial revenues for the game developers and many others hardly make it out of the gates; big budgets do not guarantee that a title will succeed. Video games, then, are not unlike movies. Though ultimately outlawed by Congress, the Commission approved the listing and trading of box office futures

contracts. We don't believe the Commission would be averse to approving contracts on video games as long as those products were deemed to serve the public interest.

Congress could have also not possibly meant casino games, or more broadly, any games. It is well understood that games are activities limited to a confined space to be played under predetermined rules. This has been a well known fact in other disciplines that analyzed games, such as sociology. As Roger Caillois, a French sociologist powerfully summarized:

> *In effect, play is essentially a separate occupation, carefully isolated from the rest of life, and generally is engaged in with precise limits of time and place. There is place for play: as needs dictate, the space for hopscotch, the board for checkers or chess, the stadium, the racetrack, the list, the ring, the stage, the arena, etc. Nothing that takes place outside this ideal frontier is relevant … In every case, the game's domain is therefore a restricted, closed, protected universe: a pure space.*[11]

The fact that spatial boundaries exist in the context of a true game is the primary reason why States have jurisdiction over games in the first place; they can regulate activity that is happening within their borders and since games happen in confined space, by definition they happen within State borders.[12]

To the extent consideration and prizes are involved, States would also have jurisdiction over where the boundary of skill needs to be drawn and to the extent a game is a gambling game, whether that activity will be permitted. Gaming law is fairly established in this regard; games of skill are not gambling and games of chance are. What the state decides on is i) definition of "sufficient" skill; and ii) whether or not to permit gambling and if so, under what terms.

Either way, gaming activity, when defined properly and narrowly to only include true games, is not under the Commission's jurisdiction. Contracts on sporting events and other contests, on the other hand, are not *games,* they are *claims* on contingent events and certainly fall under the Commission's jurisdiction. Contracts on sporting events settle based on sports-related outcomes. ErisX already acknowledges this point in their submission when they make the following representations:

- *The moneyline Contracts settle based upon the outright winner of a game.*
- *The point spread Contracts settle based upon the winner of a game after taking into account the away team's total points as adjusted by the point spread.*

[11] Roger Caillois, *Man, Play and Games* 6-7 (1961).

[12] It is true that advances in technology allow two people to play a game, say chess, even when they are not within a confined space. However, technology is just another form of delivery; if the players wished to bypass technology and play the game the old fashioned way, they could do it. This is not true for sports bets, or any other claims for that matter. The issue is not that these activities can be carried out online, or via an app. It is the fact that these contracts could never settle without having a connection to real life. A true game, on the other hand, always settles in the confined space it is played in without needing to know what is going on in the real world.

- *The Over/Under Contracts settle based upon the total points scored by each team in a game, and whether the point total was over or under a predetermined point threshold (the "over/under value").*

ErisX, in a comment submitted to the Commission by its CEO on December 29, 2020 reinforced that point, but wrapped it into an incoherent conclusion.[13]

> *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).*

It is not at all clear what a "future contract based on wagers" means. The fact that these contracts settle based on the outcome of an event obviously does not imply that they are not gambling. The question is whether they serve the public interest, regardless of what events they settle on.

While ErisX does not explicitly say that sports is an excluded commodity in their submission, they clearly are taking that position. How can they not, when they are self-certifying the contracts and subject themselves to CFTC jurisdiction? In addition, in a public post introducing these contracts, they stated that their partnership with RSBIX is "ErisX's first strategic collaboration to provide listing and clearing services enabled by our recent DCO order amendment permitting us to clear derivatives **on any commodity**."[14] (emphasis added). ErisX therefore, must believe that sports performance is an excluded commodity. It is worth noting that the Managing Director of NSEI, and CEO of CWH petitioned the Supreme Court in 2013, *pro se*, asking the question "Is sports performance an excluded commodity under the Commodity Exchange Act?" The question may have been premature; however its significance is being validated eight years later, with the Commission now finding itself in a situation to opine on the matter.

We believe any claims that are contingent on anything sports-related, performance-related or otherwise, are under CFTC's jurisdiction. On the performance side, the settlement can be based on game outcomes, point spreads, total points scored, athlete performance, whether an athlete is going to meet a benchmark, i.e. rushing 100 yards, score 20 points, etc. The contracts can be structured as event contracts, as indices, or they can have some other complicated mechanics. They can be settled based on a single event, or multiple events. We believe that the specific structure is not what matters, only the fact that the contract settles based on a future contingent event. The natural implication is that unless the contingent event(s) are realized and the uncertainty surrounding these events are resolved, the contracts won't be settled.

Along those lines, NSEI also believes that daily fantasy sports ("DFS") positions are simply contingent claim contracts on athlete performance. The fact that the settlement mechanism is different from a traditional event contract (these positions settle based on athlete performance and

[13] Available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=63780&SearchText=.
[14] https://erisxinsights.medium.com/erisx-and-rsbix-introduce-sporting-event-based-futures-contracts-8f747f16c671.

relative ranking of the participants) is not determinative. These contracts settle based on a set of future contingent events, and as the New York Attorney General's office aptly pointed out, "customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes."[15] Thus, contrary to popular belief, daily fantasy sports are not games, but rather claims on contingent events and thus fall under the Commission's jurisdiction.[16] Moreover, since they are purely entertainment claims, they do not serve the public interest and should be prohibited by the Commission.[17] One does not "play" DFS as you "play" a game, one rather participates in a sports pool where the payouts are based on future contingent events of individual players pooled together.

Congress was clear in its mandate. It did not want contracts that don't serve the public interest to enter the financial markets, making the CFTC the ultimate authority that is tasked with making that determination.

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)?**

This provision essentially serves as a catch-all provision. As detailed above, NSEI believes gaming and gambling are not synonyms and the most reasonable interpretation of the gaming provision is that Congress wanted to keep gambling contracts at bay. As such, once the term "gaming" is properly defined, NSEI believes that the Commission does not need to consider the prong referenced in this question, as the Commission can exclusively rule on the "gaming" provision alone.

In the alternative, if the Commission chooses to consider this prong, then the Wire Act of 1961 becomes relevant. The First Court of Appeals affirmed just last week, on January 20, 2021, that the Wire Act clearly covers sports gambling contracts.[18] Thus, any sports gambling contracts that cross the state borders are unlawful under Federal law anyway.

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[15] https://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf.

[16] See, John T. Holden & Ryan Rodenberg, *Modern Day Bucket Shops? Fantasy Sports and Illegal Exchanges*, 6 Tex. A&M L. Rev. 619 (2019). Available at: https://doi.org/10.37419/LR.V6.I3.2. The authors state that "that certain fantasy contests may run counter to Commodity Futures Trading Commission regulations," and discuss whether CFTC has jurisdiction over daily fantasy sports. We believe it does. In addition, CFTC's jurisdiction is not limited to a subset of daily fantasy sports offerings; it covers all of them. To be clear, we do not agree with the following statement in the paper's conclusion: "The CFTC's jurisdiction over event contracts could potentially set up the agency to one day regulate the DFS market or even a sports gambling market. Specifically, it appears likely that the CFTC could regulate certain DFS contests—especially the head-to-head variety—as a type of financial product." Asserting jurisdiction and regulation are not the same; rather, the latter is a subset of the former. The CFTC allows the listing and trading of contracts that fall under its jurisdiction *only if* they serve the public interest. Neither traditional sports betting nor DFS serves the public interest.

[17] NSEI's detailed views on this matter can be found in a series of posts it recently published on its FCP blog at www.thefcpblog.com.

[18] Opinion available at http://media.ca1.uscourts.gov/pdf.opinions/19-1835P-01A.pdf.

In doing so, the First Circuit also hinted that the existing sports gambling contracts may already be in violation of the Wire Act, notwithstanding the fact that they may have been legalized in some states. This is so because of the way that our communication protocols work today, including a heavy reliance on cloud computing.

The First Circuit was pretty clear that lotteries cross state lines in a myriad of ways. For example, it stated:

> *All of the NHLC's lottery-related activities use the internet or interstate wires.*

Also:

> *For its brick-and-mortar operations, the state lottery relies on computer gaming and back-office systems that manage lottery inventory and sales, which in turn depend on out-of-state backup servers.*

And:

> *Via its website and various social media platforms, the NHLC communicates draw results, advertises lottery games, and provides general information.*

Finally:

> *While the players themselves must be physically located in New Hampshire for the entirety of the transaction, intermediate routing of data or information ancillary to the transaction may cross state lines.*

In sum, it is pretty clear that the Court was not challenging the fact that the lottery operations cross the state borders. The lottery is saved not because it is not interstate, but because the Court believed it is outside the four corners of the Wire Act. Sports gambling clearly is within those four corners.

Thus, NSEI believes that the following activities are quite likely caught up in the Wire Act's net.

1. Daily Fantasy Sports
2. Practically any form of traditional sports betting delivered via mobile
3. Traditional sports betting that happens within a state at brick-and-mortar locations

It is not a coincidence that these contracts might be in violation of the Wire Act and simultaneously fall under CFTC jurisdiction. The Wire Act may have preceded the Commission's creation, but it was passed by a Congress that was relying on the same principle: to prohibit contracts crossing state lines that don't serve the public interest. The Wire Act may or may not have covered lotteries, it surely covered sports gambling, and it may have even covered contracts on non-sporting contests.[19] The contracts ErisX is proposing are already being listed and traded on unregulated venues and if

[19] Regarding lotteries, the First Court of Appeals concluded that lotteries were out of the reach of the Wire Act. At the same time there were no legal state lotteries when the Wire Act was enacted. Even more importantly, the legislative history of the Wire Act shows that Congress has made a conscious choice to not address lottery-type offerings because they did not cross the state lines. On the second issue of whether or not the phrase "contest" covers non-sporting events, there is no consensus; however, the Treasury issued regulations a few years ago before the Wire Act, where it separately defined the terms "sporting event" and "contest," with the latter including, among other things, elections. Thus, under one interpretation, the Wire Act simply addresses any claims that would now be considered under CFTC's jurisdiction.

they are unlawful under Federal law as we contend, the prong raised by the Commission in this question provides another vehicle for the Commission to rely on.

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?

It is an indisputable fact that prior to ErisX's submission, there was universal agreement that contracts that settle based on game outcomes are characterized as gambling. In addition to those contracts being entertainment claims, which in our opinion, fall under CFTC jurisdiction, they may already be in violation of the Wire Act.

ErisX essentially contends a contract with the exact same mechanics could escape the gambling characterization, if it is listed and traded under the terms outlined in its submission and if the trading is restricted to a narrow set of participants, and potentially becomes a risk management tool. In other words, ErisX is asking the Commission whether contracts that are totally indistinguishable from what we know as sports bets from a structural perspective, would serve the public interest if trading is limited to a narrow set of participants.

The answer is no. An insurmountable problem with the contracts proposed by ErisX is the following: unlike any other contract that the Commission has ever approved, the ErisX contracts are not designed to manage a *naturally occurring risk* for its purportedly most important constituent, the bookmakers. We don't disagree that bookmakers may be facing the risk of imbalanced books, but the *only* reason that they face that risk is because the Commission has not yet taken action on sports bets, which are event contracts that serve no valid economic purpose. As also mentioned in footnote 7 above, the Commission was concerned with such contracts and acknowledged that they would not serve a legitimate economic purpose.[20]

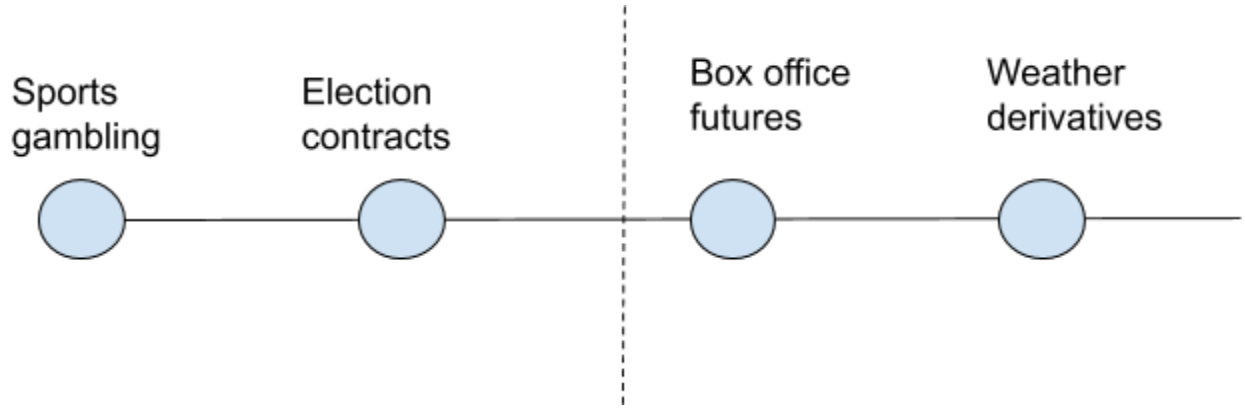
[20] https://www.cftc.gov/sites/default/files/files/opa/opahedgestreetdesignationmemo021704.pdf.

> *HedgeStreet has stated, however, that it intends to list only contracts that have a legitimate economic purpose and does not intend to list for trading contracts based on terrorist activity or gambling activities, such as the outcome of sporting events.*

It is widely believed that sports gambling is a matter reserved to the states. As detailed in our answer to the first question above, we vehemently disagree. That position is based on the false premise that "gaming" and "gambling" are equivalent. They are *not*. Rather, as we also noted in our amicus brief to the Supreme Court of the United States in *Murphy*, we believe sports performance is an excluded commodity, sports gambling contracts are commodity contracts that fall under CFTC jurisdiction, there is strong evidence that Congress, through the creation of the CFTC and their powers granted to the Commission, has occupied the field of sports gambling, and finally, as the Commission also acknowledged, sports gambling contracts do not serve a valid economic purpose.

The following illustration might be helpful.

Figure 2: "Exotic" Contracts Along the Entertainment-Purpose Spectrum



Weather Derivatives. CFTC has long allowed the listing and trading of weather derivatives.[21] These contracts allow participants that are exposed to weather risk to hedge that risk through the use of futures contracts.

Box Office Futures. As mentioned above, box office futures were subject to lengthy discussions. The Commission approved the listing and trading of the contract on a 3-2 vote. The Commission stated that "[t]he contracts are intended to allow participants in the motion picture industry to manage the financial risks associated with the production and distribution of motion pictures."[22]

[21] See, e.g. https://www.cftc.gov/PressRoom/SpeechesTestimony/opabrownhruska-45.
[22] https://www.cftc.gov/PressRoom/PressReleases/5834-10.

However, Congress outlawed the contracts; a statutory ban exists today for box office futures as well as onion futures.

Election Contracts. Notwithstanding the fact that there are various state laws on election contracts, the Commission asserted jurisdiction on election contracts. On April 2, 2012, the Commission issued an order prohibiting North America Derivatives Exchange's (f/k/a HedgeStreet) political event derivative contracts.[23] The Commission subsequently allowed the trading of these types of contracts pursuant to no-action letter dated October 29, 2014.[24]

Sports Gambling. Sports gambling largely consists of traditional sports bets and DFS offerings. The Commission has not yet asserted jurisdiction.

Evaluated on this spectrum, the difference between ErisX contracts and the others become clear. Regardless of whether traders take positions in certain contracts (the trading of which could happen on CFTC-regulated venues), elections will take place, movies will be made and it will snow in the Midwest. These risks are occurring naturally and there is a different set of stakeholders whose fortunes may be impacted by those risks. As such, futures contracts can be an effective way of hedging those risks to the extent contracts can be designed that serve the public interest.

Unlike these contracts, the risk faced by the bookmakers is not naturally occurring. It is an artificial risk that is created only because the Commission has not yet asserted jurisdiction on sports-based event contracts.

It is well understood that the derivatives markets work best when hedgers meet speculators. As long as excessive speculation can be curbed, the existence of speculators is desired; it helps with liquidity and creates markets that function properly. That view was also publicly endorsed by one of the ex-CFTC commissioners.[25]

> *I know we need speculators. There are no markets without them. Speculators are good. But like a lot of good things, too much can be problematic. Therefore, it is the excessive speculation that can cause problems, contort markets, and result in consumers and businesses paying unfair prices and negatively impacting our economy.*

ErisX has effectively turned the model upside down. Instead of arguing on the merits and proposing that at least a subset of speculators should be allowed, it proposed to restrict trading. If allowed by the Commission, the proposed approach would basically split the market into two; the same contract would trade on a state-regulated bookmaker, as well as a CFTC-regulated venue. Speculators would meet in one venue regulated by the state government, and purported hedgers, who face some risks only because the purely speculative entertainment activity exists elsewhere in

[23] https://www.cftc.gov/PressRoom/PressReleases/6224-12.
[24] The no-action relief was granted to Victoria University of Wellington for operating a small-scale not-for-profit market. CFTC Letter No. 14-130.
[25] https://www.cftc.gov/PressRoom/SpeechesTestimony/opachilton-63.

the first place, would meet in another venue regulated by the federal government. This is not how financial markets are supposed to work.

Another data point that is somewhat revealing is the fact that while many sports gambling operators submitted comments to the Commission, the Commision will surely notice that at least a few of them seem to have largely relied on the same template. If these commenters truly agreed on the language without the need to deviate from a general template, they could have just co-signed the letter and submitted as one comment. That is fairly standard practice in amicus briefs or comments submitted to regulators. If, on the other hand, this issue was truly important to them, then it would have been reasonable to expect that each commenter would take the time to produce a customized comment. For those commenters who did not bother to deviate from a general copy, we cannot think of any other reason than hoping to make the Commission believe there is strong industry support behind these contracts.

The proposed contracts do not fare better with respect to the second set of constituents, stadium owners and vendors. ErisX references win-loss statistics as a risk that needs to be managed. In this case, the win-loss ratios are naturally occurring, the sports events would go on and win-loss records would be tabulated regardless of any trading. The problem is that none of the contracts proposed by ErisX settle based on win-loss records. The fact that the Rams would win a game by six points, or that the total score would be over 41 are completely irrelevant when it comes to Rams' playoff chances, which is the one thing that stadium owners and vendors could potentially care about. As far as the moneyline contracts go, there may be a few games where, toward the end of the season, winning or losing could push a team into the playoffs, but those instances represent an extremely small portion of total games. Good teams would have already secured the playoffs and bad teams would have already been eliminated from contention. The impact is at most on a few teams in a few games, and this would be an even bigger problem for leagues that play more games during a season, such as the NBA. Using similar logic, we don't see how any team winning or losing the first, fifteenth or thirty-first game of the season has any impact on its playoff chances.

In any event, at the start of any game, whether it is the second, tenth, or the last, win-loss records are cumulative statistics that reflect past performance. Futures contracts are designed to manage risks based on future contingent events. Contract settlement for ErisX, in all cases, depends on future events in a single game, but not win-loss records.

Thus, even assuming, *arguendo*, there is a set of constituents that would need to manage win-loss related risks, the contracts proposed by ErisX are hopelessly inadequate for the purposes of managing that risk. It is also noted that none of the comments received as of the morning of January 28, 2021 came from stadium owners or vendors, which suggests that this group either does not believe they face this particular risk, or they are not interested in managing it, or they don't believe proposed contracts by ErisX are tools they can rely on toward managing the risk.

Given ErisX contracts are either addressing risks that are not naturally occurring or purporting to address risks without aligning the settlement structure to the risks (if they exist in the first place), we do not believe the ErisX proposal is genuine. Instead, it appears that ErisX may be hoping that ErisX could simply be using participation exemption as a first step toward nationally regulated sports gambling.

Our view is not pure conjecture. For starters, a Google search reveals that RSBIX stands for Regulated Sports Book Index Exchange. The name, in and of itself, is not dispositive; but the fact that the exchange is openly using Sports Book in its name, while also not openly disclosing it may be indicative. Even more importantly, in a public podcast where the proposed ErisX contracts are discussed, there is a segment (which starts just before the 1 hour 13 minutes mark)[26], where the host asks about proposition bets and ErisX effectively responds that they would consider future innovations once the proposed contracts get some traction. NSEI is concerned, and believes that the totality of the circumstances suggests that ErisX could, in the future, propose amendments to participants arguing that retail bettors also need to manage these risks.

While it is certainly true that the Commission can only evaluate what's in front of them and not the hypotheticals, we do believe that a holistic evaluation of public interest should take into account the possible next steps that could be taken by product developers/DCMs. It is worth noting that if the Commission approves these contracts, a participation amendment would be the only thing that is standing between the future status quo and a federally regulated sportsbook. Emboldened by the state action, the proposal by ErisX appears to be an attempt to gain the CFTC's approval, which would undoubtedly give some sort of legitimacy to creating more state action, thus justifying additional participants and/or contracts. We urge the Commission to consider the impact of potentially creating this type of feedback loop. If ErisX contracts are approved, at that point, the only thing standing between the status quo and federally regulated quasi-sports gambling would be an amendment request.

If sports performance is an excluded commodity, which is implicit in ErisX submission, then the sports-based event contracts that are already trading on state-regulated venues *must* fall under the Commission's jurisdiction. Moreover, the Commission not asserting jurisdiction on those contracts is the only reason why bookmakers are subject to a risk of imbalanced books in the first place.

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?**

[26] https://stocksandjocks.net/show-archives/sporting-futures/#.X9oZh4f2maA.twitter.

NSEI believes that a proper response to the question should provide some historical context as the boundary between state rights and federal rights is rooted in developments that literally preceded the foundation of the United States.

In 18th century England, it was common to take "insurance claims" on cargo or other people's lives. Essentially, insurance contracts were being used for gambling purposes. Realizing the mischief they created, laws have been passed to limit the contracts to only those who had a vested interest in them. That's how the insurable interest doctrine was born.[27]

It was an early example of allowing contracts only if they served the public interest. However, these contracts should not be mistaken as being equivalent to those proposed by ErisX from a participation limitation perspective. While the insurable interest doctrine can be seen as limiting the participants, the crucial difference is the risks managed are genuine regardless of whether insurance is taken on them or not; they occur naturally. That's not the case with the ErisX contracts.

Earlier in that century, the Statute of Anne came into effect. In pertinent part, it provided:

> … *who shall, at any time or sitting, by playing at Cards, Dice, Tables or other Game or Games whatsoever, or* ***by betting on the Sides or Hands of such as do play*** *(emphasis added)*

As far as we are aware, this is the first law that effectively distinguished between games and claims. The statute not only outlawed chance games, but it also outlawed betting on the outcomes. It was effectively the precursor of today's gambling laws, serves as evidence that gambling can happen in multiple ways, through chance games or entertainment claims and was understood more than 300 years ago.

Those laws quite literally entered, sometimes word by word, the state books as states were being formed. For example, an early version of the law of Illinois (1827) read almost identical to the Statute of Anne.[28] Similarly, the Tennessee Attorney General concluded that the state's gambling laws were heavily influenced by and even expanded on the Statute of Anne.[29] Over time, those laws changed somewhat, with some states deciding to outlaw claims on future contingent events. When the perception became that these provisions meant future markets are nothing but regulated gambling and they started to interfere with the legitimate functions that commodity markets provide, the Courts stepped in, generally ruling that bona fide business transactions would not constitute gambling. As a result, some states modified their laws and started exempting bona fide business transactions from their gambling laws.

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[27] http://www.contingentfeeblog.com/2008/08/articles/corporate-owned-life-insurance/origin-of-the-insurable-interest-doctrine/#:~:text=The%20insurable%20interest%20doctrine%2C%20as,to%20profit%20from%20another's%20loss.

[28] The Illinois law stated: "Any person who shall, at any time or sitting, by. playing at cards, dice, or any other game or games, or by betting on the side or hands of such as do game…" Available at https://courts.illinois.gov/court/SupremeCourt/Docket/2019/Sep/124472_AEB.pdf, p. A-82.

[29] https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2004/op04-046.pdf

Thus, prior to the creation of the CFTC, states effectively regulated both games and claims. For the former, most states understood that the skill-chance spectrum is determinative. For the latter, their default position was to rule out all contingent claims, which was subsequently modified to distinguish claims that have a valid economic purpose from those that don't.

When the Commission was created by Congress in 1974, the Commission's initial focus was on agricultural commodities, but over time, the definition of commodity expanded. Regardless of what the underlying commodity is, the threshold question has always been whether the contracts serve the public interest. Even when the Commodity Futures Modernization Act ("CFMA") resulted in language changes, Congress was clear, as evidenced by the legislative history cited above, that the Commission had the authority to rule on the basis of public interest/economic purpose.. The Commission itself agreed stating that:[30]

> *WHEREAS, the legislative history ofCEA Section 5c(c)(5)(C) indicates Congress's intent to restore, for the purposes of that provision, the economic purpose test that was used by the Commission to determine whether a contract was contrary to the public interest pursuant to CEA Section 5(g) prior to its deletion by the Commodity Futures Modernization Act of 2000;*

and:

> *WHEREAS, the restored economic purpose test calls for an evaluation of an event contract's utility for hedging and price basing purposes;*

and:

> *WHEREAS, the Commission has the discretion to consider other factors in addition to the economic purpose test in determining whether an event contract is contrary to the public interest.*

NSEI takes the view that any contingent claim (other than insurance claims which are subject to a different set of regulatory bodies though operating on the exact same principle of public interest) falls under CFTC jurisdiction and the state laws are simply moot with CFTC's preemptive powers granted by Congress. State laws are there for historical purposes and to the extent a state wants to use them, it is best viewed as a backup policy deterring bad behavior. In any event, the CFTC has ultimate jurisdiction.

Some of the commentators take the view that pure entertainment contracts would fall outside the CFTC's jurisdiction. To the extent that their statement means that those contracts serve no valid economic purpose and should therefore be prohibited by the CFTC, we agree. On the other hand, if

[30] Order prohibiting the Listing and Trading of Event Contracts, available at https://www.cftc.gov/sites/default/files/stellent/groups/public/@rulesandproducts/documents/ifdocs/nadexorder040212.pdf.

those commentators mean that pure entertainment contracts can continue to be listed and traded outside of the CFTC's purview, we completely disagree.

Quite often, sports gambling, political election markets and box office contracts are mentioned in the same breath. "But what of markets listing contracts in attendance at movies, or political or legal events or in sporting events? [I]t is crucial that market organizers or potential market organizers are able to understand whether they are covered by CFTC requirements."[31]

In addition, treating sports-based contracts differently would create the ultimate discontinuity, lopsided incentives and a disjointed result: As we noted in our amicus brief to the Supreme Court:

> *Creating a contract with no purpose would instantly become a better strategy than creating a product with some purpose. Stripping all purpose, hiding behind the veil of state experimentation, and pushing a narrative around jobs and tax revenues would become the dominant and obvious strategy. There will always be some states that want to be a laboratory after all. If this is how our society is incentivized, entrepreneurs will purposely strip purpose from their contracts and hope to keep dry under the state umbrella.*

In this universe, being a sports gambling operator becomes a much better choice than an election market operator. We don't think that's the outcome that Congress intended. A game would not escape the state's jurisdictional net because no skill is involved at all. It would not make sense for a state to prohibit poker (on the theory that while it involves skills it is not sufficient) and let roulette go because the latter involves no skill whatsoever. Similarly, a contingent event contract that has no purpose whatsoever, should not be able to escape the CFTC's jurisdiction. Otherwise, the approach would create the incongruent result that contracts that settle based on the Buccaneers winning the Super Bowl are subject to a different standard than contracts that settle based on Biden winning the presidency. The latter, while prohibited by the Commission, presumably serves some purpose: for example, a U.S.-based multinational can expect that its cash flows may change materially depending on the administration's tax policy and may want to hedge that risk. The former serves no valid economic purpose whatsoever.

States could hypothetically amend their laws on election contracts and start regulating them. That would of course be a prohibited act under the Commission's existing 2012 order. If the Commission decides to take no action on the listing and trading of those contracts however, soon the legalization trends may accelerate and before long, a DCM can propose to list and trade election contracts (perhaps with limited participation) on the theory that bookmakers trading election contracts need to balance their books. Now the Commission would find itself evaluating the very same contracts that it prohibited in the first place. NSEI submits that this is precisely what is happening now with the ErisX contracts, sans the Commission having an explicit prohibition in place.

[31] Paul Architzel, Event Markets Evolve: Legal Certainty Needed, Futures Industry, March/April 2006.

Without any doubt, for a gambling operator, anything and everything that can be traded is a potential revenue opportunity, notwithstanding potential encroachment into CFTC territory. When the sports world shut down, one sportsbook came close to listing and trading election contracts; luckily, the state of West Virginia reversed course quickly and those contracts never saw the light of day.[32] The episode served as a live example of how a state could act as a backstop. If the state did not take enforcement action, we believe the Commission would have. In another example, one sportsbook started taking bets on the weather.[33]

These are two examples of what can be best characterized as encroachment into the CFTC territory, albeit in two different ways. In the first case, the contracts are already prohibited. In the second case, the contracts are not prohibited per se but trading happens in a shadow market, rather than a CFTC-regulated venue. Either way, the willingness of sports gambling operators pushing the envelope in the absence of sports and offering contracts where CFTC asserted jurisdiction by either regulating or prohibiting the contracts actually proves the point: sports bets, election contracts and weather contracts are all claims on contingent events. The states may have had jurisdiction over them at some point, but their powers are now preempted.

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?**

As discussed earlier, this was precisely the concern that Congress had regarding sports-based event contracts. NSEI believes that contracts proposed by ErisX lead to substantial incentives to manipulate game outcomes. It is best for the Commision to outright prohibit contracts that provide these incentives. With a contract that settles on the point spread or game outcome, one missed shot or one double dribble could change the settlement of the contract completely. Election markets, in contrast, while having legitimate integrity issues in their own right, are generally less prone to actions by a single individual.

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

Determining the exact boundary where entertainment ends and valid economic purpose starts is a difficult task. Directionally however, it is clear that the economic purpose test serves as the dividing line to delineate purposeful contracts from those that are used for entertainment only.

[32] https://www.wsj.com/articles/west-virginia-approves-then-disapproves-betting-on-elections-11586384497.
[33] https://www.baltimoresun.com/gambling/sns-sportsbook-bovada-gamblers-bet-city-based-weather-20200317-sjnfyht2nvca5nic3sf76mqub4-story.html.

NSEI believes the following factors should be considered by the Commission in determining whether any proposed contracts, including those proposed by ErisX, are contrary to public interest.

Existence of Genuine Commercial Risk. One factor that the Commission can use is to assess whether genuine commercial risk exists. If not, the Commission need not go any further. As stated above, in this case the commercial risk exists only because the Commission has not asserted jurisdiction over sports gambling. NSEI fully believes that it has the authority to do so.

Evaluation of Contracts As Effective Tools of Managing the Risk. If genuine commercial risk exists, the Commission can look to whether the proposed contracts are effective ways to manage that risk. If the contract purports to help industry participants to manage a naturally occurring risk, the settlement structure should be aligned to the risks that are to be managed.

Industry Representations Around Use. The Commission should give weight toward whether the targeted group intends to use the contracts proposed. That point may not be determinative on its own, but it is an important factor. For example, the Commission has rightly questioned how exactly the box office futures will be used when the movie industry was generally taking the position that they do not intend to use the contracts. In this case, gaming operators say they are intending to use the contacts, but as mentioned above, that is a consideration only because of the underlying sports gambling activity. With respect to the second set of constituents (stadium owners and vendors), we see no evidence of intended use, at least based on the comments provided or lack thereof.

Public Interest, in General. The underlying question for any financial contract is ultimately not only risk management, but more broadly public interest. While the Commission has historically focused on risk management, it could potentially assert jurisdiction where there is other evidence of public interest being served. Such is not the case here.

Price Discovery. Trading results in prices, which can be beneficial for the industry from a price basing or price dissemination perspective. The ErisX contracts settle based on game outcomes and other game-based events and the resulting numbers are simply short-term probability estimates that don't really rise to being a true price, nor can we see how they can be used for any meaningful price discovery. We cannot think of any individual, other than the gambler and the bookmaker, that cares about the point spread or total points. Sports teams, players and fans care about whether their team wins or loses, but the result of a single game hardly matters for anything.

Totality of Circumstances. There may be other collateral considerations that the Commission may want to consider. For example, if a contract results in substantially better financial literacy for the society, that is a positive factor. Certain science-claim type contracts may be helpful in steering our youth toward STEM-fields. In sharp contrast, ErisX contracts seem to be on the verge of setting the Commission to be on a path to becoming a gambling regulator.

Integrity and Manipulation. As it has done to date, the Commission should continue to carefully evaluate incentives the contracts will create. Event contracts, relative to other formats are more susceptible to integrity issues, and sports-based event contracts are even more so. With a contract that settles on the spread or game outcome, one missed shot could change the outcome completely. Election markets, in contrast, while having legitimate integrity issues in their own right, are generally less prone to actions by a single individual.

Desired Organizing Principle for Financial Markets. Since inception, the CFTC is guided by the public interest principle, which manifested itself through the economic purpose test. As detailed throughout this comment, this has been the guiding principle for financial markets not just in the US, but also historically in the UK.

Granting approval on ErisX contracts would effectively amount to an implicit stamp of approval on the underlying sports gambling contracts. That is so because the only risk that these contracts purportedly help hedge is a risk that does not naturally exist. CWH and NSEI long maintained that the sports industry is just like any other, and genuine commercial risks should be managed. The risks that the gambling operators face, on the other hand, are not genuine commercial risks; they only exist because of the underlying gambling activity, which falls under the CFTC's purview.

Thus, if ErisX contracts are allowed to be listed and traded, that would effectively reverse a half-century of reliance by the Commission on using valid economic purpose as a filter to separate the contenders from the pretenders, not to mention a more than three-century old principle of taking extreme care with contingent event contracts. A world where ErisX contracts are listed and traded would create an entirely different paradigm and would open the floodgates to all other products. Literally every claim becomes tradeable. This would be a much more liberal approach and would signify a substantial departure from existing norms.

We don't think such a substantial paradigm shift is desirable and it feels especially delicate given the pandemic and the general economic conditions we find ourselves in. More than ever, participants of financial markets as well as the general public need protection and the Commission should find it straightforward to reject ErisX contracts given the public interest principle it has been guided by since its inception.

Hazards of Litigation. The Commission deserves substantial deference on its actions. If the Commission does not think a contract serves the public interest then the onus is on the product developer/DCM to articulate a better case.

In general, the Commission should not be concerned about hazards of litigation on its actions. However, the fact that this is such a fringe case could invite unwanted litigation that would be costly and time-consuming for the Commission when its guidance and leadership is needed the most. CFTC-regulated point spread contracts would be unthinkable at any point of the Commission's

history, and it should be similarly unthinkable now. Such a radical departure from past norms is precisely what creates the litigation threat.

Election contracts would be an example. It would be hard to justify for the Commission why a Buccaneers contract exists, on both unregulated and regulated venues, and the election contracts remain prohibited. Sensing that inconsistency, there would not be much that would stop a participant from giving it a shot, offering election contracts and taking their chances with the litigation. If over/under contracts are allowed to trade, then practically anything under the sun can be allowed to trade. It wouldn't be inconceivable for the litigant to argue that the Commission has fully abandoned the economic purpose test by allowing contracts on point spreads. Similarly, the litigants will likely argue that the Commission is being inconsistent and that it has "unclean hands." Sports gambling operators already made similar arguments against the sports leagues. We don't think that type of Wild West behavior is what the Commission is seeking.

The public interest standard has worked as intended. It may not have manifested itself in a large number of rejections, but it acted as an effective deterrence. The economic purpose test was the mechanism that kept the claims that only cater to speculative desires at bay. Contracts that had a solid case came in and passed through the filter. Contracts that were in the grey area gave it a shot with mixed results. Knowing that they will be judged by a high standard, promoters of purposeless contracts did not even try in the first place. Emboldened by state-level legislation, ErisX is arguably the first such attempt in a long time.

In the unlikely event that CFTC is willing to take the lead on a much more liberal market paradigm, where the trading universe expands substantially and is able and willing to take on the corresponding regulatory burden and potential litigation, we don't think ruling on a fringe case is an effective way to start the transition. If the organizing principle of the financial markets will change from economic purpose to a larger universe of trading, Congressional action and continuous dialogue with the stakeholders (through concept releases or otherwise) would be a much more effective way of achieving that outcome than a controversial permit followed by extensive litigation.

NSEI again thanks the Commission for requesting comments from the public. NSEI reverberates its contention that the Commission should adhere to its longstanding position of serving the public interest by prohibiting the listing and trading of the ErisX contracts for the reasons submitted hereto.

The New Sports Economy Institute