**COMMENTS BY PROFESSORS WITH EXPERTISE IN THE SPORTS INDUSTRY ON THE CFTC’S PROPOSED RULEMAKING BARRING SPORTS FUTURES MARKETS**

The undersigned are professors who research and teach about the legal, economic, and business aspects of the sports industry. For the reasons set forth below, we believe that a blanket prohibition on sports events futures trading is precipitous. The proposed rulemaking fails to consider the potential public interest benefits that such a market innovation would create. Instead, the Commission should render its public interest determination of a carefully crafted sports futures market pursuant to its general regulatory authority to review specific futures contract trading.

We defer to others regarding a detailed assessment of the Commission’s authority raised by Commissioners Mersinger and Pham, other than to conclude that our own review of the sources cited in the Notice of Proposed Rulemaking persuades us that the text and legislative history of the Commodity Exchange Act (CEA) gives the Commission the authority to recognize the public interest benefits of sports futures trading, and to assess whether these benefits outweigh the risks to the public interest and the administrative costs of approving and overseeing sports futures markets. We are concerned that a blanket prohibition on sports futures through this rulemaking proceeding will prevent innovations with potential to serve two important public interests. First, as with other futures markets, a sports futures market allows firms that make substantial investments reliant for their profitable return on the success of a particular sports team (such as sponsors, media companies, and businesses adjacent to sports events) to hedge their investment. This hedging allows these firms, as well as sports clubs and leagues, to increase investment. Second, and of perhaps greater importance, sports futures promote critical transparency, allowing both private actors and public policymakers to assess market trends, and to increase the accountability of market actors. The latter is particularly important where – as is typical in the sports industry -- vigorous competition, either in the product market or in the market for corporate control, is not available to facilitate this accountability.

Because the issues concerning sports futures are quite distinct from those raised by event contracts involving elections, wars, or other world events, we recommend that any rulemaking exclude sports futures, and that the distinctive issues raised by sports futures should instead be considered in the context of a proceeding on application of one or more proposed sports futures market organizers.

1. **Futures markets serve an undervalued public interest in promoting transparency.**

Although the primary public interest in lawful commodities trading is to create a reliable market for those involved in the production and sale of commodities to hedge risks of market volatility, an under-valued interest is that futures markets also promote critical transparency. A reliable futures market allows private actors to assess market trends and make more informed investment decisions, promoting the effective working of free markets. Futures markets also provide critical information to public policy makers who can assess the extent to which, as Judge Richard Posner characterized competitive markets, firms are adopting policies that disserve their customers and, if they do, whether market retribution will be swift. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

The sports industry relies to a significant extent on consumer loyalty and delayed market retribution. If Pizza Hut disserves its customers, there are several avenues of accountability: consumers can switch their patronage to rival brands, or investors can replace management through the market for corporate control. However, if the Baltimore Orioles or Washington Commanders disserve their consumers, as well as betraying the huge public trust demonstrated by the significant stadium subsidies the public provides to their teams, we do not want fans to switch their patronage to the Texas Rangers or Dallas Cowboys, and there is no market process to replace their management. Sports futures, by signaling the market’s expectations about the frequent rhetoric of eventual sporting success, offers a critical and unique benefit to the sports industry.

Section 15(b) of the CEA requires the Commission to “take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving” the purposes of the CEA. A “hallmark” of the antitrust laws is whether output is “responsive to consumer preference.” *NCAA v. Board of Regents,* 468 U.S. 85, 107 (1985). Most sporting competitions operate in marketplaces where there are no reasonable substitutes for the product on offer. Moreover, the distinctive nature of sports encourages consumers to be loyal to their club or league. Sports futures offer a unique innovation to increase transparency in this distinctive market. At a minimum, the “least anticompetitive means of achieving” the goals of the CEA would be to carefully consider the benefits and harms of sports futures betting in the context of specific proposals.

1. **The CFTC is not constrained by text or legislative history in recognizing the public benefits in sports futures, even if these markets will invite some investment for entertainment purposes.**

The relevant statutory provision, § 5c(c)(5)(C) of the CEA, authorizes the Commission to prohibit certain “event contracts” from being listed or made available for clearing or trading on or through a registered entity, if such contracts involve an activity that is enumerated in CEA section 5c(c)(5)(C) or “other similar activity” as determined by the Commission by rule or regulation, *and the Commission determines that such contracts are contrary to the public interest.* The broad power granted to the CFTC to make a public interest declaration is confirmed in the legislative history cited in the Notice of Proposed Rulemaking. When this section was added to the statute in 2010, the Chair of the relevant Senate committee, Sen. Blanche Lincoln, expressly informed her colleagues that the provision’s objective was to give the CFTC “the power to prevent the creation of futures and swaps markets that would allow citizens to profit from devastating events and also prevent gambling through futures markets.” 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010), available at <https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf>. We emphasize that Sen. Lincoln did not state that the provision would *require* the CFTC to prevent whatever she thought might be “gambling through futures markets.” When combined with the statutory authorization, it is clear, as the Notice of Proposed Rulemaking states elsewhere, that the Commission makes a two-step determination as to whether it has jurisdiction over certain financial instruments, and whether to ban such instruments if their marketing is contrary to the public interest. Nothing cited by the Notice of Proposed Rulemaking indicates that Congress intended to either make its own public interest determination that any event contracts with aspects similar to gaming should be prohibited, or that the CFTC lacked the authority to balance the benefits we articulate above against various considerations suggesting that these contracts might be contrary to the public interest.

Similarly, the Notice points to a colloquy between Sen. Lincoln and Sen. Feinstein reflecting Sen. Feinstein’s apparent concerns with situations where the “predominant use of the contract is speculative.” 156 Cong. Rec. S5906 (daily ed. July 15, 2010), available at <https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf>. Even here, these leading senators are clear that the text was being drafted to give the CFTC *the power* to block these contracts as contrary to the public interest. Nothing in this colloquy suggests that, either through rulemaking or individualized assessments, the CFTC was *required* to make such a finding. Thus, even though the Notice currently observes that “the utility of a contract, or category contracts, for purposes of hedging and price-basing” are “relevant factors” in the public interest determination, there is no support in text or history for the conclusion that these are the *only* factors.

It would be unfortunate if the CFTC were to construe the text and legislative intent as requiring the Commission to make a binary choice between “good” contracts where the predominant effect is to permit firms to hedge investments and “bad” contracts where the predominant effect is speculative. This is particularly true in the distinctive case of sports futures. In our view, there will be three simultaneous effects of sports futures contract trading: (1) it will allow hedging by those who make investments whose return is significantly affected by sporting events (also likely increasing the willingness of sponsors, media rights purchasers, luxury box purchasers, and others to make these investments, bringing further revenue into sports); (2) it will promote greater transparency about the likely success of clubs who draw upon consumer loyalty, and thus greater accountability for leagues and club owners; and (3) it will attract speculative investment by those who, as in traditional commodities futures markets, believe that they can profit by a shrewd assessment of market trends. Even if, from a quantitative standpoint, the speculative aspect can be said to “predominate,” this does not mean that the benefits from hedging and transparency are insufficient to render these markets “in the public interest.”

Other language in the Notice of Proposed Rulemaking could be read to suggest that any futures market that might attract investors seeking to trade for entertainment purposes should be prohibited. This would be an unfortunate overreach. To imaginatively illustrate, suppose a television reality show akin to “Dancing with the Stars” featured celebrities spending time with those who earn their living trading pork belly futures, and the ensuing popularity led Americans to choose for their own entertainment to invest in these markets. Because these markets serve important interests, the fact that part of the demand for investment is based on entertainment would not radically change the public interest determination the statute requires the Commission to make.

Notwithstanding this ambiguous rhetoric in the Notice, it eventually concludes with an understanding consistent with the text and legislative history: “The Commission will consider all relevant factors in evaluating whether a contract, or category of contracts, is contrary to the public interest, and there is no one factor that will be determinative in the Commission’s evaluation.” Notice at 43. The transparency benefits of sports futures are a relevant factor that warrants the Commission’s consideration, and the concern that sports futures investment could be motivated by gaming or entertainment motivations cannot be “determinative.”

1. **A § 40.11(c) proceeding is the preferred process to explore if effective regulation of sports futures markets significantly minimizes market distortions**

We do not claim that the benefits in investment hedging and increased transparency necessarily outweigh the risks to the public interest from efforts by unscrupulous individuals to distort decision for profits in futures market trading. We do suggest that an individualized assessment, in the 90-day review period set forth in §40.11(c) of the CFTC’s regulations, would be a better way for the CFTC to determine whether sports futures trading is in the public interest.

We recognize the concern expressed in the Notice of Proposed Rulemaking that the proposed amendments would reduce the frequency of event contract submissions to the Commission that raise potential public interest concerns, which would allow for more efficient use of Commission and staff resources by reducing the need to conduct individualized event contract reviews pursuant to § 40.11(c). The administration of the CEA is not within our expertise, but it cannot be that any type of regulated instrument that would “raise potential public interest concerns” should be banned by rulemaking to avoid costly individualized reviews. The time-consuming nature of individualized reviews could be avoided in the future if, in the context of a §40.11(c) review, the Commission were to determine that all, or virtually all, event contracts involving sports were contrary to the public interest. But the CFTC has yet to make such a determination, and it can best do so by undertaking the sound investment of time and resources into a few individualized reviews before reaching the broad conclusion that, as a category, all sports event futures are contrary to the public interest.

Although for some investors, sports futures trading has similarities to gaming, the investments differ in important ways. Event contracts can be limited to economically relevant longer-term events, rather than a single contest or a spot bet on a single sporting event. The careful tracking of investments, only made through registered brokers, makes detection of market manipulation far easier than even regulated gambling markets. The penalties for market manipulation in futures markets are far more severe. More significantly, the risks of compulsive gambling can also be policed more effectively in sports futures than in sports gambling, as the identity of the investor is harder to disguise and those who should not be allowed to participate, either because of industry involvement or because of compulsive tendencies, can be more readily enforced.

4. **The public interest analysis for election futures differs from sports futures in four fundamental respects.**

First, the risks of election distortion are far greater than the risks that sporting competitions will be distorted by futures trading. There already exists a massive sports gambling market that creates incentives for unscrupulous individuals to distort markets; no such market exists regarding elections.

Second, there is a distinctive public interest in a functioning democracy where voters cast ballots for candidates whose policies they prefer, not candidates whose victories will profit them in a futures market. There is no such interest or concern if a lifelong Yankee fan chooses to short the Yankees or go long on the Red Sox and therefore decides to cheer for Tanner Houck to strike out Aaron Judge as opposed to Judge hitting a home run over the Green Monster. Similarly, as Sen. Feinstein noted in legislative debate, there is a particular public interest concern with contracts that would allow someone to profit from events that threaten our national security. 156 Cong. Rec. S5906-07 (daily ed. July 15, 2010), available at <https://www.congress.gov/111/crec/2010/07/15/CREC-2010-07-15-senate.pdf>. No such concerns are present when someone profits from the long-term success of a sports team.

Third, the transparency benefits provided by sports futures markets are far greater than those of election futures. Politics already features significant transparency as rival candidates, the media, and pervasive public polling provide citizens with the assessment of trends and the sort of information that futures markets provide. Political competition provides ample opportunity, without the need for a futures market, for a rival candidate to persuade voters to oust the incumbent office holder. No such mechanism existed for fans and consumers to oust Daniel Snyder as the owner of the NFL franchise in the nation’s capital area. Sports futures, in contrast, could identify trends that would facilitate pressure from sponsors, fans, and potential new ownership to lead to responsive changes.

Finally, those with investments at risk have existing markets in which to hedge losses caused by election results, but no such markets exist for sports investments.

**Conclusion**

The CFTC should amend the proposed rule to exclude sports futures event contracts from its blanket prohibition, and it should consider the many public interest issues raised by sports futures in the context of a regulatory proceeding in the context of a specific proposal.

Stephen F. Ross

Rodney Fort

William W. Berry III

Michelle Sikes

**Author Background**

**Stephen F. Ross** is Professor of Law and Co-Director of the Center for the Study of Sports and Society at The Pennsylvania State University. He previously served as an attorney with the Federal Trade Commission and the Antitrust Division of the Department of Justice, as a clerk to Hon. Ruth Bader Ginsburg, and a Judiciary Committee aide to Sen. Howard Metzenbaum. He is the co-author of a leading sports law casebook and writes about sports and the law globally.

**Rodney Fort** is Professor Emeritus in the Sports Management Program of the Department of Kinesiology at the University of Michigan. He is the author of a leading text on sports economics and has written widely about sport economics and policy.

**William W. Berry III** is the Associate Dean for Research and Montague Professor of Law at the University of Mississippi. A scholar in criminal law, sports law, and entertainment law, he is the co-author of leading sports and entertainment law casebooks and teaches international sports law in a summer program at Cambridge University.

**Michelle Sikes** is Associate Professor of Kinesiology, African Studies, and History at The Pennsylvania State University. She writes about international sport history and race and gender in sport, with a background in economic history.