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

RE: Event Contracts RIN number 3038-AF14 / Notice of Proposed Rulemaking, 89 Fed. Reg. 48968

Dear Mr. Kirkpatrick:

Morgan, Lewis & Bockius LLP ("Morgan Lewis")[1] respectfully submits this comment letter to the Commodity Futures Trading Commission (the "Commission" or the "CFTC") in response to the above-referenced Commission Notice of Proposed Rulemaking regarding Event Contracts. This comment letter addresses the CFTC's proposal to modify its Event Contracts Rules by (i) adopting a new definition of "gaming" that applies to event contracts involving specified enumerated activities, including athletic games; and (ii) making a categorical pre-determination that contracts involving gaming are "contrary to the public interest," thereby prohibiting all event contracts involving athletic games from being listed for trading or clearing on a

[1] Founded in 1873, Morgan Lewis's team of more than 2,200 lawyers and legal professionals provides corporate, transactional, litigation, and regulatory services to clients in major industries, including financial services, sports and intellectual property, from over 30 offices located in the United States, Europe, the Middle East and Asia Pacific. Morgan Lewis regularly represents a broad range of participants in CFTC-regulated commodity derivatives markets, including DCMs, SEFs, DCOs, FCMs, SDs, CPOs, CTAs, funds, proprietary traders, commercial end users and hedgers. Morgan Lewis also advises clients involved in the sports industry, including professional sports teams and leagues; media companies and broadcasters; marketers and advertisers; stadium, arena, and other venue owners; retailers; ticketing companies; gaming operators; online platforms; and their investors, and counsels clients on regulation of sports betting.

designated contract market, swap execution facility, or derivatives clearing organization (each, a "registered entity").[2]

Our primary interest in the Proposal relates to the Commission's proposed new definition of "gaming" and the categorical proclamation that every contract involving athletic games would automatically be deemed by the Commission to be "contrary to the public interest" and prohibited from being listed for trading or clearing on a registered entity, eliminating any process for the Commission to review or analyze the potential commercial risk management utility of such contracts. The Proposal includes an unnecessarily overbroad definition of gaming as it applies to athletic games that is (i) inconsistent with the commonly understood definition of event contracts, (ii) inconsistent with Congressional intent, and (iii) inconsistent with the federal and state regulation of sports gambling. The Proposal compounds the problems with its overbroad definition by applying that definition to declare in advance that entire categories of event contracts, including those involving sports, are contrary to the public interest and therefore automatically disqualified from being listed, thus precluding individual consideration of the specific attributes and potential commercial utility of such contracts.

We believe that to the extent the Commission has a concern with athletic event contracts, its focus and rulemaking should properly be with event contracts that serve as a proxy for a pure bet on the outcome of a game or contest. For example, certain binary event contracts had been self-certified by Eris Exchange, LLC, based on the moneyline, the point spread, and the total points for individual NFL games. CFTC Announces Review of RSBIX NFL Futures Contracts Proposed by Eris Exchange, LLC, CFTC Release No. 8345–20 (Dec. 23, 2020), https://www.cftc.gov/PressRoom/PressReleases/8345-20. However, there are potentially many types of innovative contracts involving athletic games that are not tied to the outcome of a single game or multiple games and that have the potential to serve a real economic hedging purpose ("Non-Binary Sports Contracts").[3] Non-Binary Sports Contracts could create a market for hedging, trading, and investing related to sports economics. These types of innovative contracts could allow sports industry participants to manage their financial and business risks, which are impacted by athlete and team performance over time. There are numerous economic risks associated with professional athlete contracts and league/team management. Non-Binary Sports Contracts could provide price discovery and an opportunity to hedge against the economic impact of individual athlete risks, such as poor performance or injury, and league and team risks. The hedging opportunity is beneficial to those who have financial exposure to (or

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[2] Event Contracts, Notice of Proposed Rulemaking, 89 Fed. Reg. 48968 (June 10, 2024) (the "Proposal").

[3] See Comment Letter of Calumet Consulting, LLC (June 19, 2024): "Contracts that are based on measures that comprise multiple performance inputs of a team or athlete over multiple games would provide significant hedging and risk management benefits to numerous industry participants who are exposed to economic consequences from team and athlete performance. These contracts would be based on continuously priced measures that reflect team and player performances in multiple contests as opposed to the kind of binary payoffs on individual contests that characterize 'sports gaming' as commonly understood, and which the Commission seems most concerned with."

wish to obtain exposure to) a team or individual athletes, including sponsorship/endorsements, media broadcast rights, stadium construction and operation, and passive franchise owners/investors. Such contracts could provide significant hedging and risk management benefits to numerous industry participants who are exposed to economic consequences from team and athlete performance. But this can happen only if the Commission does not unnecessarily include such contracts within an overbroad definition of gaming that would automatically disqualify such innovative contracts by dismissing them categorically and preclude the consideration of their economic utility on a contract-specific basis. The commercial rationale for Non-Binary Sports Contracts is fundamentally different from an individual using binary event contracts to place a wager on the outcome of a sporting event, which is what constitutes traditional sports betting. The Commission should not lump Non-Binary Sports Contracts together with binary event contracts.

A. The Proposal's definition of gaming is unnecessarily overbroad, is inconsistent with the longstanding understanding of the term "event contract" and is inconsistent with Congressional intent.

1. The Proposal's definition of gaming.

Section 5c(c)(5)(C), which was added to the Commodity Exchange Act (the "CEA") in 2010 by the Dodd-Frank Act, grants the CFTC the authority to prohibit a registered entity from listing certain types of event contracts if the CFTC determines that the contract (1) involves an enumerated activity and (2) is "contrary to the public interest." The types of agreements, contracts, or transactions that the CFTC can prohibit include those that involve "activity that is unlawful under any Federal or State law; terrorism; assassination; war; gaming; or other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."[4] . Soon after enactment of the Dodd-Frank Act, the Commission adopted CFTC Rule Regulation 40.11 to implement the CEA's new event contract provisions.

Currently there is no definition of the term "gaming" in the CEA or CFTC Regulations. The CFTC proposes to amend Regulation 40.11 to define the term "gaming" for the purpose of the regulation and to provide that any contract that comes within the newly defined term would automatically be disqualified by the Commission from being listed by a registered entity. Thus, the stakes of getting the definition right are very high because an overly broad definition will result in the disqualification of types of contracts that should be permitted due to their economic utility and could result in legal challenges to the Commission's rule.[5]

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4 CEA Section 5c(5)(C)(i).

5 *See, e.g.*, KalshiEX LLC v. Commodity Futures Trading Comm'n, No.1:23-cv-03257 (D.D.C.), challenging the CFTC's recent order to prohibit Kalshi from listing certain political event contracts on its regulated derivatives exchange, alleging that the CFTC's order disapproving those contracts violates the Administrative Procedure Act.

For the purposes of Regulation 40.11, "gaming" would be defined as "the staking or risking by any person of something of value upon: (i) the outcome of a contest of others; (ii) the outcome of a game involving skill or chance; (iii) the performance of one or more competitors in one or more contests or games; or (iv) any other occurrence or non-occurrence in connection with one or more contests or games" (emphasis supplied).[6] Moreover, under the Proposal, gaming would include the staking or risking by any person of something of value on, among other things, (i) the outcome of a game in which one or more athletes compete; or (ii) an occurrence or non-occurrence in connection with such game, regardless of whether it directly affects the outcome (emphasis supplied).[7] The CFTC notes that this is a non-exhaustive list of examples of activities that constitute gaming.

The Proposal explains that the "outcome of a game" in which one or more athletes compete would encompass, among other things, the outcome of a professional or amateur (including scholastic) sports game. It also provides that whether an occurrence or non-occurrence directly affects the outcome of a game is of no importance to determining gaming under the Proposal. The CFTC elaborates that such an occurrence or non-occurrence would encompass, in the context of an athletic game, the score or individual player or team statistics at given intervals during the game, whether a particular player will participate in a game, and whether a particular individual will attend a game.[8]

2. The Proposal's definition of gaming is overly broad, is inconsistent with the longstanding understanding of the term "event contract" and should be narrowed to refer only to contracts referencing a single game or the outcome of a game or games.

The term "event contract" is not defined in the CEA or the CFTC's regulations. However, event contracts have been generally described by the Commission to be a type of derivative contract, typically producing a binary payoff structure based upon the "occurrence, extent of an occurrence, or contingency" that underlies the contract.[9] Event contracts are typically structured as all-or-nothing binary options that pay out a fixed amount when a particular event either occurs or does not occur.

Under that working definition, a contract based on "the outcome of a game involving skill or chance" or "an occurrence or non-occurrence in connection with such game, that directly affects the outcome of such game" may be properly described as an event contract because in both cases they refer to the outcome of a single game and it might be appropriate to apply the definition of "gaming" to include events that can affect the outcome of a game or the

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6 Proposed Regulation 40.11(b)(1)(i-iv).

7 Proposed Regulation 40.11(b)(2).

8 Proposal at 48976.

9 Proposal at 48969. *See also* Concept Release on the Appropriate Regulatory Treatment of Event Contracts, 73 Fed. Reg. 25669, 25671 (May 7, 2008).

performance of a competitor in a single game. However, the Proposal's new definition of gaming goes further and would stretch the application of the term event contracts beyond its commonly understood meaning to include "the performance of one or more competitors in one or more games," or "any other occurrence or non-occurrence in connection with one or more games" and would also include an occurrence or non-occurrence in connection with such game, regardless of whether it directly affects the outcome. To broadly define "gaming" to include athletic performance across multiple games and every "occurrence or non-occurrences in connection with" a game—regardless of whether it has any bearing on the outcome of the game or the performance of a competitor in the game—contradicts the plain meaning of an event contract and is unnecessary to achieve the goals that the Commission is seeking to achieve.

The definition of gaming should not include contracts that are not structured as event contracts as commonly understood. Just as the Proposal specifically excludes the application of the event market gaming definition to contracts based on a change in the price, rate, value or level of economic indicators or financial indicators or stock indices,[10] contracts such as Non-Binary Sports Contracts that are based on continuously priced measures of athletic performance over multiple games and not on the outcome of any game or games should not be within the definition of gaming or event contracts. The Commission should limit its gaming definition to the kind of binary payoffs on individual contests or outcomes of games that characterize "sports gambling." As noted above, event contracts are typically structured as all-or-nothing binary options that pay out a fixed amount when an event either occurs or does not occur. In contrast, Non-Binary Sports Contracts are not tied to a specific event or game outcome and should not be included within the scope of the Proposal's definition of gaming because no single event, occurrence or game outcome can dictate the value of such contracts, and therefore they cannot be used for betting on the outcome of a game. The Commission should not sweep Non-Binary Sports Contracts into being treated as event contracts through an unnecessarily broad definition of gaming and event contracts that refers to multiple games or occurrences that are not based on the outcome of a game or games.

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[10] Proposal at 48973:

> Contracts based on a change in the price, rate, value, or levels of the following would generally fall outside of the scope of CEA section 5c(c)(5)(C) and § 40.11:
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> - Economic indicators, including the CPI and other price indices; the U.S. trade deficit with another country; measures related to GDP, jobless claims, or the unemployment rate; and U.S. new home sales;
> - Financial indicators, including the federal funds rate; total U.S. credit card debt; fixed-rate mortgage averages (e.g., the 30-year fixed-rate mortgage interest rate); and end of day, week, or month values for broad-based stock indexes; and
> - Foreign exchange rates or currencies.

3. The Commission's proposed definition of gaming goes beyond Congressional intent and could capture contracts that are not proxies for gambling and that could serve a bona fide commercial function.

The Proposal's gaming definition goes beyond what Congress intended to be prohibited. Although the reference to gaming in Section 5c(c)(5)(C) of the CEA does not refer to "sports" or "athletic" gaming (or define the term "gaming"), the Commission cites to a colloquy regarding the then-proposed Dodd-Frank Act provision to support its inclusion of sports or athletic events in the definition of gaming.[11] The cited colloquy between Senators Blanche Lincoln and Diane Feinstein regarding event contracts refers to contracts involving singular sporting events "such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." This suggests that contracts involving the outcome of a singular game constitute activity intended to be restricted from trading on registered entities, subject to a public interest determination by the Commission.[12] The reference to singular events such as the Super Bowl, the Kentucky Derby, and the Masters Golf Tournament evidences a concern with listed derivatives contracts that would mimic traditional bets on the outcome of a particular sporting event—in other words, binary event contracts.

However, as explained above, because the proposed definition would include "the performance of one or more competitors in one or more games," or "any other occurrence or non-occurrence in connection with one or more games," the Proposal expands the definition of "gaming" well beyond the scope of concern described in the colloquy. Tellingly, the Proposal does not mention the next sentence from the Feinstein-Lincoln colloquy, which sheds further light on the intended scope of the prohibition on "gaming" contracts. Specifically, Senator Lincoln continued, "These types of contracts would not serve any real commercial purpose. Rather, they would be used solely (emphasis supplied) for gambling." As has been pointed out by other commentators on the Proposal,[13] it is certainly possible to create sports or athletic game contracts that refer not to a single game or binary outcome of a game (which was the focus of Senator Lincoln's concern) but rather Non-Binary Sports Contracts that can serve a legitimate risk management and risk-shifting purpose consistent with the function of other commodity futures contracts. If a Non-Binary Sports Contract can serve a "real" commercial purpose, it is not the type of contract that Congress sought to prohibit, because the use of such contract would not constitute gambling on a game. Non-Binary Sports Contracts should not be deemed to be a gambling or

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11 House Senate Conference Report on Dodd-Frank on July 15, 2010 (5902-5930 in the Cong. Record).

12 "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."

13 Supra note 3.

gaming contract any more than any other futures contract that may serve a dual purpose as an instrument for hedging or an instrument for assuming risk (speculation).

4. The breadth of the Commission's proposed gaming definition is inconsistent with federal and state law governing sports gambling.

a. Federal Gaming Laws

Since 2018, sports gambling has not been barred by federal law where states do not prohibit it. In 2018, the U.S. Supreme Court invalidated the Professional and Amateur Sports Protection Act (the "PASPA"), which had restricted all but a handful of grandfathered states from legalizing sports gambling since 1992.[14] This ruling enabled states to legalize sports gambling. Currently, 38 states plus the District of Columbia and Puerto Rico have legalized some form of sports betting.[15] The Proposal fails to recognize the trend toward legalization of sports betting in the United States, which has gathered momentum after the passage in 2010 of Dodd-Frank (which is where Congress added the special contract review procedures for event contracts to the CEA).

The Interstate Wire Act of 1961, often called the Federal Wire Act, is a United States federal law prohibiting the operation of betting businesses in the United States using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or assisting in the placing of bets or wagers on any sporting event or contest.[16] However, the Federal Wire Act does not prohibit lawful intrastate gambling, and interstate sports betting is permitted so long as the wager is both sent and received in a state where sports betting is legal.[17]

Additionally, the Unlawful Internet Gambling Enforcement Act (the "UIGEA"), 31 U.S.C. §§ 5361 et seq., prohibits internet gambling and related activity. Specifically, the UIGEA prohibits the "staking or risking by any person of something of value upon the outcome of … a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." While the

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14 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

15 American Gaming Association, U.S. Legal Sports Betting, Legal landscape as of May 24, 2024, https://www.americangaming.org/. *See also* Matthew Waters, Legislative Tracker: Sports Betting, Aug. 4, 2024, https://www.legalsportsreport.com/.

16 18 U.S.C. § 1084(a).

17 18 U.S.C. § 1084(b) ("Nothing in this section shall be construed to prevent [. . .] the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal."); *see also* United States v. Lyons, 740 F.3d 702, 713 (1st Cir. 2014) ("[T]he Wire Act prohibits interstate gambling without criminalizing lawful intrastate gambling or prohibiting the transmission of data needed to enable intrastate gambling on events held in other states if gambling in both states on such events is lawful.").

Supreme Court invalidated the PASPA in 2018, the UIGEA remains in effect. The key difference between the PASPA and the UIGEA is that while PASPA prevented states from legalizing sports betting, the UIGEA only applies to unlawful gambling and defers to state and other federal laws. To this end, the UIGEA makes it clear that it does not supersede state law that permits gambling. Specifically, the term "unlawful Internet gambling" does not apply to wagers "initiated and received or otherwise made exclusively within a single state" and if "the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State." Importantly, under the UIGEA, "any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act" is excluded from the definition of bet or wager.[18] Likewise, under the UIGEA, fantasy sports are explicitly excluded from the definition of bet or wager.

b. Derivatives contracts that are not based on the binary outcome of a game but rather are in the nature of Non-Binary Sports Contracts should not be deemed to be gaming or gambling under federal law because (i) they do not fall within the definition of gaming or gambling under federal law, and (ii) futures contracts traded on registered entities are specifically excluded from the definition of bets or wagers under the UIGEA.

Neither PASPA nor the Federal Wire Act contains a specific definition of the terms "gambling," "betting," "wagering," or "gaming." The scope of the Federal Wire Act (whether its prohibitions are limited to sports betting or apply to other types of gambling) has been a contested issue for years. Notably, none of the opinions considering the reach of the Federal Wire Act defined the terms "betting", "wagering", or "engaged in the business of betting or wagering". However, there is authority for the proposition that gambling, betting, wagering, and gaming, as such terms are used in federal law, all are based on there being an element of chance. "It is beyond question, and counsel for the United States so concedes, that an indispensable element of 'betting,' 'wagering,' or 'gambling' is the element of risk or chance. Every federal statute involving gambling offenses requires this element." United States v. Bergland, 209 F. Supp. 547, 548 (E.D. Wis. 1962), rev'd on other grounds, 318 F.2d 159 (7th Cir. 1963).

Derivatives contracts that are not based on the outcome of a game but rather are in the nature of Non-Binary Sports Contracts should not be deemed bets or wagers within the meaning of the UIGEA or otherwise under federal law. The UIGEA states that bets or wagers are the "staking or risking by any person of something of value upon the outcome (emphasis supplied) of … a sporting event, or a game subject to chance."[19]

Contracts such as Non-Binary Sports Contracts should not be deemed to be sports betting under the UIGEA or Federal Wire Act because under federal law sports betting involves an

[18] 31 U.S.C. § 5362(1)(E)(ii).

[19] 31 U.S.C. § 5362.

element of chance. Contracts should not be deemed to be based on the outcome of a sporting event or a game subject to chance because they consider multiple real-time measures of athletic performance across multiple sporting events without respect to the outcome of any game. No single binary event or outcome, such as the winning or losing of a game, or the number of points scored in a game being above or below a specified level, or whether a team wins or loses by more than or less than a specified point spread, is a determinative factor in the payout or amount of payout, if any, on such a contract. Nor are such types of contracts a game subject to chance. The outcome of trading in the contracts is not like flipping a coin, rolling dice or picking a number in a lottery. It will require the skill of market participants to evaluate athletic performance over multiple games in valuing and trading Non-Binary Sports Contracts, for example, by evaluating historical performance data or performing predicative data analysis, as traders do with other types of derivative contracts.

These contracts could operate like other futures contracts based on economic or equity indices. For example, broad-based stock indices are based on the weighted price performance of the companies included in the index. Any number of economic or non-economic variables can impact the price of the stock of these companies, such as earnings, dividends, interest rates, investor expectations, and macro-economic and micro-economic factors and other non-economic factors. It is impossible to precisely ascertain what the index price will or should be in the future. But regardless of the unpredictability of the price of the stock, trading stocks on a regulated securities exchange or stock index futures on a registered entity is not considered chance-based or gambling. Nor should trading in contracts like Non-Binary Sports Contracts.

Non-Binary Sports Contacts can be viewed as analogous to stock index contracts in that, as with companies in stock indices, any number of variables can impact the performance of an athlete or team, making it impossible to precisely ascertain what the contract price will be in the future. But also like a stock index, the outcome on a Non-Binary Sports Contract would not be chance-based; it is not the same as flipping a coin or rolling dice.

While the value of such Non-Binary Sports Contracts, like a stock index contract, might have some elements of unpredictability, this unpredictability is not the type of chance that gaming or gambling statutes prohibit. As the Illinois Supreme Court noted, "the outcome of every contest depends, at least to some degree, on chance. Even chess, a highly skill-based contest, can be affected by the random factors of who draws white (and thus goes first) or whether one's opponent is sick or distracted."[20] We believe that the federal laws were not intended to mean that any unpredictable or random event that could affect an outcome, such as an athlete being injured or other unforeseen occurrence, should result in the characterization of the outcome of a Non-Binary Sports Contract as the result of chance, any more than the trading of any other type of futures contract should be viewed as purely based on chance.

[20] Dew-Becker v. Wu, 2020 IL 124472, ¶ 28.

c. None of the state anti-gambling laws cited by the Commission in the Proposal would prohibit Non-Binary Sports Contracts.

In the Proposal the Commission references a few state sports antigambling laws. What the Proposal fails to acknowledge is that most states (38 states plus the District of Columbia and Puerto Rico) currently allow sports betting in some form. Non-Binary Sports Contracts should not constitute or involve unlawful activity under any of the state sports anti-gambling laws cited by the Commission in the Proposal (Georgia and Texas, prohibiting bets on the outcome of single games or the performance of an athlete in a game, and Virginia, Ohio and Maryland, prohibiting collegiate player "prop" bets).[21] All of the state sports anti-gambling laws referenced by the Commission focus on betting activity related to the outcome of a single game or the performance of an athlete in a single game. The Commission, however, without explanation or justification has determined to adopt a definition of gaming that is broader than state law in this respect, by including the performance of athletes in one or more games.[22]

d. The Commission should revise its definition of gaming to not be broader than federal or state sports gambling laws.

Even if contracts such as Non-Binary Sports Contracts were to be considered event contracts within the meaning of Regulation 40.11 (which we do not concede for the reasons stated above in Section A.2.), they should not be prohibited under CFTC Regulation 40.11 because they do not involve gambling and are not contrary to the public interest. Non-Binary Sports Contracts fall outside of the prohibition on sports gambling under federal law. First, such contracts do not involve chance. Market participants would need to use their skill in evaluating overall athletic performance measured over multiple games in valuing and trading a Non-Binary Sports Contract. Second, such contracts do not involve staking an economic interest on the outcome of an event. Third, Non-Binary Sports Contracts are not based upon the outcome of a game or games or the performance of an athlete or a team in a single game, and thus such contracts do not involve illegal conduct under the state laws cited by the Commission in the Proposal. There is no justification for the Commission to adopt a definition of gaming with respect to athletic games that goes beyond federal or state law.[23]

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21 *See* Proposal at nn. 70, 74.

22 *See* Proposal at n.72.

23 In the context involving state law regarding gaming generally (and not sports), the Proposal specifically declined to go as far as those states' definition of gaming. "The Commission acknowledges that several state statutes recognize 'gambling,' 'betting,' or 'wagering,' to encompass, more broadly, a person staking or risking something of value upon the outcome of any contingent event not in the person's influence or control—and not just a game or a contest of others. FN74 The Commission is not proposing to define 'gaming' in this manner." Proposal at 48975. This makes the Proposal's gaming definition that goes beyond state definitions in the context of sports gaming all the more perplexing.

B. The Commission wrongly asserts authority to adopt a categorical rather than a contract-specific public interest determination with respect to athletic game event contracts.

Section 5c(c)(5)(C) of the CEA reflects Congress's requirement that the Commission make a contract-by-contract analysis and considered determination for any contracts, including event contracts, proposed to be listed by a registered entity. However, the CFTC now wishes to interpret Section 5c(c)(5)(C) of the CEA and amend Rule 40.11 to authorize categorical pre-determinations of what is in the public interest by a mere designation of an enumerated activity or prescribed similar activity as a wholesale category, as opposed to a determination on a contract-by-contract basis. There have been longstanding concerns that Rule 40.11 is inconsistent with the CEA.[24] While Section 5c(c)(5)(C) grants the Commission the discretion to determine whether a registered entity's event contract that involves an enumerated activity is contrary to the public interest, Rule 40.11(a), by contrast, provides that [a registered entity] "shall not list for trading" a contract that involves . . . an enumerated activity. Read literally, Rule 40.11(a) removes entirely the expectation by Congress that the Commission will engage in a meaningful evaluation of event contracts from a public interest perspective. The Proposal aggravates this issue by making categorical public interest pre-determinations, collapsing the two-step analysis that Congress provided for event contracts into a single step and eliminating any process for consideration, evaluation, or analysis.

Historically, the CFTC has conducted a contract-specific approach to analyzing whether an enumerated activity or prescribed similar activity is contrary to the public interest. Even though "public interest" is not defined in Section 5c(c)(5)(C) of the CEA, the CFTC has historically evaluated whether a contract is contrary to the public interest with reference to the contract's commercial hedging or price-basing utility, along with considering other public interest factors. In addition to applying a version of the "economic purpose test," the CFTC has recently considered other factors when evaluating whether a particular contract is "contrary to the public interest." These factors include whether transactions are, as stated in the "findings" provision of the CEA, "affected with a national public interest by providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information"; the legislative history of CEA Section 5c(c)(5)(C); and other factors the Commission determines to consider in its discretion, such as "whether a contract may threaten the public good." These considerations can only be properly performed on a contract-by-contract basis.

Moreover, Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated considering five broad areas of market and public concern: (i) protection of market participants and the public; (ii)

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[24] *See*, *e.g.,* Statement of Commissioner Brian D. Quintenz on ErisX RSBIX NFL Contracts and Certain Event Contracts (March 15, 2021), and Dissenting Statement of Commissioner Summer K. Mersinger Regarding Order on Certified Derivatives Contracts with Respect to Political Control of the U.S. Senate and House of Representatives (September 22, 2023).

efficiency, competitiveness, and financial integrity of futures markets; (iii) price discovery; (iv) sound risk management practices; and (v) other public interest considerations. The Proposal purports to perform such an analysis[25], however, its consideration is incomplete and that underscores one of the flaws of its categorical preclusion of all gaming event contracts. The Proposal's consideration of costs and benefits does not include an evaluation of the potential price discovery and risk-management benefits of Non-Binary Sports Contracts, nor does it evaluate the costs of the loss of such benefits that would result from its categorical prohibition of such contracts from being listed.

To change its event contract review process, as the Commission now proposes, such that the Commission would make a categorical determination regarding all contracts involving an enumerated activity, such as gaming involving sports events, is wrong as a matter of law and as a matter of policy. Congress did not provide that event contracts involving enumerated activities are contrary to the public interest per se. Rather, if an event contract involves an enumerated activity, the Commission "may" determine that it is contrary to the public interest and prohibited from trading. Under CEA Section 5c(c)(5)(C), Congress delegated the authority to the Commission to make event contract public interest determinations on a case-by-case basis for contracts that involve an enumerated activity; it did not delegate the authority to make categorical prohibitions. Historically, only Congress has exercised the power to ban categories of contracts outright. Congress has invoked this power very rarely, in the case of contracts involving onions,[26] security futures[27] (until the adoption of the Commodity Futures Modernization Act of 2000), and motion picture box office receipts.[28]

It is also bad policy for the Commission to make pre-emptive broad categorical determinations as to enumerated event contracts. As illustrated in this letter, there can be various types of athletic event contracts, some of which are binary event contracts based on the outcome of a game, some that are based on multiple events or metrics, and some that are yet to be developed. To categorically treat all athletic event contracts in the same way, without conducting a fact-specific analysis of the economic utility of each contract, is contrary to the public interest in promoting responsible financial innovation, which is one of the purposes of CFTC regulation specified under the CEA.[29] The Supreme Court decision in 2018 overturning PASPA and the continued trend of states liberalizing the regulation of sports betting occurred after the adoption of Dodd-Frank and the adoption of Section 5c(c)(5)(C) of the CEA and Regulation 40.11. Most states have since legalized sports betting in some form. The Proposal fails to take these recent legal and societal trends and developments into its consideration of its

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25 Proposal at 48987.

26 The Onion Futures Act of 1958 banned futures trading in onions. The prohibition on onion futures was incorporated in the CEA by the Commodity Futures Trading Commission Act of 1974.

27 Futures Trading Act of 1982.

28 Dodd-Frank Act, July 21, 2010.

29 Section 3(b) of the CEA.

legal and public interest analysis and instead appears to want to find that "gaming," as very broadly defined in the Proposal, is per se against the public interest, without having to make a contract-specific analysis, when in fact the developing trend is to permit certain types of sports betting. To be clear, we are not suggesting that the Commission should permit event contracts that can operate as a means for betting on the outcome of an athletic game. But in seeking to prohibit such contracts it is not necessary for the Commission to also disqualify innovative athletic contracts that can serve a bona fide economic risk management purpose.

C. Conclusion

We appreciate the opportunity to provide comments on the Proposal. We are concerned that the Proposal's overbroad gaming definition and the predetermined wholesale categorical declaration of ineligibility as to gaming contracts, if adopted, would prevent legitimate commercial sports event contracts from being available to registered entities, participants with economic exposure to the sports industry, and market participants, stifling the promotion of responsible innovation, which would be contrary to one of the fundamental purposes of the Commission.

Accordingly, the Commission should either withdraw the Proposal or recalibrate its approach, by more carefully focusing on Congressional intent with respect to event contracts involving gaming, and being especially mindful of the evolving public interest, reflected in the strong trend of state liberalization of the regulation of sports betting. In performing its public interest analysis, the Commission should continue to apply its historical approach of conducting individualized analysis of contracts submitted by registered entities and, in the case of sports event contracts, distinguishing between event contracts that are solely a bet on the outcome of a sports game or contest and those contracts that are structured to serve a real economic purpose.

We look forward to further engagement with the Commission on these important issues. Please do not hesitate to contact the undersigned at 312-324-1905 (or michael.philipp@morganlewis.com) should you have any questions.

Very truly yours,

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