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REGULATORY OUTLOOK FOR DERIVATIVES BASED ON SPORTS OUTCOMES

ABSTRACT

This Note dives into the intersection between two distinct areas: sports gambling and derivatives. ErisX had the keen idea to use sports-based futures contracts for hedging purposes, and thought that because of these hedging purposes, it would not be rubbing up against any sports gambling laws. However, the Commodity Futures Trading Commission (CFTC), in charge of regulating the trading of futures contracts, still presented a problem for ErisX. The CFTC prohibits futures contracts involving “gaming,” and while the purpose of these contracts are not speculative, they still involve sports. Therefore, a new CFTC body equipped to deal with sports-based contracts would go a long way in promoting strong and stable markets in the world of sports gambling.

INTRODUCTION

The sports gambling landscape has changed dramatically in recent years.¹ After the Supreme Court struck down the federal prohibition on sports betting in *Murphy v. National Collegiate Athletic Association*, the path was cleared for individual states to determine whether and how to legalize sports gambling.²

With that monumental decision came a flurry of states legalizing sports betting, along with an exponential rise in the prominence of legal online sportsbooks.³ A sportsbook is a company or entity that accepts bets on most major sporting events, especially college and professional events.⁴ Although sports gambling has risen to new heights,⁵ there are still several states that stand to benefit from legalizing sports gambling once and for all.⁶ The Federal Wire Act (the Wire Act) prohibits interstate sports betting, which creates heightened risks for states and, more specifically, companies

1. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Apr. 7, 2021), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization.

2. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 U.S. 1461, 1484–85 (2018).

3. Katherine Sayre, *The NFL is Back and Sports Bettors are Following*, THE WALL ST. J. (Sept. 14, 2020), https://www.wsj.com/articles/the-nfl-is-back-and-sports-bettors-are-following-11600112703?mod=article_inline.

4. Matt Ryan Webber, *Sportsbook Definition*, INVESTOPEDIA (May 25, 2022), <https://www.investopedia.com/sportsbook-5217715>.

5. Jim Sergent, *Six Charts Show Sports Betting's Digital Explosion with NFL Season About to Kick Off*, USA TODAY (Sept. 9, 2021), <https://www.usatoday.com/in-depth/graphics/2021/09/09/online-sports-gambling-good-bet-industry-continue-winning-ways/5686836001/>.

6. See *Why the US Government Should Make Sports Betting Legal*, LEGAL SPORTS BETTING, <https://www.legalsportsbetting.com/why-the-us-government-should-make-sports-betting-legal/> (Jan. 22, 2020).

attempting to partake in interstate business, regardless of how many states legalize sports betting.⁷

Because sportsbooks must limit their operations to the states in which they operate,⁸ they are unable to properly hedge their risk.⁹ For example, if the Philadelphia Eagles were to make the Super Bowl, the sportsbooks operating in Pennsylvania, where sports betting is legal, would see the majority of bets placed on the home favorite.¹⁰ This means that sportsbooks are at risk of significant losses should the Eagles win, with little ability to hedge that risk.¹¹ The only way Pennsylvania sportsbooks could hedge their risk in this example would be to manipulate moneylines and point spreads to encourage Pennsylvanians to bet on the opponent.¹²

A point spread is a bet on the margin of victory in a sporting event.¹³ The perceived stronger team (the favorite) must win by a certain number of points/runs/goals for one to win their bet on the favorite.¹⁴ To win a bet on the perceived weaker team (the underdog), the underdog can lose by fewer than that number of points, or win the game outright.¹⁵ For example, in the 2022 NFL season week one matchup between the Ravens and the Jets, the Ravens were minus seven-point favorites, making the Jets plus seven-point underdogs.¹⁶ This means a bettor who took the Ravens would need the Ravens to win by more than seven, while a bettor who took the Jets would need the Jets to either win outright or lose by fewer than seven points.¹⁷ If the Ravens win by exactly seven points, it is considered a “push” and all bettors are refunded.¹⁸

A moneyline bet removes the point spread from the equation and is simply a bet on who will win the game.¹⁹ Instead of points or runs, moneyline bets are based on odds, and each team in a given matchup has its own

7. 18 U.S.C. § 1084 (1961).

8. *Id.*

9. See ERISX, ERIS EXCH. SUBMISSION NO. 2020-11E, CFTC REGULATION 40.2(A) CERTIFICATION, NOTIFICATION REGARDING THE INITIAL LISTING OF ERIS EXCHANGE RSBIX NFL FUTURES at 2, (Dec. 14, 2020), <https://bit.ly/3BznRg2>.

10. Zachary Zagger, *Sportsbooks Could Use Derivatives Market, but is it Betting?*, LAW360 (Feb. 17, 2021, 5:50 PM), <https://www.morganlewis.com/-/media/files/news/2021/law360-sportsbooks-could-use-derivatives-market--but-is-it-betting.pdf>.

11. *Id.*

12. *Id.*

13. Steven Petrella, *Point Spread Definition, Examples*, THE ACTION NETWORK, <https://www.actionnetwork.com/education/point-spread> (last visited Aug. 17, 2022, 2:23 PM)

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Steven Petrella, *Point Spread Definition, Examples*, THE ACTION NETWORK, <https://www.actionnetwork.com/education/point-spread> (last visited Aug. 17, 2022, 2:23 PM).

19. Dan Santaromita, *Moneyline Bets in Sports*, THE ATHLETIC, (Jan. 25, 2022), <https://theathletic.com/2514849/2022/01/25/moneyline-bets-in-sports-what-are-they-how-to-place-a-moneyline-bet-odds-payouts-favorites-vs-underdogs-and-examples/>.

“moneyline.”²⁰ For example, if the Chiefs are -350 favorites against the Bears (a +245 underdog), a Chiefs bettor would need to bet \$350 to win \$100, and a Bears bettor would make \$245 if they bet \$100.²¹

Not only does the current approach encourage sports bettors to bet illegally using unregulated offshore sportsbooks,²² but it also limits the growth potential for both the futures industry and the sports betting industry due to geographic limitations.²³ Recognizing these deficiencies, ErisX, the company highlighted throughout as being at the intersection of the sports betting and futures industries, attempted to offer a solution.

ErisX is a digital asset exchange that proposed to list sporting event-based futures contracts in an effort to meet the hedging needs of commercial market participants.²⁴ A digital asset exchange is an online business that allows customers to trade cryptocurrencies or digital currencies for other assets.²⁵ Sporting event-based futures contracts are contracts that depend on the outcome of a sporting event.²⁶ So, for example, a sportsbook might sell a contract to a buyer who is willing to bet that Team A will win. In this scenario, the seller would take the position that Team B will win. Thus, the futures contract is dependent on the outcome of the sporting event. These contracts were to be based on the moneyline (as seen in the previous example) and the point spread for sports games.²⁷ Further, these contracts were to only be made available “to eligible contract participants such as state-licensed sportsbooks, vendors and stadium owners with a demonstrated need to hedge financial exposure associated with their commercial business, as well as designated market makers.”²⁸

On December 14, 2020, ErisX submitted notice to the CFTC that it would list financially settled NFL Futures Contracts (the NFL contracts), or futures contracts on National Football League (NFL) games, on its electronic trading platform.²⁹ While ErisX withdrew its submission to the CFTC on March 22, 2021, the response expected from the CFTC sheds light on the uncertain landscape for derivative-based sports contracts.³⁰

20. *Id.*

21. *Id.*

22. Zagger, *supra* note 10, at 1.

23. ErisX, *supra* note 9, at 2.

24. *ErisX and RSBIX Introduce Sporting Event Based Futures Contracts*, MEDIUM (Dec. 14, 2020), <https://erisxinsights.medium.com/erisx-and-rsbix-introduce-sporting-event-based-futures-contracts-8f747f16c671>.

25. OPENWARE, <https://www.openware.com/solution/digital-assets-exchange> (last visited Sept. 11, 2022).

26. *ErisX and RSBIX Introduce Sporting Event Based Futures Contracts*, *supra* note 24, at 1.

27. *Id.*

28. *Id.*

29. ErisX, *supra* note 9, at 1.

30. Jonathan Marcus, *NFL Futures Contracts and the Future of Contracts that May Involve ‘Gaming’*, WESTLAW TODAY (Sept. 3, 2021), [https://today.westlaw.com/Document/1381c683d0ccc11ecbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://today.westlaw.com/Document/1381c683d0ccc11ecbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

Currently, the CFTC claims to employ a two-part test when evaluating whether a contract should be prohibited because it involves gaming.³¹ The first part requires the CFTC to find that the contract in question *involves* gaming.³² While the contracts in question seem to involve gaming because they are based on the outcomes of sporting events, as CFTC Commissioner Brian Quintenz explains, gaming was enumerated as a separate type of event contract.³³ This means that the CFTC's reliance on state law definitions of gambling to prove that these contracts involve *gaming* is an arbitrary classification.³⁴ The NFL contracts would only be used by sportsbooks and other eligible participants as tools to manage commercial risk,³⁵ so they should not be viewed simply as gambling, which should, in turn, prove that the contract does not involve gaming.³⁶

However, because sports are implicated, the CFTC is likely to determine that the contract involves gaming. Once it does so, it must then show that the gaming contract is “contrary to the public interest.”³⁷ Because these contracts do not have a harmful effect on any particular party and help to stabilize a risk-filled industry, they are not “contrary to the public interest.”

Ultimately, this two-part test should not lead to a finding that the contracts are impermissible. Because its vague nature allows for that to occur, a new alternative must be implemented. Additionally, the Statute and Regulation governing derivative contracts that involve gaming constitute a messy evaluation of futures contracts.³⁸ As Commissioner Quintenz admits, there is a conflict between the statutory framework, which allows event contracts barring a CFTC determination that they are contrary to public interest, and the regulatory framework, which announces a blanket prohibition on all event contracts regardless of their utility or benefit.³⁹

A possible solution to the confusion brought on by the conflicting statute and regulation is to give sportsbooks the opportunity to contract with sportsbooks in other states facing the same issue.⁴⁰ For this to take place, the CFTC must reassess its framework for evaluating futures contracts so that sportsbooks can use futures contracts, like those proposed by ErisX, to hedge against unnecessary risk. This Note proposes (1) that CFR § 40.11 and §

31. Dan M. Berkovitz, *Sports Event Contracts: No Dice Unless There is an Economic Purpose and the Exchange is Open to the Public*, COMMODITY FUTURES TRADING COMM'N (Apr. 7, 2021), <https://www.cftc.gov/PressRoom/SpeechesTestimony/berkovitzstatement040721>.

32. *Id.*

33. Brian D. Quintenz, *Any Given Sunday in the Futures Market*, COMMODITY FUTURES TRADING COMM'N (Mar. 25, 2021), <https://www.cftc.gov/PressRoom/SpeechesTestimony/quintenzstatement032521>.

34. Berkovitz, *supra* note 31.

35. Quintenz, *supra* note 33.

36. *Id.*

37. Berkovitz, *supra* note 31, at 2.

38. Quintenz, *supra* note 33.

39. *Id.*

40. *ErisX and RSBIx Introduce Sporting Event Based Futures Contracts*, *supra* note 24.

5(c)(5)(C) of the Commodities Exchange Act (the CEA) be made uniform, so that they no longer conflict; and (2) that a clearer framework be implemented for the CFTC to follow so they do not act unconstitutionally as they assess similar futures contracts going forward. The constitutional concern is that by giving the CFTC unfettered discretion, Congress has potentially violated the Non-Delegation Doctrine.⁴¹

Part I of this Note will delve into the world of derivatives and, more specifically, futures contracts. It will also discuss ErisX's proposal to list sports-based futures contracts on its exchange, its effect on the sports betting landscape, and the broader futures industry. Part II will discuss the existing legal framework used to evaluate futures contracts, and Part III will consider the contrasting opinions of two CFTC commissioners on ErisX's proposal. Lastly, Part IV will recommend a solution to the issues presented by the limited usefulness of the regulation of sports-based futures contracts: the appointment of the Event and Gaming Contracts Commission (the EGCC), which would oversee all contracts involving sports, politics, and entertainment, like the NFL contracts offered by ErisX.⁴²

Considering the explosion of sports betting since the *Murphy* decision in 2018,⁴³ it is pertinent that a committee be tasked with understanding the nuances of this industry. While the CFTC handles derivative and future contracts, the uneven approach it took in evaluating the ErisX proposal exemplified that it lacks the time and resources to thoughtfully assess the usefulness of contracts like these. Thus, the EGCC would offer a much-needed regulatory body where sports betting and finance meet.

I. BACKGROUND: WHO, WHAT, HOW?

A. FUTURES CONTRACTS

A derivative contract is a contract between two or more parties that derives its value from some underlying financial asset.⁴⁴ Common underlying assets include bonds, commodities, currencies, interest rates, and stocks, and commonly used derivatives include futures contracts, forward contracts, options, swaps, and warrants.⁴⁵

A futures contract is a type of financial derivative that obligates a party to buy or sell a particular asset at a predetermined price and at a specified

41. Quintenz, *supra* note 33.

42. Marcus, *supra* note 30.

43. Sayre, *supra* note 3.

44. Jason Fernando, *Derivative*, INVESTOPEDIA (June 8, 2021), <https://www.investopedia.com/ask/answers/12/derivative.asp>.

45. *Id.*

time in the future.⁴⁶ Futures contracts are often used for hedging purposes but can also be used for trade speculation.⁴⁷

The following example shows how a futures contract can be used to hedge risk. Suppose that Company A knows that eight months from now, it will have to buy 5,000 bushels of bananas to fulfill an order. Assume the current market price for bananas is \$3 per bushel, and the price of a six-month futures contract is \$2 per bushel. By purchasing a futures contract, Company A can guarantee a price of \$2 per bushel. This reduces the company's risk because it will be able to close its futures position and buy 5,000 bushels of bananas for \$2 per bushel in eight months at the contract's expiration date. If Company A had not purchased the eight-months futures contract and the price of bananas increased from \$3 per bushel to \$5 per bushel after one month, then the company would be forced to purchase the 5,000 bushels of bananas at the price of \$5 per bushel. This would result in a greater expense for the company (compared to the \$2 per bushel price it could have guaranteed by purchasing a futures contract for bananas).

B. ERISX CRYPTOCURRENCY EXCHANGE

ErisX operates an online trading platform that gives users access to futures markets and digital asset spot contracts.⁴⁸ Digital assets, or cryptoassets, are “transferrable assets which exist only in electronic form, are not traditional currencies, and are not backed by, or linked to, traditional commodities.”⁴⁹ The main categories of digital assets are digital currencies, virtual currencies, and cryptocurrencies (like Bitcoin).⁵⁰ A digital asset future is simply a futures contract for which the underlying asset is one or more digital assets.⁵¹ A spot contract is an agreement that enables traders to buy and sell an asset at the current market rate, known as the spot price.⁵²

While ErisX normally deals in the cryptocurrency space, it saw a unique way to give sports-linked businesses an opportunity to manage their risks while also creating a new market for sports-based futures contracts.⁵³ ErisX

46. Adam Hayes, *Futures Contract*, INVESTOPEDIA (Sept. 20, 2021), <https://www.investopedia.com/terms/f/futurescontract.asp>.

47. *Id.*

48. *ErisX—Overview*, PITCHBOOK, <https://pitchbook.com/profiles/company/233613-73#overview> (last visited Oct. 4, 2022).

49. *Regulation of Commodity and Digital Asset Derivatives—Overview*, LEXISNEXIS, https://www.lexisnexis.com/uk/lexispsl/financialservices/document/393813/8TMS-8V52-8T41-D20X-00000-00/Regulation_of_commodity_and_digital_asset_derivatives_overview (last visited Sept. 11, 2022).

50. *Id.*

51. *Id.*

52. Becca Cattlin, *What is a Spot Contract?*, IG (Nov. 9, 2020, 3:04 PM), <https://www.ig.com/en/trading-strategies/what-is-a-spot-contract—201109>.

53. Alexander Osipovich & Dave Michaels, *NFL Futures Plan Withdrawn as Regulator Prepared to Reject It*, THE WALL ST. J. (Mar. 23, 2021, 2:11 PM), <https://www.wsj.com/articles/nfl-futures-plan-withdrawn-by-exchange-as-regulator-prepared-to-spike-it-11616521600>.

planned on offering three types of futures contracts based on (i) the moneyline, (ii) the point-spread, and (iii) the point total of NFL games. It later planned to offer futures contracts for NBA games as well.⁵⁴ While these were brought to the market as futures contracts, they were effectively binary options, meaning the winner received a settlement price of one hundred dollars and the loser received a settlement price of zero dollars.⁵⁵

Ultimately, sports-based futures contracts would enable sportsbooks to hedge the risk brought on by imbalances in their books.⁵⁶ ErisX would list a game using a moneyline contract:⁵⁷ “[t]he buyer of the contract (long position) would take the position that the *away* team will win the game, while the seller of the contract (short position) would take the position that the *home* team will win the game.”⁵⁸

For example, ErisX would list a moneyline contract for the NFL Week 6 game: the Buffalo Bills versus the Tennessee Titans.⁵⁹ The buyer would take the position that the Bills will win the game, while the seller would hold the position that the Titans will win.⁶⁰ In this case, the buyer is a Buffalo sportsbook, and the seller is a Tennessee sportsbook.⁶¹ Therefore, if the Titans were to win the game, the Tennessee sportsbook effectively hedged against the losses brought on by most “hometown” bets being placed on the Titans.⁶² This hedging occurs by the Titans profiting on the futures contract sold to the Buffalo sportsbook.⁶³

Ideally, this hedging mechanism allows sportsbooks to balance the betting on both sides of a contract.⁶⁴ So, if the majority of in-state wagers are placed on one team, the sportsbook can use futures contracts to take bets on the other team, effectively evening the scale.⁶⁵ This allows sportsbooks to remain outcome-neutral without worrying about incurring huge losses on the result of a particular sporting event.⁶⁶

ErisX limited the scope of participants to licensed sportsbooks, vendors, and stadium owners that have a demonstrated need to hedge their commercial risk and designated market makers.⁶⁷ Sports stadium vendors and owners face significant commercial risk due to the sports world they operate in, and these

54. *ErisX and RSBIX Introduce Sporting Event Based Futures Contracts*, *supra* note 24.

55. Marcus, *supra* note 30.

56. *ErisX and RSBIX Introduce Sporting Event Based Futures Contracts*, *supra* note 24.

57. *Id.*

58. *Id.*

59. ErisX, *supra* note 9.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 6.

64. ErisX, *supra* note 9, at 2.

65. *Id.*

66. *Id.*

67. *Id.* at 4.

contracts would effectively hedge against that risk.⁶⁸ Massive profits are generally realized by only successful franchises in sports because they attract the most fans, and high attendance equals high revenue.⁶⁹ If a team is performing poorly, fewer people are likely to show up to the stadium, which creates a great financial risk to vendors and stadium owners.⁷⁰ Further, a poor performing team is unlikely to make the playoffs, which means that vendors are stripped of the opportunity to sell during those games, and owners are unable to sell tickets.⁷¹ While some may view this as the price to pay for doing business, the risk is an unnecessary one—allowing vendors and owners to hedge against this risk harms no one and helps to spur economic growth.⁷² To put this solution in practical terms, a stadium owner could buy a futures contract on whether a team will make the playoffs.⁷³ This contract would serve as a hedge against the potential for massive losses in revenue.⁷⁴

C. SPORTS GAMBLING

The emergence and acceptance of widespread legal gambling throughout the sports industry have drastically changed societal views and discussions.⁷⁵ The sports gambling industry dates back centuries to some of the earliest organized sporting events.⁷⁶ Sports gamblers of the early nineteenth century bet mostly on horseracing.⁷⁷ Once professional baseball was established in 1876, betting on traditional sports came to the forefront.⁷⁸ At that time, the general attitude towards sports betting was laxer than at any other point in American history.⁷⁹ Sports gambling was viewed purely as a form of entertainment.⁸⁰

Sports betting remained popular into the twentieth century, albeit it still technically being illegal.⁸¹ However, the lack of sports gambling laws at the time, and the general indifference exhibited by law enforcement, led sports

68. *Id.* at 3.

69. ErisX, *supra* note 9, at 3.

70. *Id.*

71. *Id.*

72. *Id.* at 3, 7.

73. *Id.* at 6.

74. ErisX, *supra* note 9, at 6.

75. John T. Holden, Christopher M. McLeod & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 125–26 (2020).

76. See generally John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Pastime*, 2020 WIS. L. REV. 907, 910–924 (2020) (describing the history of betting on sports).

77. *History of Sports Betting in the USA*, LEGAL SPORTS BETTING, <https://www.legalsportsbetting.com/history-of-sports-betting-in-the-usa/> (last updated Aug. 19, 2022).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

gambling to remain commonplace.⁸² In 1931, Nevada became the first state to legalize gambling.⁸³ However, no other state legalized gambling, which allowed illegal gambling operations to run rampant throughout the country.⁸⁴ In 1961, Congress enacted the Wire Act, which criminalized the use of interstate telephone lines to operate a betting or wagering business.⁸⁵ The Wire Act, which was passed in response to the plethora of nationwide gambling operations, forced sports wagering to become a largely local activity, which it has remained to this day.⁸⁶

D. THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT OF 1992

By 1991, there was growing concern throughout the country, including from the legislature, over the sudden and accelerated expansion of sports gambling.⁸⁷ A report by the Senate Judiciary Subcommittee on Patents, Copyrights, and Trademarks called sports gambling a “national problem,” and emphasized that the “harm it inflict[ed]” had the potential to proliferate nationwide.⁸⁸ This led to the first major piece of federal sports betting legislation being enacted in 1992, called the Professional and Amateur Sports Protection Act of 1992 (PASPA).⁸⁹

PASPA made it “unlawful for a State or its subdivisions to sponsor, operate, advertise, promote, license, or authorize by law or compact a lottery, sweepstakes, or other betting, gambling, or wagering scheme based on competitive sporting events.”⁹⁰ This Act effectively banned sports betting in the United States, except in four states due to PASPA’s “grandfather” provisions.⁹¹ PASPA exempted sports-based gaming and lotteries in Oregon, Delaware, and Montana.⁹² Further, it preserved the status quo in Nevada, which had already legalized sports betting operations, including single-game sports gambling.⁹³

PASPA limited public access to sports wagering until it was overturned by the Supreme Court in 2018, with its ruling in *Murphy*.⁹⁴ In *Murphy*, the court examined a provision of PASPA that would have permitted New Jersey

82. *Id.*

83. *History of Sports Betting in the USA*, *supra* note 77.

84. *Id.*

85. Anthony Cabot & Greg Cloward, *Adjust to State-Regulated Sports Wagering, Not the Other Way Around: A Proposal for Change*, 3 GAMING L. REV. 109, 109 (2021).

86. *History of Sports Betting in the USA*, *supra* note 77.

87. *What is PASPA? The Professional Amateur Sports Protection Act*, THE LINES, <https://www.thelines.com/betting/paspa/> (last visited Sept. 11, 2022).

88. *Id.*

89. *History of Sports Betting in the USA*, *supra* note 77.

90. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 U.S. 1461, 1470 (2018).

91. *What is PASPA?*, *supra* note 87.

92. *Id.*

93. *History of Sports Betting in the USA*, *supra* note 77.

94. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 U.S. 1461, 1485 (2018).

to set up a sports gambling scheme in Atlantic City if it did so within a year of PASPA's enactment.⁹⁵ However, New Jersey did not take advantage of this provision until 2012, many years after PASPA's enactment, when it amended its state constitution to give the legislature the authority to legalize sports gambling schemes in Atlantic City.⁹⁶ In 2012, the legislature enacted a law doing exactly that.⁹⁷

The plaintiffs, the National Collegiate Athletic Association (NCAA), and three major professional sports leagues sued the Governor of New Jersey and other state officials, arguing that its action to legalize sports betting based on the PASPA provision violated PASPA.⁹⁸ New Jersey countered that PASPA violated the Constitution's "anti-commandeering" principle by preventing states from modifying or repealing its laws prohibiting sports gambling.⁹⁹ The Supreme Court of the United States agreed with New Jersey, holding that PASPA's prohibition of state authorization of sports gambling violated the anti-commandeering rule because it unequivocally dictated what a state legislature could and could not do.¹⁰⁰ Accordingly, due to its far-reaching restrictions, the Supreme Court declared PASPA unconstitutional, which opened the floodgates for sports betting in states that wished to partake.¹⁰¹

Within the first six months of this decision, seven states legalized and launched sports betting,¹⁰² and more than twenty states have legalized sports betting since this decision.¹⁰³ Studies done by various companies, including Gabelli Securities, Morgan Stanley, and Macquarie Research, estimate that the market for sports betting will grow from an estimated \$2.1 billion in 2021, to \$15 billion by 2025, and \$30 billion by 2030.¹⁰⁴

E. THE WIRE ACT

While *Murphy* still allows states to authorize sports betting by licensed sportsbooks, the Wire Act requires that all licensed sportsbooks confine their operations to a single state.¹⁰⁵ While more than half of the states have

95. *Id.* at 1482.

96. *Id.* at 1465.

97. *Id.*

98. *Id.* at 1465–66.

99. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 U.S. 1461, 1466 (2018).

100. *Id.* at 1467.

101. *What is PASPA?* *supra* note 87.

102. *History of Sports Betting in the USA*, *supra* note 77.

103. Paul Verna, *The Sports Gambling Opportunity for Marketers*, EMARKETER (June 21, 2021), <https://www.emarketer.com/content/sports-gambling-opportunity-marketers>.

104. *Id.*

105. Wire Act, 18 U.S.C. § 1084 (1961).

authorized sports betting¹⁰⁶ and the industry has subsequently flourished,¹⁰⁷ this statute has caused licensed sportsbooks to carry “unbalanced” books.¹⁰⁸ Thus, contrary to popular belief, licensed sportsbooks do not seek to profit based on the outcome of a sporting event; rather, they maximize revenue from the collection of fees.¹⁰⁹

Oftentimes, regional customers favor their local sports teams, which forces sportsbooks to carry unbalanced books.¹¹⁰ A notable example of an imbalanced book relates to the 2019 Super Bowl between the New England Patriots and the Los Angeles Rams. With no real way to hedge their risks, New Jersey sportsbooks lost more than \$4.5 million when the Patriots won the Super Bowl because the majority of bets were placed on the favorite home team—the Patriots.¹¹¹ By exposing sportsbooks to this risk, the entire industry may be jeopardized as well as the millions of Americans who trust these sportsbooks to be fair and safe.¹¹²

The only hedging means currently available to licensed sportsbooks include altering odds on sporting events, in which sportsbooks artificially change betting odds to make the outcome more favorable to them, or by prohibiting additional wagers once an imbalance in its books reaches a certain threshold.¹¹³ The major problem with altering odds is that it dissuades individuals from using licensed sportsbooks altogether and perpetuates illegal gambling.¹¹⁴ If you can get more favorable odds elsewhere, why take on more risk than you need to? The issue with prohibiting gambling after a certain threshold is met is that it forces private companies to put an artificial structural constraint on their commercial operations¹¹⁵ and drives consumers to illegal offshore operations.¹¹⁶

106. Twenty-six jurisdictions have authorized licensed sports betting including Arkansas, Colorado, Delaware, the District of Columbia, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, Washington, and West Virginia.

107. David Purdum, *One Year into Legal U.S. Sports Betting: What Have We Learned?*, ESPN (May 13, 2019), https://www.espn.com/chalk/story/_/id/26740441/one-year-legal-us-sports-betting-learned; Ed Dixon, *America Goes All in: The State of Play in the US Sports Betting Market*, SPORTS PRO MEDIA (Feb. 19, 2021), <https://www.sportspromedia.com/insights/features/from-the-magazine/us-sports-betting-market-gambling-revenue-states-2021-data/>.

108. ErisX, *supra* note 9, at 2.

109. *Id.*

110. *Id.*

111. Joseph Staszewski, *New Jersey Sportsbooks Lose Millions on Patriots-Rams Super Bowl*, N.Y. POST, (Feb. 4, 2019, 7:37 PM), <https://nypost.com/2019/02/04/new-jersey-sportsbooks-lose-millions-on-patriots-rams-super-bowl/>.

112. ErisX, *supra* note 9, at 3.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

ErisX's proposed solution to the issue of imbalanced sportsbooks included using sports-based futures contracts to hedge against this unnecessary risk, which would allow sportsbooks to remain outcome-neutral and lead to a less volatile industry with more room for economic growth.¹¹⁷ It would also permit sportsbooks to hedge their exposure without having to turn away consumers or artificially skew the odds, both of which drive consumers to illegal offshore operations.¹¹⁸ Lastly, vendor and stadium owners would have the opportunity to hedge against the commercial risk associated with lower game attendance or fewer home games resulting from poor performance.¹¹⁹ Instead of taking significant losses in revenue, a stadium owner could buy or sell a moneyline contract.¹²⁰

F. ETHICAL IMPLICATIONS OF SPORTS GAMBLING LEGALIZATION

With policymakers and lobbyists nationwide pushing towards the legalization of sports betting in pursuit of public and private revenue,¹²¹ the arguments against it seem to have been forgotten.¹²² The explosion in sports betting has led to younger demographics gaining interest in an activity with potentially harmful outcomes like addiction and economic hardship.¹²³ Those afflicted with addiction tend to spend more time and money gambling rather than focusing on employment or relationships.¹²⁴ Sports gambling addiction has also been linked to other problems, including a higher probability of alcohol or drug use and psychological or mental health issues.¹²⁵ Further, ethical concerns also exist: research demonstrates that sports gambling participation is influenced by how the activity is promoted or framed.¹²⁶ Therefore, the positive framing and incredible momentum that sports gambling has enjoyed since *Murphy* is particularly problematic when presented to vulnerable populations, notably those who have experienced addictive gambling behaviors and the youth population.¹²⁷

117. ErisX, *supra* note 9, at 2.

118. *Id.* at 6.

119. *Id.* at 3.

120. *Id.*

121. Jason Kwak & Neelesh Pandey, *Sports Gambling: The Costs, Benefits and Ethical Implications of Legalization*, DUKE UNIV. BASS CONNECTIONS (Feb. 7, 2020), <https://bassconnections.duke.edu/about/news/sports-gambling-costs-benefits-and-ethical-implications-legalization>.

122. *Id.*

123. John A. Fortunato, *The Ethics of Media Framing: Examining Sports Gambling as a Legally Permitted Activity*, MEDIA ETHICS, <https://www.mediaethicsmagazine.com/index.php/browse-back-issues/215-fall-2020-vol-32-no-1/3999320-the-ethics-of-media-framing-examining-sports-gambling-as-a-legally-permitted-activity> (last visited Sept. 11, 2022).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

However, these ethical concerns in the sports gambling industry are arguably countered by the economic opportunity it generates. “State governments, sports gambling operators, sports leagues and teams, and sports media companies all benefit economically from an increase in sports gambling.”¹²⁸ With the industry’s exponential growth showing no signs of slowing down, “regulators, sponsors, and sports organizations should be mindful of the likely ethical and public health implications of promoting potentially harmful products through sport sponsorship.”¹²⁹

II. EXISTING LEGAL FRAMEWORK FOR SPORTS-BASED FUTURES CONTRACTS

The CFTC is an independent agency of the United States government that was created in 1974 through the passage of the Commodity Futures Trading Commission Act of 1974.¹³⁰ Congress granted the CFTC the authority to regulate the United States derivatives markets, which include futures, swaps, and certain kinds of options.¹³¹ When the CFTC was first created, most futures trading took place in the agricultural sector.¹³² However, the futures industry has become increasingly complex, forcing the CFTC to regulate areas it lacks the expertise to navigate, like sports betting.

17 CFR § 40.2 allows an exchange to “self-certify” contracts, or list products for trading on its exchange without prior CFTC approval.¹³³ However, in making a self-certification submission, an exchange certifies that the contracts to be listed do not violate the Commodity Exchange Act (CEA) or the CFTC’s regulations.¹³⁴

17 CFR § 40.11(a)(1) prohibits trading any contract that relates to, or references to, terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law.¹³⁵ 17 CFR § 40.11(a)(2) prohibits any contract that is similar to an activity enumerated in 17 CFR § 40.11(a)(1), and that the CFTC determines, by rule or regulation, to be “contrary to the public interest.”¹³⁶ Under 17 CFR § 40.11(c), the CFTC has the authority to impose a ninety-day review of contracts to ensure the proposed contracts do not violate 17 CFR § 40.11(a)(1) or 17 CFR §40.11(a)(2).¹³⁷ During the review period, the CFTC suspends the listing of any contract that may potentially violate the aforementioned sections of the Code of Federal

128. Fortunato, *supra* note 123.

129. *Id.*

130. *About the CFTC*, COMMODITY FUTURES TRADING COMMISSION, <https://www.cftc.gov/About/AboutTheCommission> (last visited Sept. 11, 2022).

131. *Id.*

132. *Id.*

133. 17 C.F.R. § 40.2(3)(iv) (2022).

134. *Id.*

135. 17 C.F.R. § 40.11(a)(1) (2022).

136. 17 C.F.R. § 40.11(a)(2) (2022).

137. 17 C.F.R. § 40.11(c)(1) (2022).

Regulations.¹³⁸ During the review period, the CFTC may consider comments from legislators, industry players, et cetera, addressing whether the contracts should be permitted or denied.¹³⁹ Once the ninety-day review period, or the agreed-upon extension period, has concluded, the CFTC issues its order approving or disapproving the contract in question.¹⁴⁰

The CEA, which was passed in 1936 and is codified in 7 USC §§ 1-26, regulates the trading of commodity futures in the United States.¹⁴¹ It grants the CFTC broad authority to establish regulations, which are published in Title 17 of the Code of Federal Regulations,¹⁴² and to determine whether “event contracts” (or sporting event contracts) may be listed on an exchange.¹⁴³ 7 USC § 7a-2(c)(5)(C) (the Statute) explains that if a contract is found to involve unlawful activity, terrorism, assassination, war, gaming, or similar activity, the CFTC may prohibit it if it also deems that contract “contrary to public interest.”¹⁴⁴

While the CFTC has yet to offer a decision on contracts involving sports like the type proposed by ErisX, it issued an order on April 2, 2012, prohibiting the listing or trading of certain Political Event Contracts.¹⁴⁵ Political Event Contracts are binary option contracts that pay out based on the results of political elections.¹⁴⁶ The CFTC determined that these contracts involved gaming and were contrary to the public interest.¹⁴⁷ In its opinion, the CFTC relied on the outdated Economic Purpose Test of CEA §5(g).¹⁴⁸ This test required exchanges to affirmatively demonstrate to the Commission that a proposed contract could be used for hedging or price basing purposes.¹⁴⁹ The Commission also concluded that it has “discretion to consider other factors in addition to the economic purpose test in determining whether an event contract is contrary to the public interest.”¹⁵⁰ In 2000, the Commodity Futures Modernization Act of 2000 (CFMA) repealed § 5(g) of the CEA in its entirety, meaning exchanges would no longer have to

138. *Id.*

139. Marcus, *supra* note 30.

140. 17 C.F.R. § 40.11(c)(2) (2022).

141. *Commodity Exchange Act and Regulations*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm> (last visited Sept. 11, 2022).

142. *Id.*

143. James Lundy, Josh Mahoney & Nicholas Wendland, *A Proposal to the CFTC for a New Way for “Bets” to Be Hedged*, JDSUPRA (Mar. 11, 2021), <https://www.jdsupra.com/legalnews/a-proposal-to-the-cftc-for-a-new-way-6406875/>.

144. 7 U.S.C. § 7a-2(c)(5)(C)(iv) (2022).

145. CFTC Press Rel. No. 6224-12, CFTC Issues Order Prohibiting North American Derivatives Exchange’s Political Event Derivatives Contracts, available at <http://www.cftc.gov/PressRoom/PressReleases/6224-12> (CFTC Apr. 2, 2012).

146. *Id.*

147. *Id.*

148. *Id.*

149. Berkovitz, *supra* note 31.

150. *Id.*

affirmatively demonstrate that their contracts serve the public interest to pass the economic purpose test.¹⁵¹

Here, the CFTC found that “the unpredictability of the specific economic consequences of an election mean[t] that the Political Event Contracts [could not] reasonably be expected to be used for hedging purposes.”¹⁵² Further, the CFTC found that these political event contracts could potentially have an adverse effect on the integrity of elections by, for example, “creating monetary incentives to vote for particular candidates even when such a vote may be contrary to the voter’s political views of such candidates.”¹⁵³ Therefore, the CFTC found the contracts to involve gaming and considered them contrary to the public interest.¹⁵⁴

III. ISSUES/PROBLEMS: COMMENTARY BY TWO CFTC COMMISSIONERS

In response to ErisX’s submission seeking to list sports-based futures contracts on its exchange, the CFTC implemented a ninety-day review period to determine whether the proposed sports-based futures violated CEA or CFTC provisions.¹⁵⁵ During this review period, the CFTC considered twenty-five comment letters addressing whether the futures contracts should be permitted to trade.¹⁵⁶ While the contracts seemed to have ample support, with the majority of the comment letters supporting the listing of the contracts, ErisX decided to withdraw its submission a day before the review period would have expired.¹⁵⁷ The curious timing of ErisX’s withdrawal indicates that ErisX expected an adverse decision to its submission.¹⁵⁸

Shortly after the withdrawal, CFTC Commissioners Brian Quintenz and Dan M. Berkovitz made contradictory statements that seemed to suggest that an adverse decision was, in fact, forthcoming, but also revealed the CFTC’s ambivalence with respect to the legality of the derivative contracts.¹⁵⁹

A. CFTC COMMISSIONER BRIAN QUINTENZ

Commissioner Quintenz stated that he would have dissented from the order prohibiting ErisX’s NFL contracts, citing “concerns around the statute’s constitutionality, the regulation’s validity, and the order’s arbitrariness.”¹⁶⁰ First, he explained how the statutory framework and the

151. Quintenz, *supra* note 33, at 13.

152. CFTC Press Rel. No. 6224-12, *supra* note 145, at 3.

153. *Id.* at 4.

154. *Id.*

155. Marcus, *supra* note 30, at 2.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 6.

160. Quintenz, *supra* note 33, at 2.

regulatory framework contradict one another. CEA § 5(c)(5)(C) states that contracts involving gaming are permitted so long as the Commission does not directly determine that the particular contract or group of contracts are “contrary to the public interest.”¹⁶¹ While 17 CFR §40.11 (the Regulation), on the other hand, prohibits contracts involving gaming irrespective of whether they are contrary to the public interest.¹⁶² Commissioner Quintenz argued that the CFTC’s order that was never issued (due to ErisX’s withdrawal of its submission) illuminated this contradiction between the Statute and the Regulation.¹⁶³

The order found that ErisX’s NFL contracts involved gaming and were therefore prohibited under the Regulation.¹⁶⁴ However, the order also specifically found that because the gaming contracts were contrary to the public interest, they must be prohibited and that if, going forward, they are not deemed contrary to the public interest, they shall be permitted.¹⁶⁵ As Commissioner Quintenz argued, this directly contradicts the blanket prohibition against gaming contracts found in the Regulation, so discussion of the public interest makes for a messy and difficult-to-follow standard.¹⁶⁶ Further, because the Statute here is unambiguous, the Regulation’s adoption of a *per se* rule is completely contrary to the Statute.¹⁶⁷

Commissioner Quintenz went on to raise major constitutional concerns with the current framework for evaluating futures contracts. He stated that the Statute is an impermissible and unconstitutional delegation of legislative power to the agency because (1) it gives the Commission sole discretion over whether to allow or ban any given contract by arbitrarily undertaking (or abstaining from) a public interest determination process, and (2) this public interest determination is not bound by any guiding principles.¹⁶⁸ Specifically, the words “contrary to public interest,” as the sole guiding principle, is unconstitutionally vague and represents an unconstitutional delegation.¹⁶⁹

Using this standard, the “public interest” could be based on a wide range of values and groups, making it hard to pinpoint what is suitable. While some may view the contracts as morally reprehensible because they encourage gambling, others may see them as a positive development because the contracts make their interest easier, safer, or cheaper. It may also be in the public interest to make this industry less volatile and more financially stable, which would further economic growth.

161. *Id.* at 5.

162. *Id.* at 12.

163. *Id.* at 1.

164. *Id.* at 6.

165. Quintenz, *supra* note 33.

166. *Id.*

167. *Id.* at 11.

168. *Id.* at 7.

169. *Id.* at 8.

“Identifying the interests, and balancing the competing interests, is a job for Congress, not the Commission,” Commissioner Quintenz said.¹⁷⁰ Lastly, Commissioner Quintenz pointed out how the CFTC relied on the repealed economic purpose test, which incorrectly placed the burden on ErisX to affirmatively demonstrate that the NFL contracts had hedging utility.¹⁷¹ As Commissioner Brian Quintenz mentions, the CFTC completely ignored the obvious legislative history when it placed this burden on the private petitioner.¹⁷²

B. COMMISSIONER DAN M. BERKOVITZ

Commissioner Berkovitz saw the futures contracts differently, arguing that since the NFL Contracts carried no economic purpose and retail consumers would be excluded from trading them, they should not be permitted.¹⁷³ Commissioner Berkovitz explained that the CFTC interpreted the public interest test in the CEA statute as a restoration of the economic purpose test, which was eliminated in the CFMA.¹⁷⁴ This test included the requirement that an application for the listing of a particular contract must demonstrate that the contract “reasonably [could] be expected to be, or has been, used for hedging.”¹⁷⁵

Commissioner Berkovitz also mentioned that the Commission has “discretion to consider other factors in addition to the economic purpose test in determining whether an event contract is contrary to the public interest.”¹⁷⁶ He argued that ErisX did not provide sufficient evidence that the NFL contracts would provide an effective and “more-than-occasionally-used” hedging mechanism for licensed sportsbooks, vendors, or stadium owners.¹⁷⁷ Further, Commissioner Berkovitz asserted that since the general public would not have access to the contracts, they were contrary to the public interest. Only licensed sportsbooks, vendors, and stadium owners that had demonstrated a need to hedge their commercial risk or designated market makers would be eligible to trade these contracts.¹⁷⁸ Thus, Commissioner Berkovitz’s commentary stating that these contracts were contrary to public interest is rather confusing. If gaming contracts are prohibited irrespective of their utility, that should be stated by the CFTC in its opinion. Instead, Commissioner Berkovitz argued that both the Regulation and the Statute work against the permissibility of the contracts without explaining how they

170. Quintenz, *supra* note 33.

171. *Id.* at 13.

172. *Id.*

173. Berkovitz, *supra* note 31.

174. *Id.* at 2.

175. *Id.*

176. *Id.*

177. *Id.* at 3.

178. ErisX, *supra* note 9, at 4.

work together to prohibit the contracts.¹⁷⁹ Further, the “public interest” determination, as it stands, is an entirely subjective test, meaning there is little guidance for the CFTC to abide by in determining what is “contrary to the public interest.” In order to guide the derivatives industry, the CFTC must establish a clear standard for how futures contracts will be evaluated, so that market players know exactly what to expect when using their time, resources, and money on a particular business venture.

The opposing approaches taken by the two CFTC commissioners, combined with the economic need for a hedging vehicle in this industry, exemplify the need for Congress to reconsider the framework used in assessing the permissibility of futures contracts. As CFTC Commissioner Quintenz stated, this case presents “the best catalyst for Congress to properly reclaim its legislative power and either ban such contracts outright or provide a detailed framework through which the agency can appropriately fact-find on specific contract cases.”¹⁸⁰

In order to present a solution to the issues of imbalanced sportsbooks, these problems must first be dissected. As noted by CFTC Commissioner Brian Quintenz, the relevant regulation currently contradicts the Statute it is supposed to be implementing.¹⁸¹ While the Regulation prohibits gaming contracts altogether,¹⁸² the Statute permits gaming contracts if they are not “contrary to public interest.”¹⁸³ Due to the lack of guidance as to how to interpret these conflicting laws, and the subjectivity of the public interest test, there is a true need for the CFTC to establish a clear standard for sports-based contracts, and a body equipped to assess these contracts.

Instead of relying on the outdated economic purpose test to support its “contrary to public interest” conclusion, the CFTC should have issued clear guidance on how to evaluate sports based contracts. While the CFTC’s reliance on this test was questionable from the outset, the CFTC unconvincingly argued that the sports-based futures contracts did not serve a hedging purpose and that they allowed for unintended speculative use by licensed sportsbooks and other market players who would be allowed to trade the contracts. As Commissioner Berkowitz mentioned in his press report, “the Commission should permit a designated contract market (DCM) to list contracts on sporting events that are designed to hedge the risks of commercial activity related to those events, including legalized sports bookmaking.”¹⁸⁴ Despite the growing legality of sports betting¹⁸⁵ and the CFTC’s ability to approve these contracts under the economic purpose test,

179. Berkowitz, *supra* note 31.

180. Quintenz, *supra* note 33.

181. *Id.*

182. 17 C.F.R. § 40.11 (2022).

183. 7 U.S.C. § 7a-2(c)(5)(C) (2022).

184. *Id.*

185. *Id.*

Commissioner Berkowitz stated that ErisX did not prove that they would provide an “effective and more-than-occasionally-used hedging mechanism for licensed sportsbooks, vendors, or stadium owners.”¹⁸⁶ Without a clear test to determine what constitutes a sufficient hedging purpose, and considering the CFTC’s limited experience with sports-based futures contracts, the CFTC must do better. The CFTC simply makes the blanket claim that the NFL contracts do not provide a hedging mechanism without any evidence to support its assertion. Useful guidance would minimally include a demonstration of what would suffice so that future commissioners know how to handle these issues and industry players, like ErisX, know what to expect.

IV. PROPOSED SOLUTION: THE EGCC

It is clear that a framework for evaluating whether gaming contracts are contrary to the public interest is necessary. It is not enough to grant the CFTC broad authority to make this judgment on a case-by-case basis because of their evident lack of expertise in the area. As CFTC Commissioner Quintenz points out, “‘public interest’ is too vague a standard to be left to free-wheeling administrators¹⁸⁷ and is an unconstitutional delegation of power.”¹⁸⁸

To effectively and fairly assess sports-based futures contracts like those proposed by ErisX, this Note proposes the creation of an events and gaming committee to assess the viability of financial contracts based on the outcomes of sporting events, political events, et cetera. The sports betting industry is growing each year with no signs of slowing, so the need for futures contracts to hedge unnecessary risks is as prevalent as ever. Further, the CFTC’s uneven approach to sports-based derivatives does not forecast how issues surrounding these aforementioned derivatives will be handled going forward. The EGCC would evaluate any and all contracts relating to sports, politics, and entertainment, and would allow the CFTC to focus on financial derivatives not involving these areas. This avoids the awkward reliance on the Regulation and the Statute.

The EGCC would have the authority to determine whether a contract is a viable hedging instrument, or if it is motivated by profits on the outcome of an event. First, the EGCC would ask if the contract involves sports, politics, or entertainment. This is a broad assessment: if a contract touches upon these areas in any way, it will be assessed by the EGCC. The second question in the EGCC’s determination would ask if the contract serves an economic purpose. Like the economic purpose test that was repealed in 2000,¹⁸⁹ this part of the test examines why the contract is necessary: is it being utilized to hedge against risk or for some speculative purpose? Critically, this hedging

186. *Id.*

187. Quintenz, *supra* note 33.

188. Berkovitz, *supra* note 31.

189. Berkovitz, *supra* note 31.

utility analysis would be conducted by a body well-versed in sports-based contracts, unlike the outdated economic purpose test. If the contract is being used for hedging, the EGCC would then ask if there are any negative effects of the contracts being brought to market and whether these negative effects outweigh the potential hedging purposes they are expected to serve. Rather than asking if the contracts are “contrary to public interest,” which can be subjective, as Commissioner Quintenz explained,¹⁹⁰ the EGCC would ask whose interests could be negatively affected. It is the EGCC’s job to determine if these contracts could still be offered on an exchange, in consideration of any potential negative effects.

Using the EGCC standard, it is likely that the NFL contracts offered by ErisX would have been approved for trading on the ErisX exchange. First, the NFL contracts involved sports because they were based on football. Second, the NFL contracts served an economic purpose because they hedged against unnecessary risks that sportsbooks faced due to geographic limitations, and that sports owners and vendors face due to the loss of revenue brought on by poor-performing teams. This would bring stability to an industry known for its riskiness. Many of the negative effects associated with sports gambling, including the ethical concerns, were inapplicable to these contracts because they would not have been offered to the public. While sports gambling carries with it many ethical concerns,¹⁹¹ the futures contracts offered by ErisX would not have been offered to the public.¹⁹² They are reserved for sportsbooks, sports owners, and vendors in order to hedge against lost profits.¹⁹³ Thus, they are not meant for speculating on the outcome of a sporting event, and they offer none of the addictive qualities that sports gambling generally offers to the masses. Ultimately, the hedging utility of the NFL contracts, and the lack of negative effects brought on by these contracts, would likely lead to an EGCC approval of these contracts.

Commissioner Berkowitz took issue with the contracts being privately offered, arguing that this proved that the contracts were contrary to the public interest.¹⁹⁴ Commissioner Berkowitz’s conclusion seems to be based on the “unfair advantage” certain individuals gain through the opportunity to trade sports-based contracts. However, under the assessment by the EGCC, the opposite result would be reached. Because the contracts would not have been offered to the public, there were no ethical concerns associated with them. Further, the select individuals using these contracts for hedging purposes in no way makes for an uneven playing field, as Commissioner Berkowitz seems to indicate. Companies, like ErisX, are using these contracts to hedge

190. *Id.*

191. Fortunato, *supra* note 123.

192. ErisX, *supra* note 9.

193. *Id.*

194. Quintenz, *supra* note 33.

risk, which would not have any adverse effect on the public and would actually make for safer market sports wagers.

The EGCC would fill a void in the ever-changing sports gambling industry. Delegating a regulatory body tasked with assessing the viability of derivatives or futures contracts like those offered by ErisX would ensure that the risks associated with sports gambling are thoughtfully considered, while also allowing useful hedging vehicles to be judged in a fair and consistent manner. The contracts offered by ErisX would not have brought harm to any individuals or groups, aside from those who oppose sports gambling because of their ethical concerns. However, due to the CFTC's lack of experience in assessing these types of contracts, it erred on the side of caution when it considered them "contrary to the public interest."¹⁹⁵ The EGCC would not allow this scenario to play out. Instead, it would focus on the value offered by each contract and its role in the sports and derivatives markets. Lastly, it would consider the opinions of entities in the industry (i.e., sports team owners, sportsbooks, and exchanges like ErisX) or those whose interests may be affected by the contracts in question.

CONCLUSION

Derivative contracts have long been used to hedge risk in industries ranging from finance to agriculture.¹⁹⁶ With the ErisX proposal, derivatives began to make their way into the world of sports.¹⁹⁷ While the CFTC was prepared to deny the listing of the ErisX NFL Contracts, ErisX removed its proposal with an eye towards proposing again at some point in the future.¹⁹⁸ However, it still garnered the attention of two CFTC commissioners who offered statements on their own and the CFTC's views on the legality of the NFL Contracts.¹⁹⁹ This, in turn, gave the public a look at the CFTC's uneven approach to handling sports-based derivative contracts, highlighted by contradiction and potential constitutional issues.²⁰⁰

The NFL Contracts proposed by ErisX should have been approved for listing. This approval would have opened the floodgates for other exchanges, sportsbooks, and teams to use sports-based derivative contracts in a similar way. In order to ensure that sports-based derivatives are fairly evaluated in the future, the appointment of a capable regulatory body is necessary. Therefore, the EGCC would allow for a thoughtful and targeted approach to a new hedging mechanism: the sports-based derivative contract.

195. Berkovitz, *supra* note 31.

196. *About the CFTC*, COMMODITY FUTURES TRADING COMM'N, <https://www.cftc.gov/About/AboutTheCommission> (last visited Sept. 11, 2022).

197. ErisX, *supra* note 9.

198. Marcus, *supra* note 30.

199. *Id.*

200. Quintenz, *supra* note 33.

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