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The Honorable Christopher Kirkpatrick  
Secretary, Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street, N.W.  
Washington, DC 20581

Dear Secretary Kirkpatrick:

As part of our public service and academic research obligations as referenced on the first page of “Sources of Information” in the [Congressional U.S. National Gambling Impact Study Commission's Final Report](#) (NGISC Final Report, VI-1), I have been asked to summarize the academic research of numerous colleagues which interfaces and impacts the Commodity Futures Trading Commission’s (CFTC) consideration of proposals, such as the RSBIX NFL futures contracts proposal.

For well over three decades academic colleagues and I have published and testified under oath regarding the research in these areas before the NGISC and various Congressional and state legislative committees—which still regularly includes advising the national news media.

After the Great Recession began in 2008, I personally taught several classes with a major focus on credit default swaps—beginning each semester with a review of Steve Kroft’s 60 Minutes investigative report titled “[Financial WMDs](#)” by Warren Buffett.

The type of futures contracts proposals under CFTC consideration were anticipated by the bipartisan NGISC which concluded in 1999 that Internet gambling should remain criminalized because it was impossible to control via regulations and would eventually overwhelm any regulatory system (*see, e.g.*, NGISC, recs. 5-1 to 5-4). Accordingly, the bipartisan NGISC

recommended strictly maintaining existing Federal regulations prohibiting activities such as those which would be enabled by the proposed futures contracts pending before the CFTC.

Since 1999, hundreds of law review articles, economics journals, and government reports have confirmed and extrapolated upon these conclusions of the NGISC as exemplified by dozens of subsequent authoritative documents republished in the multivolume [United States International Gambling Report](#) (beginning on page cxi of each volume).

Accordingly, before specifically addressing the CFTC's six questions, this analysis urges the CFTC to focus on the macro-economic impacts of the proposals and their practical strategic effects on financial instruments and markets.

Despite well-intentioned regulatory efforts, there is virtual economic certainty that these "innovative futures contracts" as proposed would allow de facto bucket shops to form online, and unscrupulous facilitators would abuse the type of regulatory modifications proposed to enable de facto pyramid/Ponzi schemes under the color of "CFTC legitimacy."

Therefore, the CFTC could quickly find itself overwhelmed by regulatory violations and enmeshed in unanticipated and unjustified reputational concerns.

Despite the RSBIX NFL claims that portions of congressional hearings in 2010 evidenced support for futures contracts, the academic consensus of the legislative history is totally contrary to the RSBIX NFL claims. In view of the ongoing Great Recession, the congressional hearings during this period were directed toward strict safeguards in all financial areas relating to credit default swaps—as congressional leaders fumed regarding mistakes in the 2000 Commodity Futures Modernization Act (CFMA), such as the CFMA's last provision eliminating the existing anti-gambling safeguards.

These congressional sensitivities still exist and thus argue for congressional action on any proposals such as the sweeping proposals of RSBIX NFL. The CFTC should defer to congressional action and deny the "proposed RSBIX NFL futures contracts."

## ANALYSIS OF CFTC'S SIX QUESTIONS

In addressing the CFTC's rule 40.11(a)(1) which prohibits any event contract which "relates to, or references terrorism, assassination, war, gaming, or an activity that is unlawful under any State or Federal law," it should be noted that the congressional hearings which will be cited



hereafter ironically utilize similar words in their very titles; for example, the U.S. House of Representatives Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.

Per the CFTC's six questions, a review of all 14 of the comments submitted to the CFTC as of 3PM EST on January 26, 2021 was conducted. This review was thorough but is summarized briefly as follows to better inform the public.

1. The practical and net effect of the proposed futures contracts, as described in the CFTC documentation, definitely augment or directly "involve, [or] relate to," the plain meaning concept of "gaming" as described in Commission regulation 40.11(a)(1).

For related historical legislative intent (where these issues were discussed by congressional staff on mark-up), see *e.g.*, *Internet Gambling Prohibition Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. (2006) (prepared statement of Prof. John W. Kindt, Univ. Ill.). This hearing resulted in the enactment of the Unlawful Internet Gambling Enforcement Act (UIGEA), 31 U.S.C. § 5361 *et seq.* (2006).

2. As described in the CFTC documentation, the type of futures contracts proposed are designed to support de facto via "reference" the proposal's self-described risks "directly tied to the outcome of sporting events." Five of the first 10 public comments filed on the CFTC website consist of embarrassing one-page template letters from supportive gambling-oriented interests. These five letters consist of virtually identical wordage alleging that "the RSBIX NFL Futures Contracts, [are not] ... 'unlawful under any State or Federal Law,' as described in Commission regulation 40.11(a)(1)."

However, the 25 states not mentioned in these template letters still maintain diverse prohibitions against gambling activities, including those referenced in the proposal before the CFTC. Most importantly, the U.S. Department of Justice still has an active case involving the nationwide enforcement of the prohibitions enumerated in the Federal Wire Act, 18 U.S.C. § 1084, and the DOJ is currently considering taking its case to the U.S. Supreme Court.

For legislative intent, see generally: *Hearing on H.R. 707: The Restoration of America's Wire Act: Hearing Before the Subcomm. on Crime Terrorism, Homeland Security, and Investigations of the House Comm. on the Judiciary*, 114th, Cong., 1st Sess. (2015) (prepared statement of former Asst. U.S. Attorney Mike Fagan, DOJ Internet Gambling Task Force) (prepared statement of Prof. John W. Kindt, Univ. Illinois).

Again, this situation argues for the CFTC to deny the RSBIX NFL proposal and defer to legislative developments in the U.S. Congress, as well as DOJ enforcement.

3. The public interest will be irreparably harmed by the advent of futures contracts such as those delimited in the RSBIX NFL proposal--regardless of any good faith drafting and regulatory efforts.

The academic consensus is that these types of financial instruments empower speculative bubbles emulating the subprime mortgage speculative bubble. Contracts to lay-off de facto risks directly or indirectly involving gaming or gambling activities will quickly parallel the bundling of subprime mortgages—but these instruments predicated on sports gambling do not even have the semblance of an asset base—they appear to be risk predicated on risk predicated on risk.

The overwhelming academic and governmental documentation points directly and indirectly to the impossibility of effectively regulating and controlling these types of futures contracts—they must be prohibited.

For authoritative republished government documents, congressional hearings, and academic publications (with executive summaries), see generally these academic reference books available in the U.S. Congressional Library and The Library of Congress: *THE GAMBLING THREAT TO ECONOMIES AND FINANCIAL SYSTEMS cxi, et seq.* (Wm. S. Hein Pub. 2010); *GAMBLING WITH CRIME, DESTABILIZED ECONOMIES, AND FINANCIAL SYSTEMS cxi, et seq.* (Wm. S. Hein Pub. 2009).

4. In part due to the decision in *Murphy v. National Collegiate Athletic Ass'n*, 584 U.S. \_\_\_\_ (2018), legislators and regulators are racing to catch up to the gambling industry's fast-track strategy to expand throughout all economic and financial systems.

The CFTC should focus on the macro-economic impacts of any proposals, maintain existing safeguards, and deny decisions suggested by those who would reap benefits to the detriment of the existing financial systems.

Per the analysis in answer two, *supra*, the CFTC should maintain stability of expectations in U.S. financial institutions by awaiting and/or deferring to pending Federal actions by the U.S. Congress and the DOJ.

5. As queried by the CFTC, the “trading of these contracts that involve sports gaming create incentives to influence the outcome of a sporting event or other outcomes related to sporting events.” For examples of the issues that involve incentives to influence



outcomes, see John W. Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away our Youth?*, 8 VILLANOVA SPORTS & ENT. LAW JOURNAL 221-252 (lead law review art., 2002).

Despite good faith regulatory efforts and intentions, no effective “mechanisms would be available to the Commission or to the DCM to surveil for, and guard against, manipulation of these contracts through manipulation of sporting events or other outcomes related to sporting events.”

Sponsored by U.S. Senator Bill Bradley, an NBA legend, the 1992 Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701 *et seq.* was enacted to curtail cheating involving the interface between sports and gambling, but PASPA was overruled per the 2018 *Murphy* decision on 10th Amendment “procedural” grounds. However, PASPA’s “substantive” concerns and its potential re-enactment via the Commerce Clause generated 2018 congressional hearings convened by House Judiciary Chair Robert Goodlatte. See, e.g., *Post-PASPA: An Examination of Sports Betting in America: Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, U.S. House of Representatives Comm. on the Judiciary*, 115th Cong., 2d Sess. (2018) (prepared statement of Prof. John Warren Kindt, Univ. Illinois). (Historical note: The unexpected time extensions afforded the Senate hearings on the nomination of Brett Kavanaugh to the U.S. Supreme Court, effectively derailed the new PASPA legislation which was simultaneously progressing toward mark-up.).

6. The CFTC should rule that these proposed contracts are “contrary to the public interest” and fail any economic or social test.

On a micro-economic level, these types of futures contracts benefit a relatively small group of companies to the detriment of massive numbers of stockholders and other financial interests.

On a strategic macro-economic level, these types of futures contracts empower and promote speculation upon speculation—regardless of any good faith self-regulatory or government-regulatory efforts. As decades of authoritative research by public policy academics and legislators convincingly demonstrate, the financial incentives to speculate and manipulate are overwhelming and will invariably drown out regulatory efforts—not to mention the incentives which will be created to bypass illegally any regulatory efforts.

In the macro-economic context, futures contracts destabilize existing financial systems and regulatory mechanisms. The strategic impacts of the proposed RSBIX NFL futures

contracts are destructive and their future economic impacts contain unforeseeable and unanticipated consequences—except as events can be foreshadowed by any inherently speculative properties of the contracts.

Per the last two public comments submitted to the CFTC on 1-26-21, the commentators raise the valid socio-economic concerns of gambling addiction and problem gambling, which parallel the socio-economic costs and numbers of drug addicts. For the definitive academic article, which was published by Harvard and M.I.T., see Earl L. Grinols & David B. Mustard, *Casinos, Crime and Community Costs*, 88 REVIEW OF ECONOMICS AND STATISTICS 28-45 (2006) (also applies to sports gambling issues).

It should be noted that since the early 1990s, the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (ed. III-R 1987 to ed. V 2013) has delimited the rapidly-growing "pathological gambling" as the first "behavioral addiction."

## CONCLUSION

The CFTC should deny the proposed RSBIX NFL futures contracts as they fail the safeguards addressed in the CFTC's six questions.

Decades of authoritative academic, legislative, and government analyses reject these types of proposed futures contracts as destructively undermining existing financial institutions and regulatory safeguards, as well as eroding public confidence and stability of expectations.

U.S. Congressional concerns and DOJ enforcement policies are also largely unsettled in these issue areas and are pending policy decisions

Regardless, these types of proposed futures contracts as described in the CFTC documents are not in the public interest.

Respectfully Submitted as Academic Summary of Research,



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