

[Securities Regulation Daily Wrap Up, TOP STORY—All bets are off: ‘departing’ Republican commissioner sacks CFTC process on NFL futures contracts, \(Mar. 26, 2021\)](#)

Securities Regulation Daily Wrap Up

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Commissioner Quintenz’s statement responds to an unissued Commission order and expresses his significant concerns around the constitutionality of a Commodity Exchange Act provision, the validity of a CFTC regulation, and the unissued order’s arbitrariness.

CFTC Commissioner Brian Quintenz, whose statutory term expired in April 2020, issued a statement expressing his extreme displeasure with the Commission’s handling of the RSBIX NFL futures contracts self-certified by Eris Exchange, LLC (ErisX) in December 2020. The Commission had initiated a comprehensive review of the contracts to determine if they were prohibited by statute or Commission regulations. Prior to making that determination Eris X withdrew its certification thereby ending its efforts to list the contracts.

Quintenz’s statement, which he titled [*ErisX RSBIX NFL Contracts and Certain Event Contracts—Any Given Sunday in the Futures Market*](#), sets forth what his dissent would have provided in the event ErisX had not withdrawn its self-certification, and the CFTC had issued an order rejecting the certification. Quintenz indicated that such an order was proposed and circulating among commissioners.

Setting the playing field. In a [December 2020 announcement](#), the CFTC indicated that it had initiated a review of ErisX’s three self-certified RSBIX NFL futures contracts pursuant to CFTC Regulation 40.11(c). One of those contacts was based on the outcomes of NFL games; the second on the point spread; and the third on total points for individual NFL games. In its [letter to ErisX](#), the CFTC indicated that it had 90 days—to review and make a determination with respect to the submissions. That review followed an initial CFTC determination that the subject contracts "may involve, relate to, or reference" an activity enumerated in Regulation 40.11(a) (1), including but not limited to "gaming, or an activity that is unlawful under any State or Federal law." The letter requested that ErisX refrain from listing and trading its proposed RSBIX NFL futures contracts during the pendency of the review period.

As part of the review process, the CFTC put out the matter out for public comment posing [specific questions](#) related to the RSBIX NFL futures contracts. The Commission received back 25 responses, including one from the football league itself. That [letter](#) suggested that the CFTC punt on granting an approval, and noted, "At minimum, the NFL believes that more information is required to properly assess these types of futures contracts."

Quintenz provides a look inside the CFTC locker room. Quintenz’s statement provides a rare glimpse into the inner workings of Commissioner decision-making which are often shielded from public view based on FOIA, the deliberative process privilege enjoyed by governmental entities, or other prohibitions against disclosing confidential information.

Here, Quintenz indicated that Commission staff proposed an order that found the ErisX NFL contracts involved gaming, and were prohibited by regulation, and also contrary to the public interest. According to Quintenz, the proposed order was then circulated to the Commission for a vote, utilizing a process where the proposed was considered by the most junior commissioner first then moving to the next commissioner in seniority. Just hours before this voting process could conclude, and likely in anticipation of the proposed order’s approval by the full CFTC, ErisX decided to withdraw their certification. This prevented proposed order from being fully and formally considered by the Commission and publicly issued.

In Quintenz's view, withdrawing the certification had the same functional effect on the ErisX NFL contracts that the Order would have had; the contracts will not be listed. He also took strong offense that the proposed order's legal analysis and interpretations will remain secret until forced into the open by what he describes as "another, bolder exchange's decision to see a self-certification process through to a conclusion." In making his disagreements public, Quintenz proclaimed, "Secret agency law is anathema in our democracy, and should only be tolerated where absolutely necessary. The government can try to hide behind FOIA exemptions, deliberative process, or prohibitions on disclosing "confidential information," but it shouldn't be able to take the ball home in the middle of the fourth quarter when leading by a field goal."

Points of dissent. Quintenz's sharp disagreement with the CFTC's purported position flows from the 2018 Supreme Court decision in *Murphy v. NCAA*, 138 S.Ct. 1461 (2018), which struck down the federal law that limited legal sports betting to take place only in the state Nevada. He noted that after *Murphy*, multiple states had legalized sports gambling, thereby allowing legitimate business activity in that area. The commissioner concluded that since the derivative markets' historical use is the hedging of commodity price risk associated with economic activity, contracts relating to the outcome of sporting events could now have a legitimate economic and hedging purpose for businesses in these states. He stated that was the intent of ErisX's contracts. Some of Quintenz's significant concerns and objections included the following:

- **CEA provision is unconstitutional.** Section 5c(c)(5)(C) of the CEA, which would have enabled the CFTC to prohibit the ErisX NFL contracts, is an impermissible and non-constitutional delegation of legislative power to the agency because (1) it gives the Commission complete discretion on whether to allow or effectively ban any given enumerated contract by arbitrarily undertaking (or abstaining from) a public interest determination process, and (2) that public interest determination is not bounded by any set of guiding principles or limiting circumstances around which the Commission should apply its expertise to any associated fact-finding.
- **CFTC Regulation 40.11 is invalid.** The CEA provision that provides the special rule for event contracts has a default position, that contracts referencing the enumerated events are allowed. The only event contracts that are prohibited are any contracts which are specifically "determined by the Commission to be contrary to the public interest." The statute's meaning is plain and obvious; event contracts, even those that are enumerated in the statute, are allowed unless the Commission makes a determination that the contract is contrary to the public interest. Regulation 40.11 somehow missed this, and violates the Administrative Procedures Act both for being contrary to the CEA and for fumbling the reasoned decision making" test.
- **CFTC's proposed order was arbitrary and capricious.** The proposed order incorrectly placed the burden on ErisX to show that the contracts are in the public interest, failed to give ErisX its due process, arbitrarily defined gaming, and used insufficiently justified and arbitrarily selected tests to support its findings. As such, even without the deficiencies noted in the CEA and CFTC Regulation 40.11, the proposed order was arbitrary and capricious.

Unclear when Commissioner Quintenz will leave the stadium. While Commissioner Quintenz's statutory term expired in April 2020, he had [previously indicated](#) that he would be leaving the CFTC no later than October 31, 2020. At a meeting of Market Risk Advisory Meeting on February 23, 2021, Quintenz said that his time on the Commission was coming to an end in the very near future. Since that time, Quintenz has not made any further public statements regarding the timing of his departure. Under applicable "timing out" provisions, Quintenz could conceivably remain on the Commission until the end of the 117th Congressional session which will occur in 21 months from now in December 2022. At present, it remains unclear when Commissioner Quintenz will be leaving the CFTC stadium.

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