

IV. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")⁵ imposes certain requirements on federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. Certain provisions of final Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA; OMB previously has approved and assigned OMB control number 3038-0060 to this collection of information.

B. Cost-Benefit Analysis

Section 15(a) of the CEA⁶ requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of such an order or to determine whether the benefits of such an order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its action. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The bulk of the costs imposed by the requirements of Commission Rule 36.3 relate to significant and increased information-submission and reporting requirements adopted in response to the Reauthorization Act's directive that the Commission take an active role in determining whether contracts listed by ECMs qualify as SPDCs. The enhanced requirements for ECMs will permit the Commission to acquire the information it needs to discharge its newly-mandated responsibilities and to ensure that ECMs with SPDCs are identified as entities with the elevated status of registered entity under the CEA and are in compliance with the statutory terms of the core principles of section 2(h)(7)(C) of the Act. The primary benefit to the public is to enable the Commission to discharge its statutory obligation to monitor for the presence of SPDCs and extend its oversight to the trading of SPDCs.

Issued in Washington, DC, on October 5, 2009 by the Commission.

David A. Stawick,

Secretary of the Commission.

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COMMODITY FUTURES TRADING COMMISSION

Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), To Undertake a Determination Whether the Waha Financial Basis Contract, Offered for Trading on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of action and request for comment.

SUMMARY: The Commodity Futures Trading Commission ("CFTC" or "Commission") is undertaking a review to determine whether the Waha Financial Basis contract ("WAH"), offered for trading on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under Sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder. In connection with this evaluation, the Commission invites comment from interested parties. **DATES:** Comments must be received on or before October 26, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

- Follow the instructions for submitting comments. *Federal eRulemaking Portal:* <http://www.regulations.gov>.
- *E-mail:* secretary@cftc.gov. Include Waha Financial Basis Contract (WAH) in the subject line of the message.
- *Fax:* (202) 418-5521.
- *Mail:* Send to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Courier:* Same as mail above.

All comments received will be posted without change to <http://www.CFTC.gov/>.

FOR FURTHER INFORMATION CONTACT:

Gregory K. Price, Industry Economist, Division of Market Oversight,

Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418-5515. E-mail: gprice@cftc.gov; or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418-5133. E-mail: snathan@cftc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

On March 16, 2009, the CFTC promulgated final rules implementing provisions of the CFTC Reauthorization Act of 2008 ("Reauthorization Act")¹ which subjects ECMs with significant price discovery contracts ("SPDCs") to self-regulatory and reporting requirements, as well as certain Commission oversight authorities, with respect to those contracts. Among other things, these rules and rule amendments revise the information-submission requirements applicable to ECMs, establish procedures and standards by which the Commission will determine whether an ECM contract performs a significant price discovery function, and provide guidance with respect to compliance with nine statutory core principles applicable to ECMs with SPDCs. These rules became effective on April 22, 2009.

In determining whether an ECM's contract is or is not a SPDC, the Commission will evaluate the contract's material liquidity, price linkage to other contracts, potential for arbitrage with other contracts traded on designated contract markets or derivatives transaction execution facilities, use of the ECM contract's prices to execute or settle other transactions, and other factors.

In order to facilitate the Commission's identification of possible SPDCs, Commission rule 36.3(c)(2) requires that an ECM operating in reliance on section 2(h)(3) promptly notify the Commission and provide supporting information or data concerning any contract: (i) That averaged five trades per day or more over the most recent calendar quarter; and (ii)(A) for which the ECM sells price information regarding the contract to market participants or industry publications; or (B) whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement, or other daily price of another agreement.

⁵ 44 U.S.C. 3507(d).

⁶ 7 U.S.C. 19(a).

¹ 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

II. Determination of a SPDC

A. The SPDC Determination Process

Commission rule 36.3(c)(3) establishes the procedures by which the Commission makes and announces its determination on whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish a notice in the **Federal Register** that it intends to undertake a determination as to whether the specified agreement, contract, or transaction performs a significant price discovery function and to receive written data, views, and arguments relevant to its determination from the ECM and other interested persons.² After prompt consideration of all relevant information,³ the Commission will, within a reasonable period of time after the close of the comment period, issue an order explaining its determination. Following the issuance of an order by the Commission that the ECM executes or trades an agreement, contract, or transaction that performs a significant price discovery function, the ECM must demonstrate, with respect to that agreement, contract, or transaction, compliance with the core principles under section 2(h)(7)(C) of the CEA⁴ and the applicable provisions of Part 36. If the Commission's order represents the first time it has determined that one of the ECM's contracts performs a significant price discovery function, the ECM must submit a written demonstration of its compliance with the core principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the ECM has an additional SPDC, the ECM must submit a written demonstration of its compliance with the core principles within 30 calendar days of the Commission's order.

B. Waha Financial Basis Contract

The WAH contract is cash settled based on the difference between the

bidweek price index for a particular calendar month at the Waha, West Texas hub, as published by Platts in its *Inside FERC's Gas Market Report*, and the final settlement price of the New York Mercantile Exchange's (NYMEX's) physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price is computed from fixed-price, bilateral transactions executed during the last five business days of a given month, where the transactions specify the delivery of natural gas during the following calendar month. The price index is computed as the volume-weighted average of the applicable natural gas transactions. Bidweek prices are published on the first business day of the month in which the gas flows. The size of the WAH contract is 2,500 mmBtu, and the unit of trading is any multiple of 2,500 mmBtu. The WAH contract is listed for up to 72 consecutive calendar months.

Based upon a required quarterly notification filed on July 27, 2009 (mandatory under Rule 36.3(c)(2)), the ICE reported that, with respect to its WAH contract, the total number of trades was 1,165 in the second quarter of 2009, resulting in a daily average of 18.2 trades. During the same period, the WAH contract had a total trading volume of 100,490 contracts and an average daily trading volume of 1,570.2 contracts. Moreover, the open interest as of June 30, 2009, was 96,371 contracts.

It appears that the WAH contract may satisfy the material liquidity, price linkage, and material price reference factors for SPDC determination. With respect to material liquidity, trading in the WAH contract averaged more than 1,500 contracts on a daily basis, with more than 18 separate transactions each day. In addition, the open interest in the subject contract was large. In regard to price linkage, the final settlement of the WAH contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas contract, where the NYMEX is registered with the Commission as a designated contract market ("DCM"). In regard to material price reference, while it did not specifically address the natural gas contracts under review, the ECM Study stated that, in general, market participants view the ICE as a price discovery market for certain natural gas contracts. Natural gas contracts based on actively-traded hubs are transacted on the ICE's electronic trading platform, with the remainder being completed over-the-counter and potentially submitted for clearing by voice brokers. In addition, the ICE sells its price data to market participants in

a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, the ICE offers "OTC Gas End of Day" data packages with access to all price data or just 12, 24, 36, or 48 months of historical data.

III. Request for Comment

In evaluating whether an ECM's agreement, contract, or transaction performs a significant price discovery function, section 2(h)(7) of the CEA directs the Commission to consider, as appropriate, four specific criteria: price linkage, arbitrage, material price reference, and material liquidity. As it explained in Appendix A to the Part 36 rules,⁵ the Commission, in making SPDC determinations, will apply and weigh each factor, as appropriate, to the specific contract and circumstances under consideration.

As part of its evaluation, the Commission will consider the written data, views, and arguments from any ECM that lists the potential SPDC and from any other interested parties. Accordingly, the Commission requests comment on whether the ICE's WAH contract performs a significant price discovery function. Commenters' attention is directed particularly to Appendix A of the Commission's Part 36 rules for a detailed discussion of the factors relevant to a SPDC determination. The Commission notes that comments which analyze the contracts in terms of these factors will be especially helpful to the determination process. In order to determine the relevance of comments received, the Commission requests that commenters explain in what capacity are they knowledgeable about the subject contract.

IV. Related Matters

A. Paperwork Reduction Act

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² The Commission may commence this process on its own initiative or on the basis of information provided to it by an ECM pursuant to the notification provisions of Commission rule 36.3(c)(2).

³ Where appropriate, the Commission may choose to interview market participants regarding their impressions of a particular contract. Further, while they may not provide direct evidentiary support with respect to a particular contract, the Commission may rely for background and context on resources such as its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study"). http://www.cftc.gov/stellent/groups/public/newsroom/documents/file/pr5403-07_ecmreport.pdf.

⁴ 7 U.S.C. 2(h)(7)(C).

⁵ 17 CFR 36, Appendix A.

⁶ 44 U.S.C. 3507(d).

B. Cost-Benefit Analysis

Section 15(a) of the CEA⁷ requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of such an order or to determine whether the benefits of such an order outweigh its costs; rather, it requires that the Commission “consider” the costs and benefits of its action. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The bulk of the costs imposed by the requirements of Commission Rule 36.3 relate to significant and increased information-submission and reporting requirements adopted in response to the Reauthorization Act’s directive that the Commission take an active role in determining whether contracts listed by ECMs qualify as SPDCs. The enhanced requirements for ECMs will permit the Commission to acquire the information it needs to discharge its newly-mandated responsibilities and to ensure that ECMs with SPDCs are identified as entities with the elevated status of registered entity under the CEA and are in compliance with the statutory terms of the core principles of section 2(h)(7)(C) of the Act. The primary benefit to the public is to enable the Commission to discharge its statutory obligation to monitor for the presence of SPDCs and extend its oversight to the trading of SPDCs.

Issued in Washington, DC on October 5, 2009 by the Commission.

David A. Stawick,

Secretary of the Commission.

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COMMODITY FUTURES TRADING COMMISSION

Notice of Intent, Pursuant to the Authority in Section 2(h)(7) of the Commodity Exchange Act and Commission Rule 36.3(c)(3), To Undertake a Determination Whether the Zone 6–NY Financial Basis Contract, Offered for Trading on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of action and request for comment.

SUMMARY: The Commodity Futures Trading Commission (“CFTC” or “Commission”) is undertaking a review to determine whether the Zone 6–NY Financial Basis (“TZS”) contract, offered for trading on the IntercontinentalExchange, Inc. (“ICE”), an exempt commercial market (“ECM”) under Sections 2(h)(3)–(5) of the Commodity Exchange Act (“CEA” or the “Act”), performs a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder. In connection with this evaluation, the Commission invites comment from interested parties.

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