helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorizes the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")[46] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.[47] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Order

a. Order Relating to the ICE PG&E Citygate Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the PG&E Citygate Financial Basis contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material liquidity and material price reference criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the PG&E Citygate Financial Basis contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity[48] with respect to the PG&E Citygate Financial Basis contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[49]

Issued in Washington, DC on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10305 Filed 5–3–10; 8:45 am]

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[46] 5 U.S.C. 601 *et seq.*

[47] 66 FR 42256, 42268 (Aug. 10, 2001).

[48] 7 U.S.C. 1a(29).

[49] Because ICE already lists for trading a contract (i.e., the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

COMMODITY FUTURES TRADING COMMISSION

Orders Finding That the Henry Financial Basis Contract, Henry Financial Index Contract and Henry Financial Swing Contract Traded on the IntercontinentalExchange, Inc., Do Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final orders.

SUMMARY: On October 20, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register**[1] a notice of its intent to undertake a determination whether the Henry Financial Basis ("HEN") contract, Henry Financial Index ("HIS") contract and Henry Financial Swing ("HHD") contract traded 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"), perform a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue orders finding that the HEN, HIS and HHD contracts do not perform 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.

DATES: *Effective date:* April 28, 2010.

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

The CFTC Reauthorization Act of 2008 ("Reauthorization Act")[2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged

[1] 74 FR 53720 (October 20, 2009).

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or 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 contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 20, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the HEN, HIS and HHD contracts performs a significant price discovery function and requested comment from interested parties.[7] Comments [8] were received from the Federal Energy Regulatory Commission ("FERC"), Platts,[9] Public Utility Commission of Texas ("PUCT") and ICE. The comment letters from FERC,[10] Platts and PUCT [11] did not directly address the issue of whether or not the HEN, HIS and HHD contracts are SPDCs; ICE's comments raised substantive issues with respect to the applicability of section 2(h)(7) to the subject contracts. Generally, ICE asserted that its HEN, HIS and HHD contracts are not SPDCs as they do not meet any of the criteria for SPDC determination (CL 03). ICE's comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[12] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference*, H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). See also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a 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.

[8] The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-027.html.*

[9] McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC").

[10] FERC stated that the HEN, HIS and HHD contracts are cash-settled and that none of them contemplates the actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that "FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 01.

[11] PUCT noted that it oversees the Electric Reliability Council of Texas, much like FERC oversees independent system operators. The mission of PUCT is "to ensure nondiscriminatory access to the [electricity] transmission and distribution systems, to ensure the reliability and adequacy of the regional electrical network and to perform other essential market functions." CL 04.

[12] In its October 20, 2009, **Federal Register** release, the Commission identified material liquidity, material price reference and price linkage as the possible criteria for SPDC determination of the HEN contract (arbitrage was not identified as a possible criterion). With respect to the HIS contract, the **Federal Register** release identified material liquidity and material price reference as possible criteria for SPDC determination (price linkage and arbitrage were not identified as possible criteria). With respect to the HHD contract, the **Federal Register** release identified material liquidity, arbitrage and material price reference as possible criteria for SPDC determination (price linkage was not identified as a possible criterion). The criteria not indentified in the initial release will not be discussed further in this document or the associated Orders.

Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[13] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract.

IV. Findings and Conclusions

The Commission's findings and conclusions with respect to the Henry Financial Basis (HEN) contract, the Henry Financial Index (HIS) contract and the Henry Financial Swing (HHD) contract are discussed separately below.

a. The Henry Financial Basis (HEN) Contract and the SPDC Indicia

The ICE HEN contract is cash settled based on the difference between the bidweek price of natural gas at the Henry Hub for the contract-specified month of delivery, as reported in Platts' *Inside FERC's Gas Market Report*, and the final settlement price for New York Mercantile Exchange's ("NYMEX's") Henry Hub physically-delivered natural gas futures contract for the same specified calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on their fixed-price transactions conducted during the last five business days of the month for physical delivery of natural gas at the Henry Hub; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platts bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the HEN contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The HEN contract is listed for up to 72 calendar months commencing with the next calendar month.

The Henry Hub,[14] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded Henry Hub physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and move it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

The HEN contract price measures the discrepancy between two Henry Hub-related prices, where one price is a futures price and the other is a forward cash price. Traders may make commitments to buy or sell natural gas at the Henry Hub using the NYMEX Henry Hub natural gas futures contract, which specifies physical delivery. Because the NYMEX futures contract is listed for at least twelve years, market participants can make such decisions a long time before delivery actually occurs, since they can have an effective hedge in place to offset price risk associated with long-dated cash market commitments. While the futures price and the bidweek price both reflect the price of natural gas during the following month, the two values may not be equal. This is because the NYMEX futures contract stops trading three business days prior to first business day of the delivery month. In contrast, the bidweek price is derived from cash market deals consummated during the last five business days of the month that specify physical delivery during the following calendar month. Thus, it is possible that the bidweek price could include two additional days of market information, which could result in a price that is significantly higher or lower than the futures price. The ICE HEN contract can be used to more accurately price natural gas in the delivery month. For example, a firm may lock in its November 2009 needs by taking a long position in the November 2009 contract. Assume that the futures position is established at $4.00 per mmBtu. This means that the gas was purchased at $4, which may be higher or lower than the spot price during the delivery month. During the final few days in October, the November 2009 natural gas contract stops trading and the November bidweek price is determined. Assume that the weather forecast calls for warmer than normal temperatures in the area, causing the futures price to fall and settle on October 27 at $3.90 per mmBtu, resulting in a loss of $0.10 per mmBtu on the futures side. Market sentiment of a strong downward pressure on gas prices may persist, leading spot transactions for next-month delivery to be priced even lower than the futures settlement price. In this regard, the bidweek price is determined as a volume weighted average of fixed-price transactions for November 2009 delivery that were conducted between October 25, 2009, and October 29, 2009. If the bidweek price ends up being at $3.75 per mmBtu, the firm will incur an additional loss of $0.15 per mmBtu because of falling spot prices. By taking a position in the ICE HEN contract, the firm can mitigate some of the losses by accounting for the difference between the final settlement price and the bidweek price.[15]

In its October 20, 2009, **Federal Register** notice, the Commission identified material liquidity, price linkage and material price reference as the potential SPDC criteria applicable to the HEN contract. Each of these criteria is discussed below.[16]

1. Material Price Reference Criterion

The Commission's October 20, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission noted that 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, ICE offers the "Gulf Gas End of Day" and "OTC Gas End of Day"[17] packages with access to all price data or just current prices plus a selected number of months (i.e., 12, 24, 36 or 48 months) of

[13] 17 CFR part 36, Appendix A.

[14] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas.

[15] If the firm simultaneously takes positions involving the NYMEX futures contract and the ICE HEN basis contract, the firm will be able to price the natural gas at the bidweek price.

[16] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion is not discussed in reference to the HEN contract.

[17] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

historical data. These two packages include price data for the HEN contract.

Although the Henry Hub is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the HEN contract, the Commission has found upon further evaluation that the HEN contract is not routinely consulted by industry participants in pricing cash market transactions and thus does not meet the Commission's Guidance for the material price reference criterion. In this regard, the NYMEX Henry Hub physically delivered natural gas futures contract is routinely consulted by industry participants in pricing cash market transactions at this location. Because both the HEN and the NYMEX contracts basically price the same commodity at the same location and time and the NYMEX contract has significantly higher trading volume and open interest,[18] it is not necessary for market participants to independently refer to the HEN contract for pricing natural gas at this location. Furthermore, the Commission notes that publication of the HEN contract's prices is not indirect evidence of routine dissemination. The HEN contract's prices are published with those of numerous other contracts, which are of more interest to market participants.[19] The Commission cannot surmise whether or not traders specifically purchase the ICE data packages for the HEN contract's prices.

i. Federal Register Comments

As noted above, ICE was the sole respondent which addressed the question of whether the HEN contract is a SPDC. ICE stated in its comment letter that the HEN contract does not meet the material price reference criterion for SPDC determination. ICE stated that the Commission appeared to base the case that the HEN contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether the HEN contract is a SPDC, the CFTC cited a general conclusion in its ECM study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that "[b]asing a material price reference determination on general statements made in a two year old study does not seem to meet Congress' intent that the CFTC use its considerable expertise to study the OTC markets." The Commission cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets as an indication that an investigation of certain ICE contracts may be warranted; the ECM study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

ii. Conclusion Regarding Material Price Reference

The Commission finds that the HEN contract does not meet the material price reference criterion because it is not routinely consulted by cash market participants when pricing transactions at the Henry Hub (direct evidence is not supported). Moreover, the ECM sells the HEN contract's price data along with those of other contracts, which are of more interest to market participants (indirect evidence is not supported).

2. Price Linkage Criterion

In its October 20, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the HEN contract. In this regard, the final settlement of the HEN contract is based, in part, on the final settlement price of the NYMEX's Henry Hub physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [20] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as, or move substantially in conjunction with, the prices of the referenced contract." The Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, the Commission also stated in the Guidance that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a SPDC ("minimum threshold").

To assess whether the HEN contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that the Henry Hub futures/cash price differential is determined in part by the final settlement price of the NYMEX Henry Hub physically-delivered natural gas futures contract (a DCM contract) and that the derived Henry Hub prices (using the NYMEX Henry Hub natural gas futures contract's settlement prices and the Henry Hub cash price differentials) are within 2.5 percent of the settlement prices of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, 100 percent of the Henry Hub natural gas prices derived from the HEN values were within 2.5 percent of the daily settlement price of NYMEX Henry Hub natural gas futures contract. However, staff found that the HEN contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Henry Hub natural gas futures contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. The number of trades on the ICE centralized market in the HEN contract during the same period totaled 173,973 contracts (equivalent to 43,493 NYMEX futures contracts, given the size difference).[21] Thus, total amount of centralized-market trades in the HEN contract was significantly below the minimum threshold.

i. Federal Register Comments

ICE was the sole respondent which addressed the question of whether the HEN contract is a SPDC. ICE stated in its comment letter that the HEN contract does not meet the price linkage criterion for SPDC determination because it fails the volume test provided in the Commission's Guidance.

[18] Trading data was obtained by the Commission using the Integrated Surveillance System.

[19] The Commission will rely on one of two sources of evidence—direct or indirect—to determine a SPDC. Direct evidence can be cash market transactions that are frequently based on or quoted as a differential to the potential SPDC. Indirect evidence includes contracts whose price series are routinely disseminated in industry publications or are sold to market participants by the ECM.

[20] Appendix A to the Part 36 rules.

[21] The HEN contract is one-quarter the size of the NYMEX Henry Hub physically-delivered futures contract.

ii. Conclusion Regarding the Price Linkage Criterion

The Commission finds that the HEN contract does not meet the price linkage criterion because it fails the volume test provided for in the Commission's Guidance.

3. Material Liquidity Criterion

As noted above, in its October 20, 2009, **Federal Register** notice, the Commission identified material liquidity, price linkage and material price reference as potential criteria for SPDC determination of the HEN contract. With respect to the material liquidity criterion, the Commission noted that the total number of transactions executed on ICE's electronic platform in the HEN contract was 538 in the second quarter of 2009, resulting in a daily average of 8.4 trades. During the same period, the HEN contract had a total trading volume of 78,780 contracts and an average daily trading volume of 1,232 contracts. Moreover, open interest as of June 30, 2009, was 128,504 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[22] In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 173,973 contracts (or 2,636 contracts on a daily basis). In term of number of transactions, 1,174 trades occurred in the third quarter of 2009 (17.8 trades per day). As of September 30, 2009, open interest in the HEN contract was 160,804 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The Commission notes that trading activity in the HEN contract increased between the second and third quarters of 2009. However, the number of trades per day remained relatively low and only slightly more than the reporting level of five trades per day. Moreover, the Commission notes that the number of contracts traded is comparable to that experienced in a relatively small futures market, such as the NYMEX Platinum and ICE US Frozen Concentrated Orange Juice contracts. Accordingly, the data at best provides weak evidence that the HEN contract meets the material liquidity criterion.[23]

i. Federal Register Comments

As noted above, ICE was the sole respondent which addressed the question of whether the HEN contract is a SPDC. ICE stated in its comment letter that the HEN contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

First, ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to report trade data to the CFTC." On the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[24] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. While a contract that meets this threshold may be subject to scrutiny as a potential SPDC, the threshold is not a test for material liquidity. As noted above, the Commission has not reached a decision regarding material liquidity because, regardless of the relatively large quarterly trading volume in the HEN contract, material liquidity alone is not sufficient to support a SPDC determination.

ICE also stated that "the statistics [provided by ICE] have been misinterpreted and misapplied." In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all 120 months of each contract" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract." Furthermore, ICE noted that for the HEN contract, "98% of the trades and volume actually executed on the ICE platform occurred in the single most liquid, usually prompt, month of the contract."

It is the Commission's opinion that liquidity, as it relates to the HEN contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the HEN contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the HEN contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which are cited above includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. Commission staff asked ICE to review the data it sent in its quarterly filings. In response, ICE confirmed that the volume data it provided and which the Commission cited in its October 20, 2009, **Federal Register** notice, as well as the additional volume information it cites above, includes only transaction data executed on ICE's electronic trading platform.[25] The Commission acknowledges that the open interest information it cites above includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission finds at best weak evidence that the HEN contract meets the material liquidity criterion. However, because the HEN contract does not meet either the price linkage or material price reference criterion, it is not possible to declare the HEN contract a SPDC since material liquidity cannot be used alone as a basis for a SPDC determination.

4. Overall Conclusion the HEN Contract

After considering the entire record in this matter, including the comments received, the Commission has determined that the HEN contract does not perform a significant price discovery

[22] 74 FR 53720 (October 20, 2009).

[23] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the HEN contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[24] 73 FR 75892 (December 12, 2008).

[25] Supplemental data supplied by ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 62.2 percent of all transactions in the HEN contract.

function under the criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the HEN contract does not meet the material price reference and price linkage criteria at this time, and there is at best weak evidence that it meets the material liquidity criterion, which is not sufficient by itself to support a SPDC determination. Accordingly, the Commission will issue the attached Order declaring that the HEN contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its HEN contract.[26] Accordingly, with respect to its HEN contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs.

b. The Henry Financial Index (HIS) Contract and the SPDC Indicia

The ICE HIS contract is cash settled based on the arithmetic average of the daily natural gas prices at the Henry Hub, as quoted in the "Daily Price Survey" table of Platts' *Gas Daily* during the specified month, less the Platts bidweek price that is reported in the first issue of *Inside FERC's Gas Market Report* in which the natural gas is delivered. The Platts prices are based on the fixed-price cash market transactions that are voluntarily reported by traders. As noted above, the Platts bidweek price is based on a survey of cash market traders who voluntarily report data on their fixed-price transactions conducted during the last five business days of the month for physical delivery of natural gas at the Henry Hub on a uniform basis throughout the following calendar month. The Platts bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The Gas Daily price is for next-day delivery of natural gas at the Henry Hub. The size of the HIS contract is 2,500 mmBtu, and the unit of trading is any multiple of 2,500 mmBtu. The HIS contract is listed for 36 calendar months.

The index used to settle the HIS contract measures the discrepancy between two cash market prices for natural gas, where one (the Platts bidweek price) is a fixed forward price that locks in the price paid for gas deliveries made on each calendar day of the following month. The other price (the Platts Daily Price Survey) is a calendar month average of the daily spot price for gas deliveries made during the same month. The forward and average spot prices may differ from each other as new market conditions unfold during the month in which deliveries are made.

For example, assume that a firm prices natural gas that is going to be delivered at the Henry Hub in November 2009 at the bidweek price. The NYMEX Henry Hub futures can be used to procure the physical gas, and HEN contract can be overlayed in order to achieve the bidweek price. If there is a potential that the average daily price during the delivery month may differ from the bidweek price, the firm can add the HIS contract to the NYMEX futures/ICE HEN combination to achieve a price that is based on actual daily prices rather than a forward spot price that applies to all business days in the delivery month. As a result, the HIS contract allows commercial participants to price natural gas more accurately during the delivery period.

In its October 20, 2009, **Federal Register** notice, the Commission identified material liquidity and material price reference as the potential SPDC criteria applicable to the HIS contract. Each of these factors is discussed below.[27]

1. Material Price Reference Criterion

The Commission's October 20, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission noted that 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, ICE offers "Gulf Gas End of Day" and "OTC Gas End of Day" [28] with access to all price data or just current prices plus a selected number of months (i.e., 12, 24, 36 or 48 months) of historical data. These two packages include price data for the HIS contract.

Although the Henry Hub is a major trading center for natural gas in the United States, and as noted ICE does sell price information for the HIS contract, the Commission has found upon further evaluation that the HIS contract is not "routinely consulted by industry participants in pricing cash market transactions" and thus does not meet the Commission's guidance for the material price reference criterion. In this regard, the NYMEX Henry Hub natural gas futures contract is routinely consulted by industry participants in pricing cash market transactions at this location. Because both the HIS and the NYMEX contracts basically price the same commodity at the same location and time and the NYMEX futures contract has significantly higher trading volume and open interest, it is not necessary for market participants to independently refer to the HIS contract for pricing natural gas at this location. Furthermore, the Commission notes that publication of the HIS contract's prices is not indirect evidence of routine dissemination. The HIS contract's prices are published with those of numerous other contracts, which are of more interest to market participants.[29] The Commission cannot surmise whether or not traders specifically purchase the ICE data packages for the HIS contract's prices.

i. Federal Register Comments

As noted above, ICE was the sole respondent which addressed the question of whether the HIS contract is a SPDC. ICE stated in its comment letter that the HIS contract does not meet the material price reference criterion for SPDC determination and, further, that the Commission's identification of the HIS contract as a potential SPDC is based on a disputable assertion. In issuing its notice of intent to determine whether the HIS contract is a SPDC, the CFTC cited a general conclusion in its ECM study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that "[b]asing a material price reference determination on general statements made in a two year old study does not seem to meet Congress' intent that the CFTC use its considerable expertise to study the OTC markets." The Commission cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets as an indication that an investigation of certain ICE contracts may be warranted; the ECM study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

[26] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[27] As noted above, the Commission did not find an indication of arbitrage and price linkage in connection with this contract; accordingly, those criteria are not discussed in reference to the HIS contract.

[28] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[29] The Commission will rely on one of two sources of evidence—direct or indirect—to determine a SPDC. Direct evidence can be cash market transactions that are frequently based on or quoted as a differential to the potential SPDC. Indirect evidence includes contracts whose price series are routinely disseminated in industry publications or are sold to market participants by the ECM.

ii. Conclusion Regarding Material Price Reference

The Commission finds that the HIS contract does not meet the material price reference criterion because it is not routinely consulted by cash market participants when pricing transactions at the Henry Hub (direct evidence is not supported). Moreover, the ECM sells the HIS contract's price data along with those of other contracts, which are of more interest to market participants (indirect evidence is not supported).

2. Material Liquidity Criterion

As noted above, in its October 20, 2009, **Federal Register** notice, the Commission identified material liquidity and material price reference as potential criteria for SPDC determination of the HIS contract. With respect to the material liquidity criterion, the Commission noted that the total number of transactions executed on ICE's electronic platform in the HIS contract was 550 in the second quarter of 2009, resulting in a daily average of 8.6 trades. During the same period, the HIS contract had a total trading volume of 79,330 contracts and an average daily trading volume of 1,239 contracts. Moreover, open interest as of June 30, 2009, was 127,346 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[30] In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 178,649 contracts (or 2,707 contracts on a daily basis). In term of number of transactions, 1,250 trades occurred in the third quarter of 2009 (18.9 trades per day). As of September 30, 2009, open interest in the HIS contract was 255,496 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The Commission notes that trading activity in the HIS contract increased between the second and third quarters of 2009. However, the number of trades per day remained relatively low and only slightly more than the reporting level of five trades per day. Moreover, the Commission notes that the number of contracts traded is comparable to that experienced in a relatively small futures market, such as the NYMEX Platinum and ICE U.S. Frozen Concentrated Orange Juice contracts. Accordingly, the data at best provides weak evidence that the HIS contract meets the material liquidity criterion.[31]

i. Federal Register Comments

As noted above, ICE was the sole respondent which addressed the question of whether the HIS contract is a SPDC. ICE stated in its comment letter that the HIS contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

First, ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to report trade data to the CFTC." On the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[32] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. While a contract that meets this threshold may be subject to scrutiny as a potential SPDC, the threshold is not a test for material liquidity. As noted above, the Commission has not reached a decision regarding material liquidity because, regardless of the relatively large quarterly trading volume in the HIS contract, material liquidity alone is not sufficient to support a SPDC determination.

ICE also stated that "the statistics [provided by ICE] have been misinterpreted and misapplied." In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all 120 months of each contract" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract." Furthermore, ICE noted that for the HIS contract, "98% of the trades and volume actually executed on the ICE platform occurred in the single most liquid, usually prompt, month of the contract."

It is the Commission's opinion that liquidity, with regard to the HIS contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the HIS contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the HIS contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which are cited above includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. Commission staff asked ICE to review the data it sent in its quarterly filings. In response, ICE confirmed that the volume data it provided and which the Commission cited in its October 20, 2009, **Federal Register** notice as well as the additional volume information it cites above includes only transaction data executed on ICE's electronic trading platform.[33] The Commission acknowledges that the open interest information it cites above includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission finds weak evidence at best that the HIS contract meets the material liquidity criterion. However, because the HIS contract does not meet the material price reference criterion, it is not possible to declare the HIS contract a SPDC since material liquidity cannot be used alone as a basis for a SPDC determination.

[30] 74 FR 53720 (October 20, 2009).

[31] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the HIS contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[32] 73 FR 75892 (December 12, 2008).

[33] Supplemental data supplied by ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 59.7 percent of all transactions in the HIS contract.

3. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the HIS contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the HIS contract does not meet the material price reference criterion at this time, and there is weak evidence at best that it meets the material liquidity criterion, which is not sufficient by itself to support a SPDC determination. Accordingly, the Commission will issue the attached Order declaring that the HIS contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its HIS contract.[34] Accordingly, with respect to its HIS contract ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs.

c. The Henry Financial Swing (HHD) Contract and the SPDC Indicia

The ICE HHD contract is cash settled based on the spot index price for natural gas at the Henry Hub on a specified day, as reported in the "Daily Price Survey" table of Platts' *Gas Daily.* The Platts index price is based on fixed-price cash market transactions that are voluntarily reported by traders. The size of the HHD contract is 2,500 mmBtu, and the unit of trading is any multiple of 2,500 mmBtu. The HHD contract is listed for 65 consecutive calendar days.

Swing contracts are cash-settled natural gas contracts that specify 2,500 mmBtu of gas at a particular location on a specific day and is settled using a price index published by a third-party price reporter. The ICE HHD swing contract represents the spot price of natural gas at the Henry Hub on a particular day. Swing contracts allow traders to refine or lift hedges during the delivery month that were previously established using the NYMEX Henry Hub natural gas futures contract. Swing contracts are most useful after the NYMEX futures contract has stopped trading, which is just prior to the beginning of the delivery month. Physically-delivered and cash-settled transactions based on the NYMEX Henry Hub price involves natural gas that is delivered over the entire delivery month. If, for example, a firm's needs change and it no longer needs all of the natural gas for which it hedged (say it now requires only half of the originally hedged natural gas in the final week of the delivery month), then the HHD contract can be used to offset the part of the original hedge even though NYMEX futures contract has ceased trading.

In its October 20, 2009, **Federal Register** notice, the Commission identified material liquidity, arbitrage and material price reference as the potential SPDC criteria applicable to the HHD contract. Each of these criteria is discussed below.[35]

1. Material Price Reference Criterion

The Commission's October 20, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission noted that 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, ICE offers "Gulf Gas End of Day" and "OTC Gas End of Day" [36] with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. These two packages include price data for the HHD contract.

Although the Henry Hub is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the HHD contract, the Commission has found upon further evaluation that the HHD contract is not "routinely consulted by industry participants in pricing cash market transactions" and thus does not meet the Commission's guidance for the Material Price Reference criteria. In this regard, the NYMEX Henry Hub futures contract is routinely consulted by industry participants in pricing cash market transactions at this location, because both the HHD and the NYMEX contracts basically price the same commodity at the same location and the NYMEX contract has significantly higher trading volume and open interest, it is not necessary for market participants to independently refer to the HHD contract for pricing natural gas at this location. Furthermore, the Commission notes that publication of the HHD contract's prices is not indirect evidence of routine dissemination. The HHD contract's prices are published with those of numerous other contracts, which are of more interest to market participants.[37] The Commission cannot surmise whether or not traders specifically purchase the ICE data packages for the HHD contract's prices.

i. Federal Register Comments

As noted above, ICE was the sole respondent which addressed the question of whether the HHD contract is a SPDC. ICE stated in its comment letter that the HHD contract does not meet the material price reference criterion for SPDC determination. ICE stated that the Commission appeared to base the case that the HHD contract is potentially a SPDC on a disputable assertion. First, in issuing its notice of intent to determine whether the HHD contract is a SPDC, the CFTC cited a general conclusion in its ECM study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that "[b]asing a material price reference determination on general statements made in a two year old study does not seem to meet Congress' intent that the CFTC use its considerable expertise to study the OTC markets." The Commission cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets as an indication that an investigation of certain ICE contracts may be warranted; the ECM study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

ii. Conclusion Regarding Material Price Reference

The Commission finds that the HHD contract does not meet the material price reference criterion because it is not routinely consulted by cash market participants when pricing transactions at the Henry Hub (direct evidence is not supported). Moreover, the ECM sells the HHD contract's price data along with those of other contracts, which are of more interest to market participants (indirect evidence is not supported).

2. Arbitrage Criterion

In its October 20, 2009, **Federal Register** notice, the Commission identified arbitrage as a potential basis

[34] See 73 FR 75888, 75893 (Dec. 12, 2008).

[35] As noted above, the Commission did not find an indication of price linkage in connection with this contract; accordingly, that criterion is not discussed in reference to the HHD contract.

[36] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[37] The Commission will rely on one of two sources of evidence—direct or indirect—to determine a SPDC. Direct evidence can be cash market transactions that are frequently based on or quoted as a differential to the potential SPDC. Indirect evidence includes contracts whose price series are routinely disseminated in industry publications or are sold to market participants by the ECM.

for a SPDC determination with respect to the HHD contract.

The Commission's Guidance (Appendix A to Part 36) notes that "the Commission will consider an arbitrage contract potentially to be a [SPDC] * * * if, over the most recent quarter, greater than 95 percent of the closing or settlement prices of the contract, which have been calculated using transaction prices, fall within 2.5 percent of the closing or settlement price of the contract or contracts which it could be arbitraged." As noted above, the HHD contract is a daily contract that reflects the spot price of natural gas at the Henry Hub and is listed for 65 calendar days. In contrast, the NYMEX Henry Hub natural gas futures contract is a pricing mechanism for natural gas in the future. The NYMEX Henry Hub natural gas futures contract is available for trading many months prior to the delivery period.

Arbitrage between the ICE HHD and NYMEX Henry Hub physically-delivered natural gas futures contract potentially is possible. However, the ability to arbitrage likely would be limited based on a number of factors. First, the HHD contract prices the value of natural gas on a single day while the NYMEX futures contract prices the value of gas over a calendar month. Second, the futures contract and the HHD contract are not always trading simultaneously. For example, the NYMEX futures contract trades many years before delivery while the HHD contract is listed out only 65 consecutive calendar days. Moreover, the HHD contract trades into the delivery month while the NYMEX futures contract stops trading three business days before the first business day of the delivery month. Even during the times where the two contracts are simultaneously traded, arbitrage between the two contracts likely would involve multiple HHD contract to cover a period of several days or weeks against a single NYMEX position, which would be rather cumbersome and probably not practicable. Due to the heterogeneous attributes of the two contracts, the test noted above to determine the similarity of the two price series was not performed.

i. Federal Register Comments

As noted above, ICE was the sole respondent which addressed the question of whether the HHD contract is a SPDC. ICE stated in its comment letter that the HHD contract does not meet the arbitrage criterion because it is a "'decaying' product that expires daily throughout its contract term. The HHD [contract] typically trades 'balance of month' therefore using multiple daily settlement prices. In fact, the majority of HHD trades are intra-month after the * * * [NYMEX Henry Hub natural gas futures contract] has already been priced."

ii. Conclusion Regarding the Arbitrage Criterion

The HHD contract does not meet the arbitrage criterion because it prices natural gas on a daily basis while the NYMEX futures contract prices gas on a monthly basis. Moreover, the futures contract is used to discover prices while the HHD contract is used to modify or lift preexisting hedges.

3. Material Liquidity Criterion

As noted above, in its October 20, 2009, **Federal Register** notice, the Commission identified material liquidity, arbitrage and material price reference as potential criteria for SPDC determination of the HHD contract. With respect to the material liquidity criterion, the Commission noted that the total number of transactions executed on ICE's electronic platform in the HHD contract was 5,246 in the second quarter of 2009, resulting in a daily average of 82 trades. During the same period, the HHD contract had a total trading volume of 242,968 contracts and an average daily trading volume of 3,796 contracts. Moreover, open interest as of June 30, 2009, was 20,173 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[38] In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 407,037 contracts (or 6,167 contracts on a daily basis). In term of number of transactions, 10,376 trades occurred in the third quarter of 2009 (157.2 trades per day). As of September 30, 2009, open interest in the HHD contract was 25,418 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

The Commission notes that trading activity in the HHD contract increased between the second and third quarters of 2009. Moreover, the number of trades per day was quite large and was significantly greater than the reporting level of five trades per day. Furthermore, the number of contracts traded is comparable to the levels experienced in a moderately active futures market, such as the ICE US Cotton No. 2 contract. Accordingly, the transaction data provide evidence that the HHD contract may meet the material liquidity criterion.[39]

i. Federal Register Comments

As noted above, ICE was the sole respondent which addressed the question of whether the HHD contract is a SPDC. ICE stated in its comment letter that the HHD contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

First, ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to report trade data to the CFTC." On the contrary, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[40] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. While a contract that meets this threshold may be subject to scrutiny as a potential SPDC, the threshold is not a test for material liquidity. As noted above, the Commission has not reached a decision regarding material liquidity because, regardless of the relatively large number of trades per day and the large quarterly trading volume in the HHD contract, material liquidity alone is not sufficient to support a SPDC determination.

ICE also stated that "the statistics [provided by ICE] have been misinterpreted and misapplied." In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all 120 months of each contract" as well as in strips of contract

[38] 74 FR 53720 (October 20, 2009).

[39] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the HEN contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[40] 73 FR 75892 (December 12, 2008).

months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract." Furthermore, ICE noted that for the HHD contract, "78% of the total volume was actually executed on the ICE platform in the single most liquid, usually prompt, month of the contract."

It is the Commission's opinion that liquidity, with regard to the HHD contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the HHD contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the HHD contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which are cited above includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. Commission staff asked ICE to review the data it sent in its quarterly filings and ICE confirmed that the volume data it provided and which the Commission cited in its October 20, 2009, **Federal Register** notice as well as the additional volume information it cites above includes only transaction data executed on ICE's electronic trading platform.[41] The Commission acknowledges that the open interest information it cites above includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission finds that the HHD contract may meet the material liquidity criterion. However, because the HHD contract does not meet the material price reference or the arbitrage criterion, it is not possible to declare the HHD contract a SPDC since material liquidity cannot be used alone as a basis for SPDC determination.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the HHD contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the HHD contract does not meet the material price reference and arbitrage criteria at this time nor is material liquidity sufficient by itself to support a SPDC determination. Accordingly, the Commission will issue the attached Order declaring that the HHD contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its HHD contract.[42] Accordingly, with respect to its HHD contract ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[43] 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 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 CEA[44] 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 an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. 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 Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorize the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that ICE's HEN, HIS and HHD contracts that are the subject of the attached Orders are not SPDCs; accordingly, the Commission's Orders impose no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")[45] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs

[41] Supplemental data supplied by ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 1.2 percent of all transactions in the HHD contract.

[42] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[43] 44 U.S.C. 3507(d).

[44] 7 U.S.C. 19(a).

[45] 5 U.S.C. 601 *et seq.*

are not small entities for purposes of the RFA.[46] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these Orders, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Orders

a. Order Relating to the ICE Henry Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Henry Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference and price linkage criteria for significant price discovery contracts. Moreover, under Commission Guidance material liquidity alone cannot support a significant price discovery finding for the Henry Financial Basis contract. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity[47] with respect to the Henry Financial Basis contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the Henry Financial Basis contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the Henry Financial Basis contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

[46] 66 FR 42256, 42268 (Aug. 10, 2001).

[47] 7 U.S.C. 1a(29).

b. Order Relating to the ICE Henry Financial Index Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Henry Financial Index contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference criterion for significant price discovery contracts. Moreover, under Commission Guidance material liquidity alone cannot support a significant price discovery finding for the Henry Financial Index contract. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity[48] with respect to the Henry Financial Index contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the Henry Financial Index contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the Henry Financial Index contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

c. Order Relating to the ICE Henry Financial Swing Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Henry Financial Swing contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference and arbitrage criteria for significant price discovery contracts. Moreover, under Commission Guidance material liquidity alone cannot support a significant price discovery finding for the Henry Financial Swing contract. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity[49] with respect to the Henry Financial Swing contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the Henry Financial Swing contract with the issuance of this Order.

[48] 7 U.S.C. 1a(29).

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the Henry Financial Swing contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

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[49] 7 U.S.C. 1a(29).