matters relevant to the work of the ITAC; and ensuring that the ITAC is balanced in terms of points of view, demographics, geography, and entity or organization size.

This notice is issued pursuant to the Federal Advisory Committee Act (5 U.S.C., app. 2), 19 U.S.C. 2155, and 41 CFR part 102–3 relating to advisory committees.


Nicole Y. Lamb-Hale,
Assistant Secretary for Manufacturing and Services.

For Further Information Contact:
Gregory K. Price, Industry Economist, Division of Market Oversight.

On October 9, 2009, the Commission published a notice ("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 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) 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.

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2 74 FR 52188 (October 9, 2009).
3 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.
5 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.
6 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 will publish notice in the Federal Register that it intends to undertake a determination 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.
7 The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).
8
Federal Energy Regulatory Commission ("FERC") and Financial Institutions Energy Group ("FIEG"). The comment letters from FERC and Platts did not directly address the issue of whether or not the SNJ contract is a SPDC; IECA expressed the opinion that the SNJ contract did perform a significant price discovery function; and thus, should be subject to the requirements of the core principles enumerated in Section 2(h)(7) of the Act, but did not elaborate on its reasons for saying so or directly address any of the criteria. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the SNJ contract and generally expressed the opinion that the SNJ contract is not a SPDC because it does not meet the material price reference, price linkage and material liquidity criteria for SPDC determination. These 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 designated 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 taking 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).

Accordingly, the Commission has 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. 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 the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

The San Juan Financial Basis (SNJ) Contract and the SPDC Indicia

The SNJ contract is cash settled based on the difference between the bidweek price index for a particular calendar month at the San Juan Basin on El Paso Natural Gas Company’s pipeline, as published in Platts’ 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, 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 San Juan Basin; 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 SNJ contract is 2,500 million British thermal units (“mmBtu”), and the unit of trading is any multiple of 2,500 mmBtu. The SNJ

10 In its October 9, 2009, Federal Register release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the SNJ contract. Arbitrage was not identified as a possible criterion. As a result, arbitrage will not be discussed further in this document and the associated Order.

11 17 CFR part 36, Appendix A.
contract is listed for up to 72 consecutive calendar months. The Henry Hub, 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, 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 ship 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.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America. Some of the major trading centers in the U.S. are the Rocky Mountains, the Midwest, the Gulf Coast, the West Coast, the Rocky Mountains, and the Houston Ship Channel. For locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets’ respective distances from the Henry Hub are the same. The reason is that prices may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can diverge from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

The supply of natural gas in the San Juan Basin (encompassing the four-corner region of northwestern New Mexico, northeastern Arizona, and portions of Colorado and Utah) primarily comes from New Mexico natural gas production plants in the cities of Blanco, Chaco, Rio Vista, Milagro and Valverde. The El Paso Natural Gas Company’s pipeline system, which is the largest natural gas pipeline system in the Western region of the United States, transports natural gas from the San Juan Basin production area to California, Arizona, and the Arizona/ Nevada state border.

The Blanco hub, a market center that includes the San Juan Basin, had an estimated throughput capacity of 1.2 billion cubic feet per day in 2008. Moreover, the number of pipeline interconnections at the San Juan Basin hub was 10 in 2008. Lastly, the pipeline interconnection capacity of the San Juan Basin in 2008 was 4.2 billion cubic feet per day, which constituted a 22 percent increase over the pipeline interconnection capacity in 2003. The San Juan Basin is far removed from the Henry Hub and is not directly connected to the Henry Hub. Natural gas prices at the San Juan Basin typically differ from those at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the SNJ price. Moreover, exogenous factors, such as adverse weather, can cause the SNJ gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts (or in the NYMEX or ICE Henry Hub price) can be established by adding the appropriate basis swap position to a contract is being used as a material price discovery function. Direct evidence may be established by examining spot market prices and hedging price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract’s final settlement price).

In its October 9, 2009, Federal Register notice, the Commission identified material price reference, price linkage and material liquidity as the potential SPDC criteria applicable to the SNJ contract. Each of these criteria is discussed below.

1. Material Price Reference Criterion

The Commission’s October 9, 2009, Federal Register notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact 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 “West Gas End of Day” and “OTC Gas End of Day” 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 historical data. These two packages include price data for the SNJ contract.

The Commission also noted that its October 2007 Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets (“ECM Study”) found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the SNJ contract, while not mentioned by name in the ECM Study, might warrant further study.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract is being used as a material price reference and therefore, serving a significant price discovery function. With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when 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 in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for

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12 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 at the particular locations.


15 Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.


17 As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the SNJ contract.

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


20 17 CFR part 36, Appendix A.
instance, they are quoted in dollars and cents above or below the reference contract’s price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at by adding to, or subtracting from, the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

Following the issuance of the Federal Register release, the Commission further evaluated ICE’s data offerings and their use by industry participants. Although the San Juan Basin is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the SNJ contract, the Commission has found upon further evaluation that the cash market transactions are not being directly based or quoted as a differential to the SNJ contract nor is that contract routinely consulted by industry participants in pricing cash market transactions. Thus, the contract does not meet the Commission’s Guidance for the material price reference criterion. Moreover, there are other trading points in the same general vicinity, such as the Waha hub, that are referenced more frequently. Thus, it is not necessary for market participants to independently refer to the SNJ contract for pricing natural gas at this location. In these circumstances, the SNJ contract does not satisfy the direct price reference test for existence of material price reference. Furthermore, the Commission notes that publication of the SNJ contract’s prices is not indirect evidence of material price reference. The SNJ contract’s prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the San Juan Basin, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the SNJ contract’s prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. Federal Register Comments

As noted above, NGCAFE, ICE, E1, NGSA, and FIEG addressed the question of whether the SNJ contract met the material price reference criterion for a SPDC.21 The commenters argued that because the SNJ contract is cash-settled, it cannot truly serve as an independent “reference price” for transactions in natural gas at this location. Rather, the commenters argue, the underlying cash price series against which the ICE SNJ contract is settled (in this case, the Inside FERC’s Gas Market Report price for natural gas at this location) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants “consult on a frequent and recurring basis” the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to “lock in” a fixed price for some future point in time to hedge against adverse price movements. As noted above, the San Juan Basin is a significant trading center for natural gas in North America. However, traders do not consider the San Juan Basin to be as important as other natural gas trading points, such as the Waha hub and Henry Hub. ICE22 also argued that the Commission appeared to base the case that the SNJ contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether the SNJ 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 CFTC’s reason is “hard to quantify as the ECM report does not mention” this contract as a potential SPDC. “It is unknown which market participants made this statement in 2007 or the contracts that were referenced.” In response to the above comment, the Commission notes that it cited the ECM Study’s general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia 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.

Both E123 and WGC24 stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract’s prices, such as those for the SNJ contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the SNJ prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the SNJ prices have substantial value to them. As mentioned above, the Commission notes that publication of the SNJ contract’s prices is not indirect evidence of routine dissemination. The SNJ contract’s prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the San Juan Basin, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the SNJ contract’s prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the SNJ contract does not meet the material price reference criterion because cash market transactions are not priced either explicitly or implicitly on a frequent and recurring basis at a differential to the SNJ contract’s price (direct evidence). Moreover, while the ECM sells the SNJ contract’s price data to market participants, market participants likely do not specifically purchase the ICE data packages for the SNJ contract’s prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion

In its October 9, 2009, Federal Register notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the SNJ contract. In this regard, the final settlement of the SNJ contract is based, in part, on the final settlement price of NYMEX’s physically-delivered natural gas futures contract, where NYMEX is registered with the Commission as a DCM.

The Commission’s Guidance on Significant Price Discovery Contracts25 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

21 As noted above, ICEA expressed the opinion that the SNJ contract met the criteria for SPDC determination but did not provide its reasoning.
22 CL 04.
23 CL 05.
24 CL 02.
25 Appendix A to the Part 36 rules.
trades in the SNJ contract amounted to less than the minimum volume threshold.27

i. Federal Register Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the SNJ contract met the price linkage criterion for a SPDC.28

Each of the commenters expressed the opinion that the SNJ contract did not appear to meet the above-discussed Commission guidance regarding the price relationship and the minimum volume threshold relative to the DCM contract to which the SNJ is linked. Based on its analysis discussed above, the Commission agrees with this assessment.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the SNJ contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission’s Guidance.

3. Material Liquidity Criterion

As noted above, in its October 9, 2009, Federal Register notice, the Commission identified material price reference, price linkage and material liquidity as potential criteria for SPDC determination of the SNJ contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract’s size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE’s electronic platform in the SNJ contract was 391 in the second quarter of 2009, resulting in an average of 6.1 trades. During the same period, the SNJ contract had a total trading volume of 30,722 contracts and an average daily trading volume of 480 contracts. Moreover, open interest as of June 30, 2009, was 49,105 contracts.

As noted above, IECA expressed the opinion that the SNJ contract did not meet its potential importance criterion. In light of this finding and the Commission’s Guidance cited above, there is no need to evaluate further the material liquidity criterion. In light of this finding and the Commission’s Guidance cited above, there is no need to evaluate further the material liquidity criterion. In light of this finding and the Commission’s Guidance cited above, there is no need to evaluate further the material liquidity criterion since it cannot be used alone as a basis for a SPDC determination.

24 74 FR 52188 (October 9, 2009).

25 Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

26 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 SNJ 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 criterion since it cannot be used alone as a basis for a SPDC determination.
material liquidity criterion for a SPDC.\textsuperscript{32} These commenters stated that the SNJ contract does not meet the material liquidity criterion for SPDC determination for a number of reasons. WGCCEF,\textsuperscript{33} ICE\textsuperscript{34} and EI\textsuperscript{35} noted that the Commission’s Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day, and noted that the relatively low number of trades per day in the SNJ contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that “quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another.” WGCCEF, FIEG\textsuperscript{36} and NGSA\textsuperscript{37} noted that the SNJ contract represents a differential, which does not affect other contracts, including the NYMEX Henry Hub contract and physical gas contracts. FIEG and WGCCEF also noted that the SNJ contract’s trading volume represents only a fraction of natural gas trading. 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.” Furthermore, FIEG cautioned the Commission in using a reporting threshold as a measure of liquidity. In this regard, 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”\textsuperscript{38} rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold. ICE and EI proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission’s analysis (cited above) “include trades made in all 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.”\textsuperscript{39} A similar argument was made by EI, which observed that the five-trades-per-day number “is highly misleading” because the contracts can be offered for as long as 120 months, [thus] the average per day for an individual contract may be less than 1 per day.” It is the Commission’s opinion that liquidity, as it pertains to the SNJ contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE SNJ contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the SNJ contract does not meet the material price reference or price linkage criteria, according to the Commission’s Guidance, it would be unnecessary to evaluate whether the SNJ contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

The Commission has found that the SNJ contract does not meet the material liquidity criterion.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the SNJ contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA.

\textsuperscript{32} As noted above, IECA expressed the opinion that the SNJ contract met the criteria for SPDC determination but did not provide its reasoning.

\textsuperscript{33} CL 02.

\textsuperscript{34} CL 04.

\textsuperscript{35} CL 05.

\textsuperscript{36} CL 08.

\textsuperscript{37} CL 09.

\textsuperscript{38} 73 FR 75892 (December 12, 2008).

\textsuperscript{39} In addition, both EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission’s October 9, 2009, Federal Register notice included 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; block trades comprise about 61.4 percent of all transactions in the SNJ contract. The Commission acknowledges that the open interest information that it provided in its October 9, 2009, Federal Register notice 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. Specifically, the SNJ contract does not meet the material price reference, price linkage or material liquidity criteria. Accordingly, the Commission will issue the attached Order declaring that the SNJ 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 SNJ contract.\textsuperscript{40} Accordingly, with respect to its SNJ 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. However, ICE must continue to comply with the applicable reporting requirements.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”)\textsuperscript{41} 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\textsuperscript{42} 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
determined that exempt commercial markets are not small entities for purposes of the RFA. Consequently, the Commission, 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

Order Regarding the San Juan 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 San Juan Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference, price linkage and material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity with respect to the San Juan 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 San Juan Basin 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 San Juan 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.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, same address. Telephone: (202) 418–5155. 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:

1 74 FR 52186 (October 9, 2009).

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