

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 MLN contract, which is the subject of the attached Order, is not a SPDC; accordingly, the Commission's Order imposes no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

### c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")<sup>46</sup> 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.<sup>47</sup> 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. Order

### a. Order Relating to the Malin 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 Malin Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference, price linkage or material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity<sup>48</sup> with respect to the Malin 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 Malin 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 Malin 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.

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

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010-10306 Filed 5-3-10; 8:45 am]

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## COMMODITY FUTURES TRADING COMMISSION

### Order Finding That the Carbon Financial Instrument Contract Offered for Trading on the Chicago Climate Exchange, Inc. Does Not Perform a Significant Price Discovery Function

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final order.

**SUMMARY:** On August 20, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register**<sup>1</sup> a notice of its intent to undertake a determination whether the Carbon Financial Instrument ("CFI") contract offered for trading on the Chicago Climate Exchange, Inc. ("CCX"), an exempt commercial market ("ECM") under Section 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs 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 CCX. The Commission has reviewed public comments and the entire record in this matter and has determined to issue an order finding that the CCX CFI contract, at this time, does 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:** Irina Leonova, Financial Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418-5646. Email: [ileonova@cftc.gov](mailto:ileonova@cftc.gov), or Gregory K. Price, Industry Economist, Division of Market Oversight, same address. Telephone: (202) 418-5515. E-mail: [gprice@cftc.gov](mailto:gprice@cftc.gov), or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418-5133. E-mail: [snathan@cftc.gov](mailto:snathan@cftc.gov).

### SUPPLEMENTARY INFORMATION:

#### I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act")<sup>2</sup> 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. The legislation authorizes the CFTC to designate an agreement, contract or transaction traded on an ECM 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

<sup>1</sup> 74 FR 42052 (August 20, 2009).

<sup>2</sup> Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110-246, 122 Stat. 1624 (June 18, 2008).

<sup>46</sup> 5 U.S.C. 601 *et seq.*

<sup>47</sup> 66 FR 42256, 42268 (Aug. 10, 2001).

<sup>48</sup> 7 U.S.C. 1a(29).

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.<sup>3</sup> 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 regarding 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 that either: (1) had its price information sold by the exchange to market participants or industry publications or (2) had daily closing or settlement prices which were within 2.5% of the contemporaneously determined closing, settlement or other daily price of another contract on 95 percent or more of the days in the most recent quarter.

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 publishes 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 receives written views, data and arguments relevant to its determination from the ECM and other interested persons. The Commission, within a reasonable period of time after the close of the comment period, considers all relevant information and issues an order announcing and explaining its determination. The issuance of an affirmative order subjects an ECM with a SPDC to the full application of the Commission's regulatory authorities; at that time, such an ECM becomes subject to all provisions of the CEA applicable to registered entities.<sup>4</sup> The issuance of such an order also triggers the

obligations, requirements and timetables prescribed in Commission Rule 36.3(c)(4).<sup>5</sup>

## II. Notice of Intent To Undertake SPDC Determination

On August 20, 2009, the Commission published in the **Federal Register** a notice of its intent to undertake a determination whether the CCX's CFI contract performs a significant price discovery function, and requested comment from interested parties.<sup>6</sup> Comments were received from the IntercontinentalExchange, Inc. ("ICE"); Jeremy D. Weinstein, Esq. ("Weinstein"); the California Forestry Association ("CFA"); and Scott DeMonte ("DeMonte").<sup>7</sup> The comments are more extensively discussed below in the Analysis Section.

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

The Commission is directed by section 2(h)(7) of the CEA to consider, as appropriate, the following factors in determining whether a contract performs a 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

<sup>5</sup> For an initial SPDC determination, 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 SPDC determinations, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

<sup>6</sup> 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.

<sup>7</sup> The comment letters are available on the Commission's Web site: <http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-010.html>.

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, 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 the 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 factors must be present to support a determination that a particular contract performs a significant price discovery function. Moreover, the statutory language neither prioritizes the factors nor specifies the degrees to which a SPDC must conform to the various factors. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these factors do not lend themselves to a mechanical checklist or formulaic analysis.<sup>8</sup>

Accordingly, the Commission has indicated that in making its determination it will consider the circumstances under which the presence of a particular factor, or combination of factors, would be sufficient to support a SPDC determination.<sup>9</sup> For example, for contracts that are linked to other contracts or that may be arbitrated 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.<sup>10</sup> 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.

## IV. The CCX CFI Contract

CCX, launched in 2003, operates the only North American voluntary, legally

<sup>3</sup> 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

<sup>4</sup> 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).

<sup>8</sup> Appendix A to Part 36, 17 CFR part 36 (2009).

<sup>9</sup> 17 CFR part 36, appendix A.

<sup>10</sup> Appendix A to Part 36, 17 CFR 36 (2009).

binding integrated trading system to reduce emissions of six major greenhouse gases, with offset projects worldwide. CCX offers a cap and trade system whose members<sup>11</sup> make a legally binding emission reduction commitment. Members are allocated annual emission allowances in accordance with their emissions baseline and the CCX emission reduction schedule. Members who reduce beyond their targets have surplus allowances to sell or bank; those who do not meet the targets must comply by purchasing CCX CFIs. The CCX CFI contract is a cash market instrument and not a derivatives contract. The Chicago Climate Futures Exchange (CCFE), a subsidiary of CCX that operates as a DCM, lists derivatives (futures and option contracts) on CCX CFIs.

The size of the CCX CFI contract is 100 metric tons (MT) of CO<sub>2</sub>-equivalent emissions. A CCX CFI contract involves the immediate delivery of, and payment for, vintage specific CCX carbon dioxide (CO<sub>2</sub>) emission allowances called CFIs. Earlier dated vintages may be delivered against later vintage trades. Transactions (with exception of bilateral agreements) are cleared on trade day. Full contract value settlement occurs on the next business day. CCX substitutes as a counterparty to all transactions and guarantees performance until settlement is completed.

<sup>11</sup> CCX membership categories:

Members: Entities with direct greenhouse gas (GHG) emissions. Members make a legally binding commitment to the CCX Emission Reduction Schedule and are subject to annual emissions verification by FINRA. Indirect emissions are an opt-in.

Registry Participant Members: Entities with direct GHG emissions that establish a CCX Registry account of their emissions and undergo data verification. Standardized independent third-party data verification is provided by FINRA on an annual or multi-annual basis.

Associate Members: Office-based businesses or institutions with negligible direct GHG emissions. Associate Members commit to report and fully offset 100 percent of indirect emissions associated with energy purchases and business travel from year of entry through 2010 and emissions data are verified by FINRA.

Offset Providers: Owners of title to qualifying offset projects that sequester, destroy or reduce GHG emissions. Offset Providers register and sell offsets directly on the CCX.

Offset Aggregators: Entities that serve as the administrative representative, on behalf of offset project owners, of multiple offset-generating projects. Offset projects involving less than 10,000 metric tons of carbon dioxide equivalent per year should be registered and sold through an Offset Aggregator.

Liquidity Providers: Entities or individuals who trade on CCX for purposes other than complying with the CCX Emission Reduction Schedule, such as market makers and proprietary trading groups.

Exchange Participants: Entities or individuals who purchase CFI contracts and retire them to offset emissions associated with special events or other specified activities.

Based upon a required quarterly notification filed on October 15, 2009, (mandatory under Rule 36.3(c)(2)), the CCX reported that, with respect to its CFI contract, an average of 8 trades per day occurred in the third quarter of 2009. During the same period, the CFI had an average daily trading volume of 1,141 contracts. In the second quarter of 2009, market participants traded the CFI contract on average 15 times per day with an average daily trading volume of 1,235 contracts. Because the CCX CFI is a cash market instrument, open interest figures are not applicable.

## V. Analysis

### A. The Statutory Criteria

In its notice of intent to undertake a determination whether the CCX CFI contract performs a significant price discovery function, the Commission indicated that the CCX CFI contract might satisfy the material price reference and material liquidity criteria for SPDC determination.<sup>12</sup> Further analysis reveals that the CCX CFI contract does not meet either criterion.

#### Material Price Reference Criterion

The Commission has concluded that the CCX CFI contract does not meet the material price reference criterion for SPDC determination. As noted in the original **Federal Register** notice, the CFI market is solely a CCX-created entity.<sup>13</sup> The CCX designed all of the parameters of this carbon emission reduction program, and it established the rules for membership in the ECM, allowance trading, and the creation of offsets. Based on these attributes, staff considered whether traders look to the CCX as a source of price information and price discovery for the CFI or the U.S. carbon market in general that would either be a direct or an indirect source of evidence of the material price reference. Staff concluded that it appears that CCX CFI prices are not used as a price reference to the U.S. carbon market due to the relatively small market share of the CCX CFI program in the overall U.S. carbon market, the limited potential for the CFI program to be folded into a national carbon reduction program, and significant price volatility of the CCX CFI instrument. As part of its material price reference analysis, Commission staff considered comments filed

<sup>12</sup> 74 FR 42054 (Aug. 20, 2009). The Commission did not identify either price linkage or arbitrage as the possible criteria for the CCX CFI contract to be a SPDC. Accordingly, those criteria will not be discussed further in this Order.

<sup>13</sup> 74 FR 42054 (Aug. 20, 2009).

pursuant to the request for comment and all other relevant information.<sup>14</sup>

### Material Liquidity Criterion

The Commission's decision to undertake a review to determine whether the CCX CFI contract performs a significant price discovery function was based on CCX's required initial quarterly notification filed on July 1, 2009. At that time, CCX reported that, with respect to all CFI trades combined (aggregate of vintages 2003–2010), an average of 15 separate trades per day occurred in the second quarter of 2009. Subsequent to the publication of the Commission's **Federal Register** notice announcing its intent to undertake a SPDC review, however, CCX amended its filing to show the number of trades per day for each vintage, and clarified that the exchange lists and trades CFI contract vintages individually and provides a vintage-specific closing price for each CFI vintage contract. In these circumstances, the Commission recognizes that the CCX CFI vintage-specific contracts should not be aggregated, but rather should be treated individually for the purpose of a SPDC analysis. Accordingly, the Commission has analyzed each individual vintage of the CCX CFIs to determine whether any of them are SPDCs.<sup>15</sup>

The Commission's evaluation of the supplemental data indicates that the CCX CFI vintage specific contracts (2003–2010 vintages) do not meet the material liquidity criterion for a SPDC; the average number of trades per day per vintage was only one contract, well below the five trades per day reporting threshold established by the Commission.

### B. Comments Received

The Commission received four responses to its request for comments. Two of the comment letters addressed issues beyond the scope of the instant matter;<sup>16</sup> two raised substantive issues

<sup>14</sup> 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.

<sup>15</sup> Because this shift in focus did not alter either the analysis or conclusion or otherwise suggest the need for further comment, the Commission did not republish its original notice of intent to make a SPDC determination with respect to the CCX CFI contract.

<sup>16</sup> See supra note 7. Specifically, the California Forestry Association offered the opinion that all the over-the-counter voluntary carbon trading occurring now serves a significant price discovery function. CL 02. Scott DeMonte advises the Commission to “fix the manipulation” in [its] exchanges” and

with respect to the applicability of section 2(h)(7) to the CFI contract.<sup>17</sup>

Weinstein opines that the CCX offset project protocols “do not conform to the stringent additionality<sup>18</sup> and leakage standards<sup>19</sup> that are in the carbon offset contracts \* \* \* accepted by the broader market.” Consequently, Mr. Weinstein asserts that “the absence from the CCX CFI contract of the most essential requirements for commonality with other carbon offset contract prevents market participants from using the CFI contracts for material price reference, arbitrage, and settlement and execution of transactions.” The environmental requirements of the CCX offset protocols are beyond the scope of the Commission authority, and this inquiry was limited to an evaluation whether the CCX CFI contract might satisfy the material liquidity and material price reference statutory criterion for a SPDC determination.

ICE expressed an opinion that “the CFI does not serve a significant price discovery function and the Commission may exceed its jurisdiction if it determines that the CFI serves as a significant price discovery contract.” ICE observed that the CCX CFI contract fails the threshold for material liquidity because “each [CCX CFI contract] vintage may trade less than twice a day.” Consequently, ICE concluded that “a trade every couple of hours does not equate to the “ability to transact immediately” or “a more or less continuous stream of prices.” As noted above, after a thorough review of supplemental data provided for the CCX CFI contract, Commission staff concluded that different CCX CFI vintages should be considered as separate CCX contracts. When analyzed

requests that firms be required to have collateral in excess of two times their average end of daily trade value in order to participate in this market. CL 01.

<sup>17</sup> See supra note 7. The commenters who raised substantive issues with respect to the applicability of section 2(h)(7) to the CFI contract are Jeremy D. Weinstein, Esq., owner of the law offices of Jeremy D. Weinstein, a professional corporation located in Walnut Creek, California and IntercontinentalExchange, Inc., operator of regulated exchanges, trading platforms and clearing houses serving the global markets for agricultural, credit, currency, emissions, energy and equity index markets headquartered in Atlanta, Georgia, U.S.

<sup>18</sup> There are a number of interpretations of the additionality concept in application to the environmental offset projects. The most popular interpretations are “environmental additionality” where a project is additional if the emissions from the project are lower than the baseline, and “project additionality” where the project must not have happened without the Clean Development Mechanism (CDM).

<sup>19</sup> Leakage generally refers to the increase in emissions outside the project boundary that occurs as a consequence of the project activity’s implementation.

in this manner, the CCX CFI contracts do not meet the material liquidity criterion for SPDC determination.

When analyzing the material price reference factor for a CCX CFI SPDC determination, ICE commented that “under the Commission’s theory, any spot contract automatically serves as a material price reference, simply because the *contract references itself*” (emphasis in original). Additionally, ICE expresses an opinion that “by making this determination [the CCX CFI contract is a SPDC], the Commission is broadly asserting jurisdiction over the spot market if the spot contract is electronically traded.” In response, the Commission notes that Section 2(h)(7), refers to “any agreement, contract or transaction conducted in reliance on the exemption” in Section 2(h)(3) and does not require that the Commission find that a potential SPDC contract is a commodity futures or options contract. The determination to list particular instruments in reliance on the Section 2(h)(3) exemption is made by the ECM, not the Commission, when the ECM files notice with the Commission, under Section 2(h)(5), of its reliance on such exemption. Section 2(i) of the CEA reinforces the view that instruments traded on 2(h)(3) markets may include non-futures products; that section states that there is no presumption that an agreement, contract or transaction exempted under section 2(h)(3) “is or would otherwise be subject to this chapter.”

## VI. Findings and Conclusion

In consideration of the initial and supplemental information provided by CCX, the comments received in connection with the **Federal Register** notice and all other relevant information, the Commission has determined that the CCX CFI contract does not, at this time, perform a significant price discovery function. Accordingly, as set forth in the Commission’s Order, CCX is not required to comply with Commission Rule 36.3(c)(4) applicable to ECMs with SPDCs, or otherwise to assume the statutory and regulatory responsibilities of a registered entity with respect to the CFI contract. The Reauthorization Act amended the CEA to require that the Commission evaluate not less than annually all agreements, contracts and transactions conducted on an ECM in reliance on the exemption in section 2(h)(3) to determine whether they serve a significant price discovery function.<sup>20</sup> In addition, the Commission routinely monitors contracts traded or executed in

reliance on section 2(h)(3) and reviews all ECM submissions on an ongoing basis for the presence of SPDCs. Accordingly, like all ECMs, CCX remains responsible for compliance with the reporting requirements described in Rule 36.3(a) and (b).

## VII. Related Matters

### A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”)<sup>21</sup> imposes certain requirements on federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. Certain provisions of final Commission Rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA; OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

### B. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>22</sup> 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 action. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any 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 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 and 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

<sup>21</sup> 44 U.S.C. 3507(d).

<sup>22</sup> 7 U.S.C.19(a).

<sup>20</sup> Section 2(h)(7)(D)(ii), 7 U.S.C. 2(h)(7)(D)(ii).

this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issuance 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. Amendments to section 4(i) of the CEA authorize the Commission to require large trader reports for SPDCs listed on ECMs. These increased ECM 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 the Chicago Climate Exchange's Carbon Financial Instrument contract that is the subject of the attached Order is not a SPDC; accordingly, the Commission's Order impose no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

#### VIII. Order

##### *Order Relating to the CCX CFI 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 Chicago Climate Exchange's Carbon Financial Instrument contract that was submitted to the Commission by the Chicago Climate Exchange for review on July 1, 2009 and October 15, 2009 does not, at this time, satisfy the statutory or regulatory requirements of a significant price discovery contract. Consistent with this determination, the Chicago Climate Exchange is not required at this time to comply with section 2(h)(7)(C) in connection with the Carbon Financial Instrument contract or the Part 36 regulations applicable to exempt commercial markets with significant price discovery contracts, and is not required to assume the statutory or regulatory responsibilities required of registered entities with respect to the Carbon Financial Instrument contract.

This order is based upon the representations made to the Commission by the Chicago Climate Exchange in filings dated July 1, 2009 and October 15, 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 Carbon Financial Instrument contract is not a significant price discovery contract.

The Commission may, based upon information regarding the Carbon Financial Instrument contract reviewed under this Order that is submitted in required reports and filings, issue another notice of intent to undertake a significant price discovery contract determination for these contracts. Further, issuance of this Order does not affect the Chicago Climate Exchange's continuing obligation to comply with all statutory and regulatory requirements applicable to 2(h)(3) markets, including all reporting requirements found in Commission Regulation 36.3.

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

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2010-10311 Filed 5-3-10; 8:45 am]

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#### COMMODITY FUTURES TRADING COMMISSION

##### **Order Finding That the NGPL TxOk Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function**

**AGENCY:** Commodity Futures Trading Commission

**ACTION:** Final Order.

**SUMMARY:** On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register**<sup>1</sup> a notice of its intent to undertake a determination whether the NGPL TxOk Financial Basis ("NTO") 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"), performs 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 an order finding that the NTO contract does 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](mailto:gprice@cftc.gov); or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418-5133. E-mail: [snathan@cftc.gov](mailto:snathan@cftc.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act")<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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

<sup>2</sup> Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110-246, 122 Stat. 1624 (June 18, 2008).

<sup>3</sup> 7 U.S.C. 1a(29).

<sup>4</sup> 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

<sup>1</sup> 74 FR 52208 (October 9, 2009).