

The Commission exercises its discretion to decline to hear an appeal under section 8c(b) of the CEA. The Commission believes that the means of review provided under section 8a(7) of the CEA,¹ including the Part 40 exchange rule review process, 17 C.F.R. Part 40, promulgated thereunder, is a more appropriate avenue of relief to address the Port's concerns. Accordingly, and for the reasons discussed below, the Commission dismisses the Port's two appeals under section 8c(b) of the CEA.

BACKGROUND

On March 9, 2010, the Port applied to ICE to have Corpus Christi, Texas, designated as a new delivery point for the No. 2 Cotton Contract.² The No. 2 Cotton Contract is the leading benchmark for the global cotton trade, and it provides the basis for the price of physical delivery of U.S. grown cotton to the various U.S. delivery points.³ In connection with its formal submission, the Port also requested that all 21 members of ICE's Cotton Committee be recused from participating in the evaluation of the Port's application. The Port made this request because it was concerned that the Committee had veto power over its application, and that many

¹ Section 8a(7), 7 U.S.C. § 12a(7), provides, in relevant part, that the Commission is authorized:

to alter or supplement the rules of a registered entity insofar as necessary or appropriate, by rule or regulation or by order, if after making the appropriate request in writing to a registered entity that such registered entity effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such registered entity has not made the changes so required, and that such changes are necessary or appropriate for the protection of persons producing, handling, processing, or consuming any commodity traded for future delivery on such registered entity, or the product or byproduct thereof, or for the protection of traders or to insure fair dealing in commodities traded for future delivery on such registered entity. Such rules, regulations, or orders may specify changes with respect to such matters as—

(A) terms or conditions in contracts of sale to be executed on or subject to the rules of such registered entity... .

² The United States is the world's third-largest producer of cotton (behind China and India) and is the largest cotton exporter.

³ At the time of the Port's application, the delivery points for the No. 2 Cotton Contract were Galveston, Texas; Houston, Texas; New Orleans, Louisiana; Memphis, Tennessee; and Greenville/Spartanburg, S.C. As of December 2013, New Orleans will no longer be a delivery point and Dallas/Ft. Worth, Texas, will become a new delivery point.

members of the Committee had a financial interest in opposing the application. *See* Port Supplement to Notice of Appeal, No. 10-E-02, at 7 (June 28, 2010).

In a May 21, 2010, letter sent to ICE, the Port requested information regarding the process that ICE would use to evaluate the Port's application. In this letter, the Port also requested a public hearing on its application and an opportunity to provide additional comment on the materials it submitted in its application. *See* Affidavit of Audrey R. Hirschfeld, No. 10-E-03, at Exh. D. (Oct. 8, 2010).

On May 28, 2010, ICE denied the Port's request for a public hearing, claiming that its decision regarding a delivery point application was a "purely administrative" corporate matter. *See id.* at Exh. E. ICE's rules for the No. 2 Cotton Contract do not describe the procedures that ICE will follow when it addresses a request to alter a material term of a contract.⁴ At the same time, ICE also responded to the Port's request that the members of the Cotton Committee be recused. ICE advised that the Cotton Committee members would be acting as advisors to ICE's Board of Directors ("board"), *i.e.*, they would not be the ultimate decision-makers, and that Core Principle 15, 7 U.S.C. § 7(d)(15); 17 C.F.R. § 38, App. B., which governs conflicts of interest, did not require their recusal. *See* Affidavit of Audrey R. Hirschfeld, No. 10-E-03, at Exh. E.

The Port filed its first notice of appeal on June 28, 2010, seeking review of ICE's denial of its request for a public hearing. The Port asserted that ICE's refusal to hold a public hearing and otherwise afford it procedural due process constituted an appealable "adverse action." *See* Port Supplement to Notice of Appeal, No. 10-E-02, at 2. The Port expressed concern that, if ICE conducted an internal review of its application, this would shield ICE from future Commission scrutiny of ICE's application review process. The Port requested that ICE issue an impartial

⁴ *See* Cotton No. 2 Rules for ICE Futures US, Inc., available at <https://www.theice.com/publicdocs/rulebooks/futures_us/10_Cotton.pdf>.

decision on the record, and that the record include the Port's supporting materials, presentations, and affidavits. *See id.* at 14-15.

On July 16, 2010, ICE moved to dismiss the Port's first appeal. ICE argued that the Port's appeal was premature because ICE's procedures for evaluating the Port's application had not yet "run their course," and because no final decision had been made on the merits of the Port's application. *See ICE Motion to Dismiss Appeal, No. 10-E-02, at 1-2 (July 16, 2010).*

On July 26, 2010, the Port responded to ICE's motion to dismiss, asserting that the Commission should not wait until ICE had resolved the Port's application to determine whether the procedures ICE was using were fundamentally fair. The Port argued that, if ICE resolved the Port's application using a flawed process, this would prevent the Commission from having a complete and accurate record of ICE's decision-making process. *See Port Response to Motion to Dismiss, No. 10-E-02, at 11 (July 26, 2010).*

The following day, various ICE entities (including the Cotton Committee) provided ICE's board with a non-binding recommendation, urging the board to deny the Port's application. ICE's board met on August 2, 2010, to consider several changes to the terms of the Cotton Contract, including the Port's application. At this meeting, ICE approved the addition of Dallas/Fort Worth as a delivery point, and the deletion of New Orleans as a delivery point. The board deferred making a decision regarding the Port's application so that ICE could gather additional information. ICE continued to receive additional information regarding the Port's application through August 26, 2010. *See Affidavit of Audrey R. Hirschfeld, No. 10-E-03, at 6.*

On September 8, 2010, ICE's board voted to disapprove the Port's application. Several days later, it notified the Port and (separately) its counsel of its decision, but invited the Port to reapply in the future, specifically citing then-ongoing projects to improve the Port's

infrastructure. *See* Affidavit of Audrey R. Hirschfeld, No. 10-E-03, at Exh. J. pp. 2-3. On September 22, 2010, the Port filed a second appeal. On October 8, 2010, ICE again moved to dismiss.

DISCUSSION

1. Review under section 8c(b) of the CEA

Section 8c(b) of the CEA provides that the Commission may in its discretion review an exchange decision whereby a person is suspended, expelled, otherwise disciplined or denied access to the exchange. The section further provides that the Commission may, “in its discretion and upon application of any person who is adversely affected by any other exchange action,” review such action. 7 U.S.C. § 12c(b). Part 9 of the Commission’s rules establishes the procedures implementing section 8c(b). Part 9 defines “other adverse action” to include “any exchange action, other than an access denial action or disciplinary action, that adversely affects any person, whether or not a member of the exchange” 17 C.F.R. § 9.2(g). The Commission, however, does not reach the question whether it has jurisdiction to hear this matter in adjudication. Under the broad grant of discretion in 7 U.S.C. § 12c(b), the Commission may decline to review an exchange action. The Commission, therefore, dismisses both of the Port’s adjudicatory appeals of ICE’s delivery point decision because it believes that review of ICE’s delivery point decision is more appropriately addressed through the means provided for by CEA section 8a(7) and Part 40 of Commission regulations promulgated thereunder.

2. Review under section 8a(7) of the CEA

Section 8a(7) contains a general grant of authority so that the Commission may “alter or supplement” exchange rules as “necessary or appropriate for the protection of persons producing, handling, processing, or consuming” commodities for future delivery on an exchange “or for the

protection of traders or to insure fair dealing in [such] commodities”⁵ Section 8a(7) authorizes the Commission to alter exchange rules governing several broad subject areas, including the “terms or conditions in contracts of sale to be executed on or subject to the rules of the [exchange].” 7 U.S.C. § 8a(7)(A). This process generally involves significant consultation between stakeholders and Commission staff to insure that the Commission reaches an informed application of the Core Principles that is fair to market participants and, to the extent possible, is practical for the exchange. The Commission notes that nothing in section 8a(7) addresses dispute resolution or the Commission’s adjudicatory function.

Further, the Part 40 exchange rule review process, 17 C.F.R. Part 40, provides for Commission review of any changes that an exchange makes to the terms of a contract to ensure that such terms comply with DCM Core Principles, particularly Core Principle 3 and its prohibition against listing contracts that are readily susceptible to manipulation. *See* 7 U.S.C. § 7(d)(3).⁶ In addition, exchange actions may be reviewed through the Commission’s ongoing exchange oversight authority, including the authority granted to the Commission pursuant to section 8a(7).

Because ICE’s delivery point decision concerns a potential change to the terms of the No. 2 Cotton Contract, the Commission believes that any review of such change is most appropriately and efficiently addressed through the means provided for in section 8a(7) of the CEA and the Part 40 exchange rule review process promulgated thereunder.

CONCLUSION

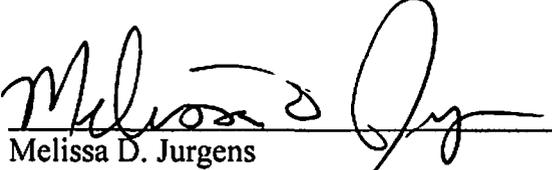
⁵ The Commission may invoke its authority under section 8a(7) only if it first provides the exchange with a written notice requesting the exchange to modify its rules. If the exchange does not accede to the Commission’s request, the Commission must grant the exchange notice and an opportunity for a hearing. The Commission may then impose the changes. *See supra* note 4.

⁶ Unless a Commission rule provides otherwise, an exchange has reasonable discretion in establishing the manner in which it complies with the DCM Core Principles. *See* 7 U.S.C. § 7(d)(1)(B).

The Commission exercises its discretion to dismiss both appeals filed by the Port.

IT IS SO ORDERED.

By the Commission (Acting Chairman WETJEN and Commissioners CHILTON and O'MALIA).


Melissa D. Jurgens
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 14, 2014