

**Dissent of**  
**Commissioner Jill E. Sommers**  
**from**  
**Approval of Media Derivatives Exchange's Opening Weekend Motion  
Picture Revenue Futures and Binary Option Contracts**

**June 14, 2010**

I respectfully dissent from the Commission's action taken today to approve Media Derivatives Exchange's (MDEX) Opening Weekend Motion Picture Revenue futures and binary option contracts on the motion picture *Takers*, submitted for Commission approval on March 9, 2010 pursuant to Section 5c(c)(2) of the Commodity Exchange Act (CEA or Act) and Commission Regulation 40.3.

When considering whether to approve a contract submitted to the Commission for prior approval pursuant to Section 5c(c)(2) of the Act, the Commission is guided by Section 5c(c)(3) of the Act, which provides that "The Commission shall approve any such new contract . . . unless the Commission finds that the new contract . . . would violate this Act." In addition, Commission Regulation 40.3(d), "*Notice of non-approval*," authorizes the Commission, at any time during its review of a new contract, to notify the requestor that the Commission "[w]ill not, or is unable to, approve the product or instrument." In this regard, Regulation 40.3(d) requires the Commission to "[b]riefly specify the nature of the issues raised and the specific provision of the Act or regulations, including the form or content requirements of paragraph (a) of this section, that the product would violate, appears to violate or the violation of which cannot be ascertained from the submission."

Section 2(a)(1)(A) of the Act states that the Commission has exclusive jurisdiction over transactions "involving contracts of sale of a commodity for future delivery." As such, the first step in the analysis of any contract submitted for prior approval (or any contract self-certified pursuant to Section 5c(c)(1) of the Act for that matter) is whether the contract is actually a sale of a commodity, as defined by the Act.

Section 1(a)(4) of the Act, in relevant part, defines a commodity as "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in."

While the definition of "commodity" is rather broad, it is not without limits. The Statement of the Commission does not appear to recognize a limit to that definition. Moreover, the Statement of the Commission specifically states that motion picture box office receipts are a "right or interest" within the meaning of Section 1(a)(4) of the Act,

and are therefore a commodity. Analysis presented to the Commission during this contract review process concerning whether opening weekend box office revenues are a “right or interest” and therefore a “commodity,” recognized that motion picture revenues are not rights, and do not cleanly fit within the common definition of an interest. The analysis went on to indicate that determining that motion picture revenues were an interest was not problematic because the Commission has previously approved futures contracts on measures and values that did not neatly fit within the common definition of goods, articles, services, rights, or interests.

As regulators, we are required to apply the Act and Commission Regulations to the contracts MDEX submitted to the Commission for approval. In applying the Act and Regulations, where that which underlies a contract does not neatly or cleanly fit within the definition of a “commodity,” the Commission should carefully exercise its judgment in determining whether or not the underlying is, in fact, a commodity. Carefully exercising that judgment involves drawing lines. Invariably, when drawing lines, some things will end up on one side of the line, and some will end up on the other.

I believe that including motion picture box office revenues as “rights or interests” that fall within the definition of “commodity” contained in Section 1(a)(4) of the Act crosses a line that should not be crossed. On May 7, 2008, the Commission published a “*Concept Release on the Appropriate Regulatory Treatment of Event Contracts*” (73 FR 25669). In that release, the Commission recognized that it was evaluating whether or not event contracts fall within the Commission’s jurisdiction. Staff indicated in the release that since 2005, they have received a substantial number of requests for guidance on the propriety of offering and trading financial agreements that may primarily function as information aggregation vehicles. Staff also acknowledged “substantive and practical concerns that may arise from applying federal regulation to event contracts and markets.” It was in that context that the Commission in 2008 believed there should be definitive guidelines for these types of novel futures contracts. Unfortunately, the Commission has not yet acted to promulgate definitions or guidance for these markets which could provide meaning to the term “event” under the Act.

When the Commission approved the MDEX application for designation as a Designated Contract Market, I wrote a separate concurring statement wherein I stated, “The broad policy issues discussed in the Concept Release may be raised by the types of contracts [MDEX] intend[s] to list for trading. I believe it preferable for the Commission to address the broad policy issues raised in the Concept Release, and establish some framework for responding to those issues, in lieu of merely responding to individual petitions for market designation or contract approval as they happen to be submitted.” That is still my belief.

There are a number of questions which I believe have never been answered and although staff has recommended approval of these particular MDEX Opening Weekend Motion Picture Revenue futures and binary options contracts, it is unclear to me how they fit into our current regulatory structure.