

and protection of valuable natural resources.

The administration program ensures the staffing and budget necessary to carry out the goals and objectives of the plan; and, the partnerships and regional coordination program defines the range of partners that the reserve works with to achieve their goals. The reserve serves as the Southwest Florida region headquarters for the Florida Department of Environmental Protection Aquatic and Buffer Preserve field offices in Tampa Bay, Charlotte Harbor and Estero Bay. Rookery Bay also works with a plethora of organizations ranging from local governments, community groups, state and federal agencies, and international partners in China.

The boundary expansion incorporates adjacent state-owned coastal and submerged lands of the Rookery Bay Aquatic Preserve and the Cape Romano/ Ten Thousand Islands Aquatic Preserve. Incorporating these lands increases the size of the reserve from 9,400 acres to 110,000 acres. The expansion will provide a contiguous estuarine ecosystem with a broader diversity of habitats not found within the old boundary of the reserve. Habitats within the new boundary of the reserve include abundant seagrass communities, tropical hardwood hammocks, coastal strand and barrier beach communities, cypress slough and prairies, and live bottom communities.

FOR FURTHER INFORMATION CONTACT: Erica H. Seiden at (301) 563-1172 or Laurie McGilvray at (301) 563-1158 of NOAA's National Ocean Service, Estuarine Reserves Division, 1305 East-West Highway, N/ORM5, 11th floor, Silver Spring, MD 20910.

Dated: December 23, 2002.

Jamison S. Hawkins,

Acting Assistant Administrator, Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

[FR Doc. 03-939 Filed 1-15-03; 8:45 am]

BILLING CODE 3510-08-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 011003D]

Pacific Fishery Management Council; Coastal Pelagic Species Management Team Work Session Focused on Pacific Sardine Allocation.

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Council) Coastal Pelagic Species Management Team (CPSMT) will hold a public work session.

DATES: The CPSMT will meet Thursday, January 30, 2003, from 8 a.m. to 5 p.m. and Friday, January 31, 2003, from 8 a.m. until business for the day is completed.

ADDRESSES: The work session will be held in the large conference room (D-203) at NMFS Southwest Fisheries Science Center, 8604 La Jolla Shores Drive, La Jolla, CA 92037; (858) 546-7000.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220-1384.

FOR FURTHER INFORMATION CONTACT: Mr. Dan Waldeck, Pacific Fishery Management Council, (503) 820-2280.

SUPPLEMENTARY INFORMATION: The purpose of the CPSMT meeting is to develop and review preliminary analyses of management alternatives for revising the CPS fishery management plan's (FMP) annual Pacific sardine allocation framework. Possible management alternatives include:

1. Status quo - 33 percent of the harvest guideline allotted to the northern subarea and 66 percent to the southern subarea, with reallocation nine months after the start of the fishery. (See the CPS FMP for a complete description of the current Pacific sardine allocation framework).

2. No allocation - institute a coastwide harvest guideline.

3. Move northern boundary of southern subarea from 35° 40' to 39° N latitude, change reallocation date from October 1 to September 1 (or August 1), and provide for a December 1 reallocation to a coastwide harvest guideline.

4. Change reallocation date from October 1 to September 1 (or August 1), and provide for a December 1 reallocation to a coastwide harvest guideline.

Alternatives 3 and 4 include allocation percentage sub-alternatives:

a. 33 percent to the north, 66 percent to the south.

b. 50 percent to the north, 50 percent to the south.

This is a public meeting, and time for public comment will be provided at the discretion of the CPSMT chair.

Generally, a public comment period will be provided just prior to the end of each day. Please note, this is not a public hearing, it is a work session devoted to

completing preliminary analyses for Council consideration at the March 2003 Council meeting.

Although nonemergency issues not contained in the CPSMT meeting agenda may come before the CPSMT for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the CPSMT's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820-2280 at least 5 days prior to the meeting date.

Dated: January 13, 2003.

Richard W. Surdi,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 03-1015 Filed 1-15-03; 8:45 am]

BILLING CODE 3510-22-S

Commodity Futures Trading Commission

In the Matter of the New York Mercantile Exchange, Inc. and the Intercontinental Exchange, Inc., Petitions for Treatment of Floor Brokers and Floor Traders as Eligible Commercial Entities Pursuant to Section 1a(11)(C) of the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: In response to petitions from the New York Mercantile Exchange, Inc. (NYMEX) and the Intercontinental Exchange, Inc. (Intercontinental), the Commodity Futures Trading Commission (Commission or CFTC), pursuant to section 1a(11)(C) of the Commodity Exchange Act (Act), is issuing an order that deems, subject to certain conditions, floor brokers and floor traders who are registered with the Commission, when acting in a proprietary trading capacity, to be "eligible commercial entities" as that term is defined in section 1a(11) of the Act. Accordingly, subject to certain conditions as set forth in the Commission's order, registered floor brokers and floor traders, when acting

for their own accounts, are permitted to enter into transactions in exempt commodities on exempt commercial markets pursuant to section 2(h)(3) of the Act. In order to participate, the floor broker or floor trader must either be an eligible contract participant as that term is defined in section 1a(12) of the Act or have its trades on the exempt commercial market guaranteed by a clearing member that is both a member of a CFTC-registered derivatives clearing organization and is an eligible contract participant.

DATES: This order is effective January 16, 2003.

FOR FURTHER INFORMATION CONTACT:

Duane C. Andresen, Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581. Telephone: 202-418-5492. E-mail: *dandresen@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Section 1a(11) of the Act, as amended by the Commodity Futures Modernization Act of 2000 (CFMA), Pub. L. No. 106-554, which was signed into law on December 21, 2000, defines the term "eligible commercial entity" (ECE) by listing those eligible contract participants (ECP) ¹ that are qualified to be ECEs. ² Under section 2(h)(3) of the

¹ Section 1a(12) defines the term ECP by listing those entities and individuals considered to be ECPs. Included generally as ECPs are financial institutions; insurance companies and investment companies subject to regulation; commodity pools and employee benefit plans subject to regulation and asset requirements; other entities subject to asset requirements or whose obligations are guaranteed by an ECP that meets a net worth requirement; governmental entities; brokers, dealers, and futures commission merchants (FCM) subject to regulation and organized as other than natural persons or proprietorships; brokers, dealers, and FCMs subject to regulation and organized as natural persons or proprietorships subject to total asset requirements or whose obligations are guaranteed by an ECP that meets a net worth requirement; floor brokers or floor traders subject to regulation in connection with transactions that take place on or through the facilities of a registered entity or an exempt board of trade; individuals subject to total asset requirements; an investment adviser or commodity trading advisor acting as an investment manager or fiduciary for another ECP, and any other person that the Commission deems eligible in light of the financial or other qualifications of the person.

² Section 1a(11) defines the term ECE by listing those entities and individuals considered to be ECEs. Generally, an ECE is an ECP that (1) in connection with its business, demonstrates the ability to make or take delivery of the underlying commodity; incurs risk, in addition to price risk related to the commodity; or is a dealer that regularly provides risk management or hedging services to, or engages in market-making activities with, the foregoing entities with respect to the commodity or derivatives transactions in the commodity; or (2) is other than a natural person or

Act, transactions between ECEs in an "exempt commodity" ³ on an exempt commercial market (ECM) that meet the requirements of 2(h)(3)-(5) are exempt from all but certain limited requirements of the Act. ⁴ Floor brokers and floor traders, even if determined to fall within the definition of ECP, do not fall within the definition of ECE and, thus, cannot enter into transactions on ECMs. The Act, however, gives the Commission discretion to expand the ECE category. Specifically, section 1a(11)(C) provides that the list of entities defined as ECEs shall include "such other persons as the Commission shall determine appropriate and shall designate by rule, regulation, or order." A determination under this provision that registered floor brokers and floor traders are considered to be ECEs would permit these entities to enter into transactions in exempt commodities on ECMs pursuant to section 2(h)(3) of the Act.

II. The Petitions

A. NYMEX

By letter dated May 23, 2002, NYMEX submitted a petition for a Commission interpretation pursuant to section 1a(11)(C) of the Act. ⁵ Specifically,

governmental entity and regularly enters into transactions with respect to the commodity or derivatives transactions in the commodity, subject to certain qualification or total asset requirements; or (3) such other persons as the Commission shall determine appropriate.

³ Section 1a(14) of the Act defines the term "exempt commodity" to mean a commodity that is not an excluded commodity or an agricultural commodity. Section 1a(13) defines the term "excluded commodity" to mean, among other things, an interest rate, exchange rate, currency, credit risk or measure, debt instrument, measure of inflation, or other macroeconomic index or measure. Although the term "agricultural commodity" is not defined in the Act, section 1a(4) enumerates a non-exclusive list of several agricultural-based commodities and products. The broadest types of commodities that fall into the exempt category are energy and metals products.

⁴ Under section 2(h)(3), ECMs are markets that meet the requirements of sections 2(h)(3)-(5) by notifying the Commission of their intention to operate a trading facility in reliance on the exemption and by limiting themselves to transactions: (1) In exempt commodities, (2) entered into on a principal-to-principal basis by ECEs, and (3) executed or traded on an electronic trading facility. An ECM is not a registered entity, but is required to notify the Commission of its intention to operate an electronic trading facility in reliance on the exemption set forth in section 2(h)(3). The notification of operation as an ECM must include several certifications and, pursuant to Commission regulation 36.3(c)(3), a representation that it will require each participant to comply with all applicable law and that it has a reasonable basis for believing that authorized participants are ECEs. Section 2(h)(4) reserves, with respect to transactions eligible for the 2(h)(3) exemption, certain provisions of the Act, including certain anti-fraud and anti-manipulation provisions.

⁵ In its petition, NYMEX also requested that the Commission make a determination pursuant to

NYMEX, acting on behalf of its floor brokers, floor traders and clearing firms, requested that the Commission make a determination pursuant to Section 1a(11)(C) of the Act that floor brokers and floor traders, when acting in a proprietary capacity, may enter into certain specified transactions in exempt commodities on ECMs if such Commission registrants have obtained a financial guarantee for such transactions from an Exchange clearing member that is registered with the Commission as an FCM. NYMEX suggested that the permissible transactions be limited to trading in a commodity that either (1) is listed only for clearing on NYMEX, ⁶ or (2) is listed for trading and clearing on NYMEX and where NYMEX rules provide for the exchange of futures for swaps (EFS) in that contract. ⁷ NYMEX further proposed that permissible trading be limited to transactions that would subsequently be cleared at NYMEX and represented that NYMEX would have appropriate compliance systems in place to monitor such trading. ⁸

section 1a(12)(C) of the Act that floor brokers and floor traders, when acting in a proprietary capacity, be considered to be ECPs when they enter into certain specified transactions. Such a determination would permit NYMEX floor brokers and floor traders to enter into over-the-counter (OTC) transactions in exempt commodities pursuant to section 2(h)(1) of the Act.

⁶ By letter dated May 24, 2002, NYMEX filed rule changes that would implement an initiative to provide clearing services for specified energy contracts executed in the OTC markets. NYMEX certified that the rules comply with the Act and the Commission's regulations. Under the provision, NYMEX initially listed 25 contracts that are entered into OTC and accepted for clearing by NYMEX, but are not listed for trading on NYMEX. In connection with the NYMEX initiative, on May 30, 2002, the Commission issued an order pursuant to section 4d of the Act. The order provides that, subject to certain terms and conditions, the NYMEX Clearing House and FCMs clearing through the NYMEX Clearing House may commingle customer funds used to margin, secure, or guarantee transactions in futures contracts executed in the OTC markets and cleared by the NYMEX Clearing House with other funds held in segregated accounts maintained in accordance with section 4d of the Act and the Commission regulations thereunder.

⁷ Commodities listed for trading and clearing on NYMEX where NYMEX rules provide for EFSs would include, for example, an OTC natural gas swap to be exchanged for a futures position in the Exchange's Natural Gas futures contract. EFS transactions are permitted at NYMEX pursuant to NYMEX rule 6.21A, Exchange of Futures for, or in Connection with, Swap Transactions. The swap component of the transaction must involve the commodity underlying a related NYMEX futures contract, or a derivative, by-product, or related product of such a commodity. In furtherance of its effort to permit OTC clearing at the Exchange, NYMEX amended the rule to include as eligible EFS transactions "any contract executed off the Exchange that the Exchange has designated as eligible for clearing at the Exchange."

⁸ NYMEX also suggested a further limitation on floor members' permissible transactions by not permitting, initially, any transactions in electricity commodities.

In support of its request for a determination that floor members be able to trade as ECEs on ECMs, NYMEX stated, among other things, that floor brokers and floor traders, if determined to be ECPs, would meet the ECE definition requirements of section 1a(11)(A) of the Act in that the floor brokers and floor traders provide risk management and market-making activities in energy and metals derivatives products. NYMEX further stated that allowing floor brokers and floor traders with an FCM guarantee to execute transactions as ECEs on ECMs would simply be an extension of the services and expertise that such entities currently provide to users of NYMEX's markets.

B. Intercontinental

By letter dated June 3, 2002, Intercontinental⁹ requested that the Commission issue an order pursuant to section 1a(11) of the Act that would expand the ECE category to include CFTC-registered floor brokers and floor traders, thus permitting them to trade on ECMs.¹⁰ Intercontinental proposed that the floor broker or floor trader must be a member of a designated contract market (DCM) or otherwise have trading privileges on a DCM. The floor broker or floor trader must have as a part of its business the business of acting as a floor broker or floor trader, but need not have any connection or experience in the underlying products traded on the ECM. Finally, the floor broker or floor trader must be an ECP or, if the floor broker or floor trader is not an ECP, its trades on the ECM must be guaranteed by a clearing member of a U.S.-registered clearing organization.

Intercontinental stated that including floor brokers and floor traders as ECEs would be consistent with the CFMA and would recognize their value as both liquidity providers, and dealers and market makers. Intercontinental noted that the Commission has previously included floor brokers and floor traders

⁹Intercontinental operates an OTC commodities trading platform for energy and metals and is itself an ECM. Intercontinental submitted its notice of operation as an ECM to the Commission on December 27, 2001. Intercontinental also owns the International Petroleum Exchange (IPE), a U.K. FSA-regulated futures exchange for the trading of energy futures products.

¹⁰In its petition, Intercontinental also requested that the Commission expand the ECE category to include U.K. local member floor traders who are authorized by the U.K. Financial Services Authority. On November 1, 2001, Intercontinental advised Commission staff that it has decided not to seek relief at this time on behalf of non-U.S. floor brokers or floor traders. Accordingly, the Commission is not, at this time, making any determination with respect to non-U.S. floor brokers and floor traders.

in the definition of ECE as it relates to trading on a Derivatives Transaction Execution Facility (DTEF),¹¹ and contended that there is no meaningful distinction between allowing floor brokers and floor traders to trade as ECEs on a DTEF and allowing them to trade as ECEs on an ECM.¹²

C. Comments

The NYMEX and Intercontinental petitions were published in the **Federal Register** for a 15-day public comment period on June 19, 2002.¹³ In addition, the **Federal Register** release included a series of questions posed by the Commission regarding the petitions. The Commission received comments from NYMEX and from Intercontinental.¹⁴ In its comment letter of July 17, 2002, NYMEX generally reaffirmed its strong interest in the determination requested in the petition and its strong belief that such a determination would have numerous pro-competitive results. NYMEX also commented that Intercontinental's petition contained fewer conditions than NYMEX's petition for the recognition of registered floor brokers and floor traders as ECEs for trading on ECMs. Thus, NYMEX requested that if the Commission made a determination along the lines proposed in the Intercontinental petition for registered

¹¹Specifically, Commission regulation 37.1(b) states that, for the purpose of DTEF trading, "the term 'eligible commercial entity' means, and shall include, in addition to a party or entity so defined in section 1a(11) of the Act, a registered floor trader or floor broker trading for its own account, whose trading obligations are guaranteed by a registered futures commission merchant."

¹²DTEFs are registered with the Commission and generally must meet various standards of operation set forth in section 5a of the Act and part 37 of the Commission's regulations and are subject to the Commission's regulatory oversight. By comparison, ECMs are exempt from Commission regulatory oversight. While ECMs must submit to the Commission a notice of operation that satisfies the filing requirements of section 2(h)(5) of the Act and Commission regulation 36.3, ECMs are not "registered with, or designated, recognized, licensed or approved by the Commission." See section 2(h)(5) of the Act.

¹³67 FR 41698 (June 19, 2002). In that same **Federal Register** release, the Commission also requested comments with respect to NYMEX's request that the Commission make a determination pursuant to section 1a(12)(C) of the Act that NYMEX floor brokers and floor traders, when acting in a proprietary capacity, may also be considered to be ECPs when they enter into certain specified transactions. Such a determination would permit NYMEX floor brokers and floor traders to enter into over-the-counter (OTC) transactions in exempt commodities pursuant to section 2(h)(1) of the Act.

¹⁴The Commission also received a comment letter, dated September 27, 2002, from the Managing Member of Hudson Capital Group, L.L.C., an options trading group. The commenter strongly supported the petition to allow NYMEX members to trade over-the-counter energy products, but did not address particular Commission questions.

floor brokers and floor traders generally, NYMEX floor brokers and floor traders be permitted to trade on ECMs consistent with the scope of that determination.

In its comment letter of July 3, 2002, Intercontinental generally noted that under the Act, ECEs include: Certain types of ECPs who, in connection with their businesses, make or take delivery of the underlying commodity or provide hedging and risk management services in the commodity; ECPs other than natural persons or state or local governments that regularly enter into transactions in commodity derivatives; and certain types of investment funds. Intercontinental stated that the Commission, under section 1a(11)(C), has the authority to include within the ECE definition floor brokers and floor traders and, as previously noted, has already issued a rule pursuant to this authority with respect to DTEFs. Intercontinental suggested that any relief mandated by the Commission in response to the petition be broadly based and applicable to any floor brokers or floor traders that wish to be considered to be ECEs for purposes of trading on an ECM.

Intercontinental also responded to a series of questions posed by the Commission. The questions and responses are summarized below:

1. The Commission understands that at some ECMs traders have the capability of specifying the entities that are acceptable counterparties. In light of this capability, would it be reasonable and prudent to maintain a restriction on eligible counterparties, *i.e.*, limit trading by floor brokers and floor traders acting as ECEs such that the counterparties to their trades must not be floor brokers or floor traders, at least with respect to ECMs that provide for such a counterparty pre-approval mechanism.

Intercontinental responded that the Commission should not impose restrictions on eligible counterparties for ECMs, other than requiring that they qualify as ECEs. Intercontinental stated that it provides credit and risk management support capabilities, designed to provide market participants with maximum flexibility and control over their trades, as a service to its participants at no additional cost. ECEs can pre-approve trading counterparties and establish credit limits for trading with each counterparty. Use of this credit management system is voluntary, and Intercontinental is not required, by contract or applicable law or regulation, to maintain these capabilities. Intercontinental noted that because participation on its trading platform is limited to ECEs, all participants are

sufficiently sophisticated to make their own credit determinations with respect to other participants. In addition, requiring maintenance of a function that ECM and market participants might later decide is unnecessary would limit the flexibility of ECMs and is unwarranted. Intercontinental also noted that the Commission currently does not impose any counterparty restrictions on trades executed on its trading platform. Finally, Intercontinental noted that its proposal requires that floor brokers and floor traders must qualify as ECPs or have their trades be guaranteed by a clearing member of a registered clearing organization that is itself an ECP, and that the satisfaction of these requirements reduces any concern by potential counterparties with respect to the credit or collection risk posed by the execution of trades with floor brokers and floor traders.¹⁵

2. The Commission requested comments regarding whether the transactions that could be entered into by floor brokers and floor traders as ECEs on ECMs should be limited to any of the following: (a) Specifically identified contracts; (b) transactions that would be cleared; (c) commodities in which the floor broker or floor trader had trading expertise; (d) transactions for which the floor broker or floor trader was guaranteed by an Exchange clearing member; or (e) in some other way.

With respect to a limitation to specifically identified contracts, Intercontinental stated that floor brokers and floor traders should be permitted to execute transactions in all exempt commodities pursuant to section 2(h)(3) of the Act. Intercontinental noted that the Act, as amended by the CFMA, generally defines three categories of ECE: (a) Commercials who deal in the underlying physical commodity; (b) dealers and market makers; and (c) collective investment vehicles that generally are liquidity providers. Intercontinental contended that the second and third categories of ECE recognize that traders with no direct connection to the underlying physical market are eligible and valuable contributors to the efficiency of commercial markets.¹⁶ Accordingly,

¹⁵ The requirement that the clearing member guaranteeing the trades must itself be an ECP was not included as a criterion in the original petition but was added in Intercontinental's comment letter dated July 3, 2002.

¹⁶ The Commission notes that, while it is not agreeing or disagreeing with this assertion at this time, the two general categories of ECE identified by Intercontinental require, by statute, a strong connection to either derivatives transactions in the particular commodity or the underlying physical market. Under paragraph 1a(11)(A), the ECP that

Intercontinental further contended that including floor brokers and floor traders as ECEs would be consistent with the CFMA and would recognize the value of floor brokers and floor traders as both liquidity providers, and dealers and market makers. Intercontinental noted that floor brokers and floor traders understand trading markets, are sophisticated and capable as traders to the same extent as commercials, and would be valuable participants trading in all exempt commodities on Intercontinental's trading platform.

With respect to requiring that transactions be cleared, Intercontinental stated that floor broker and floor trader transactions on ECMs should not be required to be cleared in order for these entities to be included in the ECE definition. The reduction in credit risk that clearing provides would not be necessary in light of Intercontinental's proposed requirement that the floor broker or floor trader must be an ECP or that its trades must be guaranteed by a clearing member of a registered clearing organization that is itself an ECP.¹⁷

As to limiting floor brokers and floor traders to trading only those commodities in which they have trading expertise, Intercontinental argued that floor brokers and floor traders are desirable because of their expertise in trading, not their specific commodity expertise, and should not be limited to trading in particular commodities in which they have trading expertise. Intercontinental pointed out that its proposal would require floor brokers and floor traders to be registered and have as a part of their business the business of acting as a floor broker or floor trader on the DCM's open outcry market or performing an equivalent function on the DCM's electronic market¹⁸ and that, accordingly, floor

can qualify as an ECE based upon dealing or engaging in market-making activities must be an entity (floor brokers, floor traders and individuals are ineligible) that, in connection with its business, regularly provides risk management or hedging services or engages in market-making activities with other ECEs involving transactions to purchase or sell the commodity or derivative agreements, contracts, or transactions in the commodity. Under paragraph 1a(11)(B), the ECP that can qualify as an ECE based upon its status as a collective investment vehicle cannot be a natural person and regularly enters into transactions to purchase or sell the commodity or derivative agreements, contracts, or transactions in the commodity.

¹⁷ As previously noted, the requirement that the clearing member guaranteeing the trades must itself be an ECP was added in Intercontinental's comment.

¹⁸ The provision concerning performing an equivalent function on the electronic market was not included as a criterion in the original petition, but was added in Intercontinental's November 1, 2002, submission. Intercontinental represents that the intent is to include those floor brokers and floor

brokers and floor traders that satisfied these requirements would have sufficient qualifications and experience to trade in any commodity product on an ECM. Intercontinental contended that allowing floor brokers and floor traders to participate would expand the pool of potential counterparties for market participants, increase competition and efficiency, enhance price discovery and reduce liquidity risk.

With respect to a limitation to transactions for which the floor broker or floor trader was guaranteed by an Exchange clearing member, the Intercontinental proposal would require that the floor broker or floor trader must be an ECP or that its trades must be guaranteed by a clearing member of a registered clearing organization that is itself an ECP. Intercontinental stated that when a floor broker or floor trader qualifies as an ECP, that floor broker or floor trader has been deemed by the Act to be sufficiently responsible to execute trades and there is no need to require further mitigation of credit risk by having a clearing member guarantee the floor broker's or floor trader's payment obligations. Alternatively, when a floor broker or floor trader does not qualify as an ECP, it is appropriate to require that a clearing member of a registered clearing organization that is itself an ECP guarantee the trades in order to mitigate the credit and collection risk created by executing trades with a floor broker or floor trader.

3. The Commission requested comment on the assertion that there would be no meaningful distinction between allowing floor brokers and floor traders to trade as ECEs on a DTEF, as the Commission has already permitted, as compared to trading as ECEs on an ECM, and particularly on whether there should be any distinction in the treatment of floor brokers and floor traders as ECEs based upon the different regulatory regimes applicable to DTEFs and ECMs.

Intercontinental commented that the primary regulatory difference between ECMs and DTEFs is that DTEFs must comply with certain core principles, including monitoring trading and enforcing compliance with rules; making certain trade data publicly available if the Commission determines that the contract performs a price discovery function; recordkeeping; applying fitness requirements for board members, market participants and

traders who, as part of their business, provide liquidity to the markets as dealers and market makers, either on the exchange's open outcry market or on the exchange's electronic market.

others; and addressing potential conflicts of interest. The regulatory concerns addressed by these core principles primarily relate to the protection of the integrity of DTEF markets rather than particular participants within those markets.

Intercontinental stated that the current ECM regulatory framework similarly provides the Commission with sufficient authority to protect the integrity of the market.¹⁹

Intercontinental pointed out that the Commission has real-time access to Intercontinental's trading screens and can observe and evaluate prices and trading activity on a real-time basis. In the event that the Commission detected possible problems in the market, such as manipulation or attempted manipulation, it has the authority to take action against the appropriate market participants. Intercontinental further noted that the Commission also retains anti-fraud authority with respect to transactions on ECMs.

Intercontinental noted that since trading on its trading platform is entirely electronic, there are no trading rules to be enforced because buy and sell orders are electronically matched by the platform. Intercontinental represented that it applies rigorous standards to the selection of directors and all of its board members have significant experience in the commodity trading industry and many are executives of major corporations in the industry. Intercontinental concluded that the participation of floor brokers and floor traders would not require any additional regulation beyond that which already applies to ECMs under Sections 2(h)(3)–(5) and that this approach is consistent with the CFMA which was designed, in part, to provide a more flexible and less burdensome regulatory framework for futures and derivatives markets.²⁰

III. Conclusion

After consideration of the NYMEX and Intercontinental petitions and review of the comments, the Commission has determined, consistent with the Intercontinental petition, that it is appropriate to issue an order, pursuant to section 1a(11)(C) of the Act, that includes CFTC-registered floor brokers and floor traders, subject to

¹⁹ Pursuant to paragraph 2(h)(5)(F) of the Act, an ECM shall not represent to any person that the facility is registered with, or designated, recognized, licensed or approved by the Commission.

²⁰ The Commission posed an additional question concerning ECE treatment for non-U.S. registrants. That question and response are not discussed here because, as previously noted, Intercontinental has decided not to seek relief at this time on behalf of non-U.S. floor brokers or floor traders. See note 10.

certain conditions, within the definition of ECEs who can trade on ECMs.²¹ Although the Commission is neither agreeing nor disagreeing with Intercontinental's contention that two of the three general categories of ECE defined under the CFMA recognize that traders with no direct connection to the underlying commodity are eligible and valuable contributors to the efficiency of commercial markets,²² the Commission does believe that its action is consistent with the purposes of the CFMA and that it will provide floor brokers and floor traders access to a wider range of products and expand the pool of potential counterparties for ECM participants. The Commission also believes that its action potentially could increase competition and efficiency and reduce liquidity risk on ECMs. As noted above, the Commission has previously determined, for purposes of trading on a DTEF, to include within the ECE definition registered floor brokers and floor traders trading for their own accounts, whose trading obligations are guaranteed by a registered FCM.²³

In order to qualify as an ECE under the Commission's order, a CFTC-registered floor broker or floor trader must be a member of a DCM or otherwise have trading privileges on a DCM. The floor broker or floor trader must have as a part of its business the business of acting as a floor broker or floor trader, either on a DCM's open outcry market or performing an equivalent function on the DCM's electronic market, but need not have any connection to or experience in the underlying physical commodity. The Commission believes that the trading expertise that floor brokers and floor traders would bring to the ECM would be applicable to trading in any commodity product being traded. A floor broker's or floor trader's ability to, among other things, interpret market momentum and facilitate the adjustment of the market price to new information, is more a function of trading expertise than of experience in the underlying physical commodity.

²¹ The Commission notes that the Intercontinental petition is broader in scope than the NYMEX petition in that Intercontinental requested that, subject to the condition discussed above, all CFTC-registered floor brokers and floor traders be included in the definition of ECE. As previously stated, NYMEX requested that if the Commission made a determination along the lines proposed in the Intercontinental petition, NYMEX floor brokers and floor traders be permitted to trade on ECMs consistent with the scope of that determination. Accordingly, a single order addressing Intercontinental's petition eliminates the need for an order separately addressing the NYMEX petition.

²² See note 16.

²³ Commission regulation 37.1(b).

The floor broker or floor trader must either be an ECP or have its trades on the ECM guaranteed by a clearing member that is both a member of a CFTC-registered derivatives clearing organization and an ECP. The Commission believes that the requirement that either the floor broker or floor trader or the guarantor of the trades must be an ECP provides sufficient financial backing for the floor broker or floor trader and mitigates any credit and collection risk that might otherwise arise in executing trades with a floor broker or floor trader.²⁴

IV. Cost Benefit Analysis

Section 15 of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation or order under the Act. By its terms, section 15 does not require the Commission to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Rather, section 15 simply requires the Commission to "consider the costs and benefits" of the subject rule or order.

Section 15(a) further specifies that the costs and benefits of the proposed rule or order 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 of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule or order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The order is intended to reduce regulatory barriers to permit CFTC-registered floor brokers and floor traders, when acting in a proprietary capacity, to enter into transactions in

²⁴ The Commission notes that although the guarantor for the trading on the ECM, if one is required, must be a clearing member of a CFTC-registered derivatives clearing organization, there is no requirement that the trades thus executed must be cleared. No liability resulting from a guarantor's guarantee of an uncleared ECM transaction would extend to any of the guarantor's fellow clearing members. The Commission also notes that the guarantor could restrict or otherwise condition the trading for which the guarantee is provided. The guarantor could, for instance, limit trading to certain commodities or ECMs, place financial limits on overall or daily positions, or restrict trading by number or size of acceptable transactions.

exempt commodities on exempt commercial markets pursuant to section 2(h)(3) of the Act if such entities are either eligible contract participants or have obtained a financial guarantee for such transactions from a clearing member that is both a member of a CFTC-registered derivatives clearing organization and an eligible contract participant. The Commission has considered the costs and benefits of the order in light of the specific provisions of section 15(a) of the Act.

A. Protection of Market Participants and the Public

The order would permit CFTC-registered floor brokers and floor traders who are eligible contract participants, or who have guarantees from clearing members that are members of CFTC-registered derivatives clearing organizations and are eligible contract participants, to enter into proprietary transactions in exempt commodities on exempt commercial markets. Under the Act, eligible commercial entities involve sophisticated investors who have the financial wherewithal or trading expertise to participate in these markets. Accordingly, there should be no effect on the Commission's ability to protect market participants and the public.

B. Efficiency and Competition

The order is expected to benefit efficiency and competition by, among other things, increasing the flow of trading information between contract markets and exempt commercial markets, increasing the pool of potential counterparties for participants trading on exempt commercial markets, and providing essential trading expertise to the market that enhances price discovery through both the speed and efficiency of market adjustment to new fundamentals.

C. Financial Integrity of Futures Markets and Price Discovery

The order should have no effect, from the standpoint of imposing costs or creating benefits, on the financial integrity of the futures and options markets. The order should enhance the price discovery function of such markets.

D. Sound Risk Management Practices

The order should have no effect, from the standpoint of imposing costs, on the risk management practices of the futures and options industry. Where the floor broker or floor trader is qualified as an eligible contract participant, the entity has been deemed to be sufficiently responsible to execute trades by the Act, and no further mitigation of credit risk

is necessary. Where the floor broker or floor trader does not qualify as an eligible contract participant, the order requires that a clearing member of a registered derivatives clearing organization that is itself an eligible contract participant guarantee the trades in order to mitigate the credit and collection risk.

E. Other Public Interest Considerations

The order is consistent with one of the purposes of the Act as articulated in section 3 in that it would promote responsible innovation and fair competition among boards of trade, other markets and market participants.

V. Order

Upon due consideration, and pursuant to its authority under section 1a(11)(C) of the Act, the Commission hereby determines that floor brokers or floor traders who are registered with the Commission, when acting in a proprietary trading capacity, are appropriate persons as defined in section 1a(11)(C) and, thus, are deemed to be eligible commercial entities and may enter into contracts, agreements or transactions in an exempt commodity on an exempt commercial market under the following conditions:

1. Transactions must be executed on an exempt commercial market that meets the requirements of section 2(h)(3)–(5) of the Act.
2. The floor broker or floor trader must be a member of a designated contract market or otherwise have trading privileges on a designated contract market.
3. The floor broker or floor trader must have as a part of its business the business of acting as a floor broker or floor trader on a designated contract market's open outcry market or performing an equivalent function on a designated contract market's electronic market.
4. The floor broker or floor trader must either be an eligible contract participant or have its trades on the exempt commercial market guaranteed by a clearing member that is a member of a Commission-registered derivatives clearing organization and is an eligible contract participant.

Issued in Washington, DC, on January 9, 2003, by the Commission.

Jean A. Webb,

Secretary of the Commission.

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DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission ("Commission") will hold an informal conference followed by a public hearing on Wednesday, January 29, 2003. The hearing will be part of the Commission's regular business meeting. Both the conference session and business meeting are open to the public and will be held at the Commission offices at 25 State Police Drive, West Trenton, New Jersey.

The conference among the Commissioners and staff will begin at 9:30 a.m. Topics of discussion include: a progress report on development of the Commission's new comprehensive plan; a progress report on the Tri-State Water Management Plan; a status report on the PCB TMDL for the Delaware Estuary; an opportunity for stakeholder comment on the structure and mandate of the TMDL Implementation Advisory Committee; a report on the activities of the Flow Management Technical Advisory Committee; a discussion regarding the Commission's fee structure for project review under Section 3.8 of the Delaware River Basin Compact; and a presentation on stormwater management approaches in Chester County.

The subjects of the public hearing to be held during the 1 p.m. business meeting include, in addition to the dockets listed below, a resolution approving the Commission's budgets for the fiscal year ending June 30, 2004.

1. *Merrill Creek Owners Group D-77-110 CP (Amendment 15)*. A resolution to amend Table A (Revised) of Docket D-77-110 CP (Amendment 14) to include the addition of the PPL Corporation, PPL Global, LLC and Lower Mount Bethel Energy, LLC facility in Lower Mount Bethel Township, Northampton County, Pennsylvania as a "Designated Unit." The power facility is a 600 megawatt independent power project approved via Docket D-99-54 on March 7, 2000. The project is subject to curtailment unless its consumptive water use during DRBC lower basin drought conditions can be made up by releases from storage. The Merrill Creek reservoir will provide the storage and is located in Harmony Township, Warren County, New Jersey.

2. *Covanta Warren Energy Resource Co., L.P. D-85-90 RENEWAL*. A renewal of a ground water withdrawal project to continue an allocation of 17 million