Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and March 24, 2010, 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 Mid-C Financial Peak Daily 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.

b. Order Relating to the Mid-C Financial Off-Peak Daily 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 Mid-C Financial Off-Peak Daily contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference or material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [42] with respect to the Mid-C Financial Off-Peak Daily 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 Mid-C Financial Off-Peak Daily contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., July 27, 2009, and March 24, 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 Mid-C Financial Off-Peak Daily 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 June 25, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–16206 Filed 7–1–10; 8:45 am]

BILLING CODE 6351–01–P

[42] 7 U.S.C. 1a(29).

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the Fuel Oil-180 Singapore Swap 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 20, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Fuel Oil-180 Singapore Swap ("SZS") 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 SZS 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:* June 25, 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;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov*.

[1] 74 FR 53728 (October 20, 2009).

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as an SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) 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

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 20, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the SZS contract performs a significant price discovery function and requested comment from interested parties.[7] Comments were received from Working Group of Commercial Energy Firms ("WGCEF"), Platts, ICE and Shell International Eastern Trading Company ("SIETCO).[8] The comment letter from Platts did not directly address the issue of whether or not the SZS contract is a SPDC. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the SZS contract and generally expressed the opinion that the SZS contract is not a SPDC because it does not meet the material price reference and material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

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

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously 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 or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[9] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[10] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract.

IV. Findings and Conclusions

The Fuel Oil-180 Singapore Swap (SZS) Contract and the SPDC Indicia

The SZS contract specifies 1,000 metric tons of 180 CentiStokes (cst) Singapore high-sulfur fuel oil. The contract is cash-settled based on the

[5] 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).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] 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.

[8] WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." McGraw-Hill, through its division Platts, compiles and calculates monthly energy price indices from energy trade data submitted to Platts by energy marketers. ICE is an exempt commercial market, as noted above. SIETCO, a subsidiary of Royal Dutch Shell Oil Company (Shell Oil) located in Singapore, handles exports and trading of Shell Oil petroleum products in the Asia-Pacific region. The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-030.html.*

[9] In its October 20, 2009, **Federal Register** release, the Commission identified material price reference and material liquidity as the possible criteria for SPDC determination of the SZS contract. Price linkage and Arbitrage were not identified as possible criteria. As a result, price linkage and arbitrage will not be discussed further in this document and the associated Order.

[10] 17 CFR 36, Appendix A.

arithmetic average of the means between the daily high and low price quotations for "HSFO 180 CST" delivered in the specified calendar month, published under the "Singapore" heading in Platts' *Asia-Pacific/Arab Gulf Marketscan.* The SZS contract specifies the delivery of high-sulfur fuel oil in Singapore on an FOB basis.[11] The SZS contract is listed for up to 60 consecutive calendar months beginning with the next calendar month.

After crude oil is extracted from the ground and brought to a refinery, it goes through a process called fractional distillation. During fractional distillation, the oil is heated, causing different types of oil within the crude to separate as they have different boiling points. Classically, fractional distillation is accomplished in a distillation column, which siphons off various fractions as they precipitate out. During fractional distillation, oil refineries can also use catalysts to "crack" the hydrocarbon chains in the crude oil to create specific oil fractions.

Fuel oil is a fraction obtained from petroleum distillation, either as a distillate or a residue. Fuel oil is made of long hydrocarbon chains, particularly alkanes, cycloalkanes and aromatics. Technically, different grades of fuel oil exist; fuel oil is classified into six classes, numbered 1 through 6, according to its boiling point, composition and purpose. Broadly speaking, fuel oil is any liquid petroleum product that is burned in a furnace or boiler for the generation of heat or used in an engine for the generation of power, except oils having a flash point of approximately 104 degrees Fahrenheit and oils burned in cotton or wool-wick burners. Thus, fuel oils can include kerosene, diesel, and heating oil. However, the term "fuel oil" typically is used in a stricter sense to refer to the heavy commercial fuel that is obtained from crude oil, which is thicker than gasoline and naphtha.

No. 5 fuel oil and No. 6 fuel oil are called residual fuel oils ("RFO") or heavy fuel oils. More No. 6 oil is produced compared to No. 5 oil, thus the terms heavy fuel oil and residual fuel oil are sometimes used as names for No. 6. No. 5 fuel oil is a mixture of 75–80 percent No. 6 oil and 25–20 diesel fuel (No. 2 oil). No. 6 oil may also contain a small amount of No. 2 to get it to meet specifications.

Heavy fuel oils, also known as bunker fuels,[12] are used for powering marine vessels. The hydrocarbon chains in bunker fuel are very long, and this fuel is highly viscous as a result. The thick fuel is difficult for most engines to burn since it must be heated before it will combust, so it tends to be used in large engines like those on board ships. Ships have enough space to heat bunker fuel before feeding it into their engines, and their extremely sophisticated engines are capable of burning a wide range of fuels, including low quality bunker fuel. The principal market for Singapore high-sulfur fuel oil 180 cst is the Asia-Pacific region.

Fuel oil is transported worldwide by fleets of supertankers making deliveries to suitably sized strategic ports such as Houston, Singapore, and Rotterdam. Where a convenient seaport does not exist, inland transport may be achieved with the use of barges.

Market participants keep abreast of fuel oil prices worldwide in order to take advantage of arbitrage opportunities. In this regard, international fuel oil prices are compared with those in the trader's home port after accounting for transportation costs. Market participants may find it profitable to ship fuel oil from one market to another. For example, it is sometimes profitable to ship fuel oil from the Gulf Coast of the United States to Singapore. Such conditions do not exist all of the time; in fact, a trader may realize this opportunity only a few times per year.

In its October 20, 2009, **Federal Register** notice, the Commission identified material price reference and material liquidity as the SPDC criteria potentially applicable to the SZS contract. Each of these criteria is discussed below.[13]

1. Material Price Reference Criterion

The Commission's October 20, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, the ICE offers the "OTC Oil End of Day" data package with access to all price data or just 12, 24, 36, or 48 months of historical data. This package includes price data for the SZS contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study")[14] found that in general, market participants view the ICE as a price discovery market for certain energy contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the SZS contract, while not mentioned by name in the ECM Study, might warrant further review.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[15] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price

[11] The term "FOB" indicates "free on board." In other words, the seller will pay for transportation of the product to the port of Singapore, as well as the cost of loading the fuel oil onto the cargo ship (this includes inland hauling charges, customs clearance, origin documentation charges, demurrage (if any), and origin port handling charges—in this case Singapore).

[12] Bunker fuel gets its name from the containers on ships and in ports that it is stored in; in the days of steam they were coal bunkers but now they are bunker-fuel tanks. The Australian Customs and the Australian Tax Office define a bunker fuel as the fuel that powers the engine of a ship or aircraft. Bunker A is No. 2 fuel oil, bunker B is No. 4 or No. 5 and bunker C is No. 6. Since No. 6 is the most common, the term "bunker fuel" is often used as a synonym for No. 6. No. 5 fuel oil is also called navy special fuel oil or just navy special, No. 6 or 5 are also called furnace fuel oil ("FFO"); the high viscosity requires heating, usually by a re-circulated low pressure steam system, before the oil can be pumped from a bunker tank.

[13] As noted above, the Commission did not find any indication of price linkage or arbitrage in connection with this contract; accordingly, those criteria were not discussed in reference to the SZS contract.

[14] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf.*

[15] 17 CFR 36, Appendix A.

of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

Although Singapore has one of the most utilized ports in the world and ICE sells price data for its SZS contract, the Commission has found upon further evaluation that cash market transactions are not being directly based or quoted as a differential to the SZS contract nor is that contract routinely consulted by industry participants in pricing cash market transactions. In this regard, traders use the SZS contract's price as an indicator of arbitrage potential between two fuel oil markets (*e.g.,* Singapore and the U.S. Gulf Coast). But because the market conditions are not always such that diverting fuel oil from one market to Singapore is profitable, traders do not regularly keep track of the SZS contract's prices. Instead, traders refer to the SZS contract on an occasional basis and during periods when it is historically profitable to ship fuel oil to Singapore. Cash market transactions are not priced on a frequent and recurring basis at a differential to the SZS contract's price. Moreover, market participants likely do not specifically purchase the ICE data packages for the SZS contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions. Thus, the SZS contract does not meet the Commission's Guidance for the material price reference criterion.

i. **Federal Register** Comments

ICE and SIETCO addressed the question of whether the SZS contract met the material price reference criterion for a SPDC. The commenters argued that the underlying cash price series against which the ICE SZS contract is settled (in this case, the Platts price for 180 cst fuel oil in Singapore) is the authentic reference price and not the ICE contract itself. Consequently, the commenters maintain that the only price which is referenced and relied upon by market participants for this product is the one published by Platts. Commission staff believes that this interpretation of price reference is too limiting in that it only considers the average index value on which the contract is cash settled after trading ceases. Instead, the Commission believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, the port of Singapore is a significant trading center for 180 cst fuel oil in the Asian market. However, traders do not consult the SZS contract's price on a frequent and recurring basis since the potential for arbitrage between fuel oil market centers worldwide is sporadic and infrequent.

ICE argued that the Commission appeared to base the case that the SZS contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether the SZS contract is a SPDC, the CFTC cited a general conclusion in its ECM Study "that certain market participants referred to ICE as a price discovery market for certain energy contracts." ICE states that this argument is "nearly impossible to respond to as the ECM report did not mention the SZS [contract] as a potential significant price discovery contract. It is hard to say which market participants made this statement *in 2007 or the contracts that were referenced* * * * Basing a material price reference determination on general statements made in a two year old study does not seem to meet Congress' intent that the CFTC use its considerable expertise to study the OTC markets." In response to the above comment, the Commission notes that it cited the ECM Study's general finding that some ICE energy contracts appear to be regarded as price discovery markets merely as an indication that a further review of certain ICE contracts may be warranted, and was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

WGCEF argued that the SZS contract does not meet the direct evidence or the indirect evidence with respect to the material price reference criterion. With regard to direct evidence, WGCEF stated that "[t]here are no other related contracts traded in any market that settle to, or reference, the contract." As noted above, this view of price reference is narrow. Nevertheless, while the Commission believes that price reference can include consultation on a frequent and recurring basis, the Commission has determined that such frequent and recurring consultation does not take place with respect to the SZS contract.

ii. Conclusion Regarding Material Price Reference

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

2. Material Liquidity Criterion

As noted above, in its October 20, 2009, **Federal Register** notice, the Commission identified material liquidity and material price reference as potential criteria for SPDC determination of the SZS contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

The Commission noted that the total number of transactions executed on ICE's electronic platform in the SZS contract was 1,957 in the second quarter of 2009, resulting in a daily average of 30.6 trades. During the same period, the SZS contract had a total trading volume of 13,170 contracts and an average daily trading volume of 205.8 contracts. Moreover, open interest as of June 30, 2009, was 11,356 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[16]

In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 22,255 contracts (or 337 contracts on a daily basis). In terms of

[16] 74 FR 53728 (October 20, 2009).

number of transactions, 4,625 trades occurred in the third quarter of 2009 (70.1 trades per day). As of September 30, 2009, open interest in the SZS contract was 15,681 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.[17]

Trading activity in the SZS contract, as characterized by total quarterly volume, indicates that the SZS contract experiences trading activity similar to that of other thinly-traded contracts.[18] Thus, the SZS contract does not meets a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.[19]

Federal Register Comments

As noted above, WGCEF, ICE, and SIETCO addressed the question of whether the SZS contract met the material liquidity criterion for a SPDC. These commenters stated that the SZS contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

ICE noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."

ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to *report* trade data to the CFTC." In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs" [20] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold.

ICE proposed that the statistics it provided were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) include trades made in all months of the contract as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a *single* traded month or strip of a given contract."

It is the Commission's opinion that liquidity, as it pertains to the SZS contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE SZS contract itself would be considered liquid. Nevertheless, in light of the fact that the Commission has found that the SZS contract does not meet the material price reference criterion, material liquidity cannot be used alone for SPDC determination.

Additionally, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 20, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. SIETCO expressed a similar concern. In this respect, the Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 42.5 percent of all transactions in the SZS contract. The Commission acknowledges that the open interest information it provided in its October 20, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission has found that the SZS contract does not meet the material price reference criterion.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the SZS contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the SZS contract does not meet the material price reference criterion at this time. In light of this fact, according to the Commission's Guidance, it would be unnecessary to evaluate whether the SZS contract meets the material liquidity criterion since the Commission believes it is not useful as the sole basis for a SPDC determination. Accordingly, the Commission is issuing the attached Order declaring that the SZS contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its SZS contract.[21] Accordingly, with respect to its SZS contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements for ECMs.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [22] imposes certain requirements

[17] In this regard, supplemental data subsequently submitted by the ICE indicated that block trades are included in the on-exchange trades; block trades comprise 42.5 percent of all transactions in the SZS contract.

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

[19] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the SZS contract does not meet the material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since the Commission believes it is not useful as the sole basis for a SPDC determination. 17 CFR 36, Appendix A.

[20] 73 FR 75892 (December 12, 2008).

[21] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[22] 44 U.S.C. 3507(d).

on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [23] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) 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 or 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 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. Amendments to 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 SZS 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") [24] 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 exempt commercial markets. The Commission previously has determined that exempt commercial markets are not small entities for purposes of the RFA.[25] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Order

Order Relating to the Fuel Oil-180 Singapore Swap 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 Fuel Oil-180 Singapore Swap contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference and material liquidity criteria for significant price discovery contracts. Moreover, under Commission Guidance material liquidity alone cannot support a significant price discovery finding for the Fuel Oil-180 Singapore Swap contract.

Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [26] with respect to the Fuel Oil-180 Singapore Swap 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 Fuel Oil-180 Singapore Swap 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 Fuel Oil-180 Singapore Swap 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 June 25, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–16209 Filed 7–1–10; 8:45 am]

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[23] 7 U.S.C. 19(a).

[24] 5 U.S.C. 601 *et seq.*

[25] 66 FR 42256, 42268 (Aug. 10, 2001).

[26] 7 U.S.C. 1a(29).

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, June 30, 2010, 2 p.m.–3 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.