

resolution process that includes buy-sell matching, should apply to the data. An index developer should: Provide adequate security for collected data, including a backup system; have the ability to process large quantities of data quickly and accurately; and possess sufficient market knowledge and statistical expertise to recognize errors in reported data.

5. *Accessible.* All interested customers should have reasonable access to price reports on a timely basis.

## Questions

We seek responses to key questions in order to achieve an appropriate solution:

1. Should the Commission have access to the data? Under the current regime of trade publication indices, the Commission and the CFTC have limited ability to investigate allegations of manipulation. Can this regime achieve the goals of verifiability and transparency? Are there near-or long-term changes that could be made to achieve sufficient verifiability and transparency other than allowing for regulatory review?

2. Should the Commission mandate reporting? The volume of transactions reported has declined, as companies have suspended reporting due to uncertainty over reporting standards or to review their procedures and safeguards for reporting accurate information.<sup>6</sup> Developers of price indices have expressed concern that withholding trade information from the market undermines the index process.<sup>7</sup> The reluctance of some companies to report trade information voluntarily raises the question of whether trade reporting should be mandatory. Due to antitrust laws, the industry acting alone could not implement certain means of requiring report, such as stopping trading with non-reporting companies. In other markets where "self-regulating organizations" (SROs) exist there have been exemptions to such antitrust laws allowing mandatory reporting. Should the Commission require entities holding blanket market-based rate authority to report specified trade information to one or more index developers whose indices meet specified standards, subject to

adequate confidentiality protections? How can sufficient completeness be achieved without some form of mandate to report? How could the Commission implement a mandate under current law? Would legislation allowing the Commission to mandate price reporting help?

3. Should reports include counterparties? The verification process effectiveness increases when the index provider has information on whether a transaction was a purchase or sale, with counterparty company name. Some reporting companies have commented that this information is highly sensitive and that they will not report the data to a third party, or that non-disclosure agreements bar reporting such information. Others, including index providers, argue that without counterparty data they cannot confirm reported trades and thus assure accuracy in the data used to construct indices. Staff recognizes the fundamental tension between the need to ensure accurate indices and to protect commercially sensitive information. Is there a way to achieve sufficient verifiability without a buy/sell indicator and counterparty information? If there were a requirement to report counterparty data, what protections could the Commission or an index developer provide for commercially sensitive information?

4. Should there be an external audit? There appears to be general consensus that some audit process is necessary to achieve verifiability but less agreement on the nature of the audit process. The highest degree of confidence would result from an external process and data audit by a major independent firm, with the results of the audit (and underlying data) provided to the Commission for review. Some index providers argue that review of the information by anyone outside their company would raise liability and impose costs. However, an audit process that only addresses process or that is only internal would provide less transparency and confidence. Staff views auditing and reporting to the Commission as central to restoring confidence in price indices. Parties should comment on the type of audits and reports best suited to achieving verifiability.

5. Should the Commission authorize price reporting entities? How can the Commission implement standards of review, reporting, confidentiality and auditing? Are there minimum standards that the Commission could apply to price reporting entities? How can companies providing transaction data have assurance that they are providing

data to *bona fide* price reporting entities?

6. Should the Commission delegate any regulatory functions to an SRO? If so, which one? Depending on the scope of regulatory functions deemed appropriate to oversee price discovery mechanisms, the Commission could delegate many such functions to an SRO. These include standards of conduct, compliance, surveillance, auditing, enforcement, rulemaking, standardization of formats, dispute resolution, adjudication, and membership requirements.

SROs are well-established in certain financial industries, often operating under supervision from agencies that have been granted specific legislative authority.<sup>8</sup> We request comment on the steps that would be necessary for the Commission to sponsor or validate an SRO-type entity for price formation in the energy industry. SROs also raise significant questions of cost, governance and oversight. If the Commission mandated use of an SRO and/or subjected the SRO to government oversight, would the Commission need additional specific legislative authority to create and regulate such an SRO? If the Commission were given authority or direction to supervise price formation mechanisms, could it delegate some price surveillance to an SRO? We request comment on the extent of the Commission's current powers to accomplish an SRO solution.<sup>9</sup>

Advantages of an SRO are centralizing the process of reporting, processing, and disseminating data under conditions which provide for oversight and auditing, creating a high degree of confidence. Disadvantages include the time to select or create the SRO, potential need for legislative authority, and potential disruption in the transition from existing indices to new indices resulting from SRO data or published by the SRO, and the potential for significant costs.

## Written Comments

We encourage interested parties to submit written comments on the issues discussed above in advance of the June

<sup>6</sup> Recently, for example, Entergy-Koch Trading announced that it has suspended all price reporting "until there is further clarity and certainty around industry expectations and the government regulation guidelines."

<sup>7</sup> For example, in NGI's "Statement on Natural Gas Price Surveys," NGI urged "companies which have not reported prices in the past or who have let their price reporting lapse to make contributions to our surveys in the interests of a robust market measure." See [www.intelligencepress.com/features/ngi\\_statement.html](http://www.intelligencepress.com/features/ngi_statement.html).

<sup>8</sup> For instance, the National Futures Association registers and monitoring futures brokers under the oversight of the CFTC and pursuant to legislative provisions; GovPX, Inc. is a private company which benchmarks U.S. Treasury market prices without legislative provisions, but with the approval of the U.S. Treasury and Federal Reserve.

<sup>9</sup> Two examples include the InterContinental Exchange (ICE) which suggests that its existing eConfirm system currently operates as a central processing platform hub, and the University of Houston Global Energy Management Institute (UH-GEM) which proposes to develop a new energy price data hub within six months.