

(a) The swap agreement is entered into solely between eligible swap participants at the time such persons enter into the swap agreement;

(b) The swap agreement is not part of a fungible class of agreements that are standardized as to their material economic terms;

(c) The creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or determining the terms of the swap agreement, including pricing, cost, or credit enhancement terms of the swap agreement; and

(d) The swap agreement is not entered into and traded on or through a multilateral transaction execution facility;

Provided, however, That paragraphs (b) and (d) of Rule 35.2 shall not be deemed to preclude arrangements or facilities between parties to swap agreements, that provide for netting of payment obligations resulting from such swap agreements nor shall these subsections be deemed to preclude arrangements or facilities among parties to swap agreements, that provide for netting of payments resulting from such swap agreements; *Provided further,* That any person may apply to the Commission for exemption from any of the provisions of the Act (except 2(a)(1)(B)) for other arrangements or facilities, on such terms and conditions as the Commission deems appropriate, including but not limited thereto, the applicability of other regulatory regimes.

PART 36—EXEMPTION OF SECTION 4(c) CONTRACT MARKET TRANSACTIONS

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AUTHORITY: 7 U.S.C. 2, 6, 6c, and 12a.

SOURCE: 60 FR 51342, Oct. 2, 1995, unless otherwise noted.

§36.1 Exemption and definitions.

(a) *Duration of Exemption.* The provisions of this part apply to any section 4(c) contract market transaction entered into on or after November 1, 1995. The provisions of this part expire, and are no longer valid as to any such transaction entered into on or after three years following the date the first contract trades pursuant to this part.

(b) *Scope of exemption.* Each board of trade on which section 4(c) contract market transactions are permitted to be traded pursuant to this part shall be deemed for such purposes to be designated as a contract market within the meaning of the Act and, with respect to section 4(c) contract market transactions, shall comply with and be subject to all of the provisions of the Act and the Commission's regulations applicable to a contract market other than those provisions which are specifically inconsistent with this part, in which case the provisions of this part shall govern.

(c) *Definitions.* As used in this part:

(1) *Section 4(c) contract market transaction* means:

Any agreement, contract, or transaction (or class thereof) entered into on or subject to the rules of a contract market in accordance with the provisions of this part, and that is executed by a member of the section 4(c) contract market that is an eligible participant for its own account, or a futures commission merchant or floor broker for its own account or on behalf of an eligible participant.

(2) *Eligible Participant* means:

- (i) A bank or trust company;
- (ii) A savings association or credit union;
- (iii) An insurance company;
- (iv) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. §80a-1 *et seq.*) or an investment company performing a similar role or function subject as such to foreign regulation, *provided* that such investment company or

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foreign person is not formed solely for the purpose of constituting an eligible participant and has total assets exceeding \$5,000,000;

(v) A commodity pool formed and operated by a person subject to regulation under the Act or a foreign person performing a similar role or function subject as such to foreign regulation, *provided* that such commodity pool or foreign person is not formed solely for the purpose of constituting an eligible participant and has total assets exceeding \$5,000,000;

(vi) A corporation, partnership, proprietorship, organization, trust, or other entity not formed solely for the purpose of constituting an eligible participant (A) which has total assets exceeding \$10,000,000; or (B) which has a net worth of \$1,000,000 and enters into a section 4(c) contract market transaction in connection with the conduct of its business; or (C) which has a net worth of \$1,000,000 and enters into a section 4(c) contract market transaction to manage the risk of an asset or liability owned or incurred in the conduct of its business or reasonably likely to be owned or incurred in the conduct of its business;

(vii) An employee benefit plan subject to the Employee Retirement Income Security Act of 1974 or a foreign person performing a similar role or function subject as such to foreign regulation with total assets exceeding \$5,000,000 or whose investment decisions are made by a bank, trust company, insurance company, investment adviser subject to regulation under the Investment Advisers Act of 1940 (15 U.S.C. §80b-1 *et seq.*), or a commodity trading advisor subject to regulation under the Act;

(viii) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing;

(ix) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. §78a *et seq.*) or a foreign person performing a similar role or function subject as such to foreign regulation, acting on its own behalf: *Provided, however*, that if such

broker-dealer is a natural person or proprietorship, the broker-dealer must also meet the requirements of paragraph (c)(2)(vi) or (xi) of this section;

(x) A futures commission merchant, floor broker, or floor trader subject to regulation under the Act or a foreign person performing a similar role or function subject as such to foreign regulation; or

(xi) Any natural person with total assets exceeding at least \$10,000,000.

(3) *Section 4(c) contract market trading rules* means: Contract market rules prescribing trading procedures applicable only to section 4(c) contract market transactions.

(4) *Terms and conditions* has the same meaning as in §1.41(a)(2) of this chapter.

§36.2 Trading of section 4(c) contract market transactions.

A section 4(c) contract market transaction may be traded pursuant to the provisions of this part provided the following conditions are met:

(a) The section 4(c) contract market transaction:

(1) Provides that settlement or delivery shall be in cash (at a cash settlement price that reflects the cash market for the underlying commodity and is based on a price series that is reliable, publicly available, and timely) or by means other than the transfer or receipt of any commodity, except a foreign currency for which there is no legal impediment to delivery and for which there exists a liquid cash market; *provided however*, that the terms and conditions of such transaction are in conformity with the underlying cash market (or, in the absence of conformity, are necessary or appropriate) and that trading is not readily susceptible to price manipulation, nor to causing or being used in the manipulation of the price of any underlying commodity;

(2) Is cleared through a clearing organization subject to Commission oversight;

(3) Except with respect to a broad-based index, does not involve any, or the price of any, wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain