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Significant Price Discovery Contracts on Exempt Commercial Markets; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 15, 16, 17, 18, 19, 21, 36, 40

RIN 3038–AC76

Significant Price Discovery Contracts on Exempt Commercial Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Rules.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is promulgating final rules to implement those provisions of the CFTC Reauthorization Act of 2008 (''Reauthorization Act'') [1] relating to exempt commercial markets (''ECMs'') on which significant price discovery contracts (''SPDCs'') are traded or executed. In addition to promulgating regulations mandated by the Reauthorization Act, the Commission also is amending existing regulations applicable to registered entities in order to clarify that such regulations are now applicable to ECMs with SPDCs.

DATES: *Effective Date:* April 22, 2009.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Overview

The Commodity Futures Modernization Act of 2000 (''CFMA'') amended the Commodity Exchange Act (''CEA'' or the ''Act'') [2] to replace the Act's ''one-size-fits-all'' supervisory framework for futures trading with a multi-tiered approach to oversight of derivatives markets. The CFMA applies different levels of oversight to markets based primarily on the nature of the underlying commodity being traded, the participants who are trading, and the manner in which trading is conducted. In general, the more sophisticated the traders or commercial participants, or the less susceptible a commodity is to manipulation or other market or trading abuses, the less regulatory oversight is required under the CFMA. In addition to creating three new categories of trading facility,[3] the CFMA created a number of exemptions and exclusions from regulation for certain swaps and other derivative products traded either bilaterally or on electronic trading facilities-including an exemption for transactions in exempt commodities traded on electronic trading facilities, also known as exempt commercial markets (''ECMs'').[4]

Since the adoption of the CFMA, ECMs have evolved such that some no longer are simple trading platforms with low trading volumes relative to DCMs. Also over time, these facilities began to offer ''look-alike'' contracts that are linked to the settlement prices of their exchange-traded counterparts, and in at least one case these look-alike contracts began to garner significant volumes. More recently, several active ECMs began to offer the option of centralized clearing for their contracts—an option which became widely utilized by their customers to manage counterparty risk. This evolution, particularly the linkage of ECM contract settlement prices to DCM futures contract settlement prices, began to raise questions about whether ECM trading activity could impact trading on DCMs and whether the CFTC had adequate authority to address that impact and protect markets from manipulation and abuse.

The Commission responded to these changing markets in a variety of ways. Its Office of the Chief Economist (''OCE'') conducted a study of the relationship between the natural gas contracts that trade on the New York Mercantile Exchange (''NYMEX''), a DCM, and the InterContinental Exchange (''ICE''), an ECM. Concurrently, the Commission's Division of Market Oversight issued a series of special calls [5] for information related to ICE's cleared natural gas swap contracts that are cash-settled based on the settlement price of the NYMEX physical delivery natural gas contract. Following the OCE study and the special calls, the Commission held a public hearing in September 2007 to further explore a number of issues, including the adequacy of the CFMA's regulatory approach; the similarities and differences between ECMs and DCMs; the associated regulatory risks of each market category; the types of regulatory changes that might be appropriate to address identified risks; and the impact that regulatory or legislative changes might have on the U.S. futures industry and the global competitiveness of the U.S. financial industry. Based on information developed as a result of these efforts, the Commission published its October 2007 ''Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets'' (''ECM Report''). The ECM Report, which was provided to the Commission's Congressional oversight committees, recommended, among other things, that the CEA be amended to grant the CFTC additional authority over ECM contracts serving a significant price discovery function and that certain self-regulatory responsibilities be assigned to ECMs offering such contracts.

The Reauthorization Act's provisions regarding ECMs were based largely on the Commission's recommendations for improving oversight of ECMs whose contracts perform a significant price discovery function. The legislation significantly expanded the CFTC's regulatory authority over ECMs by adding a new section 2(h)(7) to the CEA establishing criteria for the Commission to consider in determining whether a particular ECM contract performs a significant price discovery function and providing for greater regulation of SPDCs traded on ECMs. In addition to extending the CFTC's regulatory oversight to the trading of SPDCs, the Reauthorization Act requires ECMs to adopt position limit and accountability level provisions for SPDCs; authorizes the Commission to require the reporting of large trader positions in SPDCs; and establishes core principles governing ECMs with SPDCs. The core principles applicable to ECMs with SPDCs are derived from selected DCM core principles and designation criteria set forth in the CEA, and Congress intended that they be construed in a like manner.[6]

[1] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[2] 7 U.S.C. 1 *et seq.*

[3] Designated Contract Markets (''DCMs'') are open to all participants and may offer all types of commodities; Derivatives Transaction Execution Facilities (''DTEFs'') generally are open only to sophisticated participants and are limited as to the types of commodities that may be traded; and Exempt Boards of Trade (''EBOTs'') may trade only excluded commodities and are open only to eligible contract participants and are subject to no regulatory oversight, exempt from most provisions of the CEA and not registered with or designated by the CFTC.

[4] The CFMA established the ECM exemption in section 2(h)(3) of the CEA, 7 U.S.C. 2(h)(3).

[5] Section 2(h)(5)(B)(iii) of the Act, 7 U.S.C. 2(h)(5)(B)(iii), requires that an ECM relying on the exemption provided in section 2(h)(3) must, upon a special call by the Commission, provide such information related to its business as the Commission may determine appropriate to enforce the antifraud provisions of the Act, to evaluate a systemic market event, or to obtain information requested by a Federal financial regulatory authority in connection with its regulatory or supervisory responsibilities.

[6] Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 110–627, 110 Cong., 2d Sess. at 985 (2008) (''Conference Committee Report''). The core principles and designation

The legislation directed the Commission to issue rules implementing the provisions of new section 2(h)(7) and to include in such rules the conditions under which an ECM will have the responsibility to notify the Commission that an agreement, contract or transaction conducted in reliance on section 2(h)(3) of the Act may perform a significant price discovery function. The Reauthorization Act mandated that the ''significant price discovery standards'' rules be proposed not later than 180 days after the date of enactment of the Reauthorization Act, and that the Commission issue final rules not later than 270 days after the date of implementation of that Act.[7]

Consistent with Congress' directive, the Commission on December 12, 2008 issued a notice of proposed rulemaking (''NPRM'' or ''proposing release'') to substantially amend rule 36.3[8] of the Commission's rules applicable to ECMs to implement the broadened regulatory authority conferred by section 2(h)(7) of the CEA over ECMs with SPDCs. In addition, the proposed rules implicated parts 16 through 21 (market, transaction and large trader reporting rules) and part 40 (provisions common to contract markets, derivatives transaction execution facilities and derivatives clearing organizations). In promulgating these final rules, the Commission recognizes that these are rapidly evolving markets. We are mindful that, as we carry out Congressional directives in the present context, we continue to maintain careful scrutiny of the marketplace with regard to new products and trading platforms in the future. As markets evolve, we acknowledge our obligation to continue to adapt our regulatory oversight to protect consumers and ensure the integrity of the core risk management and price discovery functions of our markets.

B. The Proposed Rules

1. Part 36: Exempt Markets—Rules Applicable to ECMs

The Commission proposed to amend rule 36.3(b) to: (1) Specify the information submission requirements, both initially and on an ongoing basis, for all ECMs and also for ECMs with respect to agreements, contracts or transactions that have not been determined to perform a significant price discovery function; and (2) to enumerate separately the enhanced information submission obligations for ECMs with SPDCs. Consistent with the Reauthorization Act's directive that the Commission's rulemaking address specific statutory criteria for identifying a SPDC and the conditions under which an ECM will be responsible for notifying the Commission of a possible SPDC, proposed rule 36.3(c) addressed (1) The criteria on which the Commission will rely in making a determination that an agreement, contract or transaction performs a significant price discovery function; (2) the factors that will trigger an ECM's obligation to notify the Commission of a possible SPDC; (3) the procedures the Commission will follow in reaching its determination whether a contract is a SPDC; and (4) the procedures, standards and timetables by which an ECM with a SPDC must demonstrate compliance with the core principles. Because the criteria mandated by Congress for determining the existence of a SPDC do not lend themselves to bright-line rules or formulas, proposed Appendix A to Part 36 explains how the Commission anticipates applying the criteria, on a case-by-case basis, to the facts and circumstances under consideration.

Consistent with the Reauthorization Act, the CFTC's proposed rules required ECMs with SPDCs to establish a self-regulatory regime with respect to those contracts. Those responsibilities generally are set forth in nine core principles, largely derived from counterpart provisions for DCMs, including core principles that require the ECM to implement an acceptable trade monitoring program; to develop an audit trail in order to detect and deter market abuses; to adopt position limitations or position accountability levels for speculators in SPDCs; to develop and implement procedures for the exercise of emergency authority; to make public daily trading information; to develop a program to monitor compliance with the ECM's rules; to establish rules to minimize conflicts of interest in the decision-making process of the ECM; and to avoid taking any actions or adopting any rules that result in any unreasonable restraints of trade or impose any material anticompetitive burden on trading on the ECM. Proposed Appendix B to Part 36 offers guidance and non-exclusive safe harbors for compliance with the core principles. In proposing this guidance, the Commission made every effort to construe the ECM core principles in a like manner as it construes the DCM core principles.

Parts 15–21: Market, Transaction and Large Trader Reporting Rules

Collectively, the Commission's market, transaction, and large trader reporting rules (''reporting rules'') effectuate the Commission's market and financial surveillance programs. The market surveillance program analyzes market data to detect and prevent market manipulation and disruptions and to enforce speculative position limits. The financial surveillance program uses market data to measure the financial and systemic risks that large contract positions may pose to Commission registrants and clearing organizations. The Reauthorization Act authorized the Commission to establish a comprehensive transaction and position reporting system for SPDCs when it defined ECMs with SPDCs as registered entities and made certain provisions of the Act directly applicable to SPDCs.[9] In addition to proposing technical and conforming amendments to parts 15 through 21 of its rules, the Commission sought in the proposed rules to extend to SPDCs the reporting rules that currently apply to DCMs and DTEFs by defining clearing member and clearing organization and amending the definition of reporting market in Commission rule 15.00 to apply to positions in, and the trading and clearing of, SPDCs.[10]

Specifically, the NPRM proposed that ECMs be required to provide clearing member reports for SPDCs pursuant to rule16.00. Under proposed rule 16.01, ECMs, like DCMs, would be required to

criteria for DCMs are contained in section 5 of the CEA, 7 U.S.C. 7.

[7] Public Law 110–246, sec. 13204(b)(1).

[8] Part 36 of the Commission's rules contains the provisions that apply to exempt markets regardless of whether the markets are a significant source for price discovery. Rule 36.3 imposes a number of requirements on ECMs, including required notification of intent to rely on the exemption in section 2(h)(3) of the Act; initial and ongoing information submission requirements; prohibited representations; required price discovery notification; and price dissemination requirements.

[9] Specifically, section 4a of the CEA permits the Commission to set, approve exchange-set, and enforce speculative position limits. 7 U.S.C. 6a. Section 4c(b) of the Act, 7 U.S.C. 6c(b), gives the Commission plenary authority to establish rules pursuant to which the terms and conditions on which commodity options transactions may be conducted and provides the basis for the Commission's authority to establish a large trader reporting system for transactions on ECMs that involve commodity options. Section 4g of the Act imposes reporting and recordkeeping obligations on registered persons and requires them to file reports on positions executed on any board of trade and in any SPDC traded or executed on an ECM. 7 U.S.C. 6g. Finally, section 4i of the Act requires the filing of such reports as the Commission may require when positions made or obtained on DCMs, DTEFs or ECMs with respect to SPDCs equal or exceed Commission-set levels. 7 U.S.C. 6i.

[10] Consistent with ECM Core Principle IV's directive that ECMs take into account contracts that are treated by DCOs as fungible with a SPDC when establishing position limits or accountability levels for SPDCs, in this section the term SPDC will include any contracts that are fungible and cleared by DCOs together with SPDCs.

submit to the Commission and publicly disseminate option deltas and aggregated trading data on a daily basis.[11] ECM clearing members that clear SPDCs would, regardless of their registration status with the Commission or their status as domestic or foreign persons, be required to file reports for large SPDC positions when the positions meet or exceed the contract reporting levels of Commission rule 15.03(b). In addition, the NPRM proposed to require clearing members to identify the owners of reportable SPDC positions on Form 102.[12] Under the proposed rules, SPDC traders likewise would be subject to the special call provisions of the Commission's part 18 rules for reportable positions. Furthermore, the Commission proposed that clearing members clearing SPDCs, SPDC traders, and ECMs listing SPDCs would each be subject to the special call provisions of the part 21 rules.[13]

In order to communicate effectively with foreign clearing members and foreign traders and to properly administer the proposed special call provisions of parts 17, 18 and 21 of the Commission's rules, the Commission also proposed to amend the designation of agent provisions of rule 15.05 to require ECMs that list SPDCs to act as the agent of foreign clearing members and foreign traders for the purpose of accepting service or delivery of any communication, including special calls, issued by the Commission to a foreign clearing member or trader. The Commission also proposed new rule 16.02 to require all reporting markets, including ECMs listing SPDCs, to report on a daily basis trade data and related order information for each transaction that is executed on the market,[14] and to specify the information to be included in such reports.[15] In this regard, while the Commission proposed amendments to its part 17 rules dealing with reportable positions, it did not extend those proposals to SPDC transactions that are not cleared for the simple reason that no clearing members are involved in clearing such transactions. For purposes of enforcing SPDC position limits and monitoring large SPDC positions, the Commission anticipated using proposed rule 16.02 to access transaction information and trader identification to enforce position limits and monitor large positions for market and financial surveillance purposes.

Part 40: Provisions Common to Registered Entities

The Reauthorization Act amended the definition of ''registered entity'' in section 1a(29) of the CEA to include ECMs with SPDCs. Because certain provisions in part 40 of the Commission's rules apply to registered entities—and, accordingly, to ECMs with SPDCs—the Commission proposed to amend part 40 to specify the provisions which would be applicable to all registered entities.[16] The Commission emphasized in its NPRM that although not all provisions of part 40 will be applicable to ECMs with SPDCs, even sections that are not being amended in this rulemaking may be *de facto* amended by virtue of the fact that the term ''registered entity'' now includes ECMs with SPDCs.

C. Overview of Comments Received[17]

General. The Commission received a total of eleven comments from a range of commenters, including a government agency,[18] several trade associations,[19] two ECMs,[20] an interdealer broker in over-the-counter (''OTC'') energy markets,[21] and a DCM.[22] Most commenters expressed support for the proposed rules and several particularly commended the Commission's adherence to the letter and spirit of the Reauthorization Act. Several commenters offered specific recommendations for clarification or modification of certain provisions. These comments will be addressed more fully below. The Commission notes that some commenters requested that particular rules and core principle guidance proposed for ECMs be modified to mirror analogous provisions for DCMs. In this regard, the Commission reminds interested parties that the Reauthorization Act did not mandate identical rules for ECMs and DCMs, and the Commission has attempted to craft rules tailored to the special concerns raised by SPDCs. In that same vein, interested parties should bear in mind that Commission acceptable practices for all core principles do not denote requirements under the Act; rather, they offer safe harbors. Registered entities always have the option of crafting alternate means of complying with core principles than those set forth in the Commission's acceptable practices.

Core Principle IV. Several commenters expressed substantive concerns with respect to the Commission's proposed guidance and acceptable practices for compliance with Core Principle IV (Position Limitations or Accountability). Specifically, these commenters objected to the Commission's proposal that ECM market surveillance programs account

[11] The NPRM also proposed to uniformly apply the public dissemination requirement of Commission rule 16.01(e) to DCMs, DTEFs, and ECMs with SPDCs.

[12] The Commission's Division of Market Oversight (''DMO'') increasingly has been charged with administering the procedural requirements of the reporting rules. Accordingly, the Commission proposed to shift the delegation of the Commission's authority to determine the format of reports and the manner of reporting under parts 15 to 21 of the Commission's rules from the Executive Director to the Director of DMO.

[13] Part 21 of the Commission's rules establishes the Commission's ability to request information on persons that exercise trading control over commodity futures and options accounts along with additional account-related information for positions that may or may not be reportable under Commission rule 15.03(b). The final rules amend paragraphs (i)(1) and (i)(2) of rule 21.02 to ensure that any special call to an intermediary for information that classifies a trader as commercial or noncommercial, and the positions of the trader as speculative, spread positions, or positions held to hedge commercial risks, can be made with respect to both commodity futures and commodity options contracts. 17 CFR 21.02)(i).

[14] For some time, DCMs consistently have provided transaction level data on request by the Commission pursuant to rule 38.5(a). Proposed rule 16.02 would make such submissions mandatory.

[15] Such reports would include time and sales data, reference files and other information as the Commission or its designee may request; upon request, this information could be accompanied by data that identifies or facilitates the identification of each trader for each transaction or order included in a submitted report. The Commission noted in the NPRM that recent acquisitions of technology have enabled the agency to more effectively integrate trade data and related orders into its trade practice, market, and financial surveillance programs. Accordingly, new rule 16.02 would make the submission of such information mandatory.

[16] In particular, the proposed amendments to part 40 made rules 40.1, 40.2 and 40.5–40.8 and Appendix D specifically applicable to ECMs with SPDCs.

[17] In this NPRM, comment letters (''CL'') are referenced by the letter's author and/or file number and page. These letters are available through the Commission's Internet Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2008/08-012.html.*

[18] The Federal Energy Regulatory Commission (''FERC'') (CL 05) responded to the CFTC's request for comments but did not comment on the particulars of the proposed rules.

[19] American Feed Industry Association (''AFIA'') (CL 04) (representing animal feed interests); International Swaps and Derivatives Association, Inc. (''ISDA'') (CL 06) (representing participants in the privately negotiated derivatives industry); American Public Gas Association (''APGA'') (CL 07) (the national association for publicly-owned natural gas distribution systems); Society of Independent Gasoline Marketers of America (''SIGMA'') (CL 08) (a national trade association representing independent chain retailers and marketers of motor fuel); Air Transport Association of America, Inc. (''ATA'') (CL 09) (airline trade association); Managed Funds Association (''MFA'') (CL 10) (representing the global alternative investment community).

[20] HoustonStreet Exchange (CL 01); InterContinental Exchange, Inc. (''ICE'') (CL 03).

[21] OTC Global Holdings, Inc. (CL 11) OTC Global Holdings has submitted notification to the Commission of its intent to operate a market pursuant to the exemption found in section 2(h)(3) of the Act.

[22] CME Group (CL 02).

for uncleared transactions through volume accountability levels (based on a measure of net uncleared trading calculated by netting each trader's long and short uncleared transactions against the same counterparty). As more fully discussed below, the Commission believes the issues and recommendations raised by these commenters merit further attention and study. The Commission is mindful, however, that the time constraints imposed by the Reauthorization Act for issuing final rules implementing section 2(h)(7) do not permit the level of study necessary to properly address and resolve these issues.[23] Moreover, even if the Commission was prepared immediately to adopt some or all of the suggested changes, they reflect a substantial departure from the proposed guidance that might warrant re-proposal under the Administrative Procedure Act.[24]

For these reasons, the Commission, in an abundance of caution, has determined not to make final its Core Principle IV proposed guidance and acceptable practices relating to uncleared trades pending a full and complete evaluation of the issues raised in these comments. Accordingly, upon publication of this notice of final rulemaking, the Commission intends to immediately examine these issues and to issue a notice of proposed rulemaking that specifically addresses appropriate guidance and acceptable practices for uncleared trades on ECMs.

Like all core principles, Core Principle IV is statutory, and the Commission's decision not to provide particular guidance or safe harbors with respect to ECM uncleared trades at this time does not diminish an ECM's obligation to comply with the core principle itself. In that regard, the Commission reminds interested parties that section 2(h)(7)(C)(ii) of the CEA gives an electronic trading facility explicit discretion to take into account differences between cleared and uncleared SPDCs in applying the position limits and accountability core principle.[25] Likewise, the Commission will take these differences into account when reviewing an ECM's implementation of a core principle, as directed by section 2(h)(7)(D)(i).

II. The Final Rules

A. Part 36—Exempt Markets

Part 36 of the Commission's rules governs both exempt boards of trade and ECMs, regardless of whether any individual contract traded thereon is a significant source for price discovery. As described *infra,* Rule 36.3 more particularly imposes a number of requirements and restrictions on ECMs, including notification of the ECM's intent to rely on the section 2(h)(3) exemption; initial and ongoing information submission requirements; prohibited representations; price discovery notification; and price dissemination requirements. The Commission is adopting as proposed the provisions of Rule 36.3(b) that separately specify the information submission requirements, both initially and on an ongoing basis, for all ECMs and for ECMs with respect to agreements, contracts or transactions that have not been determined to perform a significant price discovery function.

The Commission is adopting as proposed the substance of that provision's enhanced reporting requirements for ECMs with SPDCs. However, the final rules will correct an error in numbering in rule 36.3(b)(2). As proposed, rule 36.3(b)(2)(i) provided that ECMs, with respect to contracts that have not been determined to be SPDCs, must identify to the CFTC those contracts that averaged five trades per day or more over the most recent calendar quarter, and for each such contract, either: pursuant to subparagraph (A), submit a weekly report to the CFTC showing specific information; or, pursuant to subparagraph (B)(1), provide the Commission with electronic access sufficient to allow it to compile the same information. The rule then also required in subparagraph (B)(2) through (B)(4) that the ECM maintain and provide the CFTC with other records.[26] These last three requirements were incorrectly numbered. Because they apply regardless of whether the ECM has elected the weekly reporting path of rule 36.3(b)(2)(i)(A) or to provide access to the CFTC pursuant to rule 36.3(b)(2)(i)(B), these requirements properly are numbered as 36.3(b)(2)(ii)–(iv) rather than as 36.3(b)(2)(i)(B)(2)–(4).[27]

Proposed rule 36.3(c) and Appendix A to Part 36 set forth the procedures and guidance, respectively, which the Commission will use in determining whether an ECM agreement, contract or transaction is a SPDC. The Commission is adopting, substantially as proposed, Appendix A and its general guidance as to how the Commission expects flexibly to apply the four criteria specified in section 2(h)(7) of the CEA for determining a SPDC—price linkage, arbitrage, material price reference and material liquidity. Although much of rule 36.3(c) and its SPDC-determination procedures are being adopted as proposed, some provisions have been modified in response to comments and some have been modified to reflect technical and clarifying changes.

The Commission has made a technical correction to proposed new rule 36.3(c)(1)(i). This rule is intended to track the statutory language added to the CEA by the Reauthorization Act as section 2(h)(7)(B)(i), which provides that in determining a SPDC, the Commission shall consider, as appropriate,

> 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 or a derivatives transaction execution facility, or a significant price discovery contract 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.

As proposed, section 36.3(c)(1)(i) inadvertently dropped a portion of the statutory language. The final rules have been corrected to reflect the complete statutory provision.

As proposed, rule 36.3(c)(3) provides that the Commission will issue an order determining whether a contract is a SPDC after consideration of all relevant information, including any ''data, views and arguments'' submitted to the Commission in response to **Federal Register** notification of the Commission's intent to so evaluate the contract. The proposed rule did not include a timeframe for issuance of such an order. CME Group suggests that the public interests underlying the regulatory oversight requirements for

[23] Congress has directed that the Commission issue proposed rules implementing section 2(h)(7) of the CEA not later than 180 days after the date of enactment of the Reauthorization Act (June 18, 2008), and that the Commission issue final rules no later than 270 days after the date of enactment. Public Law 110–246 at section 13204.

[24] 5 U.S.C. 553.

[25] *See also* Conference Committee Report at 985–86.

[26] Subparagraph (B)(2) required that the ECM maintain a record of allegations and complaints; subparagraph (B)(3) direct the ECM to provide the CFTC with a copy of the record of each complaint relating to violations of the CEA; pursuant to subparagraph (B)(4) the ECM must provide the Commission with a quarterly list of transactions executed in reliance on the section 2(h)(3) exemption and indicate the terms and conditions, average daily trading volume, and most recent open interest figures for each such transaction.

[27] To complete this technical correction, proposed rule 36.3(b)(2)(i)(B)(1) is properly numbered as 36.3(b)(2)(i)(B) in the final rules.

SPDCs dictate that such determinations be issued within a reasonable timeframe following the close of the comment period for the **Federal Register** notification.[28] The Commission is committed to the prompt and thorough processing of SPDC determinations and agrees, as CME Group suggests, that absent special circumstances, its order generally should issue within 60 days of the closing of the comment period. We are aware, however, that the term ''special circumstances'' may take its meaning from the particular context, including but not limited to the volume of work before the agency and the complexity of the submission under review, and we are reluctant to define those circumstances by rule. The Commission instead has modified rule 36.3(c)(3) to specify that the Commission shall promptly consider relevant information and shall issue an order explaining its determination within a reasonable period of time after the close of the comment period.[29]

Proposed rule 36.3(c)(4) established the timetables for compliance with the core principles by ECMs that have been determined to have a SPDC, providing a 90-day grace period for an ECM's initial SPDC and a 15-day grace period for subsequently-identified SPDCs traded on the same ECM. CME Group suggests that the passage of the Reauthorization Act put ECMs on notice that one or more of their contracts may become a SPDC at some future date; in its view, a 45-day grace period should be sufficient for all ECMs. ATA also views a 90-day grace period as excessive in light of ECMs' sophistication and suggests that ECMs can demonstrate compliance with the core principles in 60 days. With due regard for the market integrity interests associated with the core principles, we disagree that all ECMs will be able, in every circumstance, to demonstrate compliance with all the core principles within 45 or 60 days. While larger, established ECMs may be prepared to develop core principle compliance strategies in anticipation of a SPDC determination, the grace period must also permit ECMs that are less well-established sufficient time to develop and implement programs responsive to the core principles. Accordingly, the Commission has adopted as final the 90-day grace period for initial compliance with the core principles.

Although ISDA found the 90-day time frame reasonable, noting that it allows market participants to make necessary changes to their trading system to ensure compliance with the core principles,[30] it objected to the 15-day grace period for subsequently-identified SPDCs and urged the Commission to extend the timeframe in recognition of the additional obligations compliance imposes and the likely system changes required of ECMs.[31] ICE noted that both the 90-day and 15-day grace periods generally allow sufficient time for an ECM to comply with the core principles, but warned that 15 calendar days may not be sufficient time for clearing firms that outsource large trader reporting to meet the reporting requirements. The Commission has considered these suggestions and believes that 30 calendar days should be sufficient to ensure that clearing firms can meet the reporting requirements and avoid market disruptions. Rule 36.3(c)(4) has been modified accordingly to grant a 30-day period for ECMs to come into core principle compliance for their subsequent SPDCs. In addition to this change, the Commission has determined to clarify rule 36.3(c)(4) by changing the second sentence of this provision[32] to read ''* * * one of the electronic trading facility's agreements, contracts or transactions performs a significant price discovery function* * *''

In order to clarify its intent and eliminate a redundancy in paragraph (B)(4) of Appendix A, the Commission is amending Appendix A to part 36 as follows: Paragraph (B)(4) is deleted in its entirety as repetitive of paragraph (B)(3). In paragraph (B)(3), the language beginning with ''In combination with this volume level'' will become new paragraph (B)(4).

B. Substantive Compliance With Core Principle IV: Guidance and Acceptable Practices

Although comments addressing the nine ECM SPDC core principles generally expressed satisfaction with the Commission's proposed guidance and acceptable practices, the Commission's guidance for substantive compliance with Core Principle IV—particularly with respect to speculative position limits and the treatment of uncleared contracts—was a cause for concern among several commenters. Their comments are summarized below.

1. The Commission's authority with respect to uncleared trades. In its comment letter, ISDA questioned the Commission's authority under the Reauthorization Act to address limits for uncleared SPDC transactions in its Core Principle IV acceptable practices.[33] In support, ISDA cites Core Principle IV's direction that ECMs take into account positions in other ''agreements, contracts, and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible'' with a SPDC when determining appropriate position limitations or accountability for the SPDC.[34] The Commission believes that Congress did not so limit the Commission's authority with respect to uncleared SPDC transactions; on the contrary, both the statutory language and the legislative history make plain that Congress intended for new CEA section 2(h)(7) to apply to all SPDCs, whether cleared or uncleared. The Conference Committee report emphasizes that the legislation gives electronic trading facilities ''the explicit discretion to take into account differences between cleared and uncleared SPDCs in applying the position limits or accountability core principle.''[35] And CEA section 2(h)(7)(D) directs the Commission to ''take into consideration the differences'' between cleared and uncleared trades in reviewing an ECM's implementation of the core principles. Under principles of statutory construction, Congress must be presumed to have said what it meant.[36] The Commission believes that the ECM SPDC Core Principle IV clause cited by ISDA in support of its argument stands for a different proposition altogether. Specifically, the clause pertains to

[28] CME Group CL 02 at 7–8.

[29] The ATA urged the Commission to revise proposed rule 36.3(c)(3) ''to provide 14 calendar days notice, not 30, of its intention to designate a contract as an SPDC.'' CL 09 at 5. The Commission wishes to clarify that rule 36.3(c)(3) establishes a 30-day notice and comment period following the Commission's notice of its intention to undertake a determination whether a particular contract is a SPDC. ATA further urges the Commission to specify that it will issue a final determination no later than 14 days from the end of the comment period. As discussed *supra,* while the Commission is committed to reviewing potential SPDCs as expeditiously as possible, in our view 14 days is inadequate to review and issue a determination on any SPDC and in most cases would preclude an adequate evaluation of complex matters.

[30] ISDA CL 06 at 3.

[31] *Id.* ISDA's comment did not recommend a specific time period.

[32] As proposed, the relevant phrase reads as follows: ''* * * the electronic trading facility's agreement, contract or transaction performs a significant price discovery function* * *'' *See* 73 FR 75888 at 75911.

[33] ISDA CL 06 at 2.

[34] *Id.*

[35] Conference Committee Report at 985–86; Public Law 110–246 at 13201.

[36] Where the plain language of a statute is clear, courts generally will presume that Congress meant precisely what it said absent a showing that ''as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.'' *Engine Mfrs. Ass'n* v. *EPA,* 88 F.3d 1075, 1089 (D.C. Cir. 1996), quoted *in National Public Radio, Inc. et al.* v. *FCC,* 254 F.3d 226, 230 (D.C. Cir. 2001).

transactions in ''other agreements, contracts and transactions.'' Accordingly, Congress directed ECMs to include certain non-SPDC transactions when applying position limitations and/or accountability levels to a SPDC. So, for example, if another non-SPDC ECM contract or even a contract executed off of a trading facility pursuant to CEA Section 2(h)(1) is fungible and cleared together with a SPDC, the subject ECM should take those non-SPDC positions ''into account'' when administering the SPDC's position limit or accountability regime.

2. Grace period for open positions. As proposed, the acceptable practices for Core Principle IV permitted a grace period of 90 calendar days from the ECM's implementation of speculative position limit rules for traders to comply with those rules unless a hedge exemption is granted by the ECM. MFA has recommended that the Commission, rather than creating a new grace period applicable only to SPDCs, should rely on the existing standards of section 4a(b)(2) of the CEA[37] and the standards applied to exchange-set speculative position limits under rule 150.5(f).[38] The Commission believes that this recommendation is premised on a misunderstanding of the statutory and regulatory structures governing exchange-set speculative position limits. As MFA notes, section 4a(b)(2) applies to Commission-set speculation limits, not exchange-set limits.[39]

Furthermore, Rule 150.5(f) no longer has direct application to DCM-set position limits. The statutory authority governing DCM-set limits is found in CEA section 5(d)(5)— DCM Core Principle 5.[40] That core principle does not contain any aspect of the exemptive language found in either CEA section 4a or Rule 150.5(f). Moreover, it should be noted that the part 38 rules explicitly exempt agreements, contracts or transactions traded on a DCM from all Commission rules other than those specifically referenced in Rule 38.2. That provision did not retain Rule 150.5(f).[41] Further, although the acceptable practices for Core Principle 5 (which are found in Appendix B to part 38) contain many of rule 150.5's provisions, they do not specify the rule 150.5(f) good faith exemption. Accordingly, the part 150 rules essentially constitute guidance for DCMs administering position limit regimes, Commission staff in overseeing such regimes has not required that position limits include an exemption for positions acquired in good faith.

The Reauthorization Act established Core Principle IV as part of new CEA section 2(h)(7) to require the establishment of position limitations or accountability levels for SPDCs listed on ECMs. As with DCM Core Principle 5, ECM Core Principle IV does not contain the exemptive provision for positions established in good faith—nor do its acceptable practices rely for authority on section 4a of the CEA. For this reason, the Commission was not obliged to adopt such a good faith exemption.[42] In the Commission's view, the primary goal for an ECM with a SPDC should be to ensure that large positions not be disruptive to the market. Indeed, a sudden decrease in a position to meet an ECM's newly-adopted position limit could itself be disruptive. The Commission's proposed acceptable practice was crafted to permit market participants to make any necessary adjustments to their positions in an orderly fashion, thus reducing market disruptions and avoiding, as much as possible, an unfair impact on position holders. For the reasons discussed in these sections, the Commission has determined to adopt the acceptable practice as proposed (except with respect to uncleared trades, as discussed *infra*), and reminds interested parties that acceptable practices serve as a safe harbor and do not represent the only means of compliance with the core principles.

3. Position Accountability

MFA also encourages the Commission to bring its Core Principle IV acceptable practices with respect to position accountability into closer alignment with its acceptable practices for DCMs. Although perfect symmetry between the DCM and ECM core principles and acceptable practices was not mandated by the Reauthorization Act and is not a primary goal of this rulemaking, it is the Commission's view that its expectations for DCMs and ECMs in this regard are not significantly different. MFA argues that ''DCMs are not mandated to conduct an inquiry in response to every breach of a position accountability level. Rather, DCMs have the discretion to determine whether to open an inquiry in particular cases.''[43] So, too, do ECMs under the Core Principle IV acceptable practices.[44] Unlike position limits, accountability levels are not limitations on position sizes, as traders are permitted to take positions in excess of the established accountability levels. ECMs are obliged to monitor trading in their markets and to discourage manipulative activity in the spot month as well as in back months; the purpose of accountability levels is to provide the ECM with additional information and authority to address positions that threaten to create disorderly trading or market abuses. For positions that exceed a position accountability level, appropriate action by the ECM may be dictated by a number of factors, including characteristics of the market and the size of the position relative to the market. For smaller positions that exceed the accountability level, the ECM may find that placing such positions on a ''close watch'' is appropriate. For larger positions, depending on the potential threat to the market, it may be appropriate for the ECM to request that the trader not further increase (or even reduce) a position. Market liquidity also should be considered when monitoring traders with positions above the accountability level; an ECM may find it appropriate to more aggressively limit positions in markets that are relatively illiquid. In any event, ECMs are reminded that the acceptable practices serve as safe harbors; alternative methods to monitor trading may be sufficient.

Also in connection with the ECM's monitoring of positions, the Commission has considered MFA's concern that the term ''investigation'' may connote a level of wrongdoing which, in turn, might inadvertently render a commodity pool ineligible to receive investor funds[45] or otherwise have an adverse effect on a trader's business. Although the Commission believes such a misimpression is unlikely, we have modified the acceptable practice to replace the word ''investigation'' with ''inquiry.''

With regard to establishing position accountability levels in non-spot months and all months combined, MFA questioned why ECMs are given specific guidance—that is, the ''10% of open

[37] 7 U.S.C. 6a(b)(2).

[38] MFA CL 10 at 6.

[39] *Id.*

[40] ''(5) Position Limitations or Accountability.—To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, the board of trade shall adopt position limitations or position accountability for speculators, where necessary and appropriate.'' 7 U.S.C. 7(d)(5).

[41] 17 CFR 38.2.

[42] In part for the reasons discussed in this section, the Commission expects in the near future to revisit and clarify Core Principle 5 for DCMs.

[43] MFA CL 10 at 4.

[44] MFA points to the directive in the Core Principle IV acceptable practices that an ECM ''should initiate'' an inquiry once a trader exceeds a position accountability level as an indication that action is mandated in every case. The Commission does not view this language as a mandate; as noted above, acceptable practices serve as safe harbors and do not represent the only means of compliance with the core principles.

[45] MFA CL 10 at 4.

interest'' standard—while DCMs are free to determine their own methodology.[46] Again, the Commission wishes to emphasize that its guidance for ECMs need not follow precisely the guidance it has offered—or not offered—for DCMs. The Commission believes it is sound practice for DCMs and ECMs to adopt non-spot month and all-months-combined position accountability levels or position limits and believes the specific guidance offered in this acceptable practice will be beneficial to ECMs wishing to take advantage of the safe harbor. Moreover, the Commission intends shortly to revisit DCM Core Principle 5 with a view to providing more specific guidance with respect to non-spot month and all-months-combined position accountability levels. Finally, the Commission wishes to remind interested parties that the ''10% of open interest'' standard for determining position accountability levels applies to unique SPDCs (i.e., cleared ECM contracts that are determined to be SPDCs based on material price reference grounds, rather than on the basis of economic equivalence[47] with another contract through a price linkage or arbitrage relationship). The acceptable practices for non-unique, economically-equivalent SPDCs provide that the ECM may adopt the accountability levels adopted by the DCM for the underlying contract.[48] As noted, the Commission expects to further consider the treatment of uncleared trades and anticipates proposing rule amendments as well as guidance and acceptable practices in the near future.

Speculative Position Limits: Accountability Levels for Uncleared Trades.

Both ISDA[49] and ICE[50] opined that requiring ECMs to adopt the same speculative position limits as an ''unaffiliated'' DCM would be anticompetitive since the DCM would have the authority to dictate the ECM's position limits even where an ECM is the dominant, more liquid market. CME Group and APGA suggest that the Commission should propose comprehensive, industry-wide speculative position limits that would apply to both cleared and uncleared transactions.[51] Similarly, MFA suggested that SPDCs should be incorporated into the existing regulatory framework because a separate category for uncleared trades could impede a trader's ability to reflect the true net economic exposure of a position and could chill legitimate economic activity.[52]

APGA supports the use of spot month speculative position limits as an effective tool for addressing contracts on commodities—such as natural gas—with constrained deliverable supplies.[53] It urges, however, that the Commission modify its proposed guidance such that an ECM must account for positions that may be held on another registered entity in economically-related SPDCs in setting such limits. Without such a revision, APGA believes that traders will be able to amass a far larger speculative position in the spot month by dividing its position among several markets or market segments for SPDCs.[54] Accordingly APGA urges that the volume accountability level for uncleared contracts should be included in calculating the size of a trader's position for speculative position limits purposes. APGA expresses similar concerns with respect to the Commission's proposal in the Core Principle IV guidance, and similarly suggests the establishment of separate accountability levels for cleared and uncleared trades and a separate volume accountability level in the spot month.[55] CME Group agrees that the proposed guidance should be reconsidered, and pointed out that the disparate standards provided by the acceptable practices make it possible for a trader to maintain double the position permitted for an economically equivalent contract on a DCM. CME Group believes that there should be one position limit and one associated set of accountability levels for non-spot contracts that apply across all activities for a SPDC, including cleared and uncleared trades.[56]

As noted above, these and other recommendations related to the proposed guidance and acceptable practices for Core Principle IV with respect to uncleared trades raise complex issues which, in the Commission's view, warrant further serious consideration before a decision can be made whether, and to what extent, they should be implemented. For this reason, the Commission has determined not to make final those aspects of the Core Principle IV guidance and acceptable practices relating to uncleared trades pending additional study of these comments and consultation with the commenters and others, culminating in a subsequent rulemaking proposing guidance and acceptable practices applicable to uncleared trades. As part of this process, and in the course of formulating that proposed guidance, the Commission will consider the issues raised in the comments received in connection with the instant rulemaking.

C. Market, Transaction and Large Trader Reporting Rules

Reporting Rules. With the three substantive exceptions noted below, the

[46] *Id.* at 4–5.

[47] With regard to ICE and ISDA's concern that economic equivalence is subjective (ICE CL 03 at 5; ISDA CL 06 at 2–3); the Commission believes the concept of economic equivalence is relatively straightforward. Essentially, the concept is designed to capture SPDCs that replicate or serve as a close substitute for a corresponding DCM, DTEF or second ECM SPDC contract. In this regard, any SPDC that is cash settled based on another contract's settlement price will be considered economically equivalent, assuming sufficient volume. In addition, SPDCs that can be used to arbitrage price discrepancies may be considered economically equivalent to DCM contracts. For arbitragable contracts to be considered economically equivalent, both the prices and the contract terms would have to be highly correlated. As part of its determination whether a particular contract is an SPDC, the Commission will indicate whether it considers the SPDC economically equivalent to another contract.

[48] ICE and ISDA warned that requiring an ECM to adopt a DCM's position limits for its economically-equivalent SPDCs may have anticompetitive implications for trading on an ECM (ICE CL 03 at 6; ISDA CL 06 at 3): a DCM could set an artificially low position limit for its own contract in order to squeeze out an ECM. The Commission does not believe this is a likely consequence of its acceptable practice. First, assuming that the DCM contract is the dominant market, setting the spot-month limit at an extraordinarily low level would limit trading in its own contract, which would be self-defeating. Secondly, the instant procedures are acceptable practices that provide a safe harbor; they are not rules or requirements, and they do not comprise all possible means of satisfying Core Principle IV. If an ECM believes that a DCM is engaging in anticompetitive behavior (which is itself the subject of a core principle for both ECMs and DCMs), it should notify the Commission and should propose alternative position limits and/or accountability levels that are reasonable and based on economic analysis.

[49] ISDA CL 06 at 3.

[50] ICE CL 03 at 5–6.

[51] CME Group CL 02 at 6; APGA CL 07 at 3–4.

[52] MFA CL 10 at 6. AFIA requests that as part of the final rule the Commission exercise its authority to remove the exemption for position limits that has been given to Index Speculator Funds. CL 04 at 2–3. The Commission appreciates AFIA's concern but notes that such an action is beyond the scope of the instant rulemaking.

[53] APGA CL 07 at 2–3. APGA also suggested that the Commission set federal speculative limits for exempt commodities and that such limits should be applied to a given trader's aggregate position in economically-equivalent contracts across all registered entities. While innovative and worthy of further consideration in the future, the Commission believes these recommendations are beyond the scope of the instant rulemaking.

[54] APGA CL 07 at 2–3.

[55] *Id.* at 5–6. APGA argues that the separate volume accountability category potentially would enable speculative traders to amass a larger position before prompting an inquiry by the ECM. More critically, where there is a separate volume accountability level in the spot-month, APGA stated that a trader can readily avoid a spot month speculative position limit by holding a combination of cleared and uncleared positions, even on the same market.

[56] CME Group CL 02 at 6.

Commission is promulgating the reporting rules as proposed.[57] Five commenters addressed the proposed reporting rules. ATA expresses support for the extension of the reporting rules to SPDCs—specifically, ATA endorses the application of the reporting requirements to ECM clearing members that clear SPDCs, regardless of their registration status with the Commission or their status as foreign or domestic persons.[58] ATA additionally expressed support for the use of transaction and trader identification data that would be collected under new rule 16.02 to monitor large SPDC positions. Four commenters expressed general concerns or recommended the adoption of additional or alternative amendments to the reporting rules.

CME Group, for example, observes that while the acceptable practices for Core Principle IV advise ECMs to establish an effective program for enforcement of SPDC position limits that should include a large trader reporting system to monitor and enforce daily compliance with position limit rules, Appendix B to Part 36 does not establish similar acceptable practices that tie large trader reporting requirements to the daily monitoring of volume accountability levels for uncleared SPDCs.[59] As noted above, the Commission intends expeditiously to propose rules and acceptable practices that will focus on position limit and accountability rules for uncleared SPDCs. The Commission intends to address CME Group's concern at that time.

HoustonStreet, an ECM, opined that voice brokers must be subject to the same reporting requirements as ECMs to ensure a level playing field in the OTC energy markets and to prevent market participants from avoiding transparency and disclosure obligations.[60] The Commission does not have authority under the CEA to directly extend the reporting rules to voice-brokered transactions which are not entered into in reliance on a section 2(h)(3) exemption and are not otherwise fungible with SPDCs for clearing purposes. Although the Commission does have the authority to require the reporting of all OTC and cash market positions (including voice-brokered transactions) under section 4i of the Act when traders' positions in contracts executed on or subject to the rules of a registered entity exceeds fixed thresholds, such an extension of the reporting rules is beyond the scope of this rulemaking.[61]

ISDA comments that the reporting rules' references to clearing members ''carrying'' large positions may be inappropriate in the context of transactions that are executed on ECMs, which by definition are principal-to-principal markets that do not permit some forms of intermediation.[62] With respect to ECMs, the Commission reiterates that the large trader reporting requirements of part 17 place the burden of routine position reporting on clearing members that clear positions for market participants or clear proprietary transactions. The term ''carry'' is used in the reporting rules to refer to and encompass both positions that are cleared for market positions and those that are cleared for the benefit of proprietary accounts. In either instance, the reporting rules view the clearing member to be carrying positions that, when in excess of the levels delineated in rule 15.03, would be reportable as part of a special account under part 17 of the Commission's rules. The continued use of the term ''carry'' in the reporting rules is consistent with the nature of ECM transactions. In coming to this determination, the Commission understands that clearing members that clear transactions for ECM market participants, although not executing SPDC or SPDC-fungible transactions on behalf of market participants, are in part providing clearing intermediation and taking on certain responsibilities that may be associated with executing brokers. In addition, the reporting rules generally need a working vocabulary that is flexible enough to cover transactions that are executed on disparate market structures and subject to different clearing methods. Because the reporting rules heretofore have not been applied to ECM transactions, the Commission will be mindful of the potential for ambiguities in the application of the rules to SPDCs and SPDC-fungible transactions, will monitor for the specific concerns raised by ISDA, and will implement appropriate amendments should they be required.

APGA raises a number of concerns and offered several recommendations. APGA noted that as proposed, the reporting rules would not routinely provide information on a SPDC trader's large uncleared positions and thus would leave a gap in the Commission's ability to collect necessary trader and market data. APGA initially notes that the transaction reporting requirements of new rule 16.02, which the Commission intends to use in part for market surveillance purposes, may not significantly improve the Commission's surveillance capability because of the possible inability to link the transaction-based information collected under the rule with a particular trader.[63] The language of new rule 16.02 requires all reporting markets, including ECMs with SPDCs, to report trade data and related order information for each transaction executed on the market, and upon request to accompany such data with information that identifies or facilitates the identification of each trader for each reported transaction. Since rule 16.02 only extends the identification requirement to markets that independently maintain such data, APGA is concerned that unless ECMs are explicitly required to maintain identifying information, the Commission will be unable to obtain the data it needs to construct an accurate picture of a trader's large positions in SPDCs.

Section 2(h)(5)(B)(ii)(I) of the Act requires all ECMs to maintain current records that include the name and address of each participant that is authorized to enter into transactions on the facility in reliance on section 2(h)(3) of the Act. In addition, final rule 36.3(b)(1) mandates that ECMs demonstrate that they require each authorized market participant to be an eligible commercial entity and that all contracts will be entered into solely on a principal-to-principal basis. The rule also requires that ECMs have in place a program to routinely monitor participants' compliance with these requirements. The Commission believes that the nature of the section 2(h)(3) qualified exemption itself, along with the above-mentioned statutory and regulatory requirements, mandates that ECMs know the identity of each trader for each transaction effected by such trader on or subject to the rules of the electronic trading facility regardless of whether such transactions are subject to centralized clearing or settled bilaterally by the executing traders. New rule 16.02 applies to all reporting markets, including DCMs. DCMs do not, as a matter of routine practice, collect detailed trader identifying data.[64]

[57] 17 CFR parts 15 through 21.

[58] ATA CL 09 at 8.

[59] CME Group CL 02 at 5.

[60] HoustonStreet, CL 01 at 1.

[61] A routine trader reporting requirement, including the routine reporting of OTC positions, is not a current requirement for any contract traded on or subject to the rules of a DCM.

[62] ISDA CL 06 at 3–4.

[63] APGA CL 07 at 7–8.

[64] Unlike SPDCs traded on ECMs, however, all contracts on DCMs are funneled through clearing members that are subject to the large trader reporting rules. Therefore, the Commission need

Continued

Accordingly, rule 16.02 has been drafted to take into consideration current DCM practice while permitting the Commission to collect detailed trader identification data—which ECMs are required to maintain—from ECMs that are reporting markets.

APGA also argues that even if the Commission did collect identifying data under rule 16.02 from ECMs that are reporting markets, it still would be unable to determine a particular trader's ability to impact market prices without routinely obtaining information with respect to uncleared contracts that are economically related to SPDCs but effectuated off of a registered entity. Accordingly, APGA urges the Commission to use its authority under section 4i of the Act to require that large traders routinely report such transactions.[65] Alternatively, APGA recommends that the Commission at a minimum adopt a formal policy of aggressively using its special call authority under rule 18.05 to request information with respect to such uncleared transactions. APGA describes this policy as one that could require staff to issue special calls for information regarding uncleared positions for all traders that hold positions that are below speculative position limits but which are large enough to be significant.[66]

As discussed above in connection with HoustonStreet's comment letter, the Commission does have the authority, under section 4i of the CEA and the special call provisions of part 18 of its rules, to require traders that hold reportable SPDC positions to report their OTC (cleared and uncleared) and cash market positions. An extension of routine reporting requirements to such positions is, however, beyond the scope of this rulemaking and at odds with a long-established large trader reporting system that places the initial burden of reporting on intermediaries that are typically regulated and well-versed in complying with routine reporting requirements. Any routine reporting requirement imposed on traders as a class would represent a substantial departure from the Commission's current reporting system and would necessitate careful study and consideration prior to a final determination.

Lastly, APGA recommends that for the purpose of regulatory clarity the Commission's special call authority under rule 18.05 be amended to refer directly to traders that hold or control reportable futures or option SPDC positions on ECMs operating under sections 2(h)(3) through 2(h)(5) of the Act.[67] The language of rule 18.05 applies directly to traders with reportable positions. A reportable position, in turn, is defined in rule 15.00 to include commodity futures and options positions on reporting markets—including, with respect to a contract that the Commission determines to be a SPDC—that exceeds the reporting levels established by Commission rule 15.03. Accordingly, the Commission believes that the plain language of rule 18.05, as proposed, is directly applicable to traders that hold or control reportable futures or options SPDC positions on ECMs operating pursuant to sections 2(h)(3) through 2(h)(5) of the Act.

Changes to the Final Rules. For the purpose of regulatory clarity and to address generally the concerns raised by the commenters with respect to the scope of the reporting rules, the Commission is defining the terms futures and options contract solely for the purpose of the reporting rules as contracts executed on or subject to the rules of a reporting market, and all agreements, contracts and transactions that are treated by DCOs as fungible with such contracts.[68] The new definition impacts all of the operative provisions of parts 15 through 21 and reinforces and clarifies the applicability of the reporting rules, as proposed and adopted, to ECMs that list SPDCs, to SPDCs and to transactions that are treated as fungible with SPDCs by DCOs.

Rule 16.02 as adopted substitutes for the phrase ''for each transaction executed on the reporting market,'' the phrase ''for each futures or options contract.'' The Commission recognizes that certain transactions that are treated as fungible with SPDCs by DCOs may not clearly be executed on a reporting market, and this change is intended to address that point. In addition, final rule 15.05, which independently defines futures and options transactions, differs from the proposed rule in that it includes a conforming amendment to account for defining the terms futures and options contract in final rule 15.00. Lastly, the final definition of reportable position in rule 15.00 and final rule 19.00 differ from the proposed definitions in that they include nonsubstantive editorial amendments.

III. Related Matters

A. Cost Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing new regulations under the Act. Section 15(a) does not require the Commission to quantify the costs and benefits of new regulations or to determine whether the benefits of adopted rules outweigh their costs. Rather, section 15(a) requires the Commission to consider the costs and benefits of the subject rules. Section 15(a) further specifies that the costs and benefits of the rules 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 the market for listed derivatives; (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 is necessary and appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The final rules implement the Reauthorization Act by establishing an enhanced level of oversight of ECMs and ECM market participants. As a result, in certain cases, it is more appropriate to attribute the compliance costs imposed by the proposed rules to requirements that directly arise from the provisions of the Reauthorization Act.

Under the final rules, all DCMs, DTEFs (unless the Commission determines otherwise) and ECMs with SPDCs are required to provide daily transaction and related data reports to the Commission under rule 16.02. The costs associated with the daily transaction and related data reporting requirements of final rule 16.02, however, are ameliorated by the fact that DCMs have voluntarily provided transactional data to the Commission on a daily basis since the mid-1980s. The Commission estimates that DCMs would account for the substantial majority of the markets that likely would be required to file such reports under final rule 16.02.

The final rules extend the reporting requirements of parts 15 to 21 of the Commission's rules to ECMs with SPDCs and to transactions in SPDCs and SPDC-fungible contracts. The

not rely on new rule 16.02 to conduct DCM market surveillance.

[65] APGA CL 07 at 10.

[66] *Id.* at 9–10.

[67] *Id.*

[68] As noted in text, the Commission is utilizing these definitions solely to clarify the scope of its reporting rules. It does not intend these definitions to have any bearing on determining the boundaries of futures and options transactions over which it has jurisdiction under the CEA.

requirements of the adopted rules are substantial, involve the submission of daily reports, and impose burdens on market participants that clear and trade SPDCs and SPDC-fungible contracts. More specifically, the adopted rules require ECMs with SPDCs to provide clearing member reports for SPDCs and SPDC-fungible contracts to the Commission pursuant to CFTC rule 16.00. Final rule 16.01 requires ECMs to submit to the Commission and publicly disseminate option deltas and aggregated trading data on a daily basis for such transactions. Pursuant to rule 17.00, ECM clearing members that clear SPDCs and SPDC-fungible contracts are required to file reports with the Commission for large positions when such positions meet or exceed the contract reporting levels of rule 15.03. Under rule 17.01, clearing members also must identify the owners of reportable positions on Form 102. SPDC traders likewise are subject to the special call provisions of final part 18 of the Commission's rules for reportable positions, and clearing members, SPDC traders, and ECMs listing SPDCs are each subject to the special call provisions of final part 21 of the Commission's rules.

The costs associated with the requirements of the reporting rules should be reduced in part by the substantial overlap between the persons that already are subject to the reporting rules and the persons that are subject to the reporting rules pursuant to the Commission's final rules. For example, there is substantial overlap between traders of the natural gas contract on ICE and traders of the same contract on NYMEX. With respect to clearing members of ICE, for example, such persons often are clearing members or affiliates of clearing members of NYMEX.

The benefits of extending the reporting rules to SPDCs and SPDC-fungible contracts are substantial. As an initial matter, it is important to note that a significant focus of the Reauthorization Act concerned amending the CEA with the specific intent of giving the CFTC authority to extend its reporting rules to SPDC markets and market participants. To the extent that contracts listed on ECMs serve a significant price discovery function, the regulatory value of enhanced oversight, through the application of the reporting rules to such contracts, is elevated. The Commission analyzes the information funneled to it by the requirements of the reporting rules to conduct financial, market and trade practice surveillance. Without such information, the ability of the Commission to discharge its regulatory responsibilities—including the responsibilities to prevent market manipulations and commodity price distortions and ensure the financial integrity of the listed derivatives marketplace—would be compromised.

The bulk of the costs that are imposed by the requirements of final rule 36.3 relate to significant and increased submission of information requirements. For example, under final rule 36.3(b)(1), all ECMs are required to file certain basic information (including contract terms and conditions) with, and to make certain demonstrations related to compliance with the terms of the CEA section 2(h)(3) exemption to, the Commission. Final rule 36.3(b)(2) requires ECMs to submit transactional information on a weekly basis to the Commission for certain traded contracts that are not SPDCs and would not be subject to the terms of final rule 16.02. Likewise, final rule 36.3(c)(4) imposes a substantial cost on ECMs with SPDCs as a result of the information that such markets are required to submit to the Commission.

In enacting the Reauthorization Act, Congress directed the Commission to take an active role in determining whether contracts listed by ECMs qualify as SPDCs. Accordingly, the Commission has adopted enhanced informational requirements for ECMs with respect to contracts that have not been identified as SPDCs specifically for the purpose of acquiring the information that it needs to discharge this newly-mandated responsibility. In addition, the substantial information submission and demonstration requirements that are imposed on ECMs with SPDCs have been adopted because ECMs with SPDCs, by statute, acquire certain of the self-regulatory responsibilities of fully regulated DCMs. The submission requirements associated with final rule 36.3(c)(4) are therefore tailored to enable the Commission to ensure that ECMs with SPDCs, as entities with the elevated status of a registered entity under the Act, are in compliance with the statutory terms of the core principles of section 2(h)(7)(C) of the Act. As with the final reporting rules, the primary benefit to the public of final rule 36.3 is that its requirements enable the Commission to discharge its statutory responsibility for monitoring for the presence of SPDCs and extending its oversight to the trading of SPDCs.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.*, requires that agencies consider the impact of their rules on small businesses. As noted in the proposing release, the requirements related to the proposed amendments fall mainly on registered entities, exchanges, futures commission merchants, clearing members, foreign brokers and large traders. The Commission previously has determined that exchanges, futures commission merchants and large traders are not ''small entities'' for purposes of the RFA.[69] Similarly, clearing members, foreign brokers and traders would be subject to the final rules only if clearing, carrying or holding large positions. Accordingly, the Acting Chairman, on behalf of the Commission, certified in the NPRM pursuant to 5 U.S.C. 605(b) that the actions to be taken herein will not have a significant economic impact on a substantial number of small entities.[70]

C. Paperwork Reduction Act

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Final rule 16.02, the Commission's reporting rules, and certain provisions of final rule 36.3 result in information collection requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[71] The Commission submitted the proposing release along with supporting documentation to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission requested that OMB approve, and with respect to rules 36.3 and 16.02 assign a new control number for, the collections of information covered by the proposing release. The information collection burdens created by the Commission's proposed rules, which were discussed in detail in the proposing release, are identical to the collective information collection burdens of the final rules.

The Commission invited the public and other Federal agencies to comment on any aspect of the information collection requirements discussed above.[72] Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicited comments in order to: (i) Evaluate whether the proposed collections of information were necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimates of the burden of

[69] 47 FR 18618 (April 30, 1982).

[70] 73 FR 75888 at 75900.

[71] 44 U.S.C. 3501–3520.

[72] 73 FR 75888 at 75903.

the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. The Commission received no comment on its burden estimates or on any other aspect of the information collection requirements contained in its proposing release.

The title for the collection of information under rule 36.3 is ''Regulation 36.3—Exempt Commercial Market Submission Requirements.'' OMB has approved and assigned OMB control number 3038–0060 to this collection of information. The requirements of Commission rule 36.3 were covered previously by OMB control number 3038–0054 which applied to both EBOTs and ECMs. As a result of the Reauthorization Act, EBOTs and ECMs must comply with additional, divergent regulatory requirements. Accordingly, the Commission sought a new and separate control number for ECMs operating in compliance with the requirements of rule 36.3. As a result of OMB's approval of a control number specifically for ECMs, the Commission intends to submit the necessary documentation to OMB to enable it to apply OMB control number 3038–0054 exclusively to EBOTs.

The final amendments to parts 15 to 21 of the Commission's rules affect two existing collections of information titled ''Large Trader Reports'' (OMB control number 3038–0009) and ''Futures Volume, Open Interest, Price, Deliveries, and Exchanges of Futures'' (OMB control number 3038–0012). OMB has approved the amendments made to these two collections of information.

Finally, the title for the collection of information of new rule 16.02 is ''Regulation 16.02—Daily Trade and Supporting Data Reports.'' OMB has approved assigned OMB control number 3038–0061 to this collection of information.

List of Subjects

17 CFR Part 15

Brokers, Commodity futures, Reporting and recordkeeping requirements

17 CFR Part 16

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 17

Brokers, Commodity futures, Reporting and recordkeeping requirements

17 CFR Part 18

Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 19

Commodity futures, Cottons, Grains, Reporting and recordkeeping requirements.

17 CFR Part 21

Brokers, Commodity futures, Reporting and recordkeeping requirements.

17 CFR Part 36

Commodity futures, Commodity Futures Trading Commission

17 CFR Part 40

Commodity futures, Contract markets, Designation application, Reporting and recordkeeping requirements.

In consideration of the foregoing, and pursuant to the authority contained in the Act, as amended by the Reauthorization Act of 2008, Title XIII of Public Law 110–246, 122 Stat. 1624 (2008), and in particular sections 2, 5, 6, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, the Commodity Futures Trading Commission hereby amends 17 CFR parts 15, 16, 17, 18, 19, 21, 36 and 40 as follows:

PART 15—REPORTS—GENERAL PROVISIONS

■ 1. The authority citation for part 15 is revised to read as follows:

Authority: 7 U.S.C. 2, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 9, 12a, 19, and 21, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

■ 2. Section 15.00 is revised to read as follows:

§ 15.00 Definitions of terms used in parts 15 to 21 of this chapter.

As used in parts 15 to 21 of this chapter:

(a) *Cash or Spot,* when used in connection with any commodity, means the actual commodity as distinguished from a futures or options contract in such commodity.

(b) *Clearing member* means any person who is a member of, or enjoys the privilege of clearing trades in his own name through, the clearing organization of a designated contract market, registered derivatives transaction execution facility, or registered entity under section 1a(29) of the Act.

(c) *Clearing organization* means the person or organization which acts as a medium for clearing transactions in commodities for future delivery or commodity option transactions, or for effecting settlements of contracts for future delivery or commodity option transactions, for and between members of any designated contract market, registered derivatives transaction execution facility or registered entity under section 1a(29) of the Act.

(d) *Compatible data processing media* means data processing media approved by the Commission or its designee.

(e) *Customer means* ''customer'' (as defined in § 1.3(k) of this chapter) and ''options customer'' (as defined in § 1.3(jj) of this chapter).

(f) *Customer trading program* means any system of trading offered, sponsored, promoted, managed or in any other way supported by, or affiliated with, a futures commission merchant, an introducing broker, a commodity trading advisor, a commodity pool operator, or other trader, or any of its officers, partners or employees, and which by agreement, recommendations, advice or otherwise, directly or indirectly controls trading done and positions held by any other person. The term includes, but is not limited to, arrangements where a program participant enters into an expressed or implied agreement not obtained from other customers and makes a minimum deposit in excess of that required of other customers for the purpose of receiving specific advice or recommendations which are not made available to other customers. The term includes any program which is of the character of, or is commonly known to the trade as, a managed account, guided account, discretionary account, commodity pool or partnership account.

(g) *Discretionary account* means a commodity futures or commodity option trading account for which buying or selling orders can be placed or originated, or for which transactions can be effected, under a general authorization and without the specific consent of the customer, whether the general authorization for such orders or transactions is pursuant to a written agreement, power of attorney, or otherwise.

(h) *Exclusively self-cleared contract* means a cleared contract for which no persons, other than a reporting market and its clearing organization, are permitted to accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trade.

(i) *Foreign clearing member* means a ''clearing member'' (as defined by

paragraph (b) of this section) who resides or is domiciled outside of the United States, its territories or possessions.

(j) *Foreign trader* means any trader (as defined in paragraph (s) of this section) who resides or is domiciled outside of the United States, its territories or possessions.

(k) *Futures, futures contract, future delivery or contract for future delivery,* means any contract for the purchase or sale of any commodity for future delivery that is executed on or subject to the rules of a reporting market, including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts.

(l) *Guided account program* means any customer trading program which limits trading to the purchase or sale of a particular contract for future delivery of a commodity or a particular commodity option that is advised or recommended to the participant in the program.

(m) *Managed account program* means a customer trading program which includes two or more discretionary accounts traded pursuant to a common plan, advice or recommendations.

(n) *Open contracts means* ''open contracts'' (as defined in § 1.3(t) of this chapter) and commodity option positions held by any person on or subject to the rules of a board of trade which have not expired, been exercised, or offset.

(o) *Option, options, option contract, or options contract,* unless specifically provided otherwise, means any contract for the purchase or sale of a commodity option that is executed on or subject to the rules of a reporting market, including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts.

(p) *Reportable position* means:

(1) For reports specified in parts 17, 18 and § 19.00(a)(2) and (a)(3) of this chapter any open contract position that at the close of the market on any business day equals or exceeds the quantity specified in § 15.03 of this part in either:

(i) Any one futures of any commodity on any one reporting market, excluding futures contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market; or

(ii) Long or short put or call options that exercise into the same future of any commodity, or long or short put or call options for options on physicals that have identical expirations and exercise into the same physical, on any one reporting market.

(2) For the purposes of reports specified in § 19.00(a)(1) of this chapter, any combined futures and futures-equivalent option open contract position as defined in part 150 of this chapter in any one month or in all months combined, either net long or net short in any commodity on any one reporting market, excluding futures positions against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market, which at the close of the market on the last business day of the week exceeds the net quantity limit in spot, single or in all-months fixed in § 150.2 of this chapter for the particular commodity and reporting market.

(q) *Reporting market* means a designated contract market, registered entity under section 1a(29) of the Act, and unless determined otherwise by the Commission with respect to the facility or a specific contract listed by the facility, a registered derivatives transaction execution facility.

(r) *Special account* means any commodity futures or option account in which there is a reportable position.

(s) *Trader* means a person who, for his own account or for an account which he controls, makes transactions in commodity futures or options, or has such transactions made.

■ 3. Section 15.01 is amended by revising paragraph (a) to read as follows:

§ 15.01 Persons required to report.

* * * * *

(a) Reporting markets—as specified in parts 16, 17, and 21 of this chapter.

* * * * *

■ 4. Section 15.05 is amended by revising the heading and paragraph (a); and by adding paragraph (i) to read as follows:

§ 15.05 Designation of agent for foreign persons.

(a) For purposes of this section, the term ''futures contract'' means any contract for the purchase or sale of any commodity for future delivery, or a contract identified under section 36.3(b)(1)(i) as traded in reliance on the exemption in section 2(h)(3) of the Act, traded or executed on or subject to the rules of any designated contract market or registered derivatives transaction execution facility, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term ''option contract'' means any contract for the purchase or sale of a commodity option, or as applicable, any other instrument subject to the Act pursuant to section 5a(g) of the Act, traded or executed on or subject to the rules of any designated contract market or registered derivatives transaction execution facility, or for the purposes of paragraph (i) of this section, a reporting market (including all agreements, contracts and transactions that are treated by a clearing organization as fungible with such contracts); the term ''customer'' means any person for whose benefit a foreign broker makes or causes to be made any futures contract or option contract; and the term ''communication'' means any summons, complaint, order, subpoena, special call, request for information, or notice, as well as any other written document or correspondence.

* * * * *

(i) Any reporting market that is a registered entity under section 1a(29)(E) of the Act that permits a foreign clearing member or foreign trader to clear or effect contracts, agreements or transactions on the trading facility or its clearing organization, shall be deemed to be the agent of the foreign clearing member or foreign trader with respect to any such contracts, agreements or transactions cleared or executed by the foreign clearing member or the foreign trader. Service or delivery of any communication issued by or on behalf of the Commission to the reporting market shall constitute valid and effective service upon the foreign clearing member or foreign trader. The reporting market which has been served with, or to which there has been delivered, a communication issued by or on behalf of the Commission to a foreign clearing member or foreign trader shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the foreign clearing member or foreign trader.

(1) It shall be unlawful for any such reporting market to permit a foreign clearing member or a foreign trader to clear or effect contracts, agreements or transactions on the facility or its clearing organization unless the reporting market prior thereto informs the foreign clearing member or foreign trader of the requirements of this section.

(2) The requirements of paragraphs (i) and (i)(1) of this section shall not apply to any contracts, transactions or agreements if the foreign clearing member or foreign trader has duly executed and maintains in effect a

written agency agreement in compliance with this paragraph with a person domiciled in the United States and has provided a copy of the agreement to the reporting market prior to effecting or clearing any contract, agreement or transaction on the trading facility or its clearing organization. This agreement must authorize the person domiciled in the United States to serve as the agent of the foreign clearing member or foreign trader for the purposes of accepting delivery and service of all communications issued by or on behalf of the Commission to the foreign clearing member or the foreign trader and must provide an address in the United States where the agent will accept delivery and service of communications from the Commission. This agreement must be filed with the Commission by the reporting market prior to permitting the foreign clearing member or the foreign trader to clear or effect any transactions in futures or option contracts. Unless otherwise specified by the Commission, the agreements required to be filed with the Commission shall be filed with the Secretary of the Commission at Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(3) A foreign clearing member or a foreign trader shall notify the Commission immediately if the written agency agreement is terminated, revoked, or is otherwise no longer in effect. If the reporting market knows or should know that the agreement has expired, been terminated, or is no longer in effect, the reporting market shall notify the Secretary of the Commission immediately. If the written agency agreement expires, terminates, or is not in effect, the reporting market, the foreign clearing member and the foreign trader shall be subject to the provisions of paragraphs (i) and (i)(1) of this section.

* * * * *

■ 5. Section 15.06 is added to read as follows:

§ 15.06 Delegations.

(a) The Commission hereby delegates, until the Commission orders otherwise, the authority to approve data processing media, as referenced in § 15.00(d), for data submissions to the Director of the Division of Market Oversight, to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(b) [Reserved]

PART 16—REPORTS BY REPORTING MARKETS

■ 6. The authority citation for part 16 is revised to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6g, 6i, 7, 7a and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008), unless otherwise noted.

■ 7. Section 16.01 is amended by revising paragraph (e) to read as follows:

§ 16.01 Trading volume, open contracts, prices, and critical dates.

* * * * *

(e) *Publication of recorded information.* (1) Reporting markets shall make the information in paragraph (a) of this section readily available to the news media and the general public without charge, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains. The information in paragraphs (a)(4) through (a)(6) of this section shall be made readily available in a format that presents the information together.

(2) Reporting markets shall make the information in paragraphs (b)(1) and (b)(2) of this section readily available to the news media and the general public, and the information in paragraph (b)(3) of this section readily available to the general public, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains.

* * * * *

■ 8. Section 16.02 is added to read as follows:

§ 16.02 Daily trade and supporting data reports.

Reporting markets shall provide trade and supporting data reports to the Commission on a daily basis. Such reports shall include transaction-level trade data and related order information for each futures or options contract. Reports shall also include time and sales data, reference files and other information as the Commission or its designee may require. All reports must be submitted at the time, and in the manner and format, and with the specific content specified by the Commission or its designee. Upon request, such information shall be accompanied by data that identifies or facilitates the identification of each trader for each transaction or order included in a submitted trade and supporting data report if the reporting market maintains such data.

■ 9. Section 16.07 is amended by revising the heading and introductory text; and by adding paragraph (c) to read as follows:

§ 16.07 Delegation of authority to the Director of the Division of Market Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the authority set forth in paragraphs (a), (b) and (c) of this section to the Director of the Division of Market Oversight, to be exercised by such Director or by such other employee or employees of such Director as may be designated from time to time by the Director. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

* * * * *

(c) Pursuant to § 16.02, the authority to determine the specific content of any daily trade and supporting data report, request that such reports be accompanied by data that identifies or facilitates the identification of each trader for each transaction or order included in a submitted trade and supporting data report, and establish the time for the submission of and the manner and format of such reports.

PART 17—REPORTS BY REPORTING MARKETS, FUTURES COMMISSION MERCHANTS, CLEARING MEMBERS, AND FOREIGN BROKERS

■ 10. The authority citation for part 17 is revised to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6d, 6f, 6g, 6i, 7, 7a and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110–246, 122 Stat. 1624 (June 18, 2008), unless otherwise noted.

■ 11. Revise the heading of part 17 as set forth above.

■ 12. Section 17.00 is amended by the heading of paragraph (a) and paragraphs (a)(1), (b)(1), and (f); and by adding and reserving paragraph (c) to read as follows:

§ 17.00 Information to be furnished by futures commission merchants, clearing members and foreign brokers.

(a) *Special accounts—reportable futures and options positions, delivery notices, and exchanges of futures.* (1) Each futures commission merchant, clearing member and foreign broker shall submit a report to the Commission

for each business day with respect to all special accounts carried by the futures commission merchant, clearing member or foreign broker, except for accounts carried on the books of another futures commission merchant or clearing member on a fully-disclosed basis. Except as otherwise authorized by the Commission or its designee, such report shall be made in accordance with the format and coding provisions set forth in paragraph (g) of this section. The report shall show each futures position, separately for each reporting market and for each future, and each put and call options position separately for each reporting market, expiration and strike price en each special account as of the close of market on the day covered by the report and, in addition, the quantity of exchanges of futures for commodities or for derivatives positions and the number of delivery notices issued for each such account by the clearing organization of a reporting market and the number stopped by the account. The report shall also show all positions in all contract months and option expirations of that same commodity on the same reporting market for which the special account is reportable.

* * * * *

(b) * * *

(1) *Accounts of eligible entities*—Accounts of eligible entities as defined in § 150.1 of this chapter that are traded by an independent account controller shall, together with other accounts traded by the independent account controller or in which the independent controller has a financial interest, be considered a single account.

* * * * *

(c) [Reserved]

* * * * *

(f) *Omnibus accounts.* If the total open long positions or the total open short positions for any future of a commodity carried in an omnibus account is a reportable position, the omnibus account is in Special Account status and shall be reported by the futures commission merchant or foreign broker carrying the account in accordance with paragraph (a) of this section.

* * * * *

■ 13. Section 17.03 is amended by revising the heading, the introductory text, and paragraphs (a) and (b) to read as follows:

§ 17.03 Delegation of authority to the Director of the Division of Market Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the authority set forth in the paragraphs below to the Director of the Division of Market Oversight to be exercised by such Director or by such other employee or employees of such Director as designated from time to time by the Director. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(a) Pursuant to § 17.00(a) and (h), the authority to determine whether futures commission merchants, clearing members and foreign brokers can report the information required under paragraphs (a) and (h) of § 17.00 on series '01 forms or using some other format upon a determination that such person is unable to report the information using the format, coding structure or electronic data transmission procedures otherwise required.

(b) Pursuant to § 17.02, the authority to instruct or approve the time at which the information required under §§ 17.00 and 17.01 must be submitted by futures commission merchants, clearing members and foreign brokers provided that such persons are unable to meet the requirements set forth in §§ 17.01(g) and 17.02.

* * * * *

■ 14. Section 17.04 is amended by revising the heading, paragraph (a), and paragraph (b)(1)(ii) to read as follows:

§ 17.04 Reporting omnibus accounts to reporting firms.

(a) Any futures commission merchant, clearing member or foreign broker who establishes an omnibus account with another futures commission merchant, clearing member or foreign broker shall report to that futures commission merchant, clearing member or foreign broker the total open long positions and the total open short positions in each future of a commodity and, for commodity options transactions, the total open long put options, the total open short put options, the total open long call options, and the total open short call options for each commodity options expiration date and each strike price in such account at the close of trading each day. The information required by this section shall be reported in sufficient time to enable the futures commission merchant, clearing member or foreign broker with whom the omnibus account is established to comply with the regulations of this part and the reporting requirements established by the reporting markets.

(b) * * *

(1) * * *

(ii) The account is an omnibus account of another futures commission merchant, clearing member or foreign broker; or

* * * * *

PART 18—REPORTS BY TRADERS

■ 15. The authority citation for part 18 is revised to read as follows:

Authority: 7 U.S.C. 2, 4, 5, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 12a and 19, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008); 5 U.S.C. 552 and 552(b), unless otherwise noted.

■ 16. Section 18.01 is revised to read as follows:

§ 18.01 Interest in or control of several accounts.

If any trader holds, has a financial interest in or controls positions in more than one account, whether carried with the same or with different futures commission merchants or foreign brokers, all such positions and accounts shall be considered as a single account for the purpose of determining whether such trader has a reportable position and, unless instructed otherwise in the special call to report under § 18.00 for the purpose of reporting.

■ 17. Section 18.04 is amended by revising paragraphs (a)(7) and (b)(3)(i) to read as follows:

§ 18.04 Statement of reporting trader.

* * * * *

(a) * * *

(7) The names and locations of all futures commission merchants, clearing members, introducing brokers, and foreign brokers through whom accounts owned or controlled by the reporting trader are carried or introduced at the time of filing a Form 40, if such accounts are carried through more than one futures commission merchant, clearing member or foreign broker or carried through more than one office of the same futures commission merchant, clearing member or foreign broker, or introduced by more than one introducing broker clearing accounts through the same futures commission merchant, and the name of the reporting trader's account executive at each firm or office of the firm.

* * * * *

(b) * * *

(3) * * *

(i) Commercial activity associated with use of the option or futures market (such as and including production, merchandising or processing of a cash commodity, asset or liability risk management by depository institutions, or security portfolio risk management).

* * * * *

■ 18. Section 18.05 is amended by revising paragraphs (a)(2), (a)(3), and (a)(4) to read as follows:

§ 18.05 Maintenance of books and records.

(a) * * *

(2) Over the counter or pursuant to sections 2(d), 2(g) or 2(h)(1)–(2) of the Act or part 35 of this chapter;

(3) On exempt commercial markets operating pursuant to sections 2(h)(3)–(5) of the Act;

(4) On exempt boards of trade operating pursuant to section 5d of the Act; and

* * * * *

PART 19—REPORTS BY PERSONS HOLDING BONA FIDE HEDGE POSITIONS PURSUANT TO § 1.3(z) OF THIS CHAPTER AND BY MERCHANTS AND DEALERS IN COTTON

■ 19. The authority citation for part 19 is revised to read as follows:

Authority: 7 U.S.C. 6g(a), 6i, and 12a(5), as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008), unless otherwise noted.

■ 20. Section 19.00 is amended by revising paragraph (a) to read as follows:

§ 19.00 General provisions.

(a) *Who must file series '04 reports.* The following persons are required to file series '04 reports:

(1) All persons holding or controlling futures and option positions that are reportable pursuant to § 15.00(p)(2) of this chapter and any part of which constitute bona fide hedging positions as defined in § 1.3(z) of this chapter;

(2) Merchants and dealers of cotton holding or controlling positions for futures delivery in cotton that are reportable pursuant to § 15.00(p)(1)(i) of this chapter, or

(3) All persons holding or controlling positions for future delivery that are reportable pursuant to § 15.00(p)(1) of this chapter who have received a special call for series '04 reports from the Commission or its designee. Filings in response to a special call shall be made within one business day of receipt of the special call unless otherwise specified in the call. For the purposes of this paragraph, the Commission hereby delegates to the Director of the Division of Market Oversight, or to such other person designated by the Director, authority to issue calls for series '04 reports.

* * * * *

■ 21. Section 19.01 is amended by revising paragraph (b) introductory text and paragraph (b)(1) to read as follows:

§ 19.01 Reports on stocks and fixed price purchases and sales pertaining to futures positions in wheat, corn, oats, soybeans, soybean oil, soybean meal or cotton.

* * * * *

(b) *Time and place of filing reports*—Except for reports filed in response to special calls made under § 19.00(a)(3), each report shall be made monthly, as of the close of business on the last Friday of the month, and filed at the appropriate Commission office specified in paragraph (b)(1) or (2) of this section not later than the second business day following the date of the report in the case of the 304 report and not later than the third business day following the date of the report in the case of the 204 report. Reports may be transmitted by facsimile or, alternatively, information on the form may be reported to the appropriate Commission office by telephone and the report mailed to the same office, not later than midnight of its due date.

(1) CFTC Form 204 reports with respect to transactions in wheat, corn, oats, soybeans, soybean meal and soybean oil should be sent to the Commission's office in Chicago, IL, unless otherwise specifically authorized by the Commission or its designee.

* * * * *

PART 21—SPECIAL CALLS

■ 22. The authority citation for part 21 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 2a, 4, 6a, 6c, 6f, 6g, 6i, 6k, 6m, 6n, 7, 7a, 12a, 19 and 21, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008); 5 U.S.C. 552 and 552(b), unless otherwise noted.

■ 23. Section 21.01 is revised to read as follows:

§ 21.01 Special calls for information on controlled accounts from futures commission merchants, clearing members and introducing brokers.

Upon call by the Commission, each futures commission merchant, clearing member and introducing broker shall file with the Commission the names and addresses of all persons who, by power of attorney or otherwise, exercise trading control over any customer's account in commodity futures or commodity options on any reporting market.

■ 24. Section 21.02 is amended by revising the heading, introductory text, and paragraphs (f) and (i) to read as follows:

§ 21.02 Special calls for information on open contracts in accounts carried or introduced by futures commission merchants, clearing members, members of reporting markets, introducing brokers, and foreign brokers.

Upon special call by the Commission for information relating to futures or option positions held or introduced on the dates specified in the call, each futures commission merchant, clearing member, member of a reporting market, introducing broker, or foreign broker, and, in addition, for option information, each reporting market, shall furnish to the Commission the following information concerning accounts of traders owning or controlling such futures or option positions, except for accounts carried on a fully disclosed basis by another futures commission merchant or clearing member, as may be specified in the call:

* * * * *

(f) The number of open futures or option positions introduced or carried in each account, as specified in the call;

* * * * *

(i) As applicable, the following identifying information:

(1) Whether a trader who holds commodity futures or option positions is classified as a commercial or as a noncommercial trader for each commodity futures or option contract;

(2) Whether the open commodity futures or option contracts are classified as speculative, spreading (straddling), or hedging; and

(3) Whether any of the accounts in question are omnibus accounts and, if so, whether the originator of the omnibus account is another futures commission merchant, clearing member or foreign broker.

* * * * *

■ 25. Section 21.03 is amended as follows:

■ A. By revising the heading and paragraphs (a), (b), (c) and (d);

■ B. By revising paragraph (e) introductory text and paragraphs (e)(1) introductory text, (e)(1)(iv) and (e)(1)(v); and

■ C. By revising paragraphs (f), (g) and (h) to read as follows:

§ 21.03 Selected special calls-duties of foreign brokers, domestic and foreign traders, futures commission merchants, clearing members, introducing brokers, and reporting markets.

(a) For purposes of this section, the term ''accounts of a futures commission merchant, clearing member or foreign broker'' means all open contracts and transactions in futures and options on the records of the futures commission merchant, clearing member or foreign

broker; the term ''beneficial interest'' means having or sharing in any rights, obligations or financial interest in any futures or options account; the term ''customer'' means any futures commission merchant, clearing member, introducing broker, foreign broker, or trader for whom a futures commission merchant, clearing member or reporting market that is a registered entity under section 1a(29) of the Act makes or causes to be made a futures or options contract. Paragraphs (e), (g) and (h) of this section shall not apply to any futures commission merchant, clearing member or customer whose books and records are open at all times to inspection in the United States by any representative of the Commission.

(b) It shall be unlawful for a futures commission merchant to open a futures or options account or to effect transactions in futures or options contracts for an existing account, or for an introducing broker to introduce such an account, for any customer for whom the futures commission merchant or introducing broker is required to provide the explanation provided for in § 15.05(c) of this chapter, or for a reporting market that is a registered entity under section 1a(29)(E) of the Act, to cause to open an account in a contract traded in reliance on the exemption in section 2(h)(3) of the Act or to cause to be effected transactions in a contract traded in reliance on the exemption in section 2(h)(3) of the Act for an existing account for any person that is a foreign clearing member or foreign trader, until the futures commission merchant, introducing broker, clearing member, or reporting market has explained fully to the customer, in any manner that such persons deem appropriate, the provisions of this section.

(c) Upon a determination by the Commission that information concerning accounts may be relevant information in enabling the Commission to determine whether the threat of a market manipulation, corner, squeeze, or other market disorder exists on any reporting market, the Commission may issue a call for information from a futures commission merchant, clearing member, introducing broker or customer pursuant to the provisions of this section.

(d) In the event the call is issued to a foreign broker, foreign clearing member or foreign trader, its agent, designated pursuant to § 15.05 of this chapter, shall, if directed, promptly transmit calls made by the Commission pursuant to this section by electronic mail or a similarly expeditious means of communication.

(e) The futures commission merchant, clearing member, introducing broker, or customer to whom the special call is issued must provide to the Commission the information specified below for the commodity, reporting market and delivery months or option expiration dates named in the call. Such information shall be filed at the place and within the time specified by the Commission.

(1) For each account of a futures commission merchant, clearing member, introducing broker, or foreign broker, including those accounts in the name of the futures commission merchant, clearing member or foreign broker, on the dates specified in the call issued pursuant to this section, such persons shall provide the Commission with the following information:

* * * * *

(iv) Whether the account is carried for and in the name of another futures commission merchant, clearing member, introducing broker, or foreign broker; and

(v) For the accounts which are not carried for and in the name of another futures commission merchant, clearing member, introducing broker, or foreign broker, the name and address of any other person who controls the trading of the account, and the name and address of any person who has a ten percent or more beneficial interest in the account.

* * * * *

(f) If the Commission has reason to believe that any person has not responded as required to a call made pursuant to this section, the Commission in writing may inform the reporting market specified in the call and that reporting market shall prohibit the execution of, and no futures commission merchant, clearing member, introducing broker, or foreign broker shall effect a transaction in connection with trades on the reporting market and in the months or expiration dates specified in the call for or on behalf of the futures commission merchant or customer named in the call, unless such trades offset existing open contracts of such futures commission merchant or customer.

(g) Any person named in a special call that believes he or she is or may be adversely affected or aggrieved by action taken by the Commission under paragraph (f) of this section shall have the opportunity for a prompt hearing after the Commission acts. That person may immediately present in writing to the Commission for its consideration any comments or arguments concerning the Commission's action and may present for Commission consideration any documentary or other evidence that person deems appropriate. Upon request, the Commission may, in its discretion, determine that an oral hearing be conducted to permit the further presentation of information and views concerning any matters by any or all such persons. The oral hearing may be held before the Commission or any person designated by the Commission, which person shall cause all evidence to be reduced to writing and forthwith transmit the same and a recommended decision to the Commission. The Commission's directive under paragraph (f) of this section shall remain in effect unless and until modified or withdrawn by the Commission.

(h) If, during the course of or after the Commission acts pursuant to paragraph (f) of this section, the Commission determines that it is appropriate to undertake a proceeding pursuant to section 6(c) of the Act, the Commission shall issue a complaint in accordance with the requirements of section 6(c), and, upon further determination by the Commission that the conditions described in paragraph (c) of this section still exist, a hearing pursuant to section 6(c) of the Act shall commence no later than five business days after service of the complaint. In the event the person served with the complaint under section 6(c) of the Act has, prior to the commencement of the hearing under section 6(c) of the Act, sought a hearing pursuant to paragraph (g) of this section and the Commission has determined to accord him such a hearing, the two hearings shall be conducted simultaneously. Nothing in this section shall preclude the Commission from taking other appropriate action under the Act or the Commission's regulations thereunder, including action under section 6(c) of the Act, regardless of whether the conditions described in paragraph (c) of this section still exist, and no ruling issued in the course of a hearing pursuant to paragraph (g) or this paragraph shall constitute an estoppel against the Commission in any other action.

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■ 26. Section 21.04 is revised to read as follows:

§ 21.04 Delegation of authority to the Director of the Division of Market Oversight.

The Commission hereby delegates, until the Commission orders otherwise, the special call authority set forth in §§ 21.01 and 21.02 to the Director of the Division of Market Oversight to be exercised by such Director or by such other employee or employees of such Director as designated from time to time

by the Director. The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this paragraph. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section to the Director.

PART 36—EXEMPT MARKETS

■ 27. The authority citation for part 36 is revised to read as follows:

Authority: 7 U.S.C. 2, 2(h)(7), 6, 6c and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

■ 28. Section 36.3 is amended by revising paragraph (b) to read as follows:

§ 36.3 Exempt commercial markets.

* * * * *

(b) *Required information.*

(1) *All electronic trading facilities.* A facility operating in reliance on the exemption in section 2(h)(3) of the Act, initially and on an on-going basis, must:

(i) Provide the Commission with the terms and conditions, as defined in § 40.1(i) of this chapter and product descriptions for each agreement, contract or transaction listed by the facility in reliance on the exemption set forth in section 2(h)(3) of the Act, as well as trading conventions, mechanisms and practices;

(ii) Provide the Commission with information explaining how the facility meets the definition of ''trading facility'' contained in section 1a(33) of the Act and provide the Commission with access to the electronic trading facility's trading protocols, in a format specified by the Commission;

(iii) Demonstrate to the Commission that the facility requires, and will require, with respect to all current and future agreements, contracts and transactions, that each participant agrees to comply with all applicable laws; that the authorized participants are ''eligible commercial entities'' as defined in section 1a(11) of the Act; that all agreements, contracts and transactions are and will be entered into solely on a principal-to-principal basis; and that the facility has in place a program to routinely monitor participants' compliance with these requirements;

(iv) At the request of the Commission, provide any other information that the Commission, in its discretion, deems relevant to its determination whether an agreement, contract, or transaction performs a significant price discovery function; and

(v) File with the Commission annually, no later than the end of each calendar year, a completed copy of CFTC Form 205—Exempt Commercial Market Annual Certification. The information submitted in Form 205 shall include:

(A) A statement indicating whether the electronic trading facility continues to operate under the exemption; and

(B) A certification that affirms the accuracy of and/or updates the information contained in the previous Notification of Operation as an Exempt Commercial Market.

(2) *Electronic trading facilities trading or executing agreements, contracts or transactions other than significant price discovery contracts.* In addition to the requirements of paragraph (b)(1) of this section, a facility operating in reliance on the exemption in section 2(h)(3) of the Act, with respect to agreements, contracts or transactions that have not been determined to perform significant price discovery function, initially and on an on-going basis, must:

(i) Identify to the Commission those agreements, contracts and transactions conducted on the electronic trading facility with respect to which it intends, in good faith, to rely on the exemption in section 2(h)(3) of the Act, and which averaged five trades per day or more over the most recent calendar quarter; and, with respect to such agreements, contracts and transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day. Each such report shall be electronically transmitted weekly, within such time period as is acceptable to the Commission after the end of the week to which the data applies, and shall show for each such agreement, contract or transaction executed the following information:

(*1*) The underlying commodity, the delivery or price-basing location specified in the agreement, contract or transaction maturity date, whether it is a financially settled or physically delivered instrument, and the date of execution, time of execution, price, and quantity;

(*2*) Total daily volume and, if cleared, open interest;

(*3*) For an option instrument, in addition to the foregoing information, the type of option (*i.e.*, call or put) and strike prices; and

(*4*) Such other information as the Commission may determine; or

(B) Provide to the Commission, in a form and manner acceptable to the Commission, electronic access to those transactions conducted on the electronic trading facility in reliance on the exemption in section 2(h)(3) of the Act, and meeting the average five trades per day or more threshold test of this section, which would allow the Commission to compile the information described in paragraph (b)(2)(i)(A) of this section and create a permanent record thereof.

(ii) Maintain a record of allegations or complaints received by the electronic trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in section 2(h)(3) of the Act. The record shall contain the name of the complainant, if provided, date of the complaint, market instrument, substance of the allegations, and name of the person at the electronic trading facility who received the complaint;

(iii) Provide to the Commission, in the form and manner prescribed by the Commission, a copy of the record of each complaint received pursuant to paragraph (b)(2)(ii) of this section that alleges, or relates to, facts that would constitute a violation of the Act or Commission regulations. Such copy shall be provided to the Commission no later than 30 calendar days after the complaint is received. Provided, however, that in the case of a complaint alleging, or relating to, facts that would constitute an ongoing fraud or market manipulation under the Act or Commission rules, such copy shall be provided to the Commission within three business days after the complaint is received; and

(iv) Provide to the Commission on a quarterly basis, within 15 calendar days of the close of each quarter, a list of each agreement, contract or transaction executed on the electronic trading facility in reliance on the exemption set forth in section 2(h)(3) of the Act and indicate for each such agreement, contract or transaction the contract terms and conditions, the contract's average daily trading volume, and the most recent open interest figures.

(3) *Electronic trading facilities trading or executing significant price discovery contracts.* In addition to the requirements of paragraph (b)(1) of this section, if the Commission determines that a facility operating in reliance on the exemption in section 2(h)(3) of the Act trades or executes an agreement, contract or transaction that performs a significant price discovery function, the facility must, with respect to any significant price discovery contract, publish and provide to the Commission the information required by § 16.01 of this chapter.

(4) *Delegation of authority.* The Commission hereby delegates, until the

Commission orders otherwise, the authority to determine the form and manner of submitting the required information under paragraphs (b)(1) through (3) of this section, to the Director of the Division of Market Oversight and such members of the Commission's staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(5) *Special calls.* (i) All information required upon special call of the Commission under section 2(h)(5)(B)(iii) of the Act shall be transmitted at the time and to the office of the Commission as may be specified in the call.

(ii) The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls as set forth in section 2(h)(5)(B)(iii) of the Act to the Directors of the Divisions of Market Oversight, the Division of Clearing and Intermediary Oversight, and the Division of Enforcement to be exercised by each such Director or by such other employee or employees as the Director may designate. The Directors may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(6) *Subpoenas to foreign persons.* A foreign person whose access to an electronic trading facility is limited or denied at the direction of the Commission based on the Commission's belief that the foreign person has failed timely to comply with a subpoena as provided under section 2(h)(5)(C)(ii) of the Act shall have an opportunity for a prompt hearing under the procedures provided in § 21.03(b) and (h) of this chapter.

(7) *Prohibited representation.* An electronic trading facility relying upon the exemption in section 2(h)(3) of the Act, with respect to agreements, contracts or transactions that are not significant price discovery contracts, shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

* * * * *

■ 29. Section 36.3 is amended by revising paragraph (c) to read as follows:

§ 36.3 Exempt commercial markets.

* * * * *

(c) *Significant price discovery contracts*—(1) *Criteria for significant price discovery determination.* The Commission may determine, in its discretion, that an electronic trading facility operating a market in reliance on the exemption in section 2(h)(3) of the Act performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract or transaction executed or traded on the facility. In making such a determination, the Commission shall consider, as appropriate:

(i) *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 or a derivatives transaction execution facility, or a significant price discovery contract 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;

(ii) *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 contract market or derivatives transaction execution facility, or a significant price discovery contract or contracts trading 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;

(iii) *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, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility;

(iv) *Material liquidity.* The extent to which the volume of agreements, contracts or transactions in the 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 designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act;

(v) *Other material factors* [Reserved].

(2) *Notification of possible significant price discovery contract conditions.* An electronic trading facility operating in reliance on section 2(h)(3) of the Act shall promptly notify the Commission, and such notification shall be accompanied by supporting information or data concerning any contract that:

(i) Averaged five trades per day or more over the most recent calendar quarter; and

(ii) (A) For which the exchange sells its price information regarding the contract to market participants or industry publications; or

(B) 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 agreement, contract or transaction.

(3) *Procedure for significant price discovery determination.* Before making a final price discovery determination under this paragraph, the Commission shall publish notice in the **Federal Register** that it intends to undertake a determination with respect to whether a particular agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Any such written data, views and arguments shall be filed with the Secretary of the Commission, in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the **Federal Register** or within such other time specified by the Commission. After prompt consideration of all relevant information, the Commission shall, within a reasonable period of time after the close of the comment period, issue an order explaining its determination whether the agreement, contract or transaction executed or traded by the electronic trading facility performs a significant price discovery function under the criteria specified in paragraph (c)(1)(i) through (v) of this section.

(4) *Compliance with core principles.* Following the issuance of an order by the Commission that the electronic trading facility executes or trades an agreement, contract or transaction that performs a significant price discovery function, the electronic trading facility must demonstrate, with respect to that agreement, contract or transaction, compliance with the Core Principles under section 2(h)(7)(C) of the Act and the applicable provisions of this part. If the Commission's order represents the first time it has determined that one of the electronic trading facility's agreements, contracts or transactions performs a significant price discovery function, the facility must submit a

written demonstration of compliance with the Core Principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the electronic trading facility has an additional agreement, contract or transaction that performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of the Commission's order. Attention is directed to Appendix B of this part for guidance on and acceptable practices for complying with the Core Principles. Submissions demonstrating how the electronic trading facility complies with the Core Principles with respect to its significant price discovery contract must be filed with the Secretary of the Commission at its Washington, DC headquarters. Submissions must include the following:

(i) A written certification that the significant price discovery contract(s) complies with the Act and regulations thereunder;

(ii) A copy of the electronic trading facility's rules (as defined in § 40.1 of this chapter) and any technical manuals, other guides or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Subsequent rule changes must be certified by the electronic trading facility pursuant to section 5c(c) of the Act and § 40.6 of this chapter. The electronic trading facility also may request Commission approval of any rule changes pursuant to section 5c(c) of the Act and § 40.5 of this chapter;

(iii) A description of the trading system, algorithm, security and access limitation procedures with a timeline for an order from input through settlement, and a copy of any system test procedures, tests conducted, test results and contingency or disaster recovery plans;

(iv) A copy of any documents pertaining to or describing the electronic trading system's legal status and governance structure, including governance fitness information;

(v) An executed or executable copy of any agreements or contracts entered into or to be entered into by the electronic trading facility, including partnership or limited liability company, third-party regulatory service, or member or user agreements, that enable or empower the electronic trading facility to comply with a Core Principle;

(vi) A copy of any manual or other document describing, with specificity, the manner in which the trading facility will conduct trade practice, market and financial surveillance;

(vii) To the extent that any of the items in paragraphs (c)(4)(ii) through (vi) of this section raise issues that are novel, or for which compliance with a Core Principle is not self-evident, an explanation of how that item satisfies the applicable Core Principle or Principles.

The electronic trading facility must identify with particularity information in the submission that will be subject to a request for confidential treatment pursuant to § 145.09 of this chapter. The electronic trading facility must follow the procedures specified in § 40.8 of this chapter with respect to any information in its submission for which confidential treatment is requested.

(5) *Determination of compliance with core principles.* The Commission shall take into consideration differences between cleared and uncleared significant price discovery contracts when reviewing the implementation of the Core Principles by an electronic trading facility. The electronic facility also has reasonable discretion in accounting for differences between cleared and uncleared significant price discovery contracts when establishing the manner in which it complies with the Core Principles.

(6) *Information relating to compliance with core principles.* Upon request by the Commission, an electronic trading facility trading a significant price discovery contract shall file with the Commission a written demonstration, containing such supporting data, information and documents, in the form and manner and within such time as the Commission may specify, that the electronic trading facility is in compliance with one or more Core Principles as specified in the request, or that is otherwise requested by the Commission to enable the Commission to satisfy its obligations under the Act.

(7) *Enforceability.* An agreement, contract or transaction entered into on or pursuant to the rules of an electronic trading facility trading or executing a significant price discovery contract shall not be void, voidable, subject to rescission or otherwise invalidated or rendered unenforceable as a result of:

(i) A violation by the electronic trading facility of the provisions of section 2(h) of the Act or this part; or

(ii) Any Commission proceeding to alter or supplement a rule, term or condition under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to alter, supplement or require an electronic trading facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(8) *Procedures for vacating a determination of a significant price discovery function*—(i) *By the electronic trading facility.* An electronic trading facility that executes or trades an agreement, contract or transaction that the Commission has determined performs a significant price discovery function under paragraph (c)(3) of this section may petition the Commission to vacate that determination. The petition shall demonstrate that the agreement, contract or transaction no longer performs a significant price discovery function under the criteria specified in paragraph (c)(1), and has not done so for at least the prior 12 months. An electronic trading facility shall not petition for a vacation of a significant price discovery determination more frequently than once every 12 months for any individual contract.

(ii) *By the Commission.* The Commission may, on its own initiative, begin vacation proceedings if it believes that an agreement, contract or transaction has not performed a significant price discovery function for at least the prior 12 months.

(iii) *Procedure.* Before making a final determination whether an agreement, contract or transaction has ceased to perform a significant price discovery function, the Commission shall publish notice in the **Federal Register** that it intends to undertake such a determination and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Written submissions shall be filed with the Secretary of the Commission in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the **Federal Register** or within such other time specified by the Commission. After consideration of all relevant information, the Commission shall issue an order explaining its determination whether the agreement, contract or transaction has ceased to perform a significant price discovery function and, if so, vacating its prior order. If such an order issues, and the Commission subsequently determines, on its own initiative or after notification by the electronic trading facility, that the agreement, contract or transaction that was subject to the vacation order again performs a significant price discovery function, the electronic trading facility must comply with the Core Principles within 30 calendar days of the date of the Commission's order.

(iv) *Automatic vacation of significant price discovery determination.* Regardless of whether a proceeding to vacate has been initiated, any significant price discovery contract that has no open interest and in which no trading has occurred for a period of 12 complete and consecutive calendar months shall, without further proceedings, no longer be considered to be a significant price discovery contract.

■ 30. Section 36.3 is amended by adding new paragraph (d) to read as follows:

(d) *Commission Review.* The Commission shall, at least annually, evaluate as appropriate agreements, contracts or transactions conducted on an electronic trading facility in reliance on the exemption provided in section 2(h)(3) of the Act to determine whether they serve a significant price discovery function as described in § (d)(1) above.

■ 31. Add a new Appendix A to Part 36 to read as follows:

Appendix A to Part 36—Guidance on Significant Price Discovery Contracts

1. Section 2(h)(7) of the CEA specifies four factors that the Commission must consider, as appropriate, in making a determination that a contract is performing a significant price discovery function. The four factors prescribed by the statute are: Price Linkage; Arbitrage; Material Price Reference; and Material Liquidity.

2. Not all listed factors must be present to support a determination that a contract performs a significant price discovery function. Moreover, the statutory language neither prioritizes the factors nor specifies the degree to which a significant price discovery contract must conform to the various factors. Congress has indicated that it intends that the Commission should not make a determination that an agreement, contract or transaction performs a significant price discovery function on the basis of the Price Linkage factor unless the agreement, contract or transaction also has sufficient volume to impact other regulated contracts or to become an independent price reference or benchmark that is regularly utilized by the public. The Commission believes that the Arbitrage and Material Price Reference factors can be considered separately from each other. That is, the Commission could make a determination that a contract serves a significant price discovery function based on the presence of one of these factors and the absence of the other. The presence of any of these factors, however, would not necessarily be sufficient to establish the contract as a significant price discovery contract. The fourth factor, Liquidity, would be considered in conjunction with the arbitrage and linkage factors as a significant amount of liquidity presumably would be necessary for a contract to perform a significant price discovery function in conjunction with these factors.

3. These factors do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, this guidance is intended to illustrate which factors, or combinations of factors, the Commission will look to when determining that a contract is performing a significant price discovery function, and under what circumstances the presence of a particular factor or factors would be sufficient to support such a determination.

(A) MATERIAL LIQUIDITY—The extent to which the volume of agreements, contracts or transactions in the 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 designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act.

1. Liquidity is a broad concept that captures the ability to transact immediately with little or no price concession. Traditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity. So, for example, a market in which trades occur multiple times per minute at prices that differ by only fractions of a cent normally would be considered highly liquid, since presumably a trader could quickly execute a trade at a price that was approximately the same as the price for other recently executed trades. Other factors also will affect the characterization of liquidity, such as whether a large trade—*e.g.*, 100 contracts versus 1 contract—could be executed without a significant price concession. For example, having to wait a day to sell 1000 bushels of corn may be considered an illiquid market while waiting a day to sell a home may be considered quite liquid. Thus, quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another.

2. The Commission believes that material liquidity alternatively can be identified by the impact liquidity exhibits through observed prices. In markets where material liquidity exists, a more or less continuous stream of prices can be observed and the prices should be similar. For example, if the trading of a contract occurs on average five times a day, there will be on average five observed prices for the contract per day. If the market is liquid in terms of traders having to make little in the way of price concessions to execute these trades, the prices of this contract should be similar to those observed for similar or related contracts traded in liquid markets elsewhere. Thus, in making determinations that contracts have material liquidity, the Commission will look to transaction prices, both in terms of how often prices are observed and the extent to which observed prices tend to correlate with other contemporaneous prices.

3. The Commission anticipates that material liquidity will frequently be a consideration in evaluating whether a contract is a significant price discovery contract; however, there may be circumstances in which other factors so dominate the conclusion that a contract is serving a significant price discovery function that a finding of material liquidity in the contract would not be necessary. Circumstances in which this might arise are discussed with respect to the assessment of other factors below.

4. Finally, material liquidity itself would not be sufficient to make a determination that a contract is a significant price discovery contract, but combined with other factors it can serve as a guidepost indicating which contracts are functioning as significant price discovery contracts. As further discussed below, material liquidity, as reflected through the prices of linked or arbitraged contracts, will be a primary consideration in determining whether such contracts are significant price discovery contracts.

(B) 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 or a derivatives transaction execution facility, or a significant price discovery contract 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.

1. A price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract. The link may involve a one-to-one linkage, in that the value of the linked contract is based on a single contract's price, or it may involve multiple contracts. An example of a multiple contract linkage might be where the settlement price is calculated as an index of prices obtained from a basket of contracts traded on other exchanges.

2. For a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract(s). The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract(s). Where such price characteristics are observed on an ongoing basis, the Commission would expect to determine that the linked contract is a significant price discovery contract.

3. As an example, where the Commission has observed price linkage, it will next consider whether transactions were occurring on a daily basis for the linked contract in material volumes. (Conversely, where volume has increased noticeably in a particular contract, the Commission would look for linkage) The ultimate level of volume that would be considered material for purposes of deeming a contract a significant price discovery contract will likely differ from one contract to another depending on the characteristics of the underlying commodity and the overall size of the physical market in which it is traded. At a minimum, however, the Commission will consider a linked contract which has volume

equal to 5% of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a significant price discovery contract.

4. In combination with this volume level, the Commission will also examine the relationship between prices of the linked contract and the contract to which it is linked to determine whether a contract is serving a significant price discovery function. As a threshold, the Commission will consider a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement, or other daily prices over the most recent quarter to be sufficiently close for a linked contract potentially to be deemed a significant price discovery contract. For example, if, over the most recent quarter, it was found that 95 percent of the closing, settlement, or other daily prices of the contract, which have been calculated using transaction prices, were within 2.5 percent of the contemporaneously determined closing, settlement, or other daily prices of a contract to which it was linked, the Commission potentially would consider the contract to perform a significant price discovery function.

(C) ARBITRAGE CONTRACTS—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 contract market or derivatives transaction execution facility, or a significant price discovery contract or contracts trading 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.

1. Arbitrage contracts are those contracts that can be combined with other contracts to exploit expected economic relationships in anticipation of a profit. In assessing whether a contract can be incorporated into an arbitrage strategy, the Commission will weigh the terms and conditions of a contract in comparison to contracts that potentially could be used in an arbitrage strategy; will consult with industry or other sources regarding a contract's viability in an arbitrage strategy; and will rely on direct observation confirming the use of a contract in arbitrage strategies.

2. As with linked contracts, the mere fact that a contract could be employed in an arbitrage strategy will not be sufficient to make a determination that a contract is a significant price discovery contract. In addition, the level of liquidity will be considered. To assess whether designation as a significant price discovery contract is warranted, the Commission will examine the relationship between transaction prices of an arbitrage contract and the prices of the contract(s) to which it is related. The Commission believes that where material liquidity exists, prices for the arbitrage contract would be observed to move substantially in conjunction with the prices of the related contract(s) to which it is economically linked. Where such price characteristics are observed on an ongoing basis, it is likely that the linked contract performs a significant price discovery function.

3. The Commission will apply the same threshold liquidity and price relationship standards for arbitrage contracts as it does for linked contracts. That is, the Commission will view the average of five trades per day or more threshold as the level of activity that would potentially meet the material volume criterion. With respect to prices, the Commission will consider an arbitrage contract potentially to be a significant price discovery contract if, over the most recent quarter, greater than 95 percent of the closing or settlement prices of the contract, which have been calculated using transaction prices, fall within 2.5 percent of the closing or settlement price of the contract or contracts to which it could be arbitraged.

(D) 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, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.

1. 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. The primary source of direct evidence is that cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a frequent and recurring basis. The Commission expects that normally only contracts with material liquidity will be referenced by the cash market; however, the Commission notes that it may be possible for a contract to have very low liquidity and yet still be used as a price reference. In such cases, the simple fact that participants in the underlying cash market broadly have elected to use the contract price as a price reference would be a strong indicator that the contract is a significant price discovery contract.

2. In evaluating a contract's price discovery role as a directly referenced price source, the Commission will perform an analysis to determine 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. 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. The Commission will also consider whether cash market entities are quoting cash prices based on a section 2(h)(3) contract on a frequent and recurring basis.

3. The second source of evidence is that the price of the contract 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. As with contract prices that are directly incorporated into cash market prices, the Commission assumes that industry publications choose to publish prices because of the value they transfer to industry participants for the purpose of formulating prices in the cash market.

4. In applying this criterion, consideration will be given to whether prices established by a section 2(h)(3) contract are reported in a widely distributed industry publication. In making this determination, the Commission will consider the reputation of the publication within the industry, how frequently it is published, and whether the information contained in the publication is routinely consulted by industry participants in pricing cash market transactions.

5. Under a Material Price Reference analysis, the Commission expects that material liquidity in the contract likely will be the primary motivation for a publisher to publish particular prices. In other words, the fact that the price of a contract is being used as a reference by industry participants suggests, *prima facie*, that the contract performs a significant price discovery function. But the Commission recognizes that trading levels could nonetheless be low for the contract while still serving a significant price discovery function and that evidence of routine publication and consultation by industry participants may be sufficient to establish the contract as a significant price discovery contract. On the other hand, while cash market participants may regularly refer to published prices of a particular contract when establishing cash market prices, it may be the case that the contract itself is a niche market for a specialized grade of the commodity or for delivery at a minor geographic location. In such cases, the Commission will look to such measures as trading volume, open interest, and the significance of the underlying cash market to make a determination that a contract is functioning as a significant price discovery contract. If an examination of trading in the contract were to reveal that true price discovery was occurring in other more broadly defined contracts and that this contract was itself simply reflective of those broader contracts, it is less likely the Commission will deem the contract a significant price discovery contract.

6. Because price referencing normally occurs out of the view of the electronic trading facility, the Commission may have difficulty ascertaining the extent to which cash market participants actually reference or consult a contract's price when transacting. The Commission expects, however, that as a contract begins to be relied upon to set a reference price, market participants will be increasingly willing to purchase price information. To the extent, then, that an electronic trading facility begins to sell its price information regarding a contract to market participants or industry publications, the contract will meet a threshold standard to indicate that the contract potentially is a significant price discovery contract.

■ 32. Add a new Appendix B to Part 36 to read as follows:

Appendix B to Part 36—Guidance on, and Acceptable Practices in, Compliance With Core Principles

1. This Appendix provides guidance on complying with the core principles under section 2(h)(7)(C) of the Act and this part, both initially and on an ongoing basis. The guidance is provided in paragraph (a) following each core principle and can be used to demonstrate to the Commission core principle compliance under § 36.3(c)(4). The guidance for each core principle is illustrative only of the types of matters an electronic trading facility may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues and questions set forth in this guidance will help the Commission in its consideration of whether the electronic trading facility is in compliance with the core principles. A submission pursuant to § 36.3(c)(4) should include an explanation or other form of documentation demonstrating that the electronic trading facility complies with the core principles.

2. Acceptable practices meeting selected requirements of the core principles are set forth in paragraph (b) following each core principle. Electronic trading facilities on which significant price discovery contracts are traded or executed that follow the specific practices outlined under paragraph (b) for any core principle in this appendix will meet the selected requirements of the applicable core principle. Paragraph (b) is for illustrative purposes only, and does not state the exclusive means for satisfying a core principle.

CORE PRINCIPLE I OF SECTION 2(h)(7)(C)—CONTRACTS NOT READILY SUSCEPTIBLE TO MANIPULATION. The electronic trading facility shall list only significant price discovery contracts that are not readily susceptible to manipulation.

(a) *Guidance.* Upon determination by the Commission that a contract listed for trading on an electronic trading facility is a significant price discovery contract, the electronic trading facility must self-certify the terms and conditions of the significant price discovery contract under § 36.3(c)(4) within 90 calendar days of the date of the Commission's order, if the contract is the electronic trading facility's first significant price discovery contract; or 30 days from the date of the Commission's order if the contract is not the electronic trading facility's first significant price discovery contract. Once the Commission determines that a contract performs a significant price discovery function, subsequent rule changes must be self-certified to the Commission by the electronic trading facility pursuant to § 40.6 or submitted to the Commission for review and approval pursuant to § 40.5.

(b) *Acceptable practices.* Guideline No. 1, 17 CFR part 40, Appendix A may be used as guidance in meeting this core principle for significant price discovery contracts.

CORE PRINCIPLE II OF SECTION 2(h)(7)(C)—MONITORING OF TRADING. The electronic trading facility shall monitor trading in significant price discovery contracts to prevent market manipulation, price distortion, and disruptions of the delivery of cash-settlement process through market surveillance, compliance and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, demonstrate a capacity to prevent market manipulation and have trading and participation rules to detect and deter abuses. The facility should seek to prevent market manipulation and other trading abuses through a dedicated regulatory department or by delegation of that function to an appropriate third party. An electronic trading facility also should have the authority to intervene as necessary to maintain an orderly market.

(b) *Acceptable practices*—(1) *An acceptable trade monitoring program.* An acceptable trade monitoring program should facilitate, on both a routine and non-routine basis, arrangements and resources to detect and deter abuses through direct surveillance of each significant price discovery contract. Direct surveillance of each significant price discovery contract will generally involve the collection of various market data, including information on participants' market activity. Those data should be evaluated on an ongoing basis in order to make an appropriate regulatory response to potential market disruptions or abusive practices. For contracts with a substantial number of participants, an effective surveillance program should employ a much more comprehensive large trader reporting system.

(2) *Authority to collect information and documents.* The electronic trading facility should have the authority to collect information and documents in order to reconstruct trading for appropriate market analysis. Appropriate market analysis should enable the electronic trading facility to assess whether each significant price discovery contract is responding to the forces of supply and demand. Appropriate data usually include various fundamental data about the underlying commodity, its supply, its demand, and its movement through market channels. Especially important are data related to the size and ownership of deliverable supplies—the existing supply and the future or potential supply—and to the pricing of the deliverable commodity relative to the futures price and relative to similar, but non-deliverable, kinds of the commodity. For cash-settled contracts, it is more appropriate to pay attention to the availability and pricing of the commodity making up the index to which the contract will be settled, as well as monitoring the continued suitability of the methodology for deriving the index.

(3) *Ability to assess participants' market activity and power.* To assess participants' activity and potential power in a market, electronic trading facilities, with respect to significant price discovery contracts, at a minimum should have routine access to the positions and trading of its participants and, if applicable, should provide for such access through its agreements with its third-party provider of clearing services.

CORE PRINCIPLE III OF SECTION 2(h)(7)(C)—ABILITY TO OBTAIN INFORMATION. The electronic trading facility shall establish and enforce rules that allow the electronic trading facility to obtain any necessary information to perform any of the functions described in this subparagraph, provide the information to the Commission upon request, and have the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded or executed should, with respect to those contracts, have the ability and authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by participants. This includes having arrangements and resources for recording full data entry and trade details and safely storing audit trail data. An electronic trading facility should have systems sufficient to enable it to use the information for purposes of assisting in the prevention of participant and market abuses through reconstruction of trading and providing evidence of any violations of the electronic trading facility's rules.

(b) *Acceptable practices*—(1) The goal of an audit trail is to detect and deter market abuse. An effective contract audit trail should capture and retain sufficient trade-related information to permit electronic trading facility staff to detect trading abuses and to reconstruct all transactions within a reasonable period of time. An audit trail should include specialized electronic surveillance programs that identify potentially abusive trades and trade patterns. An acceptable audit trail must be able to track an order from time of entry into the trading system through its fill. The electronic trading facility must create and maintain an electronic transaction history database that contains information with respect to transactions executed on each significant price discovery contract.

(2) An acceptable audit trail should include the following: original source documents, transaction history, electronic analysis capability, and safe storage capability. An acceptable audit trail system would satisfy the following practices.

(i) *Original source documents.* Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded. For each order (whether filled, unfilled or cancelled, each of which should be retained or electronically captured), such records reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry.

(ii) *Transaction history.* A transaction history consists of an electronic history of each transaction, including (a) all the data that are input into the trade entry or matching system for the transaction to match and clear; (b) timing and sequencing data adequate to reconstruct trading; and (c) the identification of each account to which fills are allocated.

(iii) *Electronic analysis capability.* An electronic analysis capability that permits

sorting and presenting data included in the transaction history so as to reconstruct trading and to identify possible trading violations with respect to market abuse.

(iv) *Safe storage capability.* Safe storage capability provides for a method of storing the data included in the transaction history in a manner that protects the data from unauthorized alteration, as well as from accidental erasure or other loss. Data should be retained in the form and manner specified by the Commission or, where no acceptable manner of retention is specified, in accordance with the recordkeeping standards of Commission rule 1.31.

(3) Arrangements and resources for the disclosure of the obtained information and documents to the Commission upon request. To satisfy section 2(h)(7)(C)(III)(bb), the electronic trading facility should maintain records of all information and documents related to each significant price discovery contract in a form and manner acceptable to the Commission. Where no acceptable manner of maintenance is specified, records should be maintained in accordance with the recordkeeping standards of Commission rule 1.31.

(4) The capacity to carry out appropriate information-sharing agreements as the Commission may require. Appropriate information-sharing agreements could be established with other markets or the Commission can act in conjunction with the electronic trading facility to carry out such information sharing.

CORE PRINCIPLE IV OF SECTION 2(h)(7)(C)—POSITION LIMITATIONS OR ACCOUNTABILITY. The electronic trading facility shall adopt, where necessary and appropriate, position limitations or position accountability for speculators in significant price discovery contracts, taking into account positions in other agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contracts to reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month.

(a) *Guidance.* [Reserved]

(b) Acceptable practices for uncleared trades [Reserved]

(c) *Acceptable practices for cleared trades*—(1) *Introduction.* In order to diminish potential problems arising from excessively large speculative positions, and to facilitate orderly liquidation of expiring contracts, an electronic trading facility relying on the exemption in section 2(h)(3) should adopt rules that set position limits or accountability levels on traders' cleared positions in significant price discovery contracts. These position limit rules specifically may exempt bona fide hedging; permit other exemptions; or set limits differently by market, delivery month or time period. For the purpose of evaluating a significant price discovery contract's speculative-limit program for cleared positions, the Commission will consider the specified position limits or accountability levels, aggregation policies, types of exemptions allowed, methods for monitoring compliance with the specified limits or levels, and procedures for dealing with violations.

(2) *Accounting for cleared trades*—(i) Speculative-limit levels typically should be set in terms of a trader's combined position involving cleared trades in a significant price discovery contract, plus positions in agreements, contracts and transactions that are treated by a derivatives clearing organization, whether registered or not registered, as fungible with such significant price discovery contract. (This circumstance typically exists where an exempt commercial market lists a particular contract for trading but also allows for positions in that contract to be cleared together with positions established through bilateral or off-exchange transactions, such as block trades, in the same contract. Essentially, both the on-facility and off-facility transactions are considered fungible with each other.) In this connection, the electronic trading facility should make arrangements to ensure that it is able to ascertain accurate position data for the market. (ii) For significant price discovery contracts that are traded on a cleared basis, the electronic trading facility should apply position limits to cleared transactions in the contract.

(3) *Limitations on spot-month positions.* Spot-month limits should be adopted for significant price discovery contracts to minimize the susceptibility of the market to manipulation or price distortions, including squeezes and corners or other abusive trading practices.

(i) *Contracts economically equivalent to an existing contract.* An electronic trading facility that lists a significant price discovery contract that is economically-equivalent to another significant price discovery contract or to a contract traded on a designated contract market or derivatives transaction execution facility should set the spot-month limit for its significant price discovery contract at the same level as that specified for the economically-equivalent contract.

(ii) *Contracts that are not economically equivalent to an existing contract.* There may not be an economically-equivalent significant price discovery contract or economically-equivalent contract traded on a designated contract market or derivatives transaction execution facility. In this case, the spot-month speculative position limit should be established in the following manner. The spot-month limit for a physical delivery market should be based upon an analysis of deliverable supplies and the history of spot-month liquidations. The spot-month limit for a physical-delivery market is appropriately set at no more than 25 percent of the estimated deliverable supply. In the case where a significant price discovery contract has a cash settlement provision, the spot-month limit should be set at a level that minimizes the potential for price manipulation or distortion in the significant price discovery contract itself; in related futures and options contracts traded on a designated contract market or derivatives transaction execution facility; in other significant price discovery contracts; in other fungible agreements, contracts and transactions; and in the underlying commodity.

(4) *Position accountability for non-spot-month positions.* The electronic trading facility should establish for its significant price discovery contracts non-spot individual month position accountability levels and all-months-combined position accountability levels. An electronic trading facility may establish non-spot individual month position limits and all-months-combined position limits for its significant price discovery contracts in lieu of position accountability levels.

(i) *Definition.* Position accountability provisions provide a means for an exchange to monitor traders' positions that may threaten orderly trading. An acceptable accountability provision sets target accountability threshold levels that may be exceeded, but once a trader breaches such accountability levels, the electronic trading facility should initiate an inquiry to determine whether the individual's trading activity is justified and is not intended to manipulate the market. As part of its investigation, the electronic trading facility may inquire about the trader's rationale for holding a position in excess of the accountability levels. An acceptable accountability provision should provide the electronic trading facility with the authority to order the trader not to further increase positions. If a trader fails to comply with a request for information about positions held, provides information that does not sufficiently justify the position, or continues to increase contract positions after a request not to do so is issued by the facility, then the accountability provision should enable the electronic trading facility to require the trader to reduce positions.

(ii) *Contracts economically equivalent to an existing contract.* When an electronic trading facility lists a significant price discovery contract that is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract market or derivatives transaction execution facility, the electronic trading facility should set the non-spot individual month position accountability level and all-months-combined position accountability level for its significant price discovery contract at the same levels, or lower, as those specified for the economically-equivalent contract.

(iii) *Contracts that are not economically equivalent to an existing contract.* For significant price discovery contracts that are not economically equivalent to an existing contract, the trading facility shall adopt non-spot individual month and all-months-combined position accountability levels that are no greater than 10 percent of the average combined futures and delta-adjusted option month-end open interest for the most recent calendar year. For electronic trading facilities that choose to adopt non-spot individual month and all-months-combined position limits in lieu of position accountability levels for their significant price discovery contracts, the limits should be set in the same manner as the accountability levels.

(iv) *Contracts economically equivalent to an existing contract with position limits.* If a significant price discovery contract is economically equivalent to another significant price discovery contract or to a contract traded on a designated contract

market or derivatives transaction execution facility that has adopted non-spot or all-months-combined position limits, the electronic trading facility should set non-spot month position limits and all-months-combined position limits for its significant price discovery contract at the same (or lower) levels as those specified for the economically-equivalent contract.

(5) *Account aggregation.* An electronic trading facility should have aggregation rules for significant price discovery contracts that apply to accounts under common control, those with common ownership, *i.e.*, where there is a ten percent or greater financial interest, and those traded according to an express or implied agreement. Such aggregation rules should apply to cleared transactions with respect to applicable speculative position limits. An electronic trading facility will be permitted to set more stringent aggregation policies. An electronic trading facility may grant exemptions to its price discovery contracts' position limits for bona fide hedging (as defined in § 1.3(z) of this chapter) and may grant exemptions for reduced risk positions, such as spreads, straddles and arbitrage positions.

(6) *Implementation deadlines.* An electronic trading facility with a significant price discovery contract is required to comply with Core Principle IV as set forth in section 2(h)(7)C) of the Act within 90 calendar days of the date of the Commission's order determining that the contract performs a significant price discovery function if such contract is the electronic trading facility's first significant price discovery contract, or within 30 days of the date of the Commission's order if such contract is not the electronic trading facility's first significant price discovery contract. For the purpose of applying limits on speculative positions in newly-determined significant price discovery contracts, the Commission will permit a grace period following issuance of its order for traders with cleared positions in such contracts to become compliant with applicable position limit rules. Traders who hold cleared positions on a net basis in the electronic trading facility's significant price discovery contract must be at or below the specified position limit level no later than 90 calendar days from the date of the electronic trading facility's implementation of position limit rules, unless a hedge exemption is granted by the electronic trading facility. This grace period applies to both initial and subsequent price discovery contracts. Electronic trading facilities should notify traders of this requirement promptly upon implementation of such rules.

(7) *Enforcement provisions.* The electronic trading facility should have appropriate procedures in place to monitor its position limit and accountability provisions and to address violations.

(i) An electronic trading facility with significant price discovery contracts should use an automated means of detecting traders' violations of speculative limits or exemptions, particularly if the significant price discovery contracts have large numbers of traders. An electronic trading facility should monitor the continuing appropriateness of approved exemptions by periodically reviewing each trader's basis for exemption or requiring a reapplication. An automated system also should be used to determine whether a trader has exceeded applicable non-spot individual month position accountability levels and all-months-combined position accountability levels.

(ii) An electronic trading facility should establish a program for effective enforcement of position limits for significant price discovery contracts. Electronic trading facilities should use a large trader reporting system to monitor and enforce daily compliance with position limit rules. The Commission notes that an electronic trading facility may allow traders to periodically apply to the electronic trading facility for an exemption and, if appropriate, be granted a position level higher than the applicable speculative limit. The electronic trading facility should establish a program to monitor approved exemptions from the limits. The position levels granted under such hedge exemptions generally should be based upon the trader's commercial activity in related markets including, but not limited to, positions held in related futures and options contracts listed for trading on designated contract markets, fungible agreements, contracts and transactions, as determined by either a registered or unregistered derivatives clearing organization. Electronic trading facilities may allow a brief grace period where a qualifying trader may exceed speculative limits or an existing exemption level pending the submission and approval of appropriate justification. An electronic trading facility should consider whether it wants to restrict exemptions during the last several days of trading in a delivery month. Acceptable procedures for obtaining and granting exemptions include a requirement that the electronic trading facility approve a specific maximum higher level.

(iii) An acceptable speculative limit program should have specific policies for taking regulatory action once a violation of a position limit or exemption is detected. The electronic trading facility policies should consider appropriate actions.

(8) *Violation of Commission rules.* A violation of position limits for significant price discovery contracts that have been self-certified by an electronic trading facility is also a violation of section 4a(e) of the Act.

CORE PRINCIPLE V OF SECTION 2(h)(7)(C)—EMERGENCY AUTHORITY—The electronic trading facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, where necessary and appropriate, including the authority to liquidate open positions in significant price discovery contracts and to suspend or curtail trading in a significant price discovery contract.

(a) *Guidance.* An electronic trading facility on which significant price discovery contracts are traded should have clear procedures and guidelines for decision-making regarding emergency intervention in the market, including procedures and guidelines to avoid conflicts of interest while carrying out such decision-making. An electronic trading facility on which significant price discovery contracts are executed or traded should also have the authority to intervene as necessary to maintain markets with fair and orderly trading as well as procedures for carrying out the intervention. Procedures and guidelines should include notifying the Commission of the exercise of the electronic trading facility's regulatory emergency authority, explaining how conflicts of interest are minimized, and documenting the electronic trading facility's decision-making process and the reasons for using its emergency action authority. Information on steps taken under such procedures should be included in a submission of a certified rule and any related submissions for rule approval pursuant to part 40 of this chapter, when carried out pursuant to an electronic trading facility's emergency authority. To address perceived market threats, the electronic trading facility on which significant price discovery contracts are executed or traded should, among other things, be able to impose position limits in the delivery month, impose or modify price limits, modify circuit breakers, call for additional margin either from market participants or clearing members (for contracts that are cleared through a clearinghouse), order the liquidation or transfer of open positions, order the fixing of a settlement price, order a reduction in positions, extend or shorten the expiration date or the trading hours, suspend or curtail trading on the electronic trading facility, order the transfer of contracts and the margin for such contracts from one market participant to another, or alter the delivery terms or conditions or, if applicable, should provide for such actions through its agreements with its third-party provider of clearing services.

(b) *Acceptable practices.* [Reserved]

CORE PRINCIPLE VI OF SECTION 2(h)(7)(C)—DAILY PUBLICATION OF TRADING INFORMATION. The electronic trading facility shall make public daily information on price, trading volume, and other trading data to the extent appropriate for significant price discovery contracts.

(a) *Guidance.* An electronic trading facility, with respect to significant price discovery contracts, should provide to the public information regarding settlement prices, price range, volume, open interest, and other related market information for all applicable contracts as determined by the Commission on a fair, equitable and timely basis. Provision of information for any applicable contract can be through such means as provision of the information to a financial information service or by timely placement of the information on the electronic trading facility's public Web site.

(b) *Acceptable practices.* Compliance with § 16.01 of this chapter, which is mandatory, is an acceptable practice that satisfies the requirements of Core Principle VI.

CORE PRINCIPLE VII OF SECTION 2(h)(7)(C)—COMPLIANCE WITH RULES. The electronic trading facility shall monitor and enforce compliance with the rules of the electronic trading facility, including the terms and conditions of any contracts to be traded and any limitations on access to the electronic trading facility.

(a) *Guidance*—(1) An electronic trading facility on which significant price discovery contracts are executed or traded should have appropriate arrangements and resources for effective trade practice surveillance programs, with the authority to collect information and documents on both a routine and non-routine basis, including the examination of books and records kept by its market participants. The arrangements and resources should facilitate the direct supervision of the market and the analysis of data collected. Trade practice surveillance programs may be carried out by the electronic trading facility itself or through delegation or contracting-out to a third party. If the electronic trading facility on which significant price discovery contracts are executed or traded delegates or contracts-out the trade practice surveillance responsibility to a third party, such third party should have the capacity and authority to carry out such programs, and the electronic trading facility should retain appropriate supervisory authority over the third party.

(2) An electronic trading facility on which significant price discovery contracts are executed or traded should have arrangements, resources and authority for effective rule enforcement. The Commission believes that this should include the authority and ability to discipline and limit or suspend the activities of a market participant as well as the authority and ability to terminate the activities of a market participant pursuant to clear and fair standards. The electronic trading facility can satisfy this criterion for market participants by expelling or denying such person's future access upon a determination that such a person has violated the electronic trading facility's rules.

(b) *Acceptable practices.* An acceptable trade practice surveillance program generally would include:

(1) Maintenance of data reflecting the details of each transaction executed on the electronic trading facility;

(2) Electronic analysis of this data routinely to detect potential trading violations;

(3) Appropriate and thorough investigative analysis of these and other potential trading violations brought to the electronic trading facility's attention; and

(4) Prompt and effective disciplinary action for any violation that is found to have been committed. The Commission believes that the latter element should include the authority and ability to discipline and limit or suspend the activities of a market participant pursuant to clear and fair standards that are available to market participants. *See, e.g.*, 17 CFR part 8.

CORE PRINCIPLE VIII OF SECTION 2(h)(7)(C)—CONFLICTS OF INTEREST. The electronic trading facility on which significant price discovery contracts are executed or traded shall establish and enforce rules to minimize conflicts of interest in the decision-making process of the electronic trading facility and establish a process for resolving such conflicts of interest.

(a) *Guidance.*

(1) The means to address conflicts of interest in the decision-making of an electronic trading facility on which significant price discovery contracts are executed or traded should include methods to ascertain the presence of conflicts of interest and to make decisions in the event of such a conflict. In addition, the Commission believes that the electronic trading facility on which significant price discovery contracts are executed or traded should provide for appropriate limitations on the use or disclosure of material non-public information gained through the performance of official duties by board members, committee members and electronic trading facility employees or gained through an ownership interest in the electronic trading facility or its parent organization(s).

(2) All electronic trading facilities on which significant price discovery contracts are traded bear special responsibility to regulate effectively, impartially, and with due consideration of the public interest, as provided in section 3 of the Act. Under Core Principle VIII, they are also required to minimize conflicts of interest in their decision-making processes. To comply with this core principle, electronic trading facilities on which significant price discovery contracts are traded should be particularly vigilant for such conflicts between and among any of their self-regulatory responsibilities, their commercial interests, and the several interests of their management, members, owners, market participants, other industry participants and other constituencies.

(b) *Acceptable practices.* [Reserved]

CORE PRINCIPLE IX OF SECTION 2(h)(7)(C)—ANTITRUST CONSIDERATIONS. Unless necessary or appropriate to achieve the purposes of this Act, the electronic trading facility, with respect to any significant price discovery contracts, shall endeavor to avoid adopting any rules or taking any actions that result in any unreasonable restraints of trade or imposing any material anticompetitive burden on trading on the electronic trading facility.

(a) *Guidance.* An electronic trading facility, with respect to a significant price discovery contract, may at any time request that the Commission consider under the provisions of section 15(b) of the Act any of the electronic trading facility's rules, which may be trading protocols or policies, operational rules, or terms or conditions of any significant price discovery contract. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable practices.* [Reserved]

PART 40—PROVISIONS COMMON TO REGISTERED ENTITIES

■ 33. The authority citation for part 40 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a, 8 and 12a, as amended by Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110–246, 122 Stat. 1624 (June 18, 2008).

■ 34. Revise the heading of part 40 as set forth above.

§ 40.1 [Amended]

■ 35. Section 40.1 is amended as follows:

■ A. The term ''registered entity'' is removed and the term ''designated contract market, derivatives transaction execution facility or derivatives clearing organization'' is added in its place in paragraphs (b)(2), (b)(3), and (f)(2); and

■ B. The term ''contract market, derivatives transaction execution facility or derivatives clearing organization'' is removed and the term ''registered entity'' is added in its place in paragraph (h).

■ 36. Section 40.2 is amended as follows:

■ A. The term ''registered entity'' is removed and ''designated contract market, derivatives transaction execution facility or derivatives clearing organization'' is added in its place in paragraph (a) introductory text;

■ B. The term ''registered entity'' is removed and ''designated contract market or derivatives transaction execution facility'' is added in its place in paragraphs (a)(1) and (a)(3)(iv); and

■ C. Paragraph (b) is revised to read as follows:

§ 40.2 Listing and accepting products for trading or clearing by certification.

* * * * *

(b) A registered entity shall provide, if requested by Commission staff, additional evidence, information or data relating to whether any contract meets, initially or on a continuing basis, any of the requirements of the Act or Commission rules or policies thereunder which may be beneficial to the Commission in conducting a due diligence assessment of the product and the entity's compliance with these requirements.

* * * * *

§ 40.3 [Amended]

■ 37. Section 40.3 is amended by removing the term ''registered entity'' and adding in its place the term ''designated contract market or registered derivatives transaction execution facility'' in paragraphs (a)(1), (c)(1), (c)(2), and (e)(2).

§ 40.6 [Amended]

■ 38. Section 40.4 is amended by removing the term ''registered entity'' and adding in its place the term ''designated contract market'' in paragraph (b)(9)(ii).

■ 39. Section 40.6 is amended by revising paragraphs (a)(2), (c)(3)(ii)(G), and (c)(3)(ii)(H) to read as follows:

§ 40.6 Self-certification of rules.

(a) * * *

(2) The registered entity has filed its submission electronically in a format specified by the Secretary of the Commission with the Secretary of the Commission at *submissions@cftc.gov*, the relevant branch chief at the regional office having local jurisdiction over the registered entity, and, for filings submitted by a designated contract market, registered derivatives transaction execution facility, or electronic trading facility on which significant price discovery contracts are traded or executed, the Division of Market Oversight at *DMOSubmissions@cftc.gov*, and the Commission has received the submission at its headquarters by the open of business on the business day preceding implementation of the rule; *provided, however*, rules or rule amendments implemented under procedures of the governing board to respond to an emergency as defined in § 40.1, shall, if practicable, be filed with the Commission prior to the implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than twenty-four hours after implementation; and

* * * * *

(c) * * *

(3) * * *

(ii) * * *

(G) *Option contract terms.* For registered entities that are in compliance with the daily reporting requirements of § 16.01 of this chapter, changes to option contract rules relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis.

(H) *Trading Months.* For registered entities that are in compliance with the daily reporting requirements of § 16.01 of this chapter, the initial listing of trading months which are within the currently established cycle of trading months.

* * * * *

§ 40.7 [Amended]

■ 40. Section 40.7 is amended by removing the term ''designated contract market, registered derivatives transaction execution facility or registered derivatives clearing organization'' and adding in its place the term ''registered entity'' in paragraph (b).

■ 41. Section 40.8 is amended by revising paragraph (a), redesignating paragraph (b) as paragraph (c), and adding new paragraph (b) to read as follows:

§ 40.8 Availability of public information.

(a) The following sections of all applications to become a designated contract market, derivatives execution transaction facility or designated clearing organization will be public: transmittal letter, proposed rules, the applicant's regulatory compliance chart, documents establishing the applicant's legal status, documents setting forth the applicant's governance structure, and any other part of the application not covered by a request for confidential treatment.

(b) The following submissions required by § 36.3(c)(4) of this chapter by an electronic trading facility on which significant price discovery contracts are traded or executed will be public: rulebook, the facility's regulatory compliance chart, documents establishing the facility's legal status, documents setting forth the facility's governance structure, and any other parts of the submissions not covered by a request for confidential treatment.

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■ 42. Appendix D to part 40 is revised to read as follows:

Appendix D to Part 40—Submission Cover Sheet and Instructions

A properly completed submission cover sheet must accompany all rule submissions submitted electronically by a registered entity to the Secretary of the Commodity Futures Trading Commission, at *submissions@cftc.gov* in a format specified by the Secretary of the Commission.

Each submission should include the following:

1. *Identifier Code (optional)*—If applicable, the exchange or clearing organization Identifier Code at the top of the cover sheet. Such codes are commonly generated by the exchanges or clearing organizations to provide an identifier that is unique to each filing (e.g., NYMEX Submission 03–116).

2. *Date*—The date of the filing.

3. *Organization*—The name of the organization filing the submission (e.g., CBOT).

4. *Filing as a*—Check the appropriate box for a designated contract market (DCM), derivatives clearing organization (DCO), derivatives transaction execution facility (DTEF), or electronic trading facility with a significant price discovery contract (ECM–SPDC).

5. *Type of Filing*—Indicate whether the filing is a rule amendment or new product and the applicable category under that heading.

6. *Rule Numbers*—For rule filings only, identify rule number(s) being adopted or modified in the case of rule amendment filings.

7. *Description*—For rule or rule amendment filings only, enter a brief description of the new rule or rule amendment. This narrative should describe the substance of the submission with enough specificity to characterize all essential aspects of the filing.

8. *Other Requirements*—Comply with all filing requirements for the underlying proposed rule or rule amendment. The filing of the submission cover sheet does not obviate the responsibility to comply with any applicable filing requirement (e.g., rules submitted for Commission approval under § 40.5 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views). Rules submitted for Commission approval under § 40.5 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views).

Issued in Washington, DC, this 16th day of March, 2009, by the Commission.

David Stawick,

Secretary of the Commission.

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