drawn totaled 747,069 or 91.5 percent of total imports from Mexico.[3] Of this total, about 6 percent are believed to be roping steers.

This interim rule will result in an additional tuberculosis testing requirement for steers and spayed heifers with horn growth imported into the United States, entailing some additional costs for importers. The cost of tuberculin testing is between $7.50 and $10 per head. The weighted average price of an imported steer from Mexico, which is likely to be the source of most of the animals affected by this interim rule, in 2002 was $364. The cost of the additional tuberculosis test represents about 2.4 percent of that value. If supply does not change as a result of the cost increase, U.S. importers will incur overall additional costs of between $336,180 and $549,000 annually. The exact impact of a 2.4 percent increase in cost on the supply of cattle from Mexico is unknown, but the possibility exists that the cost increase may decrease the supply of cattle from Mexico and increase lease fees and/or roping steer purchase prices.

The Regulatory Flexibility Act requires that agencies specifically consider the economic effects of their rules on small entities. Entities that may be affected by this interim rule include U.S. order buyers that import steers from Mexico and cow-calf operations that sell steers comparable in age and size to those imported from Mexico. The Small Business Administration (SBA) classifies cow-calf and stocker operations as small entities if their annual receipts are not more than $750,000. There were 1,032,000 of these operations in the United States in 2002, and over 99 percent were considered small. This interim rule will also affect industries that purchase and lease roping steers for their shows. The number and size distributions of this industry are not available, but their sizes are likely to be small. Additionally, as these animals retire from roping service, they are likely to be sold to feedlots, so some feedlots might also be affected. The SBA classifies cattle feedlots as small entities if their annual receipts are not more than $1.5 million. There were 95,189 feedlots in the United States in 2002, of which about 93,000 (nearly 98 percent) had capacities of fewer than 1,000 head. Average annual receipts for these small feedlots totaled about $35,300, a figure well below the SBA's small-entity criterion. However, as of January 1, 2003, the remaining 2 percent of the Nation's feedlots, which had capacities of at least 1,000 head, held 82 percent of all U.S. cattle and calves on feed.

This interim rule may lead to increased costs for U.S. importers of roping steers and a decrease in the number of roping steers imported from Mexico. Any negative economic impacts for U.S. importers may be offset somewhat by the benefits that may accrue to U.S. cow-calf operations that sell or lease domestic roping steers if the price of those steers rises. In addition, if any increase in U.S. feeder cattle prices results from this rule, U.S. cow-calf and stocker domestic operations will gain from a stronger market.

The overall benefits to the U.S. livestock industry of reducing the risk of importing tuberculosis-infected cattle by requiring additional testing for steers and spayed heifers with horn growth are expected to be of far greater significance than any other economic impacts, whether positive or negative, of this interim rule.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements.

■ Accordingly, we are amending 9 CFR part 93 as follows:

[3] Source: Global Trade Information Services Inc., the World Trade Atlas—United States Edition, June 2003; APHIS/VS Import Tracking System National Database.

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

■ 1. The authority citation for part 93 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

§ 93.406 [Amended]

■ 2. Section 93.406 is amended as follows:

■ a. In paragraph (a)(2)(i), by adding the words ''without evidence of horn growth (polled or dehorned)'' after the word ''heifers''.

■ b. In paragraph (a)(2)(ii), by adding the words ''and steers or spayed heifers with any evidence of horn growth'' after the word ''cattle''.

■ c. In paragraph (a)(2)(iii), by adding the words ''and steers or spayed heifers with any evidence of horn growth'' after the words ''intact cattle''.

§ 93.427 [Amended]

■ 3. In § 93.427, paragraph (c)(3) is amended by adding the words ''and steers or spayed heifers with any evidence of horn growth'' after the word ''cattle''.

Done in Washington, DC, this 13th day of July, 2004.

W. Ron DeHaven,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–16282 Filed 7–19–04; 8:45 am]

BILLING CODE 3410–34–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 36

Exempt Commercial Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rulemaking.

SUMMARY: The Commodity Futures Trading Commission (''Commission'') is promulgating final rules relating to electronic trading facilities that operate in reliance on the exemption in section 2(h)(3) of the Commodity Exchange Act (''the Act''). First, the Commission is amending Rule 36.3(b), which governs Commission access to information regarding transactions on such trading facilities, to provide for access to more relevant and useful information from all such markets. Second, the Commission

is amending Rule 36.3(c)(2) to require those electronic trading facilities that operate in reliance on the exemption in section 2(h)(3) and that perform a significant price discovery function for transactions in the underlying cash market to publicly disseminate certain specified trading data. These price discovery rules are being promulgated pursuant to section 2(h)(4) of the Act, which authorizes the Commission to prescribe rules and regulations to ensure timely dissemination by such trading facilities of price, trading volume, and other trading data to the extent appropriate.

DATES: *Effective Date:* September 20, 2004.

FOR FURTHER INFORMATION CONTACT: Don Heitman, Senior Special Counsel (telephone 202–418–5041, e-mail *dheitman@cftc.gov*), Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

A. Overview

The Commodity Futures Modernization Act of 2000 (''CFMA''), appendix E of Public Law 106–554, 114 Stat. 2763 (2000), created a limited exemption from the Commission's jurisdiction for transactions conducted on certain electronic commercial markets (''exempt commercial markets,'' ''ECMs'' or ''section 2(h)(3) markets''). Specifically, section 2(h)(3) of the Act, as amended by the CFMA, provides that, except to the extent provided in section 2(h)(4), nothing in the Act shall apply to a transaction in an exempt commodity [1] that is: (a) entered into on a principal-to-principal basis solely between persons that are eligible commercial entities at the time the persons enter into the agreement, contract, or transaction; and (b) executed or traded on an electronic trading facility. Section 2(h)(4) provides that a transaction described in section 2(h)(3) shall be subject to certain specified provisions of the Act, such as the Act's antimanipulation and antifraud provisions, and furthermore, that such transactions shall be subject to price dissemination rules if the electronic trading facility serves a significant price discovery function for the underlying cash market. Section 2(h)(5) requires an electronic trading facility relying on the exemption in section 2(h)(3) to provide the Commission with certain information and to comply with trading information access provisions set out in section 2(h)(5)(B)(i). The regulations governing ECMs appear at section 36.3 of the Commission's Rules.

B. The Proposed Rules

On November 25, 2003, the Commission published proposed amendments [2] to its part 36 regulations governing exempt commercial markets. With respect to information access, the proposal noted that section 2(h)(5)(B)(i) of the Act requires ECMs to provide the Commission with either: (1) ''access to the facility's trading protocols and electronic access to the facility with respect to transactions conducted in reliance on the exemption [in section 2(h)(3)]''; or (2) ''such reports * * * regarding transactions executed on the facility in reliance on the exemption [in section 2(h)(3)] as the Commission may from time to time request to enable the Commission to satisfy its obligations under this Act.'' The proposal referred to these two statutory alternatives as, respectively, the ''electronic access option'' and the ''reporting option.''

The proposal noted that, under the existing part 36 regulations, ECMs have generally chosen to comply with the information access requirements through the electronic access option. Under this alternative, the Commission has accepted from ECMs electronic access to their trading protocols (*i.e.*, the trading agreements and/or other terms and conditions applicable to trades on the facility, generally available on their websites) in addition to view-only electronic access to the data stream of trades taking place on the system. In practice, however, the Commission has found that the information provided under the current electronic access option is neither as relevant,[3] nor as useful,[4] as anticipated.

Therefore, the Commission proposed to amend its regulations to focus Rule 36.3(b)(1) more precisely so as to provide the Commission with access to more relevant and useful information regarding trading activity on ECMs. Under the proposed rules, an ECM filing a notification with the Commission under Rule 36.3 would be required, initially and on an ongoing basis, to: (1) Provide the Commission with access to the facility's trading protocols, either electronically or in hard copy form; (2) identify those transactions conducted on the facility with respect to which it intends to rely on the exemption in section 2(h)(3); and (3) inform the Commission whether it intends to satisfy the information access requirement of section 2(h)(5)(B)(i) of the Act with respect to such transactions through either a revised reporting option or a revised electronic access option, as provided in the proposed rules.

The proposed new reporting option would require an ECM to file weekly a report for each business day, showing for each transaction executed on the facility in reliance on the exemption set forth in section 2(h)(3), certain basic commodity, maturity, price, time and quantity information. Alternatively, the proposed new electronic access option would require ECMs to grant the Commission electronic access to transactions conducted on the facility in reliance on the exemption in section 2(h)(3) that would allow the Commission to capture in permanent form a continuing record of trades on the facility such that the Commission would be able to reconstruct and compile the same information that would otherwise be provided by the trading facility under the reporting option described above.

The proposed information access rules also would require ECMs to maintain a record of allegations or complaints of instances of suspected fraud or manipulation on the facility and to provide the Commission with a copy of the record of each substantive complaint no later than three days after the complaint was received.

With respect to price discovery, the November 25 proposed rules noted that section 2(h)(4)(D) of the Act specifically provides that a transaction described in section 2(h)(3) shall be subject to:

> Such rules and regulations as the Commission may prescribe if necessary to ensure timely dissemination by the electronic trading facility of price, trading volume, and other trading data to the extent appropriate, if the Commission determines that the electronic trading facility performs a significant price discovery function for

[1] Under the Act, exempt commodities generally are tangible, non-agricultural commodities and include energy and metals products. *See* section 1a(14) of the Act, 7 U.S.C. 1a(14). *See also*, 146 Cong. Rec. S11896–01 (Dec. 15, 2000) (Statement of Senator Harkin).

[2] 68 FR 66032 (Nov. 25, 2003).

[3] The electronic access option, as currently applied, gives the Commission information regarding all contracts traded on an ECM's trading facility. This may include a large amount of extraneous data regarding contracts that are not contracts for future delivery of a commodity, or options, and are, therefore, not within the Commission's exclusive jurisdiction.

[4] The Commission's surveillance staff has determined that the information available through the current view-only electronic access to ECM trading facilities is not, in fact, equivalent to the large trader information received with respect to designated contract markets, as anticipated in the preamble to the original Part 36 Rules (*See* 66 FR 42256, at 42264 (Aug. 10, 2001)).

transactions in the cash market for the commodity underlying any agreement, contract, or transaction executed or traded on the electronic trading facility.

The existing part 36 regulations provide that if the Commission finds by order, after notice and opportunity for a hearing, that a trading facility performs a significant price discovery function for transactions in the cash market in the underlying commodity, the facility must disseminate publicly price, trading volume and other trading data, to the extent appropriate, with respect to transactions executed in reliance on the exemption as specified in the order.

The November 25, 2003 proposed rules would add specificity to the Commission's price discovery regulations in several ways. First, the Commission proposed to adopt two criteria that it would use to determine whether a section 2(h)(3) market performs a significant price discovery function for the underlying cash market. Second, the Commission proposed to specify the information that must be disseminated by section 2(h)(3) markets that serve such a significant price discovery function. Third, the Commission proposed certain amendments to its procedures for making a price discovery determination.[5]

C. Overview of Comments

The Commission received comments from two exempt commercial markets, the IntercontinentalExchange, Inc. (''ICE'') and the Natural Gas Exchange, Inc. (''NGX''). Both markets expressed concerns about various aspects of the proposed information access provisions. ICE also raised issues regarding certain elements of the price discovery provisions. The specific comments, and the Commission's responses, are described in the discussion of the Final Rules that appears below.

II. The Final Rules

A. Information Access Provisions

1. The Scope of Commission Oversight, Reliance on Section 2(h)(3), Competitive Concerns

The proposed rules would require ECMs to ''make their best effort to identify to the Commission those transactions conducted on the facility with respect to which it intends to rely on the exemption in section 2(h)(3).'' Transactions so identified would then be subject to either the reporting requirement or the electronic access requirement. The preamble noted that the trading facility would not be required to include in such identification, agreements, contracts or transactions that are not contracts for future delivery of a commodity, or options, and are, therefore, not subject to the Commission's exclusive jurisdiction. Thus, for example, the trading facility would not be required to identify, or provide information with respect to, agreements, contracts or transactions involving ''any sale of any cash commodity for deferred shipment or delivery.'' Such transactions are excluded from the Commission's exclusive jurisdiction under section 1a(19) of the Act (commonly referred to as ''the forward contract exclusion''). Neither would a trading facility be required to identify, or provide information with respect to, agreements, contracts or transactions that constitute cash or spot transactions, which are contracts for present, rather than future, delivery and likewise are not subject to the Commission's exclusive jurisdiction.

Both commenters express concern over the scope of Commission oversight, the scope of ''reliance'' on section 2(h)(3) and the burden of categorizing transactions for purposes of the information access requirements. ICE points out that, while the Act does give the Commission ''limited jurisdiction to obtain information from ECMs,'' it does not give the Commission ''ongoing regulatory jurisdiction over ECMs.'' According to ICE, the Act does not give the Commission ''authority to require ECMs to maintain specific records or to submit prescribed reports'' except to a ''limited extent.'' In this regard, ICE asserts that, ''[i]n particular, if the ECM provides the Commission with access to its trading facility (*e.g.*, 'view only' access) the CEA does not give the Commission the authority to require that the ECM submit reports to the Commission.'' Thus, the proposed rules ''go beyond the clear direction of the CEA and subject ECMs to ongoing regulatory oversight or requirements.''

The Commission agrees that the CEA does not give the Commission the same degree of oversight authority with respect to ECMs that it has over designated contract markets (''DCMs'') or derivatives transaction execution facilities (''DTFs''). Importantly, however, Congress did make ECMs subject to the antifraud and antimanipulation provisions of the Act. If the Commission is to have the ability to enforce those provisions, it must have access to meaningful information concerning transactions on ECMs. Congress would not have written section 2(h)(5)(B)(i) into the Act for the purpose of giving the Commission access to, or reports of, information that would not assist the Commission in detecting fraud or manipulation. ICE correctly points to the current ''view only access'' as an example of the type of information that the Commission might access from an ECM, but it is not the only example. For instance, under the Act the Commission would not be prohibited from requiring access to an ECM's proprietary screen, including the names of the parties to each transaction. Such information would certainly be more useful for antifraud and antimanipulation enforcement purposes than the anonymous transaction-related data proposed in the notice of proposed rulemaking. However, as noted in the letters of both commenters, ECMs are in competition with voice brokers and the Commission is well aware that requiring ECMs to provide counterparty names to the government could put them at a significant competitive disadvantage to their voice broker competitors. The information access provisions in these final rules (which have been significantly revised and narrowed, as discussed below) strike a balance between business concerns and the Commission's need for access to meaningful information with which to enforce its antifraud and antimanipulation authority as mandated by Congress.

Also with respect to competitive concerns, NGX notes that proposed Rule 36.3(b)(1)(ii)(A), the reporting option, would require ECMs to report (in addition to time, price, quantity, *etc.*) ''such other information as the Commission may determine.'' NGX suggests that the Commission should reconsider using this phrase on the grounds that it would authorize routine collection of counterparty information, which should be available to the Commission only upon special call, and disclosure of which would put ECMs at a competitive disadvantage to voice brokers. NGX also asks that the Commission make clear that any counterparty information collected would be treated as ''nonpublic'' under the Commission's Freedom of Information Act (''FOIA'') regulations.

The language referring to ''such other information as the Commission may determine'' is necessary to give the Commission flexibility to seek additional transactional data and has not been changed in the final rules. However, it was not the Commission's intention that such language could be

[5] The types of instruments traded on exempt commercial markets vary widely. Some of these instruments, but not all of them, are subject to the Commission's exclusive jurisdiction. The Commission's proposed rules were directed only to those instruments that are traded in reliance on the section 2(h)(3) exemption and are otherwise subject to the Commission's exclusive jurisdiction.

interpreted or applied to encompass counterparty information. Under these final rules, the Commission would expect to obtain counterparty information from an ECM pursuant to a special call issued under section 2(h)(5)(B)(iii) of the Act, in which case it would be classified as ''nonpublic'' under the FOIA.

ICE raises the same competitive issue about data publishers as about voice brokers. Like voice brokers, ''data publishers similarly obtain and disseminate information regarding market transactions—including, in some cases, those executed on ECMs—and may also be involved in the execution of transactions. As a result, data publishers have as much, if not more, of an ability to influence pricing decisions in the cash and derivatives markets as ECMs. The Commission should, therefore, take into account the activities of voice brokers and data publishers and their roles in the market, and consider the competitive burdens that would be placed on ECMs, in determining the final form of the Proposed Rules.'' As noted above, the proposed information access requirements for ECMs are not intrusive, and are consistent with appropriate enforcement of the Commission's antifraud and antimanipulation authority. The Act does not give the Commission authority to require data publishers to file reports, or grant access, like ECMs. However, to the extent such data publishers published knowingly inaccurate information, or participated in other cash or futures market manipulative activity within the Commission's jurisdiction, they would be subject to the Commission's enforcement authority. The string of recent Commission enforcement actions involving false natural gas price reporting is clear evidence that the Commission is committed to strictly enforcing that authority. To date, the Commission has filed 19 major enforcement actions as a result of its investigation of wrongdoing in the energy markets. Sixteen of these actions have been settled, with sanctions that include civil monetary penalties of over $220 million, while three actions remain pending.

ICE states that, ''it will be unnecessarily burdensome for an ECM to identify all transactions for which it is relying on section 2(h)(3).'' NGX, on the other hand, suggests that the Commission should reconsider its proposal to require ECMs to segregate out transactions that are subject to the Commission's exclusive jurisdiction from (for example) physical sales and to report, or provide access, only with respect to such (futures and options) data. NGX argues against narrowing the scope of information access because: (1) ''The Commission *needs* all of the market data it is receiving'' because its fraud and manipulation authority is not limited to futures and options, but extends to the cash market as well; and (2) ''The proposal infers that only some ECM transactions (principally futures and options) are covered by section 2(h)(3),'' but ''the intent of section 2(h)(3) is to extend its benefits to all forms of transaction.''

The statute gives each ECM the right and the responsibility to determine its own reliance on the section 2(h)(3) exemption. Thus, an ECM has no choice but to identify those transactions for which it chooses to rely on the exemption. Under the final rules, if some of the transactions on the ECM's trading facility are, in its view, not within the Commission's exclusive jurisdiction—for example, the same day and next day spot trades mentioned in ICE's comments—the ECM need not rely on the exemption for those transactions and so need not provide information access with respect to those transactions. If, however, an ECM finds that making such an identification is ''unnecessarily burdensome,'' it can simply decide to rely on the exemption—and provide the Commission with information access—with respect to all transactions on the facility, just as ECMs are already doing with respect to the view-only electronic information provided to the Commission under the current rules. Thus, ECMs have the choice, but not the obligation, to limit their identification of transactions to futures and options. If ECMs voluntarily choose not to limit data to futures and options, the Commission would have access to the additional market data described in NGX's point one. However, to require ECMs to provide market data concerning transactions that are not within the Commission's exclusive jurisdiction, as suggested in NGX's point two, would appear to be contrary to the spirit of section 2(h)(3).

More significantly, in response to the commenters' concerns over the scope of the information access provisions, the Commission has determined to substantially narrow the reach of that provision. Under the final rules, an ECM will only be required to identify to the Commission (and file reports, or grant electronic access concerning) ''transactions conducted on the 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.*'' [emphasis supplied] The Commission's surveillance staff has determined that imposing such a volume threshold test will eliminate reports concerning many thinly traded contracts. Such reports would be of very limited utility in detecting market manipulation, due to the high incidence of ''false positives'' [6] in markets that experience infrequent trading. Thinly traded contracts that do not meet the volume test would, nevertheless, remain subject to the Commission's antifraud and antimanipulation authority (as well as the complaint reporting requirement, as discussed below).

By substantially narrowing the scope of information to be provided to that which will be of real utility to Commission surveillance staff, the final rules will also address the commenters' concerns over the scope of information to be provided and the attendant problems in segregating out contracts subject to the Commission's exclusive jurisdiction. Under this standard, new ECMs first beginning operations will not be required to make a determination under Rule 36.3(b)(1)(ii) until after the first full calendar quarter of trading and will not be required to provide information under the reporting option or the electronic access option until at least one contract traded on the facility meets the five trade per day volume threshold.

NGX states that attempting to draw lines between ''futures'' and ''options'' and other types of transactions has ''engendered confusion and controversy including substantial legal uncertainty [and] the current proposal would restore that uncertainty.'' NGX further notes that imposing ''a formal duty by ECMs to confine their data streams to the Commission only to futures and options'' could generate a high error rate (including some transactions the Commission does not wish to review and overlooking others that would be of interest). It would also subject ECMs to the penalties under section 9(a)(3) for knowingly omitting a material fact in a report to the Commission. ICE points out that requiring an ECM to ''amend its notice to reflect the addition of, or amendments to, products traded in reliance on'' section 2(h)(3) will be ''burdensome and inconsistent with'' the purposes of the CFMA. It may be difficult to determine whether modifications to an existing product transform it into a new product.

[6] A ''false positive'' in this context means an instance in which an analysis of price activity alone may indicate the possibility of manipulation, but upon further examination it becomes apparent that the price activity did not result from manipulation.

Furthermore, requiring such frequent filings is ''inconsistent with the CEA and * * * unwarranted.''

As pointed out in the preamble to the NPRM, ECMs identifying contracts with respect to which they intend to rely on section 2(h)(3), or amending such identifications, would not be subject to liability under section 4(a) for any contracts that were misidentified in good faith. ECMs would not be subject to penalties under section 9(a)(3) because that section is not among the provisions of the Act, listed in section 2(h)(3), which apply to ECMs.

With respect to legal uncertainty, consistent with section 2(i) of the Act,[7] even if an agreement, contract or transaction was identified as being traded in reliance on the section 2(h)(3) exemption, in any enforcement action involving any such agreement, contract or transaction, the Commission would be required to prove its jurisdiction independently of an ECM's identification of that agreement, contract or transaction for purposes of compliance with the information access provisions under Rule 36.3. Also, should a trading facility seeking in good faith [8] to comply with the information access provisions of Rule 36.3 fail to identify a particular agreement, contract or transaction, which is later determined to be a futures or option contract subject to the Commission's exclusive jurisdiction, such failure would not be construed by the Commission as a violation of section 4(a) of the Act.[9] However, such transaction would still remain subject to the Commission's antifraud and antimanipulation authority. Furthermore, in view of the new volume threshold test, the universe of contracts to which the identification will have to be applied should be significantly narrowed.

As noted in the preamble to the proposed rules, a trading facility that does not offer trading in any futures or option contracts subject to the Commission's exclusive jurisdiction—for example, a facility where only cash or forward contracts are traded—is not required to file a notification under Rule 36.3. Such a facility is not generally subject to the Act.[10]

2. Applying the Information Access Rules

Trading facilities electing to provide information under the reporting option (Rule 36.3(b)(1)(ii)(A)) will be required to file weekly reports concerning only agreements, contracts or transactions with respect to which they are relying on the section 2(h)(3) exemption, and which meet the five trade per day volume standard for the preceding calendar quarter. Such reports will contain information that could be useful to the Commission in enforcing its antifraud and antimanipulation authority with respect to those trading facilities. Such reports would include, in a form and manner approved by the Commission, a report for each business day, showing for each qualifying transaction executed on the facility the following information: the commodity, the location,[11] the maturity date, whether it is a financially settled or physically delivered instrument, the date of execution, the time of execution, the price, the quantity, and such other information as the Commission may determine, and for an option instrument, in addition to the foregoing information, the type of option (call or put) and the strike price. Each such report would be required to be electronically transmitted weekly, within such time period as is acceptable to the Commission following the end of the week to which the data applies. At the beginning of each new calendar quarter, within such time period as is acceptable to the Commission, ECMs will be required to review trading for the previous calendar quarter to determine which of the contracts traded in reliance on section 2(h)(3) during that quarter also meet the five trade per day or more volume test. All contracts meeting both the reliance test and the volume test during the previous quarter will be subject to the weekly reporting requirement for the new quarter.

Those ECMs wishing to provide information pursuant to the electronic access option (Rule 36.3(b)(1)(ii)(B)) will be required, initially and on an ongoing basis, to provide the Commission with electronic access to those transactions conducted on the facility in reliance on the exemption in section 2(h)(3), which averaged five trades per day or more over the most recent calendar quarter. Such access must be structured so as to permit the Commission to capture in permanent form a continuing record of trades on the facility such that the Commission would be able to reconstruct and compile the same information regarding transactions on the trading facility that would otherwise be provided by the trading facility under the reporting option (Rule 36.3(b)(1)(ii)(A) described above). If a trading facility does not wish to undertake the task of determining which contracts meet the five-trade-per-day requirement, it can give the Commission access to information on all transactions conducted in reliance on section 2(h)(3) and the Commission will implement appropriate surveillance.

The Commission expects that the information that will be provided by ECMs in reports required under Rule 36.3(b)(1)(ii)(A), or compiled by the Commission through electronic access provided under Rule 36.3(b)(1)(ii)(B), will be useful in identifying aberrant price behavior, including intraday price spikes. Such price anomalies may serve as indicators of the need for further Commission investigation. In such instances, the Commission may, among other things, use the special call authority provided by section 2(h)(5)(B)(iii) of the Act to determine whether a fraud or manipulation may have been attempted or occurred warranting appropriate enforcement action.

3. Recording and Reporting Complaints

The proposed rules would require ECMs to maintain a record of complaints received by the trading facility concerning instances of

[7] Section 2(i) of the Commodity Exchange Act provides that:

(1) No provision of this Act shall be construed as implying or creating any presumption that—

(A) any agreement, contract, or transaction that is excluded from this Act under section 2(c), 2(d), 2(e), 2(f), or 2(g) of this Act or title IV of the Commodity Futures Modernization Act of 2000, or exempted under section 2(h) or 4(c) of this Act; or

(B) any agreement, contract, or transaction, not otherwise subject to this Act, that is not so excluded or exempted, is or would otherwise be subject to this Act.

(2) No provision of, or amendment made by, the Commodity Futures Modernization Act of 2000 shall be construed as conferring jurisdiction on the Commission with respect to any such agreement, contract or transaction, except as expressly provided in section 5a of this Act (to the extent provided in section 5a(g) of this Act), 5b of this Act, or 5d of this Act.

[8] The ''good faith'' standard will apply only to the requirement that ECMs identify *contracts* with respect to which they intend to rely on section 2(h)(3). It does not apply to the requirement that ECMs must comply with section 2(h)(5), including notice to the Commission of their intention to operate an electronic trading facility in reliance on section 2(h)(3), in order to qualify for the exemption. In other words, the Division of Enforcement would not have to establish that a trading facility did not act in good faith in order to prevail in an action alleging violation, for example, of section 4(a), against a trading facility that failed to comply with the notice requirements of section 2(h)(5). *See, e.g.*, CFTC v. Enron Corp., *et al.*, No. H–03–909 (S.D. Tex. filed Mar. 12, 2003).

[9] Section 4(a) of the Act makes it unlawful to trade a contract for future delivery of a commodity in the U.S. unless on a contract market designated by, or a derivatives transaction execution facility registered with, the Commission.

[10] The Commission notes that, under section 12(e)(2) of the Act, an agreement, contract, or transaction that is not subject to the Commission's exclusive jurisdiction would be subject to state antifraud provisions of general applicability.

[11] In this context, ''location'' means the delivery or the price-basing location specified in the agreement, contract or transaction.

suspected fraud or manipulation. The nature of the information to be recorded (and subsequently reported) concerning complaints remains unchanged in the final rules. Thus, Rule 36.3(b)(1)(iii) will require an ECM to maintain a record of all allegations or complaints concerning instances of suspected fraud or manipulation. The record will be required to include the name of the complainant, if provided, the date of the complaint, the market instrument, the substance of the allegations, and the name of the person at the trading facility who received the complaint.

The proposed rules also would require ECMs to ''Provide to the Commission * * * a copy of the record of each substantive complaint * * * no later than three business days after the complaint is received.'' The preamble notes that the Commission's intent, in limiting the reporting requirement to ''substantive'' claims of manipulation or fraud, was to ''allow an ECM to exercise its judgment to weed out clearly frivolous claims.''

ICE argues that the meaning of ''substantive'' is vague and potentially problematic. ICE is concerned that ''substantive'' could be construed to apply to every complaint, no matter how frivolous, provided the complaint, ''relates to substantive, and not procedural, aspects of the ECM's operations.'' The Commission agrees that ''substantive'', in this context, is not a very precise term. In order to clarify the scope of the complaint-reporting requirement, the Commission has amended the final rules to provide that ECMs must report to the Commission complaints that allege, or relate to, facts that would constitute a violation of the Act or Commission regulations.

ICE further argues that requiring complaints to be reported to the Commission after only three days ''is unnecessarily burdensome.'' ICE recommends that the rules should be amended to allow ECMs 30 calendar days to report complaints to the Commission. The Commission agrees that, with respect to most complaints, 30 calendar days is an appropriate time frame within which to evaluate complaints and has amended the final rules accordingly. However, with respect to one class of complaints, the Commission believes that the reporting period should not be changed. In the case of an ongoing market manipulation or fraud, time is of the essence. Therefore, if a complaint alleges, or relates to, a suspected ongoing market manipulation or fraud, an ECM will be required to provide to the Commission a copy of the record thereof within the original three-business-day time limit.

Finally, ICE argues that the Commission should not require reports of complaints concerning markets ''other than those in which the ECM performs a significant price discovery function.'' The information access and price discovery portions of the proposed rules are based on separate statutory provisions with distinct purposes. The Commission's antifraud and antimanipulation authority and responsibility apply to all transactions conducted in reliance on the exemption in section 2(h)(3), not just those that perform a significant price discovery function. Thus, there is a statutory basis for requiring ECMs to provide records of complaints concerning all trades conducted in reliance on the exemption in section 2(h)(3), not just those relating to a significant price discovery function, if the Commission is to discharge its duties under the Act. Therefore, the scope of the reporting requirement for complaints has not been changed in the final rules. Moreover, the Commission notes, this means that the complaint recording and reporting requirements apply to all trades conducted in reliance on section 2(h)(3), not just those that meet the five-trade-per-day volume test. In such instances, the need for prompt review of any and all bona fide complaints alleging fraud or manipulation outweigh any inconvenience caused by applying the recording and reporting requirements to a larger group of agreements, contracts or transactions.

B. Price Discovery Provisions

As the Commission notes above, with respect to price dissemination rules, section 2(h)(4)(D) specifically provides that a transaction described in § 2(h)(3) shall be subject to such rules and regulations as the Commission may prescribe to ensure timely dissemination of trading data if the Commission determines that the electronic trading facility performs a significant price discovery function for transactions in the underlying cash market for the commodity.

On August 10, 2001, the Commission published Rule 36.3, which implements the notification, information and other provisions of the CFMA related to section 2(h)(3) exempt commercial markets. *See* 66 FR 42255. Subsection (c)(2) of Rule 36.3 provides that the Commission may make a determination that such a trading facility performs a significant price discovery function under section 2(h)(4)(D) by order, and that such finding shall be made after notice and an opportunity for a hearing through submission of written data, views and arguments.

To date, ten electronic trading facilities have notified the Commission of their intent to operate as ECMs in reliance on the section 2(h)(3) exemption. In view of the Commission's receipt of these section 2(h)(3) notifications, the Commission proposed to add specificity to its price discovery rules in several ways. First, the Commission proposed to adopt two criteria to use to determine whether a section 2(h)(3) market performs a significant price discovery function for the underlying cash market. Second, the Commission proposed to specify the information that must be disseminated by section 2(h)(3) markets that serve such a significant price discovery function. Third, the Commission proposed certain amendments to its procedures for making a price discovery determination.

1. The Elements of Price Discovery

Price discovery commonly is defined as the process of determining prices through the interaction of buyers and sellers based on supply and demand conditions. Prices may be discovered by a single buyer and seller in a privately negotiated bilateral cash market transaction, or through the simultaneous interaction of multiple buyers and sellers in organized markets.

Organized markets, which include futures markets and certain cash markets where trading takes place in accordance with established rules, often perform an important role in facilitating price discovery in the broader cash markets. In particular, these markets facilitate price discovery in cash markets by efficiently incorporating supply and demand information for the underlying commodity into the transaction prices or bids and offers through the operation of a centralized market for the commodity. Thus, the price discovery process on organized markets may significantly enhance the efficiency of the overall cash market.

The extent to which price information is used in establishing prices for cash market transactions that occur outside of the organized markets provides a relevant factor for determining the contribution of that market to price discovery and for determining whether there is a federal interest in the public dissemination of such price information.[12] Such price information may be used in varying degrees to

[12] It is this effect that section 2(h)(4) addresses when it provides that information shall be disseminated by an exempt commercial market when ''the electronic trading facility performs a significant price discovery function for transactions in the cash market for the commodity underlying any agreement, contract, or transaction executed.''

facilitate the establishment of prices and may also serve as one of a number of sources of price information that are consulted by cash market participants in developing bids, offers, or transaction prices. In certain circumstances, such price information may be sufficiently well regarded by the industry that it serves as an important benchmark for cash market participants to consider in setting bids or offers or in negotiating cash market transaction prices.[13] In other circumstances, prices discovered on a market may be such an integral and indispensable part of the price determination process in the underlying cash market that bids, offers or cash market transaction prices have a relatively high correlation to the prices discovered on the market. This latter practice is known as price basing.

Price basing is a frequently observed practice in many futures markets and some cash markets. As indicated above, under price basing, commercial entities establish transaction prices for the underlying commodity, or a related commodity, based directly on the prices discovered on an organized market. These entities may or may not trade in the organized market. The cash market transaction prices established through price basing may be either spot or forward prices.

The relative significance of prices discovered on an organized market for its underlying cash market is directly related to the extent to which such prices are used in establishing transaction prices between commercial entities. As a result of this relationship, the use of a market's prices for price basing, either directly or indirectly, provides observable indicia that the market performs a significant price discovery function that would serve as a basis for such a determination under section 2(h)(4).

2. Proposed Criteria for Making Price Discovery Determination

While the Act authorizes the Commission to make a determination that a section 2(h)(3) market performs a significant price discovery function, it does not define that term or contain criteria to guide that determination. Accordingly, the Commission proposed two alternative criteria for making a determination that an ECM performs a significant price discovery function. The first criterion (the ''price basing criterion'') is whether ''cash market bids, offers or transactions are directly based on or quoted at a differential to the prices generated on the market on a more than occasional basis.'' [14] This criterion reflects the commercial practice known as price basing. As explained in the proposed rules, price basing directly confirms that the prices being generated on the market have significant utility with regard to discovering prices in connection with cash market transactions.

In evaluating a section 2(h)(3) market's price discovery role, assessments under this criterion would include an analysis of 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 on a particular section 2(h)(3) market. Cash market prices are set *explicitly* at a differential to the section 2(h)(3) market when, for instance, they are quoted in dollars and cents above or below the reference market's prices. Cash prices are set *implicitly* at a differential to a section 2(h)(3) market's prices when, for instance, they are arrived at after adding to, or subtracting from, the section 2(h)(3) market's price, but then quoted or reported as a flat price.[15] The Commission will also consider whether cash market entities are quoting cash prices based on a section 2(h)(3) market's prices on a more than occasional basis.[16] The price-basing criterion is unchanged in the final rules.

The second criterion proposed by the Commission (the ''price discovery criterion'') is whether ''the market's prices are routinely disseminated in a widely distributed industry publication and are consulted by the industry on a more than occasional basis for pricing cash market transactions.'' With respect to this second criterion, the Commission stated in its proposal that such publication and industry consultation ''confirms that the prices are thought to be sufficiently reliable and acceptable to be considered a significant source of price discovery.''

ICE believes that the second test should be deleted for a number of reasons. First, it asserts that the term ''consulted'' is vague and potentially all encompassing. In ICE's view, any published information is potentially consulted by market participants on more than an occasional basis but might not be a principal component of pricing decisions and thus should not be a basis for determining that an ECM performs a significant price discovery function. ICE further asserts that this test is circular in that it uses publication as a basis for determining that timely dissemination is required. Finally, ICE asserts that this second criterion adds nothing to the first.

The Commission has considered ICE's comments and believes that the price discovery criterion is necessary to effectuate Congress's intent that ECMs that serve a ''significant price discovery function'' are subject to such rules as the Commission determines are necessary to ensure timely dissemination of trading data. If the Commission were to delete the second test, it essentially would be concluding that the only markets that can serve a significant price discovery function are those that are used for price basing. However, by imposing price dissemination requirements on markets that serve a significant price discovery function, in addition to those that serve a price basing function, Congress clearly did not intend such a result. In this regard, the Act explicitly references the price-basing role of futures markets in many places (*see, e.g.*, section 4b(a)(2)(B)), and had Congress intended to limit the price discovery requirement with respect to ECMs only to those markets providing a price basing function, it would have set forth this requirement explicitly in the statute. Accordingly, the Commission has determined to retain the price discovery criterion, which will ensure that markets that serve a significant price discovery function, but do not necessarily serve a traditional price basing function, will be required to timely disseminate market data in the manner prescribed by the Commission's rules.

However, in response to ICE's concerns that a standard based on prices that are consulted ''on a more than occasional basis'' is too vague and all-encompassing, the Commission has revised Rule 36.3(c)(2)(i)(B). In

[13] If the price information discovered on a market is widely recognized in an industry, such recognition by the industry in question may lead to the publication of such information in established industry publications.

[14] 68 FR 66032 at 66035 (Nov. 25, 2003).

[15] For example, if crude oil prices were generated on a section 2(h)(3) market, practices that would satisfy the price basing criterion would include cases where cash market bids or offers would be explicitly quoted at a differential to the prices generated on that market (*e.g.*, ten cents per barrel above the exempt market's price for crude oil delivered in July). In addition, the price basing criterion would encompass cases where cash market bids, offers or transaction prices are quoted as a net price (*e.g.*, $30/barrel) and such price is calculated implicitly by adding to, or subtracting from, the section 2(h)(3) market's prices a specified price differential (*e.g.*, a $30/barrel quoted price is derived as the sum of a ten-cent per barrel differential plus the exempt market's price of $29.90/barrel).

[16] As in cash markets underlying many established futures markets, the differential for a particular cash market bid, offer or transaction may vary from time to time in response to changes in various factors that affect the relationship between cash market prices and prices discovered on a section 2(h)(3) market.

describing the industry's use of a market's prices, the final rules replace the phrase, ''are consulted by the industry on a more than occasional basis for pricing cash market transactions,'' with the phrase, ''are routinely consulted by industry participants in pricing cash market transactions.''

The Commission acknowledges the apparent circularity of the test in the price discovery criterion—*e.g.*, it requires ECMs to disseminate data based in large part upon a finding that the market is already disseminating such data—but notes that these rules will ensure that the trading data disseminated conforms to federal standards, subject to federal oversight, as Congress intended.

Under the final rules, in applying the price discovery criterion, consideration will be given to whether prices established on a section 2(h)(3) market are reported in a widely distributed industry publication, such as Platts Oil Gram, Inside FERC or the Lundberg Survey. 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.

Under the final rules, an ECM will be required to notify the Commission when it has reason to believe that one or more of the markets on which it is conducting agreements, contracts, or transactions in reliance on section 2(h)(3) meet either of the specified criteria.[17] Upon receipt of such a filing, the Commission's staff will conduct an assessment of the markets on which the ECM is conducting agreements, contracts, or transactions in reliance on section 2(h)(3) to identify those markets that perform a significant price discovery function for the associated cash market. The scope of the inquiry conducted by the Commission will vary. In the course of its assessment, Commission staff might contact cash market participants to verify the extent to which they refer to the market for price basing. The assessment might also examine whether the section 2(h)(3) market, although occasionally performing a price discovery function, was not routinely consulted by industry participants in pricing cash market transactions and thus does not perform a significant price discovery function.

If the available information indicates that a market is serving a significant price discovery function for the underlying cash market, the Commission will notify the ECM that it appears to be performing a significant price discovery function and provide the market with an opportunity for a hearing through the submission of written data, views and arguments. The Commission's notification creates a presumption that the ECM is performing a significant price discovery function, which presumption the ECM can rebut during the hearing process. The Commission, after consideration of all relevant information, will issue an order determining whether or not the ECM serves a significant price discovery function.[18]

3. Information To Be Disseminated by a Price Discovery Market

The Commission has not previously addressed the nature and scope of the information that should be disclosed by a price discovery market subject to section 2(h)(4)(D), other than by incorporating in its rules the Act's requirement that the ECM disseminate publicly ''price, trading volume and other trading data to the extent appropriate with respect to transactions executed in reliance on the exemption as specified in the order.'' *See* Commission Rule 36.3(c)(2). In determining the nature and scope of the information that should be disclosed under the proposed rules, the Commission looked to other provisions of the Act that impose public dissemination requirements on other categories of regulated and unregulated markets.

With respect to other markets, sections 5(d)(7) and (8) of the Act require DCMs to make available to the public: (i) Information concerning the terms and conditions of the contracts and the mechanisms for executing transactions; and (ii) daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts. Sections 5a(d)(4) and (5) require registered DTFs to disclose publicly: (i) information concerning contract terms and conditions, trading conventions, mechanisms and practices, financial integrity protections, and other information relevant to participation in trading on the facility; and (ii) if the Commission determines that the contracts perform a significant price discovery function for transactions in the cash market for the commodity underlying the contracts, daily information on settlement prices, volume, open interest, and opening and closing price ranges for contracts traded on the facility. Section 5d(d) requires exempt boards of trade (''EBOTs'') to disseminate publicly on a daily basis information on trading volume, opening and closing ranges, open interest, and other trading data appropriate to the market if the Commission determines that the EBOT is a significant source of price discovery for transactions in the cash market for the commodity underlying the contracts.

As noted, the Act only stipulates that an ECM should make available ''price, trading volume and other trading data to the extent appropriate.'' However, as also noted above, this requirement is unclear as to what precisely is intended to be made available to the public by ECMs, especially with regard to the term ''price.'' Based on the information that is required to be made available by the Act's other category of exempt market, the EBOT, the Commission requested comment on the reasonableness of requiring similar information, including trading activity measures, price information, and certain contextual information. The Commission also requested comment on what contextual information should be made available in order to assure that the public can accurately interpret the meaning of the trading activity and price information.

Specifically, the Commission requested comment on a requirement that the ECMs serving a significant price discovery function publicly disseminate the following information on a daily basis:

Contextual information:

- Contract terms and conditions or product descriptions; and
- Trading conventions, mechanisms, and practices.

Trading activity information:

- Trading volume; and
- Open interest, if available.

Price information:

- Opening and closing prices or price ranges;
- High and low prices;
- A volume-weighted average price; or

[17] In addition, the Commission may, at any time, *sua sponte*, conduct an assessment as to whether an ECM is serving a significant price discovery function for the associated cash market. In this regard, the Commission would consider a number of factors in deciding whether to initiate a review of a market's price discovery function, including whether the market holds itself out as performing a price discovery function for the underlying cash market. To facilitate its review of a market's price discovery function in such cases, the Commission will require that an electronic trading facility operating in reliance on section 2(h)(3) notify the Commission when the facility commences holding its markets out as serving a price discovery function.

[18] The final rules also provide the market with an opportunity to request at any time that the Commission review the continuing appropriateness of its determination in light of changed facts or circumstances.

• Any other price information approved by the Commission.[19]

The types of contextual, trading activity and price information that the Commission proposed to require to be published potentially would be useful to the price basing process; *i.e.*, this information potentially would be useful for commercial entities that do not participate directly in a market, but use the market's prices as a basis for setting prices for cash market transactions. Neither of the commenters commented on the contextual or trading information aspects of the proposed rules and the final rules with respect to public dissemination of that information are unchanged.

With respect to price information, however, ICE asked the Commission to clarify its statement in the preamble to the proposed rules that ECMs are required to publish certain market summary information without charge to the marketplace on a delayed basis.[20] Specifically, ICE suggested that the Commission clarify that, to the extent that ECMs are required to make information available on a delayed basis, DCMs are subject to the same requirement. ICE also requested clarification as to the meaning of the term ''delayed,'' and suggested that the Commission make express in its rules that delayed data be made available free of charge, if such a requirement is to be imposed. Finally, ICE requested clarification that the information dissemination requirements apply only to information on markets for which the ECM performs a significant price discovery function.

The Commission's discussion in the proposed rules of industry price dissemination practices was intended to provide a context for establishing price dissemination standards for this relatively new category of markets. The Commission is unable at this time to directly respond to ICE's request that the Commission amend its rules concerning price dissemination by DCMs since the Commission has not yet proposed rules in this area. To the extent further clarification is needed regarding the price reporting obligations of DCMs, the Commission will clarify those obligations in a separate rulemaking.

In response to ICE's request that the Commission clarify the meaning of the term ''delayed,'' the Commission is amending its proposed rules to provide that ECMs are required to make the data ''readily available to the news media and the general public without charge no later than the business day following the day to which the information pertains.'' An ECM should make such information available on a fair, equitable and timely basis and may make it available by such means as providing the information to a financial information service and by timely placement of the information on the ECM's Web site. The Commission confirms that the price dissemination rules apply only to information on markets for which the ECM performs a significant price discovery function.

In view of the different types of exempt markets, the Commission proposed, and the final rules provide, flexibility in regard to the specific price information to be published by section 2(h)(3) markets. Specifically, the final rules require that markets publish opening and closing prices or price ranges, daily high and low prices, or volume weighted average prices over a period of time that is representative of trading on the market. In addition, on a case-by-case basis, markets may publish other price information, in lieu of the price measures enumerated above, subject to the Commission's approval.

As noted above, the Act requires that opening and closing price ranges be provided by the Act's other category of exempt market—EBOTs. However, because not all exempt markets will have such information available, as a consequence of the way trading is conducted, the final rules provide that two alternative price measures, the day's high and low, or the day's volume weighted average price, may be used. Established exchanges commonly publish high and low prices for each trading session. In addition, high and low prices provide useful information regarding the range of daily trading activity. Volume weighted average prices provide a good estimate of the price applicable to most transactions executed on a market during daily trading sessions and, accordingly, may provide a better indication of the representative prices observed in a market on a given day than the other measures noted above. Finally, as noted, the final rules give ECMs the flexibility of publishing alternative price measures, subject to Commission approval, if such measures would provide the public with an adequate indication of the market's daily price levels.

III. Cost Benefit Analysis

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

Section 15(a) further specifies that the costs and benefits of the proposed rule or order shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule or order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission's proposal contained an analysis of its consideration of these costs and benefits and solicited public comment thereon. 68 FR at 66038. The Commission specifically invited commenters to submit any data that they had quantifying the costs and benefits of the proposed rules with their

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[19] The section 2(h)(3) market may satisfy the dissemination requirements by placing the information on its website, providing the information to a financial information service, or using a combination of these media. Furthermore, the section 2(h)(3) market may disseminate such additional information as it believes is appropriate for price discovery purposes. A section 2(h)(3) market may also publish all of the information specified in Rule 36.3(c)(2)(iv) whether or not the Commission has made a price discovery determination applicable to that market under Rule 36.3(c)(2)(iii). Such voluntary dissemination by a section2(h)(3) market may, in appropriate circumstances, obviate the need for the market to notify the Commission and for the Commission to make a significant price discovery determination.

[20] That statement appears in the following passage from the preamble of the proposed rules (68 FR at 66037–66038):

In considering price-reporting requirements, the Commission has focused on the reporting of delayed price information, rather than real-time price data. In this regard, the Commission notes that the Act does not appear to require publication of real-time price data. The Commission also notes that many exchanges charge fees for real-time market data (usually bids, offers and transaction prices), and that such fees can be an important source of exchange revenues. The exchanges also make certain market summary data freely available to the public on a delayed basis (where the delay can be as little as 10 minutes). This delayed market information generally includes opening and closing prices or price ranges, daily high and low prices, settlement prices, daily trading volume and open interest. The Commission interprets the Act as allowing exempt commercial markets to reap gains from the sale of real-time market data, but also to require these markets to publish the required market summary information noted above without charge to the marketplace on a delayed basis.

comment letters. *Id.* The Commission has considered the comment letters received, which included some narrative discussion of the costs and benefits of the proposed rule amendments, but neither of which set forth any data that quantified such costs and benefits.

The Commission has considered the costs and benefits of these rules in light of the specific areas of concern identified in section 15. The Commission has endeavored in these rules to impose the minimum requirements necessary to enable the Commission to perform its oversight functions, to carry out its mandate of assuring the continued existence of competitive and efficient markets and to protect the public interest in markets free of fraud and abuse. After considering their costs and benefits, the Commission has decided to adopt these rules as discussed above.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601, *et seq.*, requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. These rules will affect exempt commercial markets. The Commission has previously determined that exempt commercial markets are not small entities for purposes of the RFA.[21] The Commission received no comments regarding this determination.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA''), 44 U.S.C. 3507(d), which imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA, does not apply to these rules. The rules do not contain information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 17 CFR Part 36

Commodity futures, Commodity Futures Trading Commission.

■ In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act and, in particular, sections 2(h)(3)–(5) of the Act, the Commission hereby amends title 17, chapter I, part 36 of the Code of Federal Regulations as follows:

[21] 66 FR 42268 (Aug. 10, 2001).

PART 36—EXEMPT MARKETS

■ 1. The authority section for part 36 continues to read as follows:

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

■ 2. Section 36.3 is amended by revising paragraphs (b)(1)(i) and (ii), by adding new paragraphs (b)(1)(iii) and (iv), by redesignating paragraphs (b)(2) and (b)(3) as paragraphs (b)(3) and (b)(4), by adding a new paragraph (b)(2), by adding a heading to paragraph (c)(1), by revising paragraph (c)(2), and by adding a heading to paragraph (c)(3) to read as follows:

§ 36.3 Exempt commercial markets.

* * * * *

(b) * * *

(1) * * *

(i) Provide the Commission with access to the facility's trading protocols, either electronically or in hard copy form;

(ii) Identify to the Commission those transactions conducted on the 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 transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day, showing for each transaction executed on the facility in reliance on the exemption set forth in section 2(h)(3) of the Act, and meeting the five trades per day or more threshold test of this section, the following information: the commodity, the location, the maturity date, whether it is a financially settled or physically delivered instrument, the date of execution, the time of execution, the price, the quantity, and such other information as the Commission may determine, and for an option instrument, in addition to the foregoing information, the type of option (call or put) and the strike price. 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; or

(B) Provide the Commission, in a form and manner acceptable to the Commission, with electronic access to those transactions conducted on the facility in reliance on the exemption in section 2(h)(3) of the Act, and meeting the five trades per day or more threshold test of this section, which access would allow the Commission to compile the information described in paragraph (b)(1)(ii)(A) of this section and create a permanent record thereof;

(iii) Maintain a record of allegations or complaints received by the 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, the date of the complaint, the market instrument, the substance of the allegations, and the name of the person at the trading facility who received the complaint; and

(iv) Provide to the Commission, either electronically or in hard copy form, a copy of the record of each complaint received pursuant to paragraph (b)(1)(iii) 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 regulations, such copy shall be provided to the Commission within three business days after the complaint is received.

(2) The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting reports, the time within which such reports shall be filed, and the form and manner of providing electronic access, under paragraph (b)(1) 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.

* * * * *

(c) * * *

(1) *Prohibited representation.* * * *

(2) *Market data dissemination.* (i) *Criteria for price discovery determination.* 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 electronic trading facility when:

(A) Cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis; or

(B) The market's prices are routinely disseminated in a widely distributed industry publication and are routinely consulted by industry participants in pricing cash market transactions.

(ii) *Notification.* An electronic trading facility operating in reliance on section 2(h)(3) of the Act shall notify the Commission when it has reason to believe that:

(A) Cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis;

(B) The market's prices are routinely disseminated in a widely distributed industry publication and are routinely consulted by industry participants in pricing cash market transactions; or

(C) The market holds itself out to the public as performing a price discovery function for the cash market for the commodity.

(iii) *Price discovery determination.* Following receipt of a notice under paragraph (c)(2)(ii) of this section, or on its own initiative, the Commission may notify an electronic trading facility operating in reliance on section 2(h)(3) of the Act that the trading facility appears to meet the criteria for performing a significant price discovery function under paragraph (c)(2)(i)(A) or (B) of this section. Before making a final price discovery determination under this paragraph, the Commission shall provide the electronic trading facility with an opportunity for a hearing through the submission of written data, views and arguments. Any such written data, views and arguments shall be filed with the Secretary of the Commission in the form and manner and within the time specified by the Commission. After consideration of all relevant matters, the Commission shall issue an order containing its determination whether the electronic trading facility performs a significant price discovery function under the criteria of paragraph (c)(2)(i)(A) or (B) of this section.

(iv) *Price dissemination.* (A) An electronic trading facility that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section shall disseminate publicly and on a daily basis all of the following information with respect to transactions executed in reliance on the exemption:

(*1*) Contract terms and conditions, or a product description, and trading conventions, mechanisms and practices;

(*2*) Trading volume by commodity and, if available, open interest; and

(*3*) The opening and closing prices or price ranges, the daily high and low prices, a volume-weighted average price that is representative of trading on the trading facility, or such other daily price information as proposed by the facility and approved by the Commission.

(B) The trading facility shall make such information readily available to the news media and the general public without charge no later than the business day following the day to which the information pertains.

(v) *Modification of price discovery determination.* A trading facility that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section may petition the Commission at any time to modify or vacate that determination. The petition shall contain an appropriate justification for the request. The Commission, after notice and opportunity for a hearing through the submission of written data, views and arguments, shall by order grant, grant subject to conditions, or deny such request.

(3) *Required representation.* * * *

Issued in Washington, DC, on July 13, 2004, by the Commission.

Jean A. Webb,

Secretary of the Commission.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–8442; File No. S7–17–04]

RIN 3235–AJ03

Covered Securities Pursuant to Section 18 of the Securities Act of 1933

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting an amendment to a rule under section 18 of the Securities Act of 1933 (''Securities Act''). The purpose of the amendment is to designate options listed on the International Securities Exchange, Inc. (''ISE'') as covered securities. Covered securities under section 18 of the Securities Act are exempt from State law registration requirements.

DATES: *Effective Date:* August 19, 2004.

FOR FURTHER INFORMATION CONTACT: Kelly Riley, Assistant Director, (202) 942–0752, Gordon Fuller, Counsel to the Assistant Director, (202) 942–0792 or Brian Trackman, Attorney, (202) 942–7951, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

I. Introduction

In 1996, Congress amended section 18 of the Securities Act to exempt from State registration requirements securities listed, or authorized for listing, on the New York Stock Exchange (''NYSE''), the American Stock Exchange (''Amex''), or the National Market System of the Nasdaq Stock Market (''Nasdaq/NMS'') (collectively, the ''Named Markets''), or any national securities exchange determined by the Commission to have substantially similar listing standards to those markets.[1] More specifically, section 18(a) of the Securities Act provides that ''no law, rule, regulation, or order, or other administrative action of any State * * * requiring, or with respect to, registration or qualification of securities * * * shall directly or indirectly apply to a security that—(A) is a covered security.''[2] Covered securities are defined in section 18(b)(1) of the Securities Act to include those securities listed, or authorized for listing, on the Named Markets, or securities listed, or authorized for listing on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule are ''substantially similar'' to the Named Markets.[3]

The Commission adopted Rule 146 pursuant to section 18(b)(1)(B) of the Securities Act.[4] Rule 146(b) lists those national securities exchanges, or segments or tiers thereof that the Commission has determined to have listing standards substantially similar to those of the Named Markets, and thus securities listed on such exchanges are covered securities.[5] The ISE has petitioned the Commission to amend Rule 146(b) to determine that its listing standards for securities listed on the ISE are substantially similar to those of the Named Markets and, accordingly, that securities listed pursuant to such listing

[1] *See* National Securities Markets Improvement Act of 1996, Public Law No. 104–290, 110 Stat. 3416 (October 11, 1996).

[2] 15 U.S.C. 77r(a).

[3] 15 U.S.C. 77r(b)(1). In addition, securities of the same issuer that are equal in seniority or senior to a security listed on a Named Market or national securities exchange designated by the Commission as having substantially similar listing standards to a Named Market are covered securities for purposes of section 18 of the Securities Act. 15 U.S.C. 77r(b)(1)(C).

[4] Securities Act Release No. 7494, Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998).

[5] 17 CFR 230.146(b).