

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

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

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

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

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

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

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

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

#### **§36.1 Exemption and definitions.**

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 The provisions of this part expire, and are no longer valid as to any such transaction entered into on or after three years following the date the first contract trades pursuant to this part.

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

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

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

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

(2) *Eligible Participant* means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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sorghums, millfeed, butter, eggs, onions, solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, or frozen concentrated orange juice;

(4) Does not involve any commodity futures contract or commodity option contract in which there is any open interest and in which there has been any trading on any board of trade during the six consecutive complete calendar months preceding the date of application to trade as a section 4(c) contract market transaction, unless the transaction can reasonably be distinguished from any such futures contract or commodity option contract based on its hedging function and/or pricing basis; *provided however*, that (i) the five- and ten-year interest rate swaps futures contracts, the Rolling Spot Contracts in foreign currency, and the foreign currency forward futures contracts and options thereon, may be traded as section 4(c) contract market transactions, and (ii) a flexible commodity option may be listed as a section 4(c) contract market transaction prior to listing such option for trading otherwise; and

(5) Does not involve any contracts of sale (or options on such contracts) subject to the provisions of section 2(a)(1)(B) of the Act, including contracts for future delivery of a group or index of securities (or any interest therein or based upon the value thereof).

(b) The contract market on which the section 4(c) contract market transaction is traded need not satisfy the requirements of §1.61 of this chapter.

(c) The contract market on which the section 4(c) contract market transaction is traded or executed complies with the provisions of this part.

#### **§36.3 Section 4(c) contract market trading rules.**

A board of trade may submit for Commission review, pursuant to the expedited procedures set forth in this paragraph, trading rules for section 4(c) contract market transactions (“special execution procedures”) that need not meet the requirements of sec-

tions 4b(a)(iv), 4b(b) and 4c(a) of the Act and §§1.38(a), 1.39, 155.2, 155.3 and 155.4 of this chapter, provided that such section 4(c) contract market trading rules satisfy the terms and conditions of this section.

(a) *Definition.* “Special execution procedures” means contract market rules permitting noncompetitive bids, offers, negotiation, and/or execution of orders and transactions.

(b) Special execution procedures that permit a member to trade for his own account opposite the account of another member must provide for an audit trail that meets the requirements of §1.35(a), (e), (g) and (i) and §1.38(b) of this chapter.

(c) Special execution procedures that permit a futures commission merchant or floor broker to take the opposite side of a customer order for its own account or permit the execution of orders directly between customer accounts of different principals must provide for an audit trail that meets the requirements of paragraph (b) of this section and that also requires a written record of each customer order which must consist of customer account identification, terms of the order, including price-specific instruction from the customer, order number, and time of order receipt. No order shall be executed without price-specific instruction from the customer. Procedures submitted under this paragraph also must include a specific prohibition against disclosure of customer order information other than to facilitate execution thereof and a requirement that members provide to their customers, in writing, prior to the initial execution for that customer of any transaction using these procedures, a description of the special execution procedures and, in particular, how they vary from on-floor competitive trading procedures.

(d) Section 4(c) contract market trading rules that provide that transactions may be executed using any combination of special execution procedures and competitive on-floor trading procedures must set forth the circumstances under which such transactions could occur competitively on-floor, provided that any transaction executed using special execution procedures be in compliance with paragraphs

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(b) and (c) of this section, and include a specific prohibition against frontrunning.

(e) Section 4(c) contract market trading rules also must provide for the following:

(1) Record maintenance and retention in accordance with §1.31 of this chapter;

(2) The immediate post-execution report of each purchase and each sale transaction and dissemination on the relevant market floor, trading screen, and/or vendor service through the board of trade's market quotation system of the price, quantity, and contract traded pursuant to this section. Transactions may be executed pursuant to this section only during hours in which such immediate post-execution dissemination is available;

(3) The report to clearing, and clearing, of each transaction concluded pursuant to this section as quickly as practicable, but in no event later than required for trades subject to §§1.38 and 1.39 of this chapter; and

(4) Compliance with §36.9 of this part, except that any trade executed using special execution procedures in compliance with this section need not be in compliance with section 4b(a)(iv) of the Act.

(f)(1) Transactions offered or entered into in compliance with special execution procedures submitted to the Commission and permitted to become effective pursuant to the terms of this part shall not be deemed to violate sections 4b(a) (iv), 4b(b), or 4c(a) of the Act or §§1.38(a), 1.39, 155.2, 155.3 or 155.4 of this chapter.

(2) No person shall offer or enter into any section 4(c) contract market transaction, unless it meets all requirements of the applicable special execution procedures submitted to the Commission and permitted to become effective pursuant to the terms of this part.

(g) *Submission procedures.* (1) A board of trade seeking review of a section 4(c) contract market trading rule shall furnish one copy of the information set forth in paragraphs (b), (c) or (d) and (e) of this section, as applicable, to the Commission at its Washington, D.C. headquarters. One copy shall also be transmitted by the board of trade to the regional office of the Commission

having local jurisdiction over the board of trade. Each submission shall be labeled as being submitted pursuant to this section.

(2) Section 4(c) contract market trading rules submitted by the contract market pursuant to this section shall become effective ten days after receipt of the submission (or such earlier time as may be determined by the Commission or its delegee) unless, within the ten-day period, the Commission or its delegee notifies the board of trade in writing that the submission does not meet the conditions of this section. Upon such notification by the Commission or its delegee, the submission will be subject to the usual procedures for rule approval under section 5a(a)(12)(A) of the Act and §1.41(b) of this chapter.

(3) Notwithstanding the foregoing, if a contract market submits for review pursuant to this paragraph large order execution procedures that are substantially similar to procedures previously approved by the Commission pursuant to §1.39 of this chapter for non-section 4(c) contract market transactions, then such procedures shall be deemed effective upon Commission receipt thereof.

(4) Once trading in a section 4(c) contract market transaction has commenced, any modification to any approved section 4(c) contract market trading rule must be submitted to the Commission for review pursuant to the standards and procedures for section 4(c) contract market trading rules set forth in this section.

(5) Other section 4(c) contract market trading rules, which do not conform to the specific trading standards set forth herein and which do not satisfy the requirements of the Act and Commission Rules, may be submitted for Commission approval in accordance with section 5(a)(12)(A) of the Act and §1.41(b) of this chapter under the usual timeframes.

### §36.4 Listing of section 4(c) contract market transactions.

(a) A board of trade which has been initially designated as a contract market and has otherwise met the requirements of sections 5 and 5a of the Act (other than section 5a(a)(12)(A)) seeking to permit trading in a section 4(c)

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contract market transaction shall furnish to the Commission at least ten days prior to its proposed effective date, the rules setting forth the terms and conditions of the proposed section 4(c) contract market transaction.

(b) The board of trade shall furnish one copy of the information set forth in paragraph (a) of this section to the Commission at its Washington, D.C. headquarters. One copy shall also be transmitted by the board of trade to the regional office of the Commission having local jurisdiction over the board of trade. Each submission shall be labeled as being submitted pursuant to this part.

(c) A board of trade which has been initially designated as a contract market and has otherwise met the requirements of sections 5 and 5a of the Act (other than section 5a(a)(12)(A)) and which meets the requirements of § 36.2 shall be deemed to be designated as a contract market in section 4(c) contract market transactions, the rules submitted shall be deemed to be approved, and section 4(c) contract market transactions may be traded or executed thereon ten days after receipt of the submission pursuant to this section unless, within the ten-day period, the Commission or its delegee notifies the board of trade in writing that the proposed transactions do not meet the requirements of § 36.2. Upon such notification by the Commission or its delegee, the submission will be subject to the usual procedures for rule approval under section 5a(a)(12)(A) of the Act and § 1.41(b) of this chapter.

(d) Any modification to the rules setting forth the terms and conditions of a section 4(c) contract market transaction shall be submitted to the Commission pursuant to the procedure set forth in this section.

### § 36.5 Reporting requirements.

(a) The reporting requirements set forth in this section shall govern section 4(c) contract market transactions in lieu of the requirements of parts 16, 17, 18, and 19 of this chapter.

(b) The provisions of § 15.05 and part 21 of this chapter shall apply to section 4(c) contract market transactions as though they were set forth herein and

included specific references to eligible participants.

(c) *Reports by contract markets to the Commission.* Each contract market shall submit to the Commission in accordance with paragraph (d) of this section the following information with respect to section 4(c) contract market transactions by commodity or type of contract as specified by the Commission:

(1) For each commodity or type of contract,

(i) The total gross open contracts at the end of the day covered by the report,

(ii) Total transactions, by type of transaction, as specified by the Commission, which occurred during the day covered by the report, and

(iii) Prices, as specified by the Commission.

(2) For each clearing member by proprietary and customer account,

(i) The total of all long open contracts and the total of all short open contracts carried at the end of the day covered by the report, and

(ii) The quantity of contracts transacted during the day covered by the report, by type of transaction, as specified by the Commission.

(3) *Large trader reports*—(i) *Reportable positions.* Reportable long and short positions of traders as defined by contract market rules and approved by the Commission, separately for each futures commission merchant or member of the contract market.

(ii) *Identification information.* For each reportable position, the information specified in § 17.01(b)(1)–(b)(8) of this chapter.

(d) *Form and manner of reporting; time and place of filing reports.* Unless otherwise approved by the Commission or its designee, each contract market operating pursuant to this part shall submit the information required by paragraph (c) of this section as follows:

(1) A format and coding structure approved in writing by the Commission or its designee on compatible data processing media as defined in part 15 of this chapter shall be used;

(2) The information contained in paragraphs (c)(1) and (c)(2) of this section must be filed daily when the data are first available, but not later than

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3:00 p.m. on the business day following the day to which the information pertains. The information contained in paragraph (c)(3) must be filed on call by the Commission or its designee, at such times as specified in the call.

(3) Except for dial-up transmissions, the information should be submitted at the regional office of the Commission having local jurisdiction with respect to such contract market.

(e) *Reports by contract markets to the public.* Each contract market operating pursuant to this part shall publish for each business day the following information for section 4(c) contract market transactions by commodity or type of contract as specified by the Commission:

- (1) The total gross open contracts;
- (2) The total number of transactions by transaction type as specified by the Commission; and
- (3) Prices, as specified by the Commission.

(f) *Reports and maintenance of books and records by traders.* Every trader who owns, holds, or controls, or has held, owned, or controlled a reportable position, as defined by contract market rules, in contracts traded as section 4(c) contract market transactions shall:

(1) Keep books and records showing all details concerning all positions and transactions with respect to section 4(c) contract market transactions, all positions and transactions in any options traded thereon, and all positions and transactions in the underlying commodity, its products, and by-products and, in addition, commercial activities that the trader hedges in the underlying commodity, and shall upon request furnish to the Commission or the U.S. Department of Justice any pertinent information concerning such positions, transactions, or activities.

(2) File within one business day after a special call upon such trader by the Commission or its designee the following:

(i) Reports showing positions and transactions on such contract markets for the period of time that the trader held or controlled a reportable position, and in a form and manner as instructed in the call; and

(ii) The information specified in §18.04 of this chapter as though it pertains to section 4(c) contract market transactions.

### **§36.6 Special procedures relating to registration and listing of principals.**

(a) Notwithstanding any other provision of law, any person shall be granted a temporary license or registration as a limited introducing broker if such person:

(1) Certifies that it:

(i) Is licensed or otherwise authorized to do business and is in good standing with another federal financial regulatory authority or a foreign financial regulatory authority with which the Commission has comparability arrangements under part 30 of this chapter and has received part 30 relief;

(ii) Has filed the fingerprints of its principals with such other regulatory authority;

(iii) And its principals are not subject to a statutory disqualification from registration under section 8a(2) of the Act;

(iv) Will restrict its activities subject to regulation under the Act to section 4(c) contract market transactions; and

(v) Will be liable for all acts, omissions and failures, and responsible for the supervision, of its associated persons, employees and agents in connection with its activities as a limited introducing broker involving section 4(c) contract market transactions; and

(2) Complies with any special temporary licensing or registration procedures applicable to persons whose activities are limited to those specified in paragraph (a)(1)(iv) of this section that have been adopted by the National Futures Association and approved by the Commission.

(3) A person whose activities are limited to those specified in paragraph (a)(1)(iv) of this section shall not be subject to the minimum financial requirements set forth in §1.17 of this chapter.

(b) Notwithstanding any other provision of law, any person associated with a futures commission merchant, an introducing broker, or a limited introducing broker described in paragraph (a) of this section shall be granted a

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temporary license or registration to act in the capacity of a limited associated person of such sponsor, or be listed as a principal thereof, if such person and such person's sponsor:

(1) Certifies that he:

(i) Is licensed or otherwise authorized to do business and in good standing with another federal financial regulatory authority or a foreign financial regulatory authority with which the Commission has comparability arrangements under part 30 of this chapter and the sponsor, if applicable, has received part 30 relief;

(ii) Has filed his fingerprints with such other regulatory authority;

(iii) Is not subject to a statutory disqualification from registration under section 8a(2) of the Act; and

(iv) Will restrict his activities subject to regulation under the Act to section 4(c) contract market transactions; and

(2) Complies with any special temporary licensing, registration or principal listing procedures applicable to persons whose activities are limited to those specified in paragraph (b)(1)(iv) of this section that have been adopted by the National Futures Association and approved by the Commission.

## § 36.7 Risk disclosure.

(a) A futures commission merchant or, in the case of an introduced account, an introducing broker, may open an account for a customer with respect to an instrument governed by this part without furnishing such customer the disclosure statements required under §§ 1.55, 1.65, 33.7, and 190.10 of this chapter: *Provided, however*, that the futures commission merchant or, in the case of an introduced account, the introducing broker, does furnish the customer, prior to the customer's entry into the first section 4(c) contract market transaction with respect to a particular instrument, with disclosure appropriate to the particular instrument and the customer.

(b) This section does not relieve a futures commission merchant or introducing broker from any other disclosure obligation it may have under applicable law.

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## § 36.8 Suspension or revocation of section 4(c) contract market transaction exemption.

The Commission may, after notice and opportunity for a hearing, suspend or revoke the exemption of any section 4(c) contract market transaction if the Commission determines that the exemption is no longer consistent with the public interest and the purposes of the Act.

## § 36.9 Fraud and manipulation in connection with section 4(c) contract market transactions.

(a) *Fraud.* The requirements of sections 4b(a) and 4o of the Act and § 33.10 of this chapter shall apply to section 4(c) contract market transactions. In any event, it shall be unlawful for any person, directly or indirectly, in or in connection with an offer to enter into, the entry into, the confirmation of the execution of, or the maintenance of any transaction entered into pursuant to this part—

(1) To cheat or defraud or attempt to cheat or defraud any other person;

(2) Willfully to make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof;

(3) Willfully to deceive or attempt to deceive any other person by any means whatsoever.

(b) *Manipulation.* The requirements of sections 6(c), 6(d), and 9(a) of the Act and § 33.9(d) of this chapter shall apply to section 4(c) contract market transactions.

## PART 100—DELIVERY PERIOD REQUIRED

AUTHORITY: 7 U.S.C. 7a(a)(4) and 12a.

## § 100.1 Delivery period required with respect to certain grains.

A period of seven business days is required during which contracts for future delivery in the current delivery month of wheat, corn, oats, barley, rye, or flaxseed may be settled by delivery of the actual cash commodity after trading in such contracts has ceased, for each delivery month after May 1938, on all contract markets on which there