

## Commodity Futures Trading Commission

## § 36.2

(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—EXEMPT MARKETS

Sec.

36.1 Scope.

36.2 Exempt boards of trade.

36.3 Exempt commercial markets.

AUTHORITY: 7 U.S.C. 2, 5, 6, 6c, and 12a, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106-554, 114 Stat. 2763 (2000).

SOURCE: 66 FR 42270, Aug. 10, 2001, unless otherwise noted.

#### § 36.1 Scope.

The provisions of this part apply to any board of trade or electronic trading facility eligible for exemption

under sections 5d and 2(h)(3) through (5) of the Act, respectively.

#### § 36.2 Exempt boards of trade.

(a) *Eligible commodities.* Commodities eligible under section 5d(b)(1) of the Act to be traded by an exempt board of trade are:

(1) Commodities having—

(i) A nearly inexhaustible deliverable supply;

(ii) A deliverable supply that is sufficiently large, and a cash market sufficiently liquid, to render any contract traded on the commodity highly unlikely to be susceptible to the threat of manipulation; or

(iii) No cash market.

(2) The commodities that meet the criteria of paragraph (a)(1) of this section are:

(i) The commodities defined in section 1a(13) of the Act as “excluded commodities” (other than a security, including any group or index thereof or any interest in, or based on the value of, any security or group or index of securities); and

(ii) Such other commodity or commodities as the Commission may determine by rule, regulation or order.

(b) *Notification.* Boards of trade operating under Section 5d of the Act as exempt boards of trade shall so notify the Commission. This notification shall be filed with the Secretary of the Commission at its Washington, DC headquarters, in electronic form, shall be labeled as “Notification of Operation as an Exempt Board of Trade,” and shall include:

(1) The name and address of the exempt board of trade; and

(2) The name and telephone number of a contact person.

(c) *Additional requirements—(1) Prohibited representation.* A board of trade notifying the Commission that it meets the criteria of Section 5d of the Act and elects to operate as an exempt board of trade shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(2) *Market data dissemination.* (i) *Criteria for price discovery determination.* An exempt board of trade operating a market in reliance on the exemption in

Section 5d of the Act performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract, or transaction executed or traded on the facility 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 exempt board of trade operating a market in reliance on the exemption in Section 5d of the Act shall notify the Commission when:

(A) It has reason to believe that cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis;

(B) It has reason to believe that 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 exempt board of trade holds out the market 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 exempt board of trade operating a market in reliance on the exemption in Section 5d of the Act that the 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 exempt board of trade 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 Com-

mission shall issue an order containing its determination whether the 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 exempt board of trade 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 in Section 5d of the Act:

(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 board of trade, or such other daily price information as proposed by the board of trade and approved by the Commission.

(B) The exempt board of trade 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.* An exempt board of trade 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) *Annual Certification.* A board of trade operating under Section 5d of the Act as an exempt board of trade shall file with the Commission annually, no later than the end of each calendar year, a notice that includes: (i) A statement that it continues to operate under the exemption; and (ii) a certification that the information contained

in the previous Notification of Operation as an Exempt Board of Trade is still correct.

[66 FR 42270, Aug. 10, 2001, as amended at 71 FR 1961, Jan. 12, 2006]

### § 36.3 Exempt commercial markets.

(a) *Notification.* An electronic trading facility relying upon the exemption in Section 2(h)(3) of the Act shall notify the Commission of its intention to do so. This notification, and subsequent notification of any material changes in the information initially provided, shall be filed with the Secretary of the Commission at its Washington, DC headquarters, in electronic form, shall be labeled as “Notification of Operation as an Exempt Commercial Market,” and shall include the information and certifications specified in Section 2(h)(5)(A) of the Act.

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

(i) Provide the Commission with 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 trans-

mitted 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