

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Parts 36, 37, and 38

#### Co-Location/Proximity Hosting Services

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commodity Futures Trading Commission (“CFTC” or “Commission”) proposes a rule (“Proposal”) that requires Designated Contract Markets (DCMs), Derivatives Transaction Execution Facilities (DTEFs), and Exempt Commercial Markets (ECMs) that list significant price discovery contracts (SPDCs) that offer co-location and/or proximity hosting services to market participants to have equal access to co-location and/or proximity hosting services without artificial barriers that act to exclude some market participants from accessing these services or that act to bar otherwise qualified third-party vendors from providing these services. The Proposal also addresses fees for these services and would require that fees be equitable, uniform, and non-discriminatory, while taking into account the different level of services that may be required by various market participants and requires DCMs, DTEFs, and ECMs with SPDCs, that offer co-location and/or proximity hosting services, to disclose publicly, via their Web sites, the longest, shortest, and average latencies for each connectivity option. Finally, the Proposal would require DCMs, DTEFs, and ECMs with SPDCs, that approve third-parties to provide co-location and/or proximity hosting services to ensure they have sufficient agreements in place to obtain all information necessary from those third-parties to carry out their self-regulatory obligations and other obligations under the Commodity Exchange Act (“Act”) and Commission Regulations.

**DATES:** Comments must be received on or before July 12, 2010.

**ADDRESSES:** Comments should be sent to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments may be submitted via e-mail at [colocation@cftc.gov](mailto:colocation@cftc.gov). “Co-location/Proximity Hosting Services” must be in the subject field of responses submitted via e-mail, and clearly indicated on written submissions. Comments may also be submitted at <http://www.regulations.gov>. All comments must be in English, or, if not, accompanied by an English translation.

**FOR FURTHER INFORMATION CONTACT:** Melissa Mitchell, Attorney-Advisor, 202–418–5448, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In 1990, the Commission issued a Policy Statement Concerning the Oversight of Screen-Based Trading Systems (“Policy Statement”).<sup>1</sup> The Policy Statement consisted of ten principles that set out broad regulatory considerations arising from cross-border screen-based trading. Principles 4 and 6 are relevant to this Proposal. Principle 4 states, “From a technical perspective, the system should be designed to operate in a manner which is equitable to all market participants and any differences in treatment among classes of participants should be identified.” Principle 6 states, “Procedures should be established to ensure the competence, integrity, and authority of system users, to ensure that system users are adequately supervised, and that access to the system is not arbitrarily or discriminatorily denied.”

At the time of the Commission Policy Statement, screen-based trading of derivatives was a relatively recent

development. In fact, in issuing the Policy Statement, the Commission stated its belief that “[T]he Principles reflect the policy considerations underlying the Commission’s recent evaluation and approval of the Chicago Mercantile Exchange’s Globex trading system and the Amex Commodities Corporation’s Amex Access system.” The Commission noted that in issuing the Policy Statement, it “[W]ishes to add its support toward achieving the goal of effective regulation of cross border systems which facilitates international cooperation but does not impair the ability of system providers and sponsors to develop and implement innovative technologies.”

In the time since the Commission’s 1990 Policy Statement, futures and option trading has changed substantially as system providers and sponsors did, in fact, develop and implement innovative technologies. In particular, technological advances affecting futures and option trading have been more pronounced and extensive over the last ten years. For example, DCMs have undergone a decade-long transition from geographically-defined trading pits to global electronic trading platforms. From 2000 to 2009, electronic trading grew from approximately 9 percent to approximately 81 percent of volume on U.S. DCMs. Over the same period, the number of actively traded futures and option contracts listed on U.S. exchanges increased more than seven fold, from 266 contracts in 2000 to 1,866 contracts in 2009.<sup>2</sup> Moreover, total DCM futures and option trading volume rose from approximately 594.5 million contracts in 2000 to approximately 2.78 billion contracts in 2009, an increase of over 368%.<sup>3</sup> In addition to drastic changes in trading on DCMs, during that same ten year period, ECMs were first authorized by statute,<sup>4</sup> and have since gone from a group of nascent trading facilities to, in some cases, large, global electronic trading platforms with significant trading volume, with

<sup>1</sup> 55 FR 48670 (November 21, 1990). The Policy Statement was the Commission adopting the “Principles for the Oversight of Screen-Based Trading Systems for Derivatives Products” recommended by the International Organization of Securities Commissions (“IOSCO”) to all member jurisdictions. The IOSCO Principles were formulated by eight jurisdictions which comprised Working Party 7 to the IOSCO Technical Committee, under the Chairmanship of the Commission.

<sup>2</sup> Commodity Futures Trading Commission, *FY 2009 Performance and Accountability Report*, p.14.

<sup>3</sup> In addition, futures and option trading volume reached a peak of approximately 3.37 billion contracts in 2008, an increase of over 466% over the trading volume in 2000.

<sup>4</sup> ECMs were first authorized in the Commodity Futures Modernization Act of 2000 (“CFMA”). DTEFs were also first authorized in the CFMA; however there are not, and have never been, any active DTEFs.

contracts that rival DCM contracts, and with contracts that serve a significant price discovery function.

A primary driver of these drastic changes in futures and option trading has been the continual evolution of technologies for generating and executing orders. These technologies have dramatically improved the speed, capacity, and sophistication of the trading functions that are available to market participants.

Many trading firms have trading strategies that are highly dependent upon speed in a number of areas: Speed of market data delivery from exchange servers to the firms' servers; speed of processing of firms' trading engines; speed of access to exchange servers by firms' servers; and, speed of order execution and response by exchanges. For some trading firms, speed is now measured in microseconds, and any latency or delay in order arrival or execution can adversely affect their trading strategy. These trading firms are typically referred to as "high frequency" and/or "algorithmic" traders.<sup>5</sup> High frequency traders are professional traders that use sophisticated computer systems to engage in strategies that generate a large number of trades on a daily basis. Competition among high frequency traders has led to extensive use of co-location and/or proximity hosting services.<sup>6</sup>

In response to the emphasis on speed by trading firms, DCMs and ECMs have adopted highly automated trading systems that can offer extremely high-speed order entry and execution. In addition, to further reduce latency in transmitting market data and order messages, many trading markets offer co-location and/or proximity hosting services that enable market participants to place their servers in close proximity to the trading market's matching engine. Accordingly, the growth of co-location and/or proximity hosting services is largely related to the development of

high frequency trading in the futures and option markets.

Co-location and proximity services refer to trading market and/or certain third-party facility space that is made available to market participants for the purpose of locating their network and computing hardware closer to the trading market's matching engine. Along with space, co-location and proximity hosting services usually involve providing various levels of power, telecommunications, and other ancillary products and services necessary to maintain the trading firms' trading systems.

Co-location and proximity services are typically offered by trading markets that operate their own data centers or by third-party providers that host or connect to the computer systems of the trading markets. These services may permit: (1) Market participant servers to be located within the trading market's dedicated space in a data center; (2) market participant servers to be located in their own dedicated space within the same data center as the trading market; (3) market participant servers to be located in a separate data center on the same floor or in the same building as the trading market's data center; and/or (4) approved third-party vendors to manage a market participant's connectivity arrangements through proximity hosting services located in various data centers near the trading market's data center. During the Division's review of co-location and proximity hosting services, the Division learned that entities that utilize co-location and/or proximity hosting services include clearing firms, proprietary trading groups, market makers, algorithmic traders, hedge funds, introducing brokers, data centers, and quote vendors. Some firms directly co-locate, while others do so indirectly by trading through a firm that directly co-locates.

While there are multiple co-location and proximity hosting service options available to market participants depending on the trading market involved and the needs of the particular client, it has become clear to the Commission that trading volumes from firms that utilize co-location and/or proximity hosting services is significant. In its review of co-location and proximity hosting services undertaken prior to this Proposal, the Commission learned that volumes from market participants that utilize co-location and/or proximity hosting services varied a great deal. Some regulated trading markets have little to no volume generated thru the use of such services, while others have significant volume. One regulated trading market reported

that 29 percent of its traders utilized such services, representing 68 percent of its trading volume, while another reported that well over 100 market participants utilized the service, representing 39 percent of its trading volume, just to name a few. Moreover, the Commission learned that some regulated trading markets plan on expanding co-location and proximity hosting services in the very near future.

In light of the fundamental changes in the technology, products, and platforms of U.S. futures and option trading since the Commission's 1990 Policy Statement, and the significant volume generated by market participants utilizing co-location and/or proximity hosting services, the Commission believes it is necessary to re-address some of the issues raised in the Policy Statement in the form of a proposed rule to deter and prevent potential disruptions to market integrity. Moreover, given the differences in co-location and proximity hosting services offered to market participants, the Commission believes that consistent standards applicable to all regulated trading markets—DCMs, DTEFs, and ECMs with SPDCs—will ensure that co-location and proximity hosting services are offered and administered in an equitable, fair, and transparent manner that will protect all market participants.<sup>7</sup> Ensuring that Commission-regulated markets, and trading on those markets, are equitable, fair, and transparent are critical functions of the Commission and any activity that negatively impacts equitable, fair, and transparent trading on those markets could constitute a disruption to market integrity, for which it is a specific purpose of the Act to detect and prevent.<sup>8</sup>

<sup>7</sup> While this Proposal only sets forth requirements for co-location and third-party proximity hosting services, the Commission is actively considering an appropriate regulatory response to the proliferation of high-frequency and algorithmic traders to ensure that these traders do not have a negative impact on the stability of Commission-regulated futures and option markets or on the critical price discovery and risk management functions of these markets. The Commission notes that similar developments in the U.S. equity markets have been identified by the Securities and Exchange Commission ("SEC"). On January 13, 2010, the SEC issued a concept release requesting public comment on various equity market structure developments, including, among other things, co-location and high frequency trading. See SEC, Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (January 13, 2010), 75 FR 3594 (January 21, 2010).

<sup>8</sup> Section 3(b), 7 U.S.C. 5(c). Congress gave the Commission broad authority in Section 8a(5) of the Act, 7 U.S.C. 12a(5), to make and promulgate rules, such as those contained in this Proposal, reasonably necessary to prevent disruptions to market integrity.

<sup>5</sup> Rosenblatt Securities recently estimated that high frequency trading amounts to approximately 35% of U.S. future markets volume. See *Futures Industry*, January 2010, at p. 21. Similarly, the Tabb Group forecasts that total U.S. futures volume executed on an automated basis will increase 60% by the close of 2010. Tabb believes this is largely through high frequency trading. See "US Futures Markets in the Crosshairs of Algorithmic Revolution," published on *Hedgework* at <http://www.hedgework.com> dated November 16, 2009.

<sup>6</sup> Other characteristics of high frequency trading may also include: (1) The use of sophisticated computer systems to generate, route and execute orders, (2) short time-frames for establishing and liquidating positions, (3) submission of numerous orders that are cancelled shortly thereafter, and/or (4) ending the trading day in a neutral overall position.

## II. The Proposal

Commission Regulation Part 36 generally sets forth the provisions governing exempt markets (including ECMs), Part 37 generally sets forth the provisions governing DTEFs, and Part 38 generally sets forth the provisions governing DCMs. The Proposal would add language to Parts 36, 37, and 38 to impose identical requirements relating to co-location and proximity hosting services offered by ECMs with SPDCs, DTEFs, and DCMs.

For purposes of the Proposal the term “Co-Location/Proximity Hosting Services” is defined as trading market and certain third-party facility space, power, telecommunications, and other ancillary products and services that are made available to market participants for the purpose of locating their computer systems/servers in close proximity to the trading market’s trade and execution system. These services help to minimize network and other trading latencies, which is essential for high frequency traders.

The provision relating to “Equal access” would require that co-location and proximity hosting services be available to all qualified market participants willing to pay for the services. Consequently, co-location and proximity hosting services could not be offered on a discriminatory basis to only select market participants or to select categories of market participants. The Commission’s view is that access should be equitable, open and fair, and that view is expressed in the Act and Commission Regulations.<sup>9</sup> As a component of open and fair, the Commission believes that DCMs, DTEFs, and ECMs with SPDCs, that offer co-location and/or proximity hosting services must ensure that there is sufficient availability of such services for any and all willing and qualified market participants. For example, if the availability of a service became limited, thereby leaving some market participants or third-party hosting providers without adequate access, the Commission would not view access to those services as open and fair. In addition, the provision relating to “Equal access” would require that fair and open access be available to third-party hosting service providers seeking to provide proximity hosting services to market participants. By this provision, the Commission is seeking to ensure

that DCMs, DTEFs, and ECMs with SPDCs, are not the “only game in town” when it comes to co-location and proximity hosting services. Currently, there are third-parties that provide proximity hosting services. If market participants choose not to co-locate directly with the DCM, DTEF, or ECM, they should still have the opportunity to utilize qualified and approved third-party proximity hosting services to decrease their network and other trading latencies.

The provision relating to “Fees” would ensure that fees are not used as a means to deny access to some market participants by “pricing them out of the market.” The Commission recognizes that offering co-location and proximity hosting services involves costs to the trading market and third-party host, such as floor/rack space, power, data connections, and technical support, to name just a few. However, the Commission seeks to ensure that the fees charged to market participants and third-party proximity hosting services remain equitable and do not become an artificial barrier to effective market access. Moreover, the Commission’s view is that an equitable fee would be a uniform, non-discriminatory set of fees for the various services provided, including but not limited to fees for cabinet space usage, installation and related power provided to market participants, connectivity requirements, and maintenance and other ancillary services. The Commission would not view preferential pricing for certain market participants or certain classes of market participants as equitable pricing.

The provision relating to “Latency transparency” would ensure that general information concerning the longest, shortest, and average latencies for all connectivity options are separately detailed and readily available to the public on regulated trading markets’ Web sites. Alternatively, the Commission is studying an alternate approach for disclosing latency information that would be based on the percentile of speed rather than longest, shortest and average latencies.<sup>10</sup> The Commission requests comment on this issue and asks commenters to detail how they believe latency information should best be disclosed so market participants can make fully informed decisions about whether the benefits to

be obtained from co-location and/or proximity hosting services are worth the cost.

Specific and separate detail should be set forth for options where a market participant is directly co-located with a trading market; where a market participant is indirectly co-located through a clearing firm, futures commission merchant, introducing broker, or some other entity or market participant; where a market participant is connected via the services of a third-party proximity hosting provider; and all other manners by which market participants connect to the trading markets’ electronic trading system(s). This would ensure that any market participant considering co-location or proximity hosting services could easily assess whether incurring the cost is worth the benefit, and would ensure that market participants utilizing co-location or proximity hosting services could regularly assess whether the continued cost of the services is worth the benefits obtained. The Commission believes regulated trading markets should on a monthly basis update latency information on their Web sites. The Commission invites the public to comment on whether the proposed monthly disclosure of latency information is appropriate, or whether an alternative frequency parameter should be adopted. Commenters are specifically instructed to provide information on how such latency frequency disclosure would benefit markets, market participants, and the public.

Finally, the provision relating to “Third-party providers” would ensure that DCMs, DTEFs, and ECMs with SPDCs obtain all information about market participants, their systems, and their transactions from third-party providers necessary to carry out self-regulatory obligations and other obligations under the Act and Commission Regulations. In connection with this obligation, the Commission believes that DCMs, DTEFs, and ECMs with SPDCs should enter into contractual agreements with such third-party providers on terms consistent with the Act and Commission Regulations. In this manner, DCMs, DTEFs, and ECMs with SPDCs will be able to adequately perform their regulatory responsibilities. The Commission further notes that the proposed requirements would better prevent third-party proximity hosting service providers from improperly shielding the identities of market participants from the regulatory oversight of DCMs, DTEFs, ECMs, or the Commission. In addition, the provision relating to “Third-party providers”

<sup>9</sup> See e.g. Sections 5(b)(3), 7 U.S.C. 7(b)(3); Section 5(d)(9), 7 U.S.C. 7(d)(9); Commission Regulation Part 38, Appendix B, Core Principle 9; Sections 5a(c)(2) and (3), 7 U.S.C. 7(a)(c)(2) and (3); and Commission Regulation Part 37, Appendix A, Registration Criteria 2 and 3.

<sup>10</sup> The Commission is considering whether it would be more useful for trading markets to detail latency information in percentiles of speed, for instance the 1% and 99% percentiles of speed rather than high low, or the percentage of transactions at no worse than a given speed (*i.e.* 99% of all transactions had latencies of “x” milliseconds or less).

(along with the provision relating to "Equal access" as discussed above) would ensure that DCMs, DTEFs, and ECMs with SPDCs do not bar otherwise qualified third-parties from being providing co-location or proximity hosting services to market participants trading on that trading market.

### III. Related Matters

#### A. Cost-Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing a new regulation or order under the Act.<sup>11</sup> By its terms, Section 15(a) requires the Commission to "consider the costs and benefits" of a subject rule or order, without requiring it to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Section 15(a) requires that the costs and benefits of proposed rules 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. In concluding its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may determine that notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any provisions or to accomplish any of the purposes of the Act.<sup>12</sup>

The proposed regulations will ensure that all market participants have access to co-location and/or proximity hosting services on similar terms. An important goal of this rulemaking is to establish regulations for open and fair access and public disclosure of general latency information for each connectivity option offered by DCMs, DTEFs, and ECMs with SPDCs. The proposed regulations will not require entities to begin offering co-location and/or proximity hosting services, but only apply to those entities that choose to offer such services. The only costs that might be incurred by an entity complying with the proposed regulations (triggered only after an entity decides to offer co-location and/or proximity hosting services) include ensuring the public disclosure of

latency information. The Commission believes such costs would be minimal and that the benefits, particularly the benefits to the efficiency, competitiveness and financial integrity of the futures markets and the protection of market participants will outweigh the costs to entities. The Commission also notes that many entities already offer co-location and/or proximity hosting services to their market participants. This means that many of the entities have already incurred costs relating to technology and infrastructure, unrelated to this proposed rule. As such, costs have already been incurred, and would continue to be incurred with or without the requirement to comply with this proposed rule.

After considering the above mentioned factors and issues, the Commission has determined to propose these rules for co-location and/or proximity hosting services for DCMs, DTEFs and ECMs with SPDCs. The Commission specifically invites public comment on its application of the criteria contained in Section 15(a) of the Act and further invites interested parties to submit any quantifiable data that they may have concerning the costs and benefits of the proposed rules.

#### B. Paperwork Reduction Act of 1995

The proposed rules would require DCMs, DTEFs and ECMs with SPDCs that offer co-location and/or proximity hosting services to make information about the latencies for each connectivity option available to the public via their Web sites. This is information that most of those entities already have access to or keep in the normal course of business and can generally make available to the public via their Web site. Therefore, the Commission believes that the proposed rules will not impose new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Accordingly, the Paperwork Reduction Act does not apply. The Commission solicits comment on its estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements would result from the proposed rules.

#### C. 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. The rules proposed herein will affect DCMs, DTEFs, and ECMs with SPDCs. The Commission has

previously determined that the foregoing entities are not small entities for purposes of the RFA.<sup>13</sup> Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects

##### 17 CFR Part 36

Commodity futures, Exempt commercial markets, Significant price discovery contracts.

##### 17 CFR Part 37

Commodity futures, Derivates transaction execution facilities.

##### 17 CFR Part 38

Commodity futures, Designated contract markets.

In consideration of the foregoing and pursuant to the authority contained in the Commodity Exchange Act, the Commission hereby proposes to amend 17 CFR Parts 36, 37, 38 as follows:

### PART 36—EXEMPT MARKETS

1. The authority citation for Part 36 continues to read as follows:

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

2. Amend § 36.3 by adding paragraph (e) to read as follows:

#### § 36.3 Exempt commercial markets.

\* \* \* \* \*

(e) Co-location/Proximity Hosting Services.

(1) *Definition.* The term "co-location/proximity hosting services" means space, power, telecommunications, and other ancillary products and services made available to market participants for the purpose of enabling them to position their computer systems/servers in close proximity to the exempt commercial market's trade and execution systems.

(2) *Equal Access.* An exempt commercial market that lists a significant price discovery contract and offers co-location services to market participants shall allow access to such services to all market participants and third-party proximity hosting service providers otherwise eligible and qualified to use the services.

(3) *Fees.* An exempt commercial market that lists a significant price

<sup>11</sup> 7 U.S.C. 19(a).

<sup>12</sup> *E.g. Fisherman's Dock Co-op., Inc. v. Brown*, 75 F3d 164 (4th Cir. 1996); *Center for Auto Safety v. Peck*, 751 F2d 1336 (DC Cir. 1985) (agency has discretion to weigh factors in undertaking cost benefit analyses).

<sup>13</sup> 47 FR 18618, 18619 (April 30, 1982) discussing contract markets; 66 FR 42256, 42268 (August 10, 2001) discussing exempt commercial markets and derivatives transaction execution facilities.

discovery contract and offers co-location services to market participants shall ensure that the fees to market participants are imposed in a uniform, non-discriminatory manner. Fees shall not be used as an artificial barrier to access by any market participants. An exempt commercial market that lists a significant price discovery contract shall not offer preferential connectivity pricing arrangements to any market participant on any basis, including user profile, payment for order flow, or any other specialized pricing scheme.

(4) *Latency transparency.* An exempt commercial market that lists a significant price discovery contract and offers co-location services to market participants shall disclose monthly to the public on its Web site the longest, shortest, and average latencies for each connectivity option provided by the exempt commercial market.

(5) *Third-party providers.* An exempt commercial market that lists a significant price discovery contract and approves specific third-parties to provide proximity hosting services to market participants shall ensure it obtains on an ongoing basis all information necessary from those third-parties to carry out its self regulatory obligations and other obligations under the Commodity Exchange Act and Commission Regulations. An exempt commercial market that lists a significant price discovery contract and offers co-location services to market participants shall not act to bar otherwise eligible and qualified third-parties from providing co-location or proximity hosting services to market participants.

#### **PART 37—DERIVATIVES TRANSACTION EXECUTION FACILITIES**

3. The authority citation for Part 37 continues to read as follows:

**Authority:** 7 U.S.C. 2, 5, 6, 6c, 6(c), 7a and 12a, as amended by Appendix E of Pub. L. 106-554, 114 Stat. 2763A-365.

4. Add § 37.10 to read as follows:

##### **§ 37.10 Co-location/Proximity Hosting Services.**

(a) *Definition.* The term “co-location/proximity hosting services” means space, power, telecommunications, and other ancillary products and services made available to market participants for the purpose of enabling them to position their computer systems/servers in close proximity to the derivatives transaction execution facility’s trade and execution systems.

(b) *Equal Access.* A derivatives transaction execution facility that offers

co-location services to market participants shall allow access to such services to all market participants and third-party proximity hosting service providers eligible to use the services.

(c) *Fees.* A derivatives transaction execution facility that offers co-location services to market participants shall ensure that the fees to market participants are imposed in a uniform, non-discriminatory manner. Fees shall not be used as an artificial barrier to access by any market participants. A derivatives transaction execution facility shall not offer preferential connectivity pricing arrangements to any market participant on any basis, including user profile, payment for order flow, or any other specialized pricing scheme.

(d) *Latency transparency.* A derivatives transaction execution facility that offers co-location services to market participants shall disclose monthly to the public on its Web site the longest, shortest, and average latencies for each connectivity option provided by the derivatives transaction execution facility.

(e) *Third-party providers.* A derivatives transaction execution facility that approves specific third-parties to provide proximity hosting services to market participants shall ensure it obtains on an ongoing basis all information necessary from those third-parties to carry out its self regulatory obligations and other obligations under the Commodity Exchange Act and Commission Regulations. A derivatives transaction execution facility that offers co-location services to market participants shall not act to bar otherwise eligible and qualified third-parties from providing co-location or proximity hosting services to market participants.

#### **PART 38—DESIGNATED CONTRACT MARKETS**

5. The authority citation for Part 38 continues to read as follows:

**Authority:** 7 U.S.C. 2, 5, 6, 6c, 7, 7a-2 and 12a, as amended by Appendix E of Pub. L. 106-554, 114 Stat. 2763A-365.

6. Add § 38.7 to read as follows:

##### **§ 38.7 Co-location/Proximity Hosting Services.**

(a) *Definition.* The term “co-location/proximity hosting services” means space, power, telecommunications, and other ancillary products and services made available to market participants for the purpose of enabling them to position their computer systems/servers in close proximity to the designated

contract market’s trade and execution systems.

(b) *Equal Access.* A designated contract market that offers co-location services to market participants shall allow access to such services to all market participants and third-party proximity hosting service providers eligible to use the services.

(c) *Fees.* A designated contract market that offers co-location services to market participants shall ensure that the fees to market participants are imposed in a uniform, non-discriminatory manner. Fees shall not be used as an artificial barrier to access by any market participants. A designated contract market shall not offer preferential connectivity pricing arrangements to any market participant on any basis, including user profile, payment for order flow, or any other specialized pricing scheme.

(d) *Latency transparency.* A designated contract market that offers co-location services to market participants shall disclose monthly to the public on its Web site the longest, shortest, and average latencies for each connectivity option provided by the designated contract market.

(e) *Third-party providers.* A designated contract market that approves specific third-parties to provide proximity hosting services to market participants shall ensure it obtains on an ongoing basis all information necessary from those third-parties to effectively carry out its self regulatory obligations and other obligations under the Commodity Exchange Act and Commission Regulations. A designated contract market that offers co-location services to market participants shall not act to bar otherwise eligible and qualified third-parties from providing co-location or proximity hosting services to market participants.

Issued in Washington, DC on June 1, 2010 by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

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