

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Parts 36 and 40

RIN 3038-AC39

#### Amendments Pertinent to Registered Entities and Exempt Commercial Markets

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rules.

**SUMMARY:** The Commission is adopting final regulations that effectuate the following amendments to the Commission's regulations. The amendments delegate the Commission's authority to issue special calls to exempt commercial markets to the Director of the Division of Enforcement and that Director's designees. The amendments clarify the process for listing, clearing, or implementing products or rules, including dormant products and rules, and amend the definition of emergency to clarify that persons other than persons comprising a registered entity's full governing board may declare an emergency on behalf of the governing board. The amendments also amend the approval period for designated contract market rules that may change a material term or condition of an enumerated agricultural futures or options contract. Lastly, the amendments clarify how far in advance of implementation registered entities must submit self-certified contracts and rules to the Commission, and identify three additional categories of rules that may be implemented without certification or Commission approval.

**EFFECTIVE DATE:** February 14, 2008.

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#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

The Commission published initial comprehensive final regulations for trading facilities on August 10, 2001<sup>1</sup> to implement amendments introduced to the Commodity Exchange Act (CEA or Act) by the Commodity Futures Modernization Act of 2000 (CFMA).<sup>2</sup> The final regulations codified the procedural provisions common to

exempt boards of trade and exempt commercial markets (ECM) operating pursuant to sections 5d and 2(h)(3) through (5) of the Act, respectively, in part 36 of the Commission's regulations. The final regulations also codified the procedural provisions common to designated contract markets (DCM), derivatives transaction execution facilities (DTEF), and derivatives clearing organizations (DCO) in part 40 of the Commission's regulations, and further established the regulatory framework necessary to implement and interpret the provisions of the CEA, as amended by the CFMA, pertinent to trading facilities.

The Commission recently proposed additional amendments to parts 36 and 40 of the Commission's regulations that, based upon its experience in administering the Act, will better implement certain provisions of the Act and provide clearer direction as to the Commission's regulatory requirements thereunder (August 2007 notice of proposed rulemaking).<sup>3</sup> The Commission received two comment letters in response to the **Federal Register** publication of the August 2007 notice of proposed rulemaking. The material issues raised in each comment letter are addressed in the following discussion of the final amendments.

##### II. Exempt Commercial Markets

ECMs are electronic trading facilities that offer a platform for executing or trading principal-to-principal transactions involving exempt commodities solely between persons that are eligible commercial entities (ECM transactions).<sup>4</sup> ECM transactions, pursuant to section 2(h)(3) of the Act, as amended by the CFMA, are subject to a qualified exemption from the Act that reserves the applicability of the Act's fraud and manipulation provisions as well as the Commission's regulations thereunder to such contracts.<sup>5</sup> In accord with this reservation of applicability, the CEA specifically authorizes the Commission's issuance of special calls for information to ECMs in order to, among other things, enforce the Act's antifraud and antimanipulation provisions.<sup>6</sup>

In July 2004, the Commission amended regulation 36.3(b), which governs the Commission's access to ECM transaction data, to improve the quality of accessible information relevant to its antifraud and

antimanipulation authority.<sup>7</sup> In that rulemaking, the Commission stated that aberrant price behavior on ECMs may require further Commission investigation and the eventual use of special calls to identify wrongful conduct.<sup>8</sup> The authority to issue special calls to ECMs currently is delegated only to the Directors of the Division of Market Oversight (DMO) and the Division of Clearing and Intermediary Oversight (DCIO) or their designees.<sup>9</sup> Given that the Division of Enforcement is directly charged with the responsibility to enforce the provisions of the Act that apply to ECMs, and the importance of the authority to issue special calls to the Commission's ability to enforce its reserved antifraud and antimanipulation authority, the Commission is amending, as proposed, regulation 36.3 to expand the set of persons with delegated authority to issue ECM special calls to include the Director of the Division of Enforcement or that Director's designees.

In its comment letter submitted in response to the Commission's publication of the August 2007 notice of proposed rulemaking, the IntercontinentalExchange, Inc. (ICE), a Delaware corporation that, among other things, operates an ECM that predominantly lists energy commodities derivative contracts, emphasized that information subject to special calls may include confidential details of transactions that often reflect the proprietary trading activities of market participants.<sup>10</sup> Citing its prior experience providing information to the Division of Enforcement and the potential sensitive nature of the information that may be submitted, ICE requested that the exercise of ECM special call authority, by regulation, be restricted to certain senior Enforcement staff, or in the alternative, be subject to consideration and review by a restricted group of senior Enforcement staff. ICE argued that such restrictions would develop channels of communication between ECMs and staff from the Division of Enforcement that would be

<sup>7</sup> 69 FR 43285 (July 20, 2004).

<sup>8</sup> *Id.* at 43289.

<sup>9</sup> The persons to whom the authority to issue special calls may be designated is not restricted by regulation. Nonetheless, pursuant to Commission practice, the persons who have been so designated by the Division Directors of DMO and DCIO have been limited to Deputy Directors, Associate Directors, Branch Chiefs and Chief Counsels of those Divisions.

<sup>10</sup> Letter from Johnathan H. Short, Senior Vice President and General Counsel, ICE, to the Commission's Office of the Secretariat (September 12, 2007) (on file with the Commission), available at <http://www.cftc.gov/stellent/groups/public/@lrfederalregister/documents/frcomment/07-010c001.pdf>.

<sup>3</sup> 17 CFR parts 36 and 40, Amendments Pertinent to Registered Entities and Exempt Commercial Markets, 72 FR 45185 (August 13, 2007).

<sup>4</sup> 7 U.S.C. 2(h)(3).

<sup>5</sup> 7 U.S.C. 2(h)(4).

<sup>6</sup> 7 U.S.C. 2(h)(5)(B)(iii).

<sup>1</sup> 66 FR 42256 (August 10, 2001).

<sup>2</sup> Pub. L. 106-554, 114 Stat. 2763 (December 21, 2000).

particularly familiar with the type and working value of callable information. According to ICE, these procedural restrictions would facilitate the timely and efficient production of information by, for example, reducing the time spent on specifying the scope of particular productions.

The CEA specifically recognizes the value and sensitive nature of transaction data and expressly prohibits, with limited exceptions, the Commission's public disclosure of "information that would separately disclose the business transactions or market positions of any person \* \* \*" <sup>11</sup> The Commission appreciates and will remain aware of the concerns raised by ICE. The Commission, however, will not adopt ICE's recommendation that special call authority be restricted by regulation because adequate controls are in place to ensure the effective and proper use of delegated authority.

The issuance of an ECM special call by Enforcement staff will be an agency action undertaken pursuant to delegated authority to act on behalf of the Commission. The exercise of the authority to issue or assign the authority to issue special calls under Commission regulation 36.3 will be the product of deliberation and substantial internal process and will involve the participation of the Division Director prior to the issuance of a special call. Pursuant to Commission practice with respect to the other divisions, Division of Enforcement staff that would be designated by the Director to exercise special calls should be limited to the Division's Deputy Directors, Associate Directors and Chief Counsel. Restricting, by regulation, the Division of Enforcement's authority to issue ECM special calls to certain senior Enforcement staff, or in the alternative, requiring that issuances be subject to consideration and review by a restricted group of senior Enforcement staff, in the judgment of the Commission, will not substantially facilitate the efficiencies referenced by ICE. Accordingly, the Commission is amending Commission regulation 36.3, as proposed, to expand the set of persons with delegated authority to issue ECM special calls to include the Director of the Division of Enforcement or that Director's designees.

### III. Amendments to Part 40 of the Commission's Regulations

#### A. Self-Certification, Approval, and Dormancy

The Commission applies the procedural requirements for listing, clearing or implementing initial submissions of contracts and rules (including rule amendments) to dormant contracts and rules, and with certain exceptions, requires DCMs and DCOs to certify or submit for Commission approval all products and rules prior to listing or implementation.<sup>12</sup> Part 40 of the Commission's regulations, however, currently does not clearly indicate that the procedural requirements for listing, clearing or implementing dormant contracts and rules are identical to the requirements established for initial submissions of contracts and rules that have never been certified with, or approved by, the Commission.<sup>13</sup> Furthermore, the current product and rule filing provisions of part 40 do not clearly indicate that DCMs and DCOs, in general, must choose either to comply with the approval process established in part 40, or in the alternative, the certification process established in part 40, prior to listing, clearing, or implementing any product or rule, including any product or rule that has become dormant.<sup>14</sup>

The Commission is herein adopting several amendments to address these matters. The Commission is amending regulations 40.2(a), 40.3(a), 40.4(a), 40.5(a) and 40.6(a) to clarify that the procedural requirements for listing, clearing or implementing dormant contracts and rules are identical to the requirements established for

<sup>12</sup> The Commission defines a dormant contract as a contract or product without open interest that, after the expiration of a thirty-six month development period following initial certification or approval, has not traded in the preceding twelve consecutive calendar months. 17 CFR 40.1(b). The Commission defines a dormant rule as a rule that has remained unimplemented for twelve consecutive calendar months following the rule's initial certification with, or approval by, the Commission. 17 CFR 40.1(f).

<sup>13</sup> This alignment of procedural requirements is based, in part, on the premise that certain contracts and rules, which have remained inactive or unimplemented for a significant period of time, may contain terms that are no longer consistent with the Commission's regulations or prevailing market conditions. 67 FR 62783, 62784 (October 9, 2002).

<sup>14</sup> The Commission's regulations do not require a DTEF to either certify or submit for Commission approval a product or rule prior to listing or implementation. However, a DTEF, which is generally subject to notice filing requirements, may choose to self-certify products or rules or submit them for Commission approval pursuant to the procedures established in part 40 of the Commission's regulations. See 17 CFR 37.7.

submissions of contracts and rules (including rule amendments) that have never been certified with, or approved by, the Commission. The Commission is also amending the above referenced regulations to clarify that a DCM or DCO in general must choose either to list, clear, or implement a product or rule, including any dormant product or rule, pursuant to the self-certification provisions of part 40 or, in the alternative, pursuant to the process established in part 40 for receiving the Commission's prior approval.<sup>15</sup>

#### B. Dormant Registered Entities, Contracts, and Rules

The Commission has applied the concept of dormancy to registered entities by defining a dormant market or clearing organization as a registered entity that has been designated by, or registered with, the Commission for a period of thirty-six months or more but has not served as a facility for the trading or clearing of transactions for a period of twelve consecutive calendar months.<sup>16</sup> The Commission recognizes that a significant period of inactivity can potentially have a negative impact on a registered entity's ability to implement rules and list and clear contracts in a manner that remains consistent with current market conditions, the Commission's regulations, and self-regulatory best practices.<sup>17</sup> Accordingly, the Commission has deemed that upon a registered entity becoming dormant, its rules and contracts also become dormant.<sup>18</sup>

In contrast to this view, the current language of the Commission's regulations implies that the earliest possible time that a rule can become dormant, regardless of whether a registered entity has entered into dormancy, is at the end of a twelve month rule implementation period.<sup>19</sup> Similarly, the current language of the Commission's regulations implies that the earliest possible time that a contract can become dormant, regardless of whether a registered entity has entered into dormancy and absent affirmative

<sup>15</sup> Registered entities may voluntarily seek the Commission's approval for products, rules, and rule amendments. DCM rules that will materially change a term or condition of a contract with open interest that is based on an agricultural commodity enumerated in section 1a(4) of the Act, however, must be approved by the Commission prior to implementation. 7 U.S.C. 7a-2(c)(2)(B).

<sup>16</sup> See 17 CFR 40.1.

<sup>17</sup> See 47 FR 29515 (July 7, 1982).

<sup>18</sup> See 71 FR 1953, 1960 (January 12, 2006).

<sup>19</sup> The term "rule" is defined to include any registered entity (DCM, DTEF, or DCO) " \* \* \* rule, regulation, resolution, interpretation, stated policy, term and condition \* \* \* in whatever form adopted, and any amendment or addition thereto or repeal thereof \* \* \*" 17 CFR 40.1(h).

<sup>11</sup> 7 U.S.C. 12(a)(1).

action on the part of the registered entity, is at the end of a thirty-six month contract development period. The Commission therefore is revising the definition of a dormant product or contract, dormant rule, and dormant DCM, DTEF, and DCO in Commission regulation 40.1 to clearly establish that the dormancy of a registered entity will automatically and separately trigger the dormancy of that entity's contracts and rules.<sup>20</sup>

### C. Definition of Emergency

The Commission's regulations give registered entities the ability to implement emergency rules in response to market disruptions without certifying or receiving the Commission's approval prior to implementation.<sup>21</sup> The current definition of emergency implies that the full governing board of a registered entity must determine whether particular developments constitute an emergency before the registered entity may operate under emergency procedures.<sup>22</sup> The Commission, in its August 2007 notice of proposed rulemaking, proposed to amend the definition of emergency in regulation 40.1(g) to clarify that certain persons other than persons that comprise a registered entity's full governing board may properly issue an emergency determination on behalf of the governing board. The proposed revision was precipitated by a New York Mercantile Exchange (NYMEX) comment letter (submitted in response to the publication of a procedurally unrelated notice of proposed rulemaking) that suggested that the full governing board of an exchange, under emergency conditions, may not be able to issue a determination in a timely manner to address emergency conditions.<sup>23</sup>

The Commission received one comment in response to its proposal to amend the definition of emergency. In its comment letter, the CME Group Inc., a DCM formed by the 2007 merger of the Chicago Mercantile Exchange Inc. and the Board of Trade of the City of Chicago, expressed its support for the proposed clarification.<sup>24</sup> CME Group

based its support on the premise that an authorized committee or an exchange official may be better able to respond in the first instance to market disruptions that may quickly evolve into emergencies.

The Commission agrees with CME Group and NYMEX, and pursuant to a broader interpretation of the definition of emergency, has previously approved registered entity rules that delegate the authority to make an emergency determination to persons other than persons that comprise the full governing board. Accordingly, the Commission herein revises the definition of emergency in regulation 40.1(g) to clarify that duly authorized persons may determine whether a particular occurrence or circumstance is an emergency that "requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any agreements, contracts or transactions \* \* \*"<sup>25</sup> The final amendments to the definition of emergency require, as proposed, that the authorization to act on behalf of the governing board be derived from registered entity rules that specify in detail: (1) The persons authorized to issue an emergency opinion on behalf of the governing board; and (2) the procedures for the exercise of such authority.<sup>26</sup>

### D. Commission Review and Approval of Registered Entity Rules

In contrast to other registered entity rules that may be implemented pursuant to the self-certification process established in part 40, DCM rules that, as determined by the Commission, materially change a term or condition of a contract with open interest that is based on an agricultural commodity enumerated in section 1a(4) of the Act must be approved by the Commission prior to implementation.<sup>27</sup> Since a finding of materiality is by statute at the reasonable discretion of the Commission, part 40 currently affords DCMs the opportunity to request a materiality opinion from the Commission for rules that a submitting DCM characterizes as non-material. Upon request, the Commission will determine whether a DCM rule submitted under regulation 40.4(b)(9) at

least ten business days prior to implementation is material within the meaning of section 5c(c) of the Act.<sup>28</sup>

DCMs often simultaneously request that agricultural rule changes be reviewed for materiality, and if found to be material, approved by the Commission. Commission regulation 40.5 does not specify when the approval period commences with respect to rules submitted for materiality review under the process framed by Commission regulation 40.4(b)(9).<sup>29</sup> To establish certainty, the Commission is amending regulation 40.5 to commence the rule approval period at the conclusion of the 10-day materiality review period under regulation 40.4(b)(9). As stated in the August 2007 notice of proposed rulemaking, the commencement of the approval period at this point is appropriate because determining a rule's consistency with the Act and the Commission's regulations thereunder requires an analysis that is qualitatively different from the analysis required to determine the materiality of the same rule within the meaning of section 5c(c) of the Act.<sup>30</sup>

### E. Listing of Products and the Implementation of Registered Entity Rules

#### 1. The Timing of Submissions

The Commission understands that there may be some confusion as to how far in advance of implementation registered entities must submit self-certified products and rules to the Commission. Commission regulations 40.2(a) and 40.6(a) provide that such submissions must be filed electronically with the Commission at or before the close of business on the business day preceding implementation. Questions have arisen as to whether these provisions refer to the Commission's business day or the business day of the submitting registered entity.

The Commission is adopting regulations to clarify that the specified date is the Commission's business day. For clarity and in order to ensure proper notice of certified products and rules, the Commission is defining business day in part 40 and adding language to Commission regulations 40.2(a) and 40.6(a) to expressly require the filing of certified submissions with the Commission at least one full Commission business day prior to

<sup>20</sup> The final amendments also clarify that only registered DCOs can be dormant.

<sup>21</sup> See 17 CFR 40.6(a)(2).

<sup>22</sup> See 17 CFR 40.1(g).

<sup>23</sup> See letter from James A. Newsome, President, NYMEX, to Jean A. Webb, Secretary of the Commission (September 26, 2005) (on file with the Commission), available at [http://www.cftc.gov/foia/comment05/foi05-004\\_1page2.htm](http://www.cftc.gov/foia/comment05/foi05-004_1page2.htm).

<sup>24</sup> See letter from Craig S. Donohue, Chief Executive Officer, CME Group, to David A. Stawick, Secretary of the Commission (September 12, 2007) (on file with the Commission), available at <http://www.cftc.gov/stellent/groups/public/>

[@lrfederalregister/documents/frccomment/07-010c002.pdf](http://www.federalregister.gov/documents/2007-02-14/010c002.pdf).

<sup>25</sup> 17 CFR 40.1(g).

<sup>26</sup> The Commission is further adopting, as proposed, amendments to the definition of emergency in Commission regulation 40.1(g) to clarify the definition's applicability to all registered entities, including DCOs.

<sup>27</sup> 7 U.S.C. 7a-2(c).

<sup>28</sup> *Id.*

<sup>29</sup> See 17 CFR 40.4(b) and 40.5(b).

<sup>30</sup> August 2007 notice of proposed rulemaking, at 45187.

implementation.<sup>31</sup> In addition, to ensure that the appropriate operating divisions of the Commission have the ability to access electronic copies of submissions at the time of filing, the Commission is amending the mandatory recipients of electronic submissions filed under regulations 40.2(a)(1) and 40.6(a)(2) to include the Secretary of the Commission at *submissions@cftc.gov*, the relevant branch chief at the regional office having local jurisdiction over the registered entity, and, for filings submitted by a designated contract market or registered derivatives transaction execution facility, DMO at *DMOSubmissions@cftc.gov*.

## 2. Implementing Registered Entity Rules Without Certification

### a. Additional Rule Categories

The Commission's regulations generally permit a registered entity to implement a new or dormant rule without seeking prior Commission approval by certifying to the Commission that the rule complies with the Act and the Commission's regulations thereunder on the business day preceding implementation.<sup>32</sup> Registered entities, however, are not required to file certified submissions prior to implementing several categories of registered entity rules that are enumerated in Commission regulation 40.6(c)(2).<sup>33</sup> Registered entity rules that come within these categories typically are limited in scope and are implemented under enabling rules that have already been approved by, or certified with, the Commission. In order to lessen the burden placed on registered entities as well as better utilize Commission resources, the Commission is codifying several additional categories of registered entity rules that may be implemented without prior certification or Commission approval if subsequently included in a weekly notification of rule changes under regulation 40.6(c)(2). The categories of rules enumerated in Commission regulation 40.6(c)(2) are amended to include: (1) The initial listing of trading months that are consistent with previously approved or certified standards; (2) changes in lists of producers' brands or markings that are made pursuant to previously approved or certified standards or criteria relating to quality specifications;

<sup>31</sup> These amendments are consistent with other Commission regulations that exclude the day on which a notice is given or an event occurs in computing time periods that begin upon the occurrence of that notice or event. See 17 CFR 1.3(b) and 10.5.

<sup>32</sup> See 17 CFR 40.6(a).

<sup>33</sup> 17 CFR 40.6(c)(2).

and (3) for existing delivery locations, changes in lists of approved delivery facilities and delivery service providers that are made pursuant to previously approved or certified standards or criteria.<sup>34</sup>

A registered entity's ability to notice file changes that relate to trading months under amended regulation 40.6(c)(2) only extends to trading months within currently established cycles of trading months and does not extend to the delisting or relisting of trading months. By way of example, assume that the currently established cycle of trading months for a particular contract is December, March, May, July and September. Under the final amendments, the listing of a new trading month, such as November, would not qualify for notice filing under regulation 40.6(c) while an earlier than anticipated (or delayed) listing of a July contract could properly be notice filed.<sup>35</sup> With respect to producer's brands or markings and delivery facilities and service providers, the Commission reviews the relevant enabling standards and criteria to ensure their consistency with cash market practices and to ensure that their terms do not unreasonably restrain trade by inappropriately prohibiting the open participation of certain producers, facilities or service providers.<sup>36</sup> The identification of producers' brands and enumerated delivery facilities and service providers at an existing delivery location does not alter certified or Commission approved qualifying standards or criteria, nor does it change exchange procedures that verify compliance with those standards or criteria. The final regulations will therefore require that the Commission be kept apprised of changes in lists of

<sup>34</sup> Commission regulation 40.4(b)(2) identifies rules that are changes in lists of approved delivery facilities as immaterial. In conformance with the amendments to Commission regulation 40.6(c)(2), the Commission is amending regulation 40.4(b)(2) to identify rules that are changes to lists of approved delivery service providers as immaterial.

<sup>35</sup> The language of the final regulations for delivery months is different from the language that was proposed by the Commission in its August 2007 notice of proposed rulemaking. The final regulations discard redundant references to open interest and the delisting and relisting of trading months. The substantive effect of the final regulations, that is, allowing the initial listing of trading months (trading months that cannot have open interest or be delisted or relisted trading months) within the currently established cycle of trading months without prior certification or Commission approval, is equivalent to the substantive effect of the regulations and amendments proposed in the August 2007 notice of proposed rulemaking. See August 2007 notice of proposed rulemaking, at 45187 to 45188.

<sup>36</sup> See 17 CFR part 40, Appendix A (Application for Designation of Physical Delivery Futures Contracts).

approved producers' brands or markings, changes in lists of delivery location delivery facilities and service providers, and the initial listing of trading months that are consistent with previously certified or approved standards through weekly notices of rule changes filed under regulation 40.6(c)(2) as opposed to requiring that such changes be certified with or approved by the Commission prior to implementation.<sup>37</sup>

### b. Implementing Rules Without Notification

Rule changes that may appear in a weekly notification pursuant to Commission regulation 40.6(c)(2)(iv) also include "[c]hanges to option contract rules relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis."<sup>38</sup> The Commission currently receives substantially the same information under part 16 of the Commission's regulations, which specifies the daily reporting requirements that apply to DCMs.<sup>39</sup> In particular, regulation 16.01(b) stipulates that each reporting market must submit to the Commission on a daily basis various trade data, including trade volume, open interest and price information for all listed option strike prices, including discretionary prices.<sup>40</sup>

In January 2006, DMO staff granted no-action relief to permit DCMs to satisfy the regulation 40.6(c)(2)(iv) notification requirement by complying with the daily reporting requirements of regulation 16.01 of the Commission's regulations.<sup>41</sup> In order to codify the no-action relief granted by DMO and avoid duplicative regulatory requirements, the Commission is amending regulation 40.6(c)(2)(iv) and adding paragraph (G) to regulation 40.6(c)(3)(ii) to allow registered entities that are in compliance with regulation 16.01(b) to implement the specified changes relating to option contract strike prices without either prior approval, certification or inclusion in a weekly notification to the Commission.<sup>42</sup>

<sup>37</sup> Registered entities must be able to cite clearly identifiable registered entity rules that establish the applicable enabling standards and criteria in any such submission made under Commission regulation 40.6(c)(2).

<sup>38</sup> 17 CFR 40.6(c)(iv).

<sup>39</sup> See 17 CFR part 16.

<sup>40</sup> 17 CFR 16.01(b).

<sup>41</sup> See CFTC Staff Letter 06-01 (January 9, 2006).

<sup>42</sup> In July of 2006, the Commission adopted final rules to permit the trading of futures contracts based on corporate debt securities. 71 FR 39541 (July 13, 2006) (Debt Futures Release). The Commission herein adopts, as proposed, a technical amendment that conforms regulation 40.6(c)(2)(iii) to the adoption of the Debt Futures Release by

The Commission is making a similar amendment for registered entity rules denoting changes to contract trading months within currently established cycles of trading months that may be implemented pursuant to a regulation 40.6(c)(2) notification filing.<sup>43</sup> As with rules that are changes to option contract strike prices, the Commission currently receives adequate notification of the same information under regulation 16.01(a). In order to avoid duplicative regulatory requirements, the Commission is adding paragraph (H) to regulation 40.6(c)(3)(ii) to provide that registered entities that are in compliance with regulation 16.01(a) may effect the initial listing of contract trading months within the currently established cycle of trading months without prior approval, certification or inclusion in a weekly notification to the Commission.<sup>44</sup>

## V. Related Matters

### A. Cost Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing new regulations under the Act. Section 15(a) does not require the Commission to quantify the costs and benefits of new regulations or to determine whether the benefits of adopted regulations outweigh their costs. Rather, section 15(a) requires the Commission to consider the cost and benefits of the subject regulations. Section 15(a) further specifies that the costs and benefits of the regulations 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 regulation 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 final regulations expand the set of persons delegated by the Commission with the authority to issue ECM special calls to include the Director of the Division of Enforcement and that Director's designees. The final regulations do not expand the basis for issuing ECM special calls; rather, they simply expand the set of persons authorized to issue such special calls. There are no regulatory costs imposed by this extension of delegated special call authority.

The final regulations clarify that a DCM or DCO must generally choose either to comply with the rule approval process established in part 40 of the Commission's regulations or, in the alternative, the certification process established in part 40, prior to listing or clearing any product, or implementing any rule, including any product or rule that has become dormant. The final regulations also clearly establish that the dormancy of a registered entity will automatically and separately trigger the dormancy of that entity's contracts and rules. These clarifications are consistent with current Commission practice, do not impose any regulatory cost, and serve the public interest by facilitating regulatory certainty for persons subject to the Act and the Commission's regulations thereunder.

The final regulations clarify that the definition of emergency allows persons other than persons comprising the full governing board of a registered entity to declare an emergency on behalf of the governing board. The final regulations expressly recognize that the full governing board of an exchange under emergency conditions may not be able to issue an opinion in a timely manner to address an emergency. Accordingly, the Commission's final definition of emergency in part 40 clearly permits duly authorized persons to determine whether a particular occurrence or circumstance is an emergency. The final regulations facilitate the ability of registered entities to undertake timely action in response to emergency events and thereby better protect market participants and the financial integrity of transactions executed and cleared on registered entities. The final regulations also limit the potential costs that may

arise from any misuse of authority by requiring registered entities to adopt detailed procedural rules to effectuate the exercise of this delegated authority.

The final regulations clearly set forth the duration of the rule approval period for DCM rules that may change a material term or condition of a contract based on the agricultural commodities enumerated in section 1a(4) of the Act by commencing the rule approval period at the conclusion of the 10-day materiality review period under Commission regulation 40.4(b)(9). Commencing the approval period at this point gives the Commission time to effectively discharge its separate regulatory responsibilities to review registered entity rule changes for their impact on contracts with open interest and to determine whether such changes are consistent with the Act and the Commission's regulations thereunder. The amended review period is consistent with current Commission regulatory practice and should not place any additional cost or burden on submitting DCMs.

The final regulations address how far in advance of implementation registered entities must submit self-certified contracts and rules to the Commission pursuant to regulations 40.2(a) and 40.6(a) by clarifying that the date specified in those regulations refers to the Commission's business day. The final regulations ensure that there is at least one full Commission business day between the submission of a certified product or rule and such product or rule's listing or implementation. The final regulations provide regulatory clarity and impose no additional cost or burden.

The final regulations lessen the burden placed on registered entities as well as better utilize Commission resources by codifying several additional rule categories that may be implemented without prior certification or Commission approval if noticed to the Commission through other required filings or disclosure requirements or subsequently included in a weekly notification of rule changes to the Commission under regulation 40.6(c)(2). The final regulations add lists of approved producers' brands or markings, changes in lists of approved delivery facilities and delivery service providers, certain changes in contract trading months, and certain specified changes to option contract strike prices to the categories of rules that may be implemented without prior certification or Commission approval, or as applicable, notification. Registered entity rules that come within these categories typically are limited in scope

replacing that regulation's reference to stock indexes with a reference to securities indexes, a general term that includes both equity and debt securities. Final Commission regulation 40.6(c)(2)(iii) also includes a reference to regulation 40.6(c)(3)(ii)(F) to alert registered entities that certain rule changes relating to securities indexes may be implemented pursuant to notification or without such notice if implemented under regulation 40.6(c)(3).

<sup>43</sup> The Commission is amending the heading of regulation 40.6, and that provision's references to DCMs and DCOs, to clarify its potential applicability to all registered entities, including DTEFs.

<sup>44</sup> In its comment letter, CME Group stated that permitting DCMs that comply with the reporting requirements of Commission regulations 16.01(a) and (b) to implement changes in the listing of trading months within currently established cycles of trading months and changes to certain option contract rules relating to strike prices, without certification or prior Commission approval, will avoid duplicative requirements and will facilitate the efficient use of Commission resources.

and are implemented under enabling rules that have already been certified with, or approved by, the Commission. Permitting their implementation without certification or approval, or as applicable, notification, avoids unnecessary or duplicative regulatory requirements and better utilizes the Commission's resources.

The Commission's August 2007 notice of proposed rulemaking analyzed the aforementioned costs and benefits. No relevant comments were received with respect to the Commission's analysis. After considering these factors, the Commission has determined to amend parts 36 and 40 of the Commission's regulations as set forth below.

#### B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires that agencies consider the impact of their regulations on small businesses. The requirements related to the final amendments fall mainly on registered entities. The Commission has previously determined that registered entities are not "small entities" for the purposes of the RFA.<sup>45</sup> In addition, these final regulations, collectively, tend to relieve regulatory burdens. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the actions to be taken herein will not have a significant economic impact on a substantial number of small entities.

#### C. Paperwork Reduction Act

When publicizing final regulations, the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*) 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. The information collection requirements associated with the final regulations are administered under Office of Management and Budget control numbers 3038-0022 and 3038-0054. These final amendments to parts 36 and 40 of the Commission's regulations would not impose any new or additional recordkeeping or information collection requirement that would require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects

##### 17 CFR Part 36

Commodity futures.

##### 17 CFR Part 40

Commodity futures, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, and pursuant to the authority contained in the Act, and, in particular, sections 2, 4, 5, 5a, 5b, 5c, 5d and 8a of the Act, the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as follows:

#### PART 36—EXEMPT MARKETS

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

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

■ 2. In § 36.3, revise paragraphs (b)(3)(ii) to read as follows:

##### § 36.3 Exempt commercial markets.

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

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

\* \* \* \* \*

#### PART 40—PROVISIONS COMMON TO CONTRACT MARKETS, DERIVATIVES TRANSACTION EXECUTION FACILITIES AND DERIVATIVES CLEARING ORGANIZATIONS

■ 3. The authority citation for part 40 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a, 8 and 12a, as amended by appendix E of Pub. L. 106-554, 114 Stat. 2763A-365.

■ 4. In § 40.1, revise paragraph (a) through (g) to read as follows:

##### § 40.1 Definitions.

\* \* \* \* \*

(a) *Business day* means the intraday period of time starting at the business hour of 8:15 a.m. and ending at the business hour of 4:45 p.m.; *business hour* means any hour between 8:15 a.m. and 4:45 p.m., Eastern Standard Time or

Eastern Daylight Savings Time, whichever is currently in effect in Washington, DC, on all days except Saturdays, Sundays and federal holidays in Washington, DC.

(b) *Dormant contract or dormant product* means:

(1) Any agreement, contract, transaction, or instrument, or any commodity futures or option contract with respect to all future or option expiries that has no open interest and in which no trading has occurred for a period of twelve complete calendar months following a certification with, or approval by, the Commission; *provided, however,* that no contract or instrument under this paragraph (b)(1) initially and originally certified with, or approved by, the Commission within the preceding 36 complete calendar months shall be considered to be dormant; or

(2) Any commodity futures or option contract or other agreement, contract, transaction or instrument of a dormant registered entity; or

(3) Any commodity futures or option contract or other agreement, contract, transaction or instrument not otherwise dormant that a registered entity self-declares through certification to be dormant.

(c) *Dormant designated contract market* means any designated contract market on which no trading has occurred for a period of twelve complete calendar months; *provided, however,* no designated contract market shall be considered to be dormant if its initial and original Commission order of designation was issued within the preceding 36 complete calendar months.

(d) *Dormant derivatives clearing organization* means any derivatives clearing organization registered pursuant to Section 5b of the Act that has not accepted for clearing any agreement, contract or transaction that is required or permitted to be cleared by a derivatives clearing organization under Sections 5b(a) and 5b(b) of the Act, respectively, for a period of twelve complete calendar months; *provided, however,* no derivatives clearing organization shall be considered to be dormant if its initial and original Commission order of registration was issued within the preceding 36 complete calendar months.

(e) *Dormant derivatives transaction execution facility* means any derivatives transaction execution facility on which no trading has occurred for a period of twelve complete calendar months; *provided, however,* no derivatives transaction execution facility shall be considered to be dormant if its initial and original Commission order of

<sup>45</sup> See 47 FR 18618 (April 30, 1982).

designation was issued within the preceding 36 complete calendar months.

(f) *Dormant rule* means:

(1) Any registered entity rule which remains unimplemented for twelve complete calendar months following a certification with, or an approval by, the Commission; or

(2) Any rule or rule amendment of a dormant registered entity.

(g) *Emergency* means any occurrence or circumstance that, in the opinion of the governing board of a registered entity, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of a registered entity under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any agreements, contracts or transactions, including:

(1) Any manipulative or attempted manipulative activity;

(2) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions;

(3) Any circumstances which may materially affect the performance of agreements, contracts or transactions, including failure of the payment system or the bankruptcy or insolvency of any participant;

(4) Any action taken by any governmental body, or any other registered entity, board of trade, market or facility which may have a direct impact on trading; and

(5) Any other circumstance which may have a severe, adverse effect upon the functioning of a registered entity.

\* \* \* \* \*

■ 5. In § 40.2, revise the heading and paragraphs (a) introductory text, (a)(1) and (a)(2) to read as follows:

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

(a) Unless permitted otherwise by § 37.7 of this chapter, a designated contract market or a registered derivatives transaction execution facility must comply with the submission requirements of this section prior to listing a product for trading that has not been approved under § 40.3 of this chapter or that remains dormant subsequent to being submitted under this section or approved under § 40.3 of this chapter. A registered derivatives clearing organization must comply with the submission requirements of this section prior to accepting for clearing a product that is not traded on a registered entity and has not been approved for clearing under § 40.5 of this chapter or that remains dormant

subsequent to being submitted under this section or approved under § 40.5 of this chapter. A submission shall comply with the following conditions:

(1) The registered entity has filed its submission electronically in a format specified by the Secretary of the Commission with the Secretary of the Commission at *submissions@cftc.gov*, the relevant branch chief at the regional office having local jurisdiction over the registered entity, and, for filings submitted by a designated contract market or registered derivatives transaction execution facility, the Division of Market Oversight at *DMOSubmissions@cftc.gov*;

(2) The Commission has received the submission at its headquarters by the open of business on the business day preceding the product's listing or acceptance for clearing; and

\* \* \* \* \*

■ 6. In § 40.3, revise paragraph (a) introductory text to read as follows:

**§ 40.3 Voluntary submission of new products for Commission review and approval.**

(a) *Request for approval.* Pursuant to Section 5c(c) of the Act and §§ 37.7 and 38.4 of this chapter, a designated contract market or registered derivatives transaction execution facility may request that the Commission approve a new or dormant product prior to listing the product for trading, or if initially submitted under § 40.2 of this chapter, subsequent to listing the product for trading. A submission requesting approval shall:

\* \* \* \* \*

■ 7. In § 40.4, revise paragraph (a) and (b)(2) to read as follows:

**§ 40.4 Amendments to terms or conditions of enumerated agricultural contracts.**

(a) Notwithstanding the provisions of this part, a designated contract market must submit for Commission approval under the procedures of § 40.5, prior to its implementation, any rule or dormant rule that, for a delivery month having open interest, would materially change a term or condition, as defined in § 40.1(i), of a contract for future delivery in an agricultural commodity enumerated in Section 1a(4) of the Act, or of an option on such a contract or commodity.

\* \* \* \* \*

(b) \* \* \*

(2) For each delivery location, changes in lists of approved delivery facilities and delivery service providers, including weighmasters and inspectors,

pursuant to previously set standards or criteria;

\* \* \* \* \*

■ 8. In § 40.5, revise paragraphs (a) introductory text and (c) introductory text to read as follows:

**§ 40.5 Voluntary submission of rules for Commission review and approval.**

(a) *Request for approval of rules.* Pursuant to Section 5c(c) of the Act and §§ 37.7, 38.4 and 39.4 of this chapter, a registered entity may request that the Commission approve a new or dormant rule prior to implementation, or if initially submitted under §§ 40.2 or 40.6 of this chapter, subsequent to implementation. A submission requesting approval shall:

\* \* \* \* \*

(c) *Commencement and extension of time for review.* The Commission shall commence the review period in paragraph (b) of this section for a compliant submission under § 40.4(b)(9) ten business days after its receipt and further may extend the review period in paragraph (b) of this section for any approval request for:

\* \* \* \* \*

■ 9. Amend § 40.6 as follows:

A. Remove the term “designated contract market or registered derivatives clearing organization” and add in its place the term “registered entity” in paragraphs (a)(2), (c)(1), and (c)(3)(i);

B. Remove the term “designated contract market or a registered derivatives clearing organization” and add in its place the term “registered entity” in paragraph (c) introductory text;

C. Remove the term “designated contract markets and registered derivatives clearing organizations” and add in its place the term “registered entities” in paragraph (c)(3) introductory text;

D. Remove the term “contract market or a derivatives clearing organization’s” and add in its place the term “registered entity” in paragraph (c)(3)(ii)(B); and

E. In addition, revise the heading and paragraphs (a) introductory text, (a)(2), (c)(2)(iii), and (c)(2)(iv), and add paragraphs (c)(2)(vii) through (c)(2)(ix), (c)(3)(ii)(G) and (c)(3)(ii)(H) to read as follows:

**§ 40.6 Self-certification of rules.**

(a) *Required certification.* Unless permitted otherwise by § 37.7 of this chapter, a registered entity must comply with the following conditions prior to the implementation of any rule that has not obtained Commission approval under § 40.5 of this chapter or that remains dormant subsequent to being

submitted under this section or approved under § 40.5 of this chapter:

(1) \* \* \*

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

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iii) *Index products*. Routine changes in the composition, computation, or method of selection of component entities of an index (other than routine changes to securities indexes to the extent that such changes are not described in paragraph (c)(3)(ii)(F) of this section) referenced and defined in the product's terms, that do not affect the pricing basis of the index, which are made by an independent third party whose business relates to the collection or dissemination of price information and which was not formed solely for the purpose of compiling an index for use in connection with a futures or option product;

(iv) *Option contract terms*. Changes to option contract rules, which may qualify for implementation without notice pursuant to paragraph (c)(3)(ii)(G) of this section, relating to the strike price listing procedures, strike price intervals, and the listing of strike prices on a discretionary basis;

\* \* \* \* \*

(vii) *Approved brands*. Changes in lists of approved brands or markings pursuant to previously certified or Commission approved standards or criteria;

(viii) *Delivery facilities and delivery service providers*. Changes in lists of approved delivery facilities and delivery

service providers (including weighmasters, assayers, and inspectors) at a delivery location, pursuant to previously certified or Commission approved standards or criteria; or

(ix) *Trading Months*. The initial listing of trading months, which may qualify for implementation without notice pursuant to (c)(3)(ii)(H) of this section, within the currently established cycle of trading months.

(3) \* \* \*

(ii) \* \* \*

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

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

Issued in Washington, DC, on February 6, 2008, by the Commission.

David A. Stawik,

Secretary of the Commission.

[FR Doc. E8-2580 Filed 2-13-08; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 184

[Docket No. FDA-2008-N-0068]

#### Generally Recognized As Safe Substances; Technical Amendments

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule; technical amendments.

**SUMMARY:** The Food and Drug Administration (FDA) is amending certain regulations regarding generally recognized as safe (GRAS) substances to remove references to FDA development of food-grade specifications in cooperation with the National Academy of Sciences (NAS, now the National Academies). This action is editorial in nature and is intended to ensure the accuracy of the agency's regulations.

**DATES:** This rule is effective February 14, 2008.

**FOR FURTHER INFORMATION CONTACT:** Daniel E. Folmer, Center for Food Safety

and Applied Nutrition (HFS-265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740-3835, 301-436-1274.

**SUPPLEMENTARY INFORMATION:** FDA is amending its regulations in part 184 (21 CFR part 184). Several sections in part 184 state that FDA is developing food-grade specifications in cooperation with the National Academy of Sciences (NAS, now the National Academies). However, the National Academies is no longer developing food-grade specifications for food additives and ingredients. Therefore, this rule removes the obsolete information.

The final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

Publication of this document constitutes final action on these changes under the Administrative Procedure Act (5 U.S.C. 553). These amendments remove obsolete information and are nonsubstantive. FDA therefore, for good cause, finds under 5 U.S.C. 553(b)(3)(B) and (d)(3) that notice and public comment are unnecessary.

#### List of Subjects in 21 CFR Part 184

Food additives.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 184 is amended as follows:

#### PART 184—DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE

■ 1. The authority citation for 21 CFR part 184 continues to read as follows:

**Authority:** 21 U.S.C. 321, 342, 348, 371.

■ 2. Section 184.1065 is amended by revising paragraph (b) to read as follows:

#### § 184.1065 Linoleic acid.

\* \* \* \* \*

(b) The ingredient must be of a purity suitable for its intended use. The ingredient must also meet the specifications in § 172.860(b) of this chapter.

\* \* \* \* \*

■ 3. Section 184.1140 is amended by revising paragraph (b) to read as follows:

#### § 184.1140 Ammonium citrate, dibasic.

\* \* \* \* \*

(b) The ingredient must be of a purity suitable for its intended use.

\* \* \* \* \*

■ 4. Section 184.1155 is amended by revising paragraph (b) to read as follows: