

Today, the Commission is further amending the guidance in Appendix C to part 40. Specifically, the Commission is adding introductory language that explains to the public how its staff uses the information requested by the Appendix in evaluating requests for no-action relief by foreign boards of trade seeking to offer and sell their futures contracts on security indices to persons located in the U.S. The Commission also is deleting certain information that it no longer deems necessary in evaluating such requests. Further, the Commission is adding a provision to the guidance specifying that the foreign board of trade should, if applicable, make a request to the staff to make the futures contract available for trading in accordance with the terms and conditions of its Foreign Trading System No-Action letter received from Commission staff and provide a certification of its continued compliance with that letter.⁶ This provision will obviate the need for the foreign board of trade to seek a separate letter from the Division of Market Oversight ("DMO") in order to allow the offer and sale of its approved futures contract on its trading system in the U.S. pursuant to no-action relief provided by DMO staff.

In addition, the Commission is redesignating Appendix C of part 40 as Appendix D of part 30 of 17 CFR, Chapter I. The Commission's rules in Part 30 govern foreign futures and options transactions, and accordingly it would be more appropriate for the guidance to foreign exchanges on foreign exchange-traded products to be placed there.

Because the information in newly designated Appendix D of part 30 represents guidance only, this amendment does not constitute a rule under the Administrative Procedure Act ("APA"), 5 U.S.C. 551 *et seq.*, and accordingly, the provisions of the APA that generally require notice of proposed rulemaking and that provide other opportunities for public participation are not applicable. For the same reason, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, concerning the impact of rules on small entities, and the Paperwork Reduction

Act of 1995, 44 U.S.C. 3507(d), concerning rules that contain collections of information, are inapplicable.

■ In view of the forgoing, the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as follows:

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

■ 1. Appendix C to Part 40 is redesignated as Appendix D to Part 30.

PART 30—FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

■ 2. The authority citation for Part 30 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6, 6c and 12a, unless otherwise noted.

■ 3. In Part 30, newly designated appendix D is revised to read as follows:

Appendix D—Information That a Foreign Board of Trade Should Submit When Seeking No-Action Relief To Offer and Sell, to Persons Located in the United States, a Futures Contract on a Foreign Non-Narrow-Based Security Index Traded on That Foreign Board of Trade

A. Section 2(a)(1)(C)(iv) of the Commodity Exchange Act ("Act") generally prohibits any person from offering or selling a futures contract based on a security index in the U.S., except as otherwise permitted under the Act, including Section 2(a)(1)(C)(ii) of the Act. By its terms, Section 2(a)(1)(C)(iv) of the Act applies to futures contracts on security indices traded on both domestic and foreign boards of trade. Section 2(a)(1)(C)(ii) of the Act sets forth three criteria to govern the trading of futures contracts on a group or index of securities on contract markets and derivatives transaction execution facilities:

(1) The contract must provide for cash settlement;

(2) The contract must not be readily susceptible to manipulation or to being used to manipulate any underlying security; and

(3) The group or index of securities must not constitute a narrow-based security index.

B. While Section 2(a)(1)(C)(ii) of the Act provides that no board of trade or derivatives transaction execution facility may trade a security index futures contract unless it meets the three criteria noted above, it does not explicitly address the standards to be

applied to a foreign security index futures contract traded on a foreign board of trade. The Office of General Counsel has applied those same three criteria in evaluating requests by foreign boards of trade to allow the offer and sale within the United States of their foreign security index futures contracts when those foreign boards of trade do not seek designation as a contract market or registration as a derivatives transaction execution facility to trade those products.¹

C. In the analysis of a no-action request for a foreign security index futures contract traded on a foreign board of trade, the Office of the General Counsel asks the Division of Market Oversight (Division) to evaluate the foreign security index futures contract to ensure that it complies with the three criteria of Section 2(a)(1)(C)(ii) of the Act.

D. Because security index futures contracts are cash settled, the Division also evaluates the contract to ensure that the contract terms and conditions relating to cash settlement are consistent with the Commission's Guideline No. 1 requirements for cash settled contracts. In that regard, Guideline No. 1 requires that the cash price series be reliable, acceptable, publicly available and timely; that the cash settlement price be reflective of the underlying cash market; and that the cash settlement price not be readily susceptible to manipulation. In making its determination, the Division considers the design and maintenance of the index, the method of index calculation, the nature of the component security prices used to calculate the index, the breadth and frequency of index dissemination, and any other relevant factors.

E. In considering the susceptibility of an index to manipulation, the Division examines several factors, including the structure of the primary and secondary markets for the component equities, the liquidity of the component stocks, the method of index calculation, the total capitalization of stocks underlying the index, the number, weighting and capitalization of individual stocks in the index, and the existence of surveillance

¹ With regard to the third criterion, and CFTC and SEC jointly promulgated Rule 41.13 under the Act and Rule 3a55-3 under the Securities Exchange Act of 1934 ("Exchange Act"), governing security index futures contracts traded on foreign boards of trade. These rules provide that "[w]hen a contract of sale for future delivery on a security index is traded on or subject to the rules of a foreign board of trade, such index shall not be a narrow-based security index if it would not be a narrow-based security index if a futures contract on such index were traded on a designated contract market or registered derivatives transaction execution facility." CFTC Rule 41.13, 17 C.F.R. § 41.13; Exchange Act Rule 3a55-3, 17 C.F.R. § 240.3a55-3.

U.S. until the Commission and the U.S. Securities and Exchange Commission (SEC) adopt rules governing such products. See Section 2(a)(1)(E) of the Act, 7 U.S.C. § 2(a)(1)(E) and Section 6(k) of the Securities Exchange Act of 1934, 15 U.S.C. § 78f(k). But see Section 2(a)(1)(F) of the Act, 7 U.S.C. § 2(a)(1)(F).

⁶ See the Commission's Statement of Policy Regarding the Listing of New Futures and Option Contracts by Foreign Boards of Trade That Have Received Staff No-Action Relief to Place Electronic Trading Devices in the U.S., 65 FR 41641-01 (July 6, 2000).