

in paragraph (3) as the Commission may from time to time request to enable the Commission to satisfy its obligations under this Act.

These two statutory alternatives are referred to hereafter as, respectively, the “electronic access option” and the “reporting option.”

Regulation 36.3(b)(1), published on August 10, 2001, was intended to implement the foregoing statutory provisions. It provides as follows:

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

(i) Provide the Commission with access to the facility’s trading protocols and electronic access to transactions conducted on the facility in reliance on such exemption; or

(ii) Attach its initial trading protocols and any amendments thereto in hard copy form to the notification required in paragraph (a) of this section and provide in a form and manner acceptable to the Commission, as determined by the Commission in response to a petition by the exempt market relying on the exemption in section 2(h)(3) of the Act, information regarding transactions by large traders on the facility.

To date, those trading facilities that have sought to comply with this regulation have generally chosen the former, the electronic access option. In applying the electronic access option, the Commission has generally accepted from ECMs electronic access to their trading protocols (*i.e.*, the trading agreements and/or other terms and conditions applicable to trades on the facility, generally available on their Web sites) in addition to view-only electronic access to the data stream of trades taking place on the system. The Commission suggested, when it adopted Part 36, that such electronic access would provide information similar to that provided by large trader reports filed with the Commission with respect to trading on designated contract markets:

The [electronic] access requirement provides the Commission with information on a routine, ongoing basis, thereby serving many of the functions that large trader reports serve on the regulated markets. Using this access, the Commission is able to surveil transactions on the market in order to enforce its anti-manipulation authority.<sup>2</sup>

In practice, however, the Commission’s Division of Market Oversight (“Division”) has found that the view-only information provided under the electronic access option, by those trading facilities that have filed notifications under section 2(h)(3) over

the last 24 months, is neither as relevant,<sup>3</sup> nor as useful,<sup>4</sup> as anticipated.

Therefore, the Commission is proposing to amend its regulations to focus Rule 36.3(b)(1) more precisely so as to provide the Commission with access to more relevant and useful information regarding trading activity on exempt commercial markets. Under the amended rules, an electronic trading facility filing a notification with the Commission under Rule 36.3 would be required, initially and on an ongoing basis, to: (1) Provide the Commission with access to the facility’s trading protocols, either electronically or in hard copy form; (2) identify those transactions conducted on the facility with respect to which it intends to rely on the exemption in section 2(h)(3); and (3) inform the Commission whether it intends to satisfy the information access requirement of section 2(h)(5)(B)(i) of the Act with respect to such transactions through the electronic access option provided in paragraph 36.3(b)(1)(ii)(B), or the reporting option provided in paragraph 36.3(b)(1)(ii)(A), as described below.

The trading facility would not be required to include among the agreements, contracts or transactions for which it is seeking an exemption those agreements, contracts or transactions that are not contracts for future delivery of a commodity, or options, and are, therefore, not subject to the Commission’s exclusive jurisdiction. Thus, for example, the trading facility would not be required to identify, or provide information with respect to, agreements, contracts or transactions involving “any sale of any cash commodity for deferred shipment or delivery.” Such transactions are excluded from the Commission’s exclusive jurisdiction under section 1a(19) of the Act (commonly referred to as “the forward contract exclusion”). Neither would a trading facility be required to identify, or provide information with respect to, agreements, contracts or transactions that constitute cash or spot transactions, which are contracts for present, rather than future,

<sup>3</sup> The electronic access option, as currently applied, gives the Commission information regarding all contracts traded on an ECM’s trading facility. This may include a large amount of irrelevant, extraneous data regarding contracts that are not contracts for future delivery of a commodity, or options, and are, therefore, not within the Commission’s exclusive jurisdiction.

<sup>4</sup> The Division’s surveillance staff have determined that the information available through the current view-only electronic access to ECM trading facilities is not, in fact, equivalent to the large trader information received with respect to designated contract markets.

delivery and likewise are not subject to the Commission’s exclusive jurisdiction.

In complying with amended Rule 36.3, trading facilities shall make their best effort to identify to the Commission only those agreements, contracts or transactions that are subject to the Commission’s exclusive jurisdiction and with respect to which they intend to rely on the exemption provided in section 2(h)(3). Should a new agreement, contract or transaction be added, or an existing one amended, that would be traded in reliance on the exemption, the trading facility should amend its notice accordingly.

A trading facility that does not offer trading in any futures or option contracts subject to the Commission’s exclusive jurisdiction—for example, a facility where only cash or forward contracts are traded—is not required to file a notification under Rule 36.3. Such a facility is not subject to the Commodity Exchange Act.

Consistent with section 2(i) of the Act,<sup>5</sup> the mere fact that it was identified as being traded in reliance on the section 2(h)(3) exemption would not be construed as creating a presumption that any agreement, contract or transaction is or otherwise would be subject to the Act. Thus, for example, in any enforcement action involving any such agreement, contract or transaction, the Commission would be required to prove its jurisdiction independently of an ECM’s identification of that agreement, contract or transaction for purposes of information access under Rule 36.3. Also, should a trading facility seeking in good faith to comply with Rule 36.3 fail to identify for information access purposes a particular agreement, contract or transaction, which is later determined to be a futures or option contract subject to the Commission’s exclusive jurisdiction, such failure would not be construed by the Commission as a violation of section

<sup>5</sup> Section 2(i) of the Commodity Exchange Act provides that:

(1) No provision of this Act shall be viewed as implying or creating any presumption that —

(A) any agreement, contract or transaction that is excluded from this Act under section 2(c), 2(d), 2(e), 2(f), or 2(g) of this Act or Title IV of the Commodity Futures Modernization Act of 2000, or exempted under section 2(h) or 4(c) of this Act; or

(B) any agreement, contract or transaction, not otherwise subject to this Act, that is not so excluded or exempted is or would otherwise be subject to this Act.

(2) No provision of, or amendment made by, the Commodity Futures Modernization Act of 2000 shall be construed as conferring jurisdiction on the Commission with respect to any such agreement, contract or transaction, except as expressly provided in section 5a of this Act (to the extent provided in section 5a(g) of this Act), 5b of this Act, or 5d of this Act.

<sup>2</sup> 66 FR 42264, Aug. 10, 2001.