

4(a) of the Act.⁶ However, such transaction would still remain subject to the Commission's antifraud and antimanipulation authority.

Trading facilities electing to provide information under the reporting option would be required to file weekly reports containing information that could be useful to the Commission in enforcing its antifraud and antimanipulation authority with respect to those trading facilities. Such reports would include, in a form and manner approved by the Commission, a report for each business day, showing for each transaction executed on the facility in reliance on the exemption set forth in section 2(h)(3) the following information: the commodity, the location,⁷ the maturity date, whether it is a financially settled or physically delivered instrument, the date of execution, the time of execution, the price, the quantity, and such other information as the Commission may determine, and for an option instrument, the type of option (call or put) and the strike price. Each such report would be required to be electronically transmitted weekly, within such time period as is acceptable to the Commission following the end of the week to which the data applies.

Those trading facilities wishing to provide information pursuant to the electronic access option (Rule 36.3(b)(1)(ii)(B)) would be required, initially and on an ongoing basis, to provide the Commission with electronic access to those transactions conducted on the facility in reliance on the exemption in section 2(h)(3). Such access must be structured so as to permit the Commission to capture in permanent form a continuing record of trades on the facility such that the Commission would be able to reconstruct and compile the same information regarding transactions on the trading facility that would otherwise be provided by the trading facility under the reporting option (Rule 36.3(b)(1)(ii)(A)) described above.

The Commission expects that the information that will be provided by ECMs in reports required under Rule 36.3(b)(1)(ii)(A), or compiled by the Commission through electronic access provided under Rule 36.3(b)(1)(ii)(B), will be useful in identifying aberrant price behavior, including intraday price spikes. Such price anomalies may serve

as indicators of the need for further Commission investigation. In such instances, the Commission may, among other things, use the special call authority provided by section 2(h)(5)(B)(iii) to determine whether a manipulation may have occurred warranting appropriate enforcement action.

This reactive oversight differs from that applicable to Designated Contract Markets ("DCMs") and registered Derivatives Transaction Execution Facilities ("DTFs"). Those markets are subject to a greater degree of regulatory oversight than ECMs and, accordingly, are required to provide more frequent and detailed transaction data, which enables the Commission not only to investigate and punish manipulation after-the-fact, but to detect and prevent it as well.

Proposed Rule 36.3(b)(1)(iii) would require a trading facility to maintain a record of allegations or complaints concerning instances of suspected fraud or manipulation. The record would be required to include the name of the complainant, if provided, the date of the complaint, the market instrument, the substance of the allegations, and the name of the person at the trading facility who received the complaint. The intent of this provision is to make clear that the language of section 2(h)(5)(B)(ii) of the Act, which requires a trading facility to maintain "records of activities related to its business as an electronic trading facility exempt under paragraph (3)," extends to maintaining records relating to allegations or complaints of fraud or manipulation in trading activity on the facility.

Proposed Rule 36.3(b)(1)(iv) would require a trading facility to provide to the Commission a copy of the record of each substantive complaint no later than three days after the complaint is received. The basis for this requirement is the language appearing at the end of section 2(h)(5)(B)(i)(II) (the reporting option), which states that reports regarding transactions executed on the facility are provided "to enable the Commission to satisfy its obligations under this Act." The purpose expressed in this language seems to apply not only to the reporting subparagraph in which it appears, but also to the electronic access subparagraph that precedes it. Clearly, the two subparagraphs are intended to provide alternative methods of reaching the same objective, which is to impart information to the Commission that will enable it to perform its duties under the Act.

Given the Commission's duty to enforce the antifraud and antimanipulation provisions of the Act

with respect to transactions conducted in reliance on the section 2(h)(3) exemption, the Commission believes it is crucial that ECMs report complaints of such activities. Reports to the Commission are consistent with an ECM's ongoing obligations under section 2(h)(5)(D) both to comply with paragraph 2(h)(5) itself and to require participants trading on the facility in reliance on the section 2(h)(3) exemption to "agree to comply with all applicable law." Such reports are especially important given the after-the-fact nature of the Commission's oversight of such trading activity. It is also significant that the ECMs receiving these complaints (unlike more highly-regulated DCMs or DTFs) have no self-regulatory responsibility or authority, and thus no ability to respond to such complaints themselves beyond denying the violator future access to the trading facility. This creates an even greater need for the Commission to receive information that will enable it to take action in response to such suspected manipulation or fraud.

It should be noted that the reporting requirement is limited to "substantive" claims of manipulation or fraud. The Commission's intent in including this limitation is to allow an ECM to exercise its judgment to weed out clearly frivolous claims.⁸

III. Price Discovery Provisions

With respect to price dissemination rules, section 2(h)(4)(D) specifically provides that a transaction described in section 2(h)(3) shall be subject to:

such rules and regulations as the Commission may prescribe if necessary to ensure timely dissemination by the electronic trading facility of price, trading volume, and other trading data to the extent appropriate, if the Commission determines that the electronic trading facility performs a significant price discovery function for transactions in the cash market for the commodity underlying any agreement, contract, or transaction executed or traded on the electronic trading facility.

On August 10, 2001, the Commission published Rule 36.3, which implements the notification, information and other provisions of the CFMA related to section 2(h)(3) exempt commercial markets. See 66 FR 42255. Subsection (c)(2) of Rule 36.3 provides that the Commission may make a determination that such a trading facility performs a significant price discovery function under section 2(h)(4)(D) by order, and that such finding shall be made after notice and an opportunity for a hearing

⁶ Section 4(a) of the Act makes it unlawful to trade a contract for future delivery of a commodity in the U.S. unless on a contract market designated by, or a derivatives transaction execution facility registered with, the Commission.

⁷ In this context, "location" means the delivery or the price-basing location specified in the agreement, contract or transaction.

⁸ An ECM could, as an alternative to exercising such judgment, choose to forward all complaints to the Commission.