

and open interest. The Commission interprets the Act as allowing exempt commercial markets to reap gains from the sale of real-time market data, but also to require these markets to publish the required market summary information noted above without charge to the marketplace on a delayed basis.

In view of the different types of exempt markets, the Commission proposes to provide flexibility in regard to the specific price information to be published by section 2(h)(3) markets. Specifically, the Commission proposes to require that markets publish opening and closing prices or price ranges, daily high and low prices, or volume weighted average prices over a period of time that is representative of trading on the market. In addition, on a case-by-case basis, the Commission proposes to permit markets to publish other price information, in lieu of the price measures enumerated above, subject to the Commission's approval.

As noted above, the Act requires that opening and closing price ranges be provided by the Act's other category of exempt market—EBOTs. However, because not all exempt markets will have such information available, as a consequence of the way trading is conducted, the Commission recommends that two alternative price measures, the day's high and low, or the day's volume weighted average price, be provided. Established exchanges commonly publish high and low prices for each trading session. In addition, high and low prices provide useful information regarding the range of daily trading activity. Volume weighted average prices provide a good estimate of the price applicable to most transactions executed on a market during daily trading sessions and, accordingly, may provide a better indication of the representative prices observed in a market on a given day than the other measures noted above. Finally, as noted, the Commission is proposing to give markets the flexibility of publishing alternative price measures, subject to Commission approval, if such measures would provide the public with an adequate indication of the market's daily price levels.

IV. Cost Benefit Analysis

Section 15 of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation or order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of its action or to determine whether the benefits of the

action outweigh its costs. Rather, section 15(a) simply requires the Commission to "consider the costs and benefits" of the subject rule or order.

Section 15(a) further specifies that the costs and benefits of the proposed rule or order 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 rule or order 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 proposed price dissemination rules are intended to facilitate the continued performance of an exempt market's price discovery function. As discussed above, this function involves social benefits that extend beyond the market and its users. Moreover, the information that the proposed rules require exempt markets to disseminate is virtually certain to either exist already or be a byproduct of the operation of the market, especially one performing a significant price discovery function. Finally, the Commission is proposing to accept website posting of the required information in satisfaction of the rule, as it currently does for designated contract markets and registered derivatives transaction execution facilities. Because the exempt markets subject to the proposed rule are by definition electronic markets, all of which maintain internet websites, dissemination costs should not be significant.

In formulating the proposed price dissemination rules, the Commission also has taken into consideration that organized markets must produce prices before they can disseminate them. The Commission acknowledges that price discovery, *i.e.*, the production of prices, is a costly activity requiring considerable investment by an organized market. Restrictions on the dissemination of prices discovered on an organized exchange can be viewed as a legitimate means of protecting the exchange's investment in the production of accurate prices. The Commission acknowledges the concerns raised in certain academic studies showing that some forms of mandated price dissemination rules can produce

unintended consequences such as: (1) Less accurate prices; (2) higher trading costs; (3) wealth transfers from those who produce prices to those who consume the information contained in prices discovered elsewhere; and (4) wealth transfers from some classes of market participants to others.²⁰ These studies apply to rules concerning the dissemination of highly valuable real-time prices. Since the proposed rule applies only to the dissemination of less valuable delayed prices, the possibilities of this rule producing significant unintended consequences appear to be low.

The Commission also has considered the costs and benefits of the proposed amendments to regulation 36.3(b)(1), regarding information access, in light of the above-noted specific areas of concern identified in section 15. The Commission intends that the amended rules would impose the minimum requirements necessary to enable it to perform its oversight functions and to carry out its mandate to protect the public interest in markets that are free of fraud, abuse and manipulation.

After considering these factors, the Commission has determined to propose the rules and rule amendments set forth below.

The Commission specifically invites public comment on its application of the criteria contained in the Act for consideration. Commenters are also invited to submit any quantifiable data that they may have concerning the costs and benefits of the proposed rules with their comment letter.

V. Related Matters

A. 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 would affect exempt commercial markets. The Commission has previously determined that exempt commercial markets are not small entities for purposes of the RFA.²¹ 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

²⁰ See J. Harold Mulherin, Jeffry Netter, and James A. Overdahl, *Prices are Property: the Organization of Financial Exchanges from a Transaction Cost Perspective*, *Journal of Law and Economics* 34 (October 1991) 591–644; and J. Harold Mulherin, *Market Transparency: Pros. Cons. and Property Rights*, *Journal of Applied Corporate Finance* Volume 5 Number 4 (Winter 1993) 94–97.

²¹ 66 FR 42256, 42268 (Aug. 10, 2001).