

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 41

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-52115; File No. S7-11-01]

Technical Amendments to Rules Setting Forth the Method for Determining Market Capitalization and Dollar Value of Average Daily Trading Volume; Application of the Definition of Narrow-Based Security Index

AGENCIES: Commodity Futures Trading Commission and Securities and Exchange Commission.

ACTION: Joint technical amendment.

SUMMARY: The Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”) (collectively “Commissions”) are adopting technical amendments to certain references in rules under the Commodity Exchange Act (“CEA”) and the Securities Exchange Act of 1934 (“Exchange Act”) that set forth the method for determining market capitalization and dollar value of average daily trading volume, to reflect new terminology and rule designations that will become effective as a result of the adoption by the SEC of Regulation NMS. Specifically, the phrase “reported securities as defined in § 240.11Ac1-1” will be replaced with the phrase “NMS securities as defined in § 242.600.”

EFFECTIVE DATE: August 29, 2005

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or Tim Fox, Attorney, at (202)-551-5643, Office of Market Supervision, Division of Market Regulation, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The CFTC is amending Rule 41.11 under the CEA, 17 CFR 41.11. The SEC is amending Rule 3a55-1 under the Exchange Act, 17 CFR 240.3a55-1.¹

I. Discussion

The Commodity Futures Modernization Act ("CFMA"),² which became law on December 21, 2000, established a framework for the joint regulation of the trading of futures contracts on single securities and narrow-based security indexes (collectively, "security futures products") by the CFTC and the SEC. Under the CFMA, designated contract markets and registered derivatives transaction execution facilities may trade security futures products if they register with the SEC and comply with certain other requirements of the Exchange Act.³ Likewise, national securities exchanges and national securities associations may trade security futures products if they register with the CFTC and comply with certain other requirements of the CEA.⁴

To distinguish between security futures on narrow-based security indexes, which are jointly regulated by the Commissions, and futures contracts on broad-based security indexes, which are under the exclusive jurisdiction of the CFTC, the CFMA also

¹ Rule 41.11 of Subpart B of Rule 41 ("Narrow-Based Security Indexes") under the CEA corresponds to Rule 3a55-1 under the Exchange Act.

² Pub. L. No. 106-554, 114 Stat. 2763 (2000).

³ 15 U.S.C. 78a et seq.

⁴ 7 U.S.C. 1 et seq.

amended the CEA and the Exchange Act by setting forth an objective definition of "narrow-based security index," and certain exclusions from this definition.⁵

One of the criteria that can affect the determination of whether an index is a narrow-based security index under the statutory definition relates to the dollar value of the average daily trading volume ("ADTV") of component securities of the index.⁶ One of the exclusions from the definition depends, in part, on whether each component security of the index is one of the 750 securities with the largest market capitalization and is one of 675 securities with the largest dollar value of ADTV.⁷ The statutes require the Commissions, by rule or regulation, to jointly specify the method to be used to determine market capitalization and dollar value of ADTV for purposes of these provisions.⁸

In fulfillment of this mandate, on August 20, 2001, the Commissions jointly adopted Rule 41.11⁹ under the CEA and Rule 3a55-1¹⁰ under the Exchange Act.¹¹ These rules include references to "reported securities as defined in § 240.11Ac1-1."¹² A new regulation adopted by the SEC¹³ changes the term "reported security" to the term "NMS

⁵ Section 1a(25) of the CEA, 7 U.S.C. 1a(25), and Section 3(a)(55) of the Exchange Act, 15 U.S.C. 78c(a)(55).

⁶ See Section 1a(25)(A) of the CEA, 7 U.S.C. 1a(25)(A), and Section 3(a)(55)(B) of the Exchange Act, 15 U.S.C. 78c(a)(55)(B).

⁷ See Section 1a(25)(B) of the CEA, 7 U.S.C. 1a(25)(B), and Section 3(a)(55)(C) of the Exchange Act, 15 U.S.C. 78c(a)(55)(C).

⁸ See Section 1a(25)(E) of the CEA, 7 U.S.C. 1a(25)(E), and Section 3(a)(55)(F) of the Exchange Act, 15 U.S.C. 78c(a)(55)(F).

⁹ See 17 CFR 41.11.

¹⁰ See 17 CFR 240.3a55-1.

¹¹ See Securities Exchange Act Release No. 44724 (August 20, 2001), 66 FR 44490 (August 23, 2001).

security,” which is defined in new § 242.600. The definition of “NMS security” under new § 242.600 is identical to the definition of “reported security” under previous § 240.11Ac1-1.

To reflect the change, the Commissions are adopting conforming changes to Rule 41.11 under the CEA and Rule 3a55-1 under the Exchange Act.¹⁴ Specifically, the phrase “reported securities as defined in § 240.11Ac1-1” that appears in Rules 41.11(a)(2)(ii) and (b)(2)(ii)(B) under the CEA will be replaced with the phrase “NMS securities, as defined in § 242.600.” The phrase “reported securities as defined in § 240.11Ac1-1” that appears in Rules 3a55-1(a)(2)(ii) and (b)(2)(ii)(B) under the Exchange Act will be replaced with the phrase “NMS securities as defined in § 242.600 of this chapter.” The amendments will take effect on August 29, 2005, the same day upon which Regulation NMS becomes effective.

II. Certain Findings

Under the Administrative Procedure Act ("APA"), notice of proposed rulemaking is not required when an agency, for good cause, finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."¹⁵ The

¹² See 17 CFR 41.11(a)(2)(ii) and (b)(2)(ii)(B) and 17 CFR 240.3a55-1(a)(2)(ii) and (b)(2)(ii)(B).

¹³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (adopting Regulation NMS).

¹⁴ The SEC proposed to make the conforming changes to Rule 3a55-1 under the Exchange Act in the release re-proposing Regulation NMS. See Securities Exchange Act Release No. 50870 (December 16, 2004), 69 FR 77424 (December 27, 2004) (File No. S7-10-04), at note 402. To comply with Section 1a(25)(E)(ii) of the CEA and Section 3(a)(55)(F)(ii) of the Exchange Act, the Commissions are adopting, herewith, the conforming changes jointly.

¹⁵ 5 U.S.C. 553(b)(3)(B).

amendments described herein are non-substantive, technical changes that are required to update existing terminology and references in the relevant rules to conform to the new terminology and rule designations adopted by the SEC. For these reasons, the Commissions find that it is unnecessary to publish notice of these amendments.¹⁶

III. Statutory Authority

Pursuant to the CEA and the Exchange Act and, particularly, Section 1a(25)(E)(ii) of the CEA¹⁷ and Sections 3(a)(55)(F)(ii) of the Exchange Act,¹⁸ the Commissions are adopting technical amendments to Rule 41.11(a)(2)(ii) and (b)(2)(ii)(B) under the CEA¹⁹ and Rule 3a55-1(a)(2)(ii) and (b)(2)(ii)(B) under the Exchange Act.²⁰

TEXT OF RULES

List of Subjects

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Security futures products.

¹⁶ For similar reasons, the amendments do not require analysis under the Regulatory Flexibility Act or analysis of major status under the Small Business Regulatory Enforcement Fairness Act. *See* 5.U.S.C. 601(2) (for purposes of Regulatory Flexibility Act analyses, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking); 5 U.S.C. 804(3)(C) (for purposes of congressional review of agency rulemaking, the term "rule" does not include any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties).

¹⁷ 7 U.S.C. 1a(25)(E)(ii).

¹⁸ 15 U.S.C. 78c(a)(55)(F)(ii).

¹⁹ 17 CFR 41.11(a)(2)(ii) and (b)(2)(ii)(B).

²⁰ 17 CFR 240.3a55-1(a)(2)(ii) and (b)(2)(ii)(B).

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Securities.

Commodity Futures Trading Commission

In accordance with the foregoing, Title 17, Chapter I, of the Code of Federal Regulations is amended as follows:

PART 41 – SECURITY FUTURES PRODUCTS

1. The authority citation for Part 41 continues to read as follows:

Authority: Sections 206, 251, 252, Pub. L. 106-554, 114 Stat. 2763; 7 U.S.C. 1a, 2, 6f, 6j, 7a-2, 12a; 15 U.S.C. 78g(c)(2).

2. Section 41.11 is amended by revising paragraphs (a)(2)(ii) and (b)(2)(ii)(B) to read as follows:

§ 41.11 Method for determining market capitalization and dollar value of average daily trading volume; application of the definition of narrow-based security index.

(a) * * *

(2) * * *

(ii) The 750 securities with the largest market capitalization shall be identified from the universe of all NMS securities as defined in § 242.600 that are common stock or depository shares.

(b) * * *

(2) * * *

(ii) * * *

(B) The 675 securities with the largest dollar value of ADTV shall be identified from the universe of all NMS securities as defined in § 242.600 that are common stock or depositary shares.

* * * * *

By the Commodity Futures Trading Commission.

Jean A. Webb
Secretary

Date: July 25, 2005

Securities and Exchange Commission

In accordance with the foregoing, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows:

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES

EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Section 240.3a55-1 is amended by revising paragraphs (a)(2)(ii) and (b)(2)(ii)(B) to read as follows:

§ 240.3a55-1 Method for determining market capitalization and dollar value of average daily trading volume; application of the definition of narrow-based security index.

(a) * * *

(2) * * *

(ii) The 750 securities with the largest market capitalization shall be identified from the universe of all NMS securities as defined in § 242.600 of this chapter that are common stock or depositary shares.

(b) * * *

(2) * * *

(ii) * * *

(B) The 675 securities with the largest dollar value of ADTV shall be identified from the universe of all NMS securities as defined in § 242.600 of this chapter that are common stock or depositary shares.

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By the Securities and Exchange Commission.

Margaret H. McFarland
Deputy Secretary

Date: July 25, 2005