

NFDC TRANSMITTAL LETTER—Continued

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04/07/93	MN.	Cloquet	Cloquet Carlton County.	FDC 3/1939	NDB Rwy 17, Amdt 3A...
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COMMODITY FUTURES TRADING COMMISSION**17 CFR Part 1****Contract Market Emergency Actions****AGENCY:** Commodity Futures Trading Commission.**ACTION:** Final rule.

SUMMARY: The Commodity Futures Trading Commission ("Commission") has implemented the statutory directive set forth in section 213 of the Futures Trading Practices Act of 1992 ("Futures Trading Act") by amending regulation 1.41 to establish new procedures for a contract market emergency action. Under the amendments, a contract market must make every effort practicable to notify the Commission of its intention to implement, modify, or terminate an emergency rule. The contract market also must supplement its notice with information on the emergency action and conditions. Within ten days of receipt from a contract market of all of the required information, the Commission will permit the rule to remain in effect, unless it finds that the contract market's emergency action is arbitrary, capricious, or an abuse of discretion; lacking a reasonable basis in fact; or taken in bad faith. If the Commission determines that the contract market's emergency action does not meet this standard and finds that suspension of the rule is not contrary to the public interest and the purposes of section 5a(a)(12) of the Commodity Exchange Act, then the Commission will, in its discretion and upon such terms and conditions as it deems appropriate, suspend the effect of the rule pending review under 5a(a)(12)(A) or otherwise.

EFFECTIVE DATE: July 2, 1993.

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SUPPLEMENTARY INFORMATION:**I. Introduction**

On February 4, 1993, the Commission published for public comment in the Federal Register proposed amendments to Regulation 1.41.¹ In accordance with the requirements imposed by section 213 of the Futures Trading Act, the proposed regulation established new temporary emergency rule procedures.

II. Comments Received

The Commission received letters from five commenters, all of which were futures exchanges. Although the commenters recognized the importance of regulating emergency actions, they requested clarification, deletion, and alteration of aspects of the proposed amendments.

The Commission has carefully reviewed the comments received and, as a result, has issued final amendments that modify and clarify the proposed amendments to Regulation 1.41. Comments addressing specific provisions of the regulation and explanations of the Commission's revisions are discussed below.

III. Amendments to Regulation 1.41

The final amendments implement the statutory directive by providing additional guidance on the definition of the term "emergency;" defining the term "affiliated firm;" requiring, to the extent practicable, prior notice of an emergency action and a complete explanation of the emergency; requiring the submission of additional information on an emergency to the Commission; establishing a standard of review and procedures for a Commission determination on an emergency action; specifying new types of permissible emergency actions; and modifying procedures for taking a physical emergency action.

A. Definition of "Emergency"**1. The Proposed Rule**

Proposed amendments to Regulation 1.41(a) included modifications to the definition of the term "emergency." Under existing regulations 1.41(a)(4) (i) and (ii), the term "emergency" is defined as "[a]ny occurrence or

circumstance specifically defined as an 'emergency' by the rules of a contract market which have been submitted to the Commission" and "[a]ny other occurrence or circumstance which, in the opinion of the governing board of the contract market, requires immediate action and threatens or may threaten" the market. The current regulation also includes a nonexclusive list of possible occurrences and circumstances which may be deemed emergencies.

Under the proposed amendments, the Commission deleted the provision which permits a contract market to define the term "emergency" as any occurrence or circumstance noted in rules of the contract market. Instead, a contract market had to ensure that its rules were consistent with a modified version of the definition of "emergency." Under this modified provision, a contract market governing board could determine that an emergency existed when, in its opinion, occurrences or circumstances listed in the regulation required immediate action and threatened or could threaten the markets.

The listed occurrences or circumstances included a general provision designed to address "[a]ny other unusual, unforeseeable and adverse circumstance with respect to which it is not practicable for the contract market to submit, in a timely fashion, a rule to the Commission for prior review." In the proposed definition, the term "not practicable" was substituted for the term "impracticable" because courts have interpreted the word "impracticable" as meaning "inconvenient."²

2. Comments Received

In light of the recent bombing of the World Trade Center, the Coffee, Sugar & Cocoa Exchange, Inc. ("CSCE") commented that the list of specific occurrences and circumstances that may be considered emergencies should be expanded to add "malfunctions of plumbing, heating, ventilation and/or air conditioning systems, and other circumstances rendering trading

² *Jenson v. Continental Financial Corp.*, 404 F. Supp. 806, 809 (D. Minn. 1975); *Fifth Mooring Condominium, Inc. v. Shere*, 81 F.R.D. 712, 716 (S.D. Fla. 1978).

¹ 58 FR 7056 (February 4, 1993).

facilities not reasonably capable of being occupied."

In addition, the CSCE and New York Mercantile Exchange ("Nymex") stated that the modified definition of "emergency" might not cover all emergencies that arose in the future. The New York Mercantile Exchange ("Nymex") expressed concern that the proposed definition would not address such emergencies as loss of the external quotation system, failure of a significant number of computerized trading terminals, and widespread failure of a computer network. One futures exchange, the Chicago Mercantile Exchange ("CME"), wrote in support of the proposed definition. The CME believed that the Commission's proposed definition of "emergency" addressed the Commission's goal of requiring greater consistency among contract markets in a reasonable manner.

The Chicago Board of Trade ("CBT") and MidAmerica Exchange ("MidAm")³ also stated that substitution of the phrase "not practicable" for the word "impracticable" could alter the standard imposed on exchanges for providing prior notice to the Commission of an emergency action. In contrast, the CME commented that it had no objection to this proposed change.

3. Regulation 1.41(a)(4)

Based on review of these comments, the Commission has added an explicit reference to malfunctions of trading facilities to the list of circumstances that qualify as an emergency. The Commission notes that existing Regulation 1.41(a)(v) was broad enough to have permitted emergency action relating to the World Trade Center bombing. Under that provision, a contract market may deem to be an emergency "[a]ny circumstances which may have a severe, adverse effect upon the physical functions of a contract market including, for example, fire or other casualty, bomb threats, substantial inclement weather, power failures, communication breakdowns, and transportation breakdowns." The proposed amendments added to this provision "computer system breakdowns" and "screen-based trading system breakdowns."

For purposes of clarifying the provision, however, the Commission will add the clause "malfunctions of plumbing, heating, ventilation and air conditioning systems" to the examples of possible circumstances which may

have a "severe, adverse effect upon the physical functions of a contract market." The Commission has determined not to add the reference to "other circumstances rendering trading facilities not reasonably capable of being occupied" because the existing provision is broad enough to address these circumstances and is not limited by a reasonableness standard.

The Commission also believes that the proposed definition in Regulation 1.41(a)(4) would provide sufficient flexibility to address future emergencies and, therefore, is making this definition final. Although the Commission recognizes that it is changing a nonexclusive list of emergencies to an exclusive list and deleting the provision that permits a contract market to develop its own definition of "emergency," the regulation also includes a general clause that encompasses all "unusual, unforeseeable and adverse circumstances." The Commission believes that this clause, together with the more specific clauses, are broad enough to address the circumstances noted by Nymex, as well as any other emergency circumstances. By reducing the complete discretion available to a contract market under existing provisions, the Commission intends only to prevent the submission of emergency actions that more properly should be submitted under non-emergency rule provisions.

The Commission also has made final the proposed substitution of the term "not practicable" for "impracticable." Thus, the Commission intends to clarify that a contract market must not declare an emergency merely because it is inconvenient to submit a rule for prior review. By substituting these terms, the Commission has not altered the standard governing prior notice of an emergency action by a contract market. The prior notice standard, which is contained in Regulation 1.41(f)(2)(i), does not contain the word "impracticable."

B. Definition of "Affiliated Firm"

1. The Proposed Rule

As part of the proposed regulation, the Commission requested documentation no later than five days after notice of an emergency action of customer and proprietary market positions held by a governing board member's affiliated firm. The term "affiliated firm" was defined as "any firm in which the person is a general partner, officer, director, employee, or owner of more than ten percent of the equity interest." Existing emergency

regulations do not include a comparable term and definition.

2. Comments Received

The CME and Nymex stated that the proposed definition of "affiliated firm" was overly broad. Specifically, the CME objected to an employee floor broker having the same disclosure requirements as a sole owner of a firm. Nymex stated that inclusion of international offices in the definition of "affiliated firm" would make it burdensome to comply with the five-day submission requirement. International offices have differences in office hours as a result of time zones, presenting difficulties in communication and collection of information. Nymex suggested that the term "affiliated firm" should be limited to domestic offices.

3. Regulation 1.41(a)(8)

The Commission has considered these comments and has determined to modify related provisions of the proposed regulation but also to make the proposed definition of "affiliated firm" final with one change. The term "principal" has been added to the definition to clarify the scope of the regulation.

One purpose of obtaining position information from governing board members is to provide a basis for the Commission's determination on whether a governing board member acted in bad faith or was subject to a conflict of interest. Since it is possible for an employee to be influenced in his voting by his employer's market positions and for a governing board member to be influenced by market positions held at an international office, the Commission is unable to make its determination without this information.

Information about a governing board member's position may be readily available to the contract market through contact with clearing firms. The Commission understands, however, that the contract markets will need to obtain account numbers from its governing board members to conduct a review or permit review of governing board members' positions. If a contract market chooses not to obtain account numbers from its governing board members, then it must develop other methods for obtaining this information. As discussed more fully below, an authorized member or contract market official will have to review governing board members' position information, in any event, under section 217 of the Futures Trading Act on conflicts of interest.

Because it may be difficult for a contract market to collect the required position information, however, the

³ The CBT and MidAm are affiliated futures exchanges, and they submitted identical comment letters under different signatures.

Commission may permit a limited extension of time in certain cases, beyond the five days, for providing the Commission with documentation of the position information, where there is significant need for an extension. In addition, the Commission will require information only on net positions in certain contract months of governing board members who attended an emergency action meeting. These provisions will be discussed below.

C. Notice

1. The Proposed Rule

Under current regulation 1.41(f)(2) a contract market must notify the Commission of the adoption, modification and termination of a temporary emergency rule by the fastest available means of communication. A written copy of an emergency rule and a complete explanation of the emergency and action taken to address the emergency also must be submitted to the Commission.

Section 213 of the Futures Trading Act provides that the Commission must issue regulations to specify that a contract market may make an emergency rule effective without prior Commission approval "if the contract market makes every effort practicable to notify the Commission of such emergency rule, along with a complete explanation of the emergency involved, prior to making the emergency rule effective. If the contract market does not provide the Commission with such notification and explanation before making the emergency rule effective, the contract market shall provide the Commission with such notification and explanation at the earliest possible date."

In accordance with this statutory provision, the proposed regulation amended regulation 1.41(f)(2) to provide that "[a] contract market must make every effort practicable to provide notice to the Commission that it intends to implement, modify or terminate a temporary emergency rule prior to implementing, modifying or terminating the rule. If it is not practicable for the contract market to notify the Commission prior to taking the emergency action, the contract market shall provide the Commission with notice of the implementation, modification, or termination of any emergency rule at the earliest possible time." In addition, under the proposed regulation, notice had to include:

(1) "[T]o the extent practicable, a complete explanation of the contract market action intended or taken to meet

the emergency and a description of the nature of the emergency;"

(2) "[I]n any instance where a contract market does not provide prior notice of an emergency action, an explanation of why it was not practicable for a contract market to provide such notice; and"

(3) "[A]n explanation of why it was not practicable for the contract market to submit the temporary emergency rule to the Commission for prior review." The Commission also proposed, under regulation 1.41(f)(2)(ii), that a contract market should submit at the time of notification "[a]ny available written documentation of the nature of the emergency conditions and the intended or actual emergency action."

2. Comments Received

Two contract markets, the CME and Nymex, commented that prior notification of a temporary emergency rule would be difficult to provide to the Commission. The CME stated that it was concerned about the requirement that a contract market must attempt to notify the Commission and provide a copy of an emergency rule prior to implementation of that rule. It commented that such prior notification would not be possible since CME staff could not predict the action of the governing board members prior to the emergency rule meeting. Nymex noted that prior notice of an emergency often is not possible due to the inherent nature of the emergency, and such notice could jeopardize the stability of the market, given the sensitivity of the information relating to an emergency.

For purposes of protecting sensitive information, Nymex suggested that the Commission should make emergency rule information subject to a confidentiality provision. In addition, Nymex commented that the Commission should make the prior notice requirement less burdensome by stating that a contract market need only "make reasonable efforts under the circumstances" to provide timely notice to the Commission.

The CSCE requested clarification on the procedure for providing notice. It stated in its comment letter that the Commission should clarify whether initial notice may be given orally and by telephone. It also suggested that the Commission should specify the telephone numbers to call, including back-up numbers in case the main number for the appropriate Division is busy. In addition, the CSCE suggested that the Commission should provide one or more numbers with voice mail or some other recording device to receive messages if the individuals authorized to receive notice are not available and

should specify telephone numbers for the receipt of facsimile transmissions.

The CSCE further commented that documentation requested in proposed regulation 1.41(f)(2)(ii) should not have to be provided at the time of notification and that this request could be addressed by a subsection of the proposed regulation that required submission of documentation no later than five days after notice of the emergency. Specifically, proposed regulation 1.41(f)(3)(iii) stated that a contract market should submit to the Commission "[w]ritten documentation, not previously provided, of the emergency conditions and the emergency action, including documentation of the reasons for the specific emergency action taken."

In addition, the CME stated in its comment letter that section 213 of the Futures Trading Act does not require a contract market to explain why, in appropriate cases, it was not practicable to provide prior notice to the Commission of an emergency action. The CME, therefore, proposed that the Commission delete this provision.

3. Regulation 1.41(f)(2)

After review and consideration of the futures exchanges' comments, the Commission has determined to make proposed regulation 1.41(f)(2) final. To clarify, these emergency rule provisions implement section 213 of the Futures Trading Act by requiring that a contract market must make every effort practicable to provide certain information to the Commission that is available to a contract market. In response to the CME's comment that it will be virtually impossible to provide prior notice, the Commission recognizes that contract market staff cannot predict the outcome of a governing board meeting. Where the contract market does not know the precise action that its governing board will select, the contract market can notify the Commission of the emergency circumstances and of the intended meeting of its governing board to discuss the emergency.

In response to Nymex's comments, the Commission understands that, even when a contract market makes every effort practicable to provide prior notice of an emergency action to the Commission, it may not be able to succeed in giving such notice because of the time constraints inherent in emergencies. Thus, a contract market is not required to provide the Commission with prior notice. It need only make every effort practicable to do so. In a situation where the time pressure associated with the emergency prevents a contract market from giving prior

notice, the contract market will be able to provide notice at the earliest possible time. This standard for making "every effort practicable" to provide prior notice is required by section 213 of the statute. Because it does not require a contract market to specify the exact action to be taken, it should not interfere with the contract market's ability to take timely emergency actions.

The Commission also recognizes that notification of an intended emergency action can involve the disclosure of highly sensitive market information. As noted in the *Federal Register* release on the proposed emergency rule amendments, position information is not generally publicly available. The Commission will be particularly sensitive to the treatment of such information and to the nature of any emergency action not then public in any report on an emergency action. The Commission also notes that section 9(d) of the Commodity Exchange Act generally makes it a felony for any Commissioner, employee, or agent of the Commission who acquires non-public information which may affect the price of any commodity to trade on that information or to impart the information with the intention of assisting another person to participate in any futures transaction.

The CSCE requested clarification of certain procedural aspects of the notice provision. As required by regulation 1.41(f)(2)(i), a contract market will have to provide notice by the fastest means available and must use its best efforts to ensure that the notice is actually received by an authorized person. The Commission has not specified the form of communication that may be used for providing notice because it recognizes that this form may vary with the emergency circumstances; however, the Commission believes that notice by telephone often will be the fastest means available to provide the requested personal notice. Notice by facsimile also may prove to be the fastest means available under certain circumstances, but the contract market must use its best efforts to ensure that the facsimile is actually received by an authorized person. In addition, notice by voice mail or other recording device may satisfy the requirement that a contract market must provide notice by the fastest means available; however, as with facsimiles, a contract market must use its best efforts to ensure that the recorded notice is actually received by an authorized person.

In response to the CSCE's request for appropriate telephone and facsimile numbers, the Commission has determined to circulate an advisory to

all contract markets with information on appropriate persons to contact and their telephone and facsimile numbers. This advisory will be updated as needed.

The CSCE and CME also requested clarification of the regulation 1.41(f)(2)(ii) requirement that a contract market must provide the Commission with any available documentation of the nature of the emergency conditions and the intended or actual emergency action at the time of notification. The Commission has not specified the types of documentation that can be submitted because this information will vary with the emergency circumstances. In the *Federal Register* release on the proposed rule, the Commission noted that it particularly would be interested in receiving a draft of a temporary emergency rule, or of any recommended actions, if available, prior to action on the rule by the governing board. The Commission recognizes that a contract market frequently will not have a draft rule prepared before an emergency rule meeting because of time constraints. As stated in the regulations, a contract market need only provide such information if it is available at the time of notice.

In addition to a copy of a draft emergency rule, examples of other documentation that a contract market may have access to at the time of notification include statements showing the financial condition of a firm, price data on activity in the underlying cash market, and legal documents showing a court order that affects a futures contract. Providing this information to the Commission at the time of notification will facilitate Commission review of the emergency action. If this documentation is not available at the time of notice, then, under regulation 1.41(f)(3)(iii), the contract market will have to submit pertinent documents with its supplemental information, no later than five days after notice. The regulation 1.41(f)(3) requirement does not duplicate the 1.41(f)(2) request for documentation because it requires the submission of documentation that a contract market has not previously submitted to the Commission.

As noted by the CME, the notice procedure also requires a contract market to explain to the Commission, in appropriate cases, why it was not practicable for the contract market to provide prior notice to the Commission of an emergency action. This requirement is intended to assist the Commission in addressing its own obligation to report to Congress within 10 days or in explaining why that timeframe is impracticable and in

assessing the contract market's compliance with the Act.

Regulation 1.41 will continue to apply to clearing organizations, as well as to futures exchanges. Thus, these procedures apply to the implementation, modification, or termination⁴ of a temporary emergency rule by a clearing house.

D. Supplementary Information Requirement

1. Proposed Regulation

As proposed, regulation 1.41(f)(3) required a contract market that had given notice of an emergency action to submit supplementary information on the emergency as soon as possible after providing notice, but in no event more than five days after that time. The proposed supplementary information included:

- (1) A written copy of the temporary emergency rule;
- (2) A complete written explanation of the emergency action;
- (3) Written documentation, not previously provided, of the emergency;
- (4) A copy of the minutes of the emergency rule meeting, containing specified information, including the time that the contract market notified members of the emergency rule meeting, a summary of all discussions, and a summary of any disclosure made by a person on his or her positions in any subject contract market;
- (5) A description of the basis for and procedures followed by a governing board in making any determination as to the eligibility of an interested person to deliberate or to vote on matters relating to the emergency;
- (6) Documentation of all positions in the subject contract market "held by a governing board member in personal accounts, controlled accounts, any other accounts in which a governing board member has an interest, and customer and proprietary accounts at a governing board member's affiliated firm;" and
- (7) Such other information as the Commission may require.

2. Comments Received

Three contract markets submitted specific comments about aspects of the submission requirements. First, Nymex requested clarification of the difference between the requirements in regulations 1.41(f)(3) (ii) and (iii) that a contract market must submit a written explanation of the emergency action and

⁴ To further clarify, a contract market must notify the Commission only when it takes emergency action to terminate an emergency rule. It need not notify the Commission when its emergency rule expires.

written documentation of the emergency condition and action.

Nymex also stated that the position information requirement should be limited by requiring information only from a member of the governing board who voted on or participated in consideration of the emergency action. It also believed that the position information requirement only should apply to positions of which the governing board member had actual knowledge at the time that the contract market took the subject emergency action. In addition, Nymex noted its understanding that the proposed rules did not require a contract market to verify the disclosure made by the governing board member or to collect position information independent from the disclosure made by the governing board member. The futures exchange suggested that the Commission incorporate a position disclosure and recusal policy in the final regulation. In other areas related to the position information requirement, Nymex commented that it would be difficult to assemble the position information in five days. In addition, the futures exchange requested that the Commission cross reference section 8 of the Commodity Exchange Act, on the confidentiality of position information, in the emergency rule amendments.

Second, the CME indicated that it may not be able to provide the precise time that it notified a governing board member of an emergency rule meeting in any minutes. The exchange stated that the member may be notified by a third party, such as the member's secretary, and not by contract market staff. The CME also stated that the position information requirement should not apply to governing board members who are not invited to the emergency rule meeting. Under CME procedures, its staff reviews position information on all governing board members prior to a governing board meeting on an emergency rule, then invites only those members to the meeting who are eligible to attend the meeting under their conflict of interest policies. Since certain members would not have any information about the emergency rule meeting, the CME believed that the position information requirement should not include these people. The CME also requested clarification on whether the Commission sought position information either on net or all customer positions and either for a limited number of contract months or all contract months in the affected contract.

Third, the CSCE commented that a contract market should not have to submit minutes of the events of its governing board meetings to the Commission because the minutes could expose the contract market to litigation and could have a chilling effect on deliberations. Like Nymex, the CSCE stated that the position information requirement should apply only to a position held by a member of the governing board who voted on or participated in the consideration of the emergency action, rather than to all members of the governing board. The CSCE also believed that a contract market should not have to submit precise position information to the Commission, but rather should only have to submit information on whether a governing board member held de minimus, small, medium, or large positions in the affected contract. This comment corresponds to the CSCE's own conflicts procedures, under which its governing board determines at the beginning of a meeting on an emergency rule what position sizes will satisfy the de minimus, small, medium, or large position categories. The CSCE then requires governing board members to disclose, to the best of their knowledge, the category that describes their positions.

3. Regulation 1.41(f)(3)

The Commission has determined to modify and clarify aspects of the submission requirements in response to these comments. First, the Commission intends to merge the modified requirements in proposed regulation 1.41(f)(3)(ii), which required a written explanation of the emergency action, with the requirements of 1.41(f)(3)(iv), which required submission of minutes of the governing board meeting. The consolidated provision will require the submission of a complete written explanation of the emergency action that includes:

- (1) The names of all persons who were members of the governing board at the time of the meeting;
- (2) The names of all persons who attended the meeting in person or who were otherwise present by electronic means;
- (3) The name of any person who recused himself from the meeting;
- (4) The reason for recusal;
- (5) The time that recusal occurred;
- (6) The approximate time that notice of the meeting was given to the governing board members;
- (7) The times that the meeting began and ended;

(8) The name of any person who was directed to abstain from deliberating or voting at the meeting;

(9) A summary of any matter voted on that related to the emergency;

(10) A summary of substantive reasons given at the meeting in support of and in opposition to any matter voted on that related to the emergency;

(11) An itemized list of how each governing board member voted; and

(12) A summary of any disclosure made by a person that related to the person's market positions in any subject contract market, including disclosure of positions held in personal accounts, controlled accounts, any other accounts in which a person held an interest, and customer and proprietary accounts at a person's affiliated firm.

The consolidation of these requirements will address Nymex's request for clarification of the difference between the regulation 1.41(b)(3) (ii) and (iii) requirements for a complete written explanation of the emergency and documentation of the emergency.⁵ The written explanation includes the above items, while documentation of the emergency conditions and emergency action includes information in support of the emergency action that is not included in the written explanation. As noted above in the examples of documentation that may be submitted by a contract market at the time of notice, documentation may include, among other things, evidence of a firm's financial condition, cash market prices, and relevant court decisions.

Modifying these provisions also will address the CSCE's comment that submission of formal minutes on a governing board meeting could have a chilling effect on deliberations. The Commission has narrowed the requirement in the proposed regulation that a contract market had to provide "a summary of all discussions" to require only a summary of substantive reasons in support of and in opposition to any matter voted on that related to the emergency. The Commission also deleted the term "minutes" from the regulation.⁶ Thus, a contract market need only submit a written explanation of the governing board meeting. The Commission's intention in limiting the proposed regulation is to encourage free

⁵ The Commission also has clarified regulation 1.41(f) by changing the request for "written" documentation to a request for all documentation, regardless of whether it is in the written form.

⁶ Deletion of the term "minutes" from this regulation does not obviate a contract market's responsibility to maintain minutes for all of its meetings. See regulation 8.18.

discussion of an emergency action at a governing board meeting.

By modifying the proposed regulatory provisions, the Commission also has addressed the CME's comment regarding its inability to provide the precise time that it notifies a governing board member of the meeting. The Commission has changed the proposed regulation to require only the approximate time of notification of the meeting. This time may be based on the time that the contract market notified the third party of the meeting, since notice to the third party should occur earlier than the actual time of notification. A contract market, however, should strive to provide as precise a time of notification as possible, since an earlier time could result in unnecessary investigations into a member's trading activity. The Commission has required this information for purposes of determining whether activity in the relevant market reflected any knowledge of a pending emergency meeting. Such activity would violate the Commodity Exchange Act and Commission regulation 1.59 and could be evidence of bad faith.

The Commission also has narrowed the proposed regulation 1.41(f)(3)(v), which required documentation of governing board member's positions. The final regulation states that a contract market must provide documentation of gross positions held in any personal account, controlled account, other account in which the governing board member has an interest, and proprietary accounts at an affiliated firm, as well as documentation of net positions held in any customer accounts at an affiliated firm, by a governing board member who attended the meeting for the contract months that the contract market reasonably expects to be affected by the emergency action. The contract market must explain its reasons in writing for selecting less than all contract months in the subject contract market most affected by the emergency action. Thus, a contract market only will have to provide documentation of net, rather than gross, customer positions. In addition, a contract market will have to provide position documentation only for the contract months that are affected by the emergency action. For purposes of providing this position documentation, the Commission also may grant a limited extension of the five-day submission period.

Modifications to this provision address comments from Nymex, the CSCE, and the CME. In response to the contract markets' comments that the Commission should require position information only from a governing

board member who participated in the emergency rule meeting, the Commission has determined to limit the submission requirement to members who attended the meeting. In this way, the Commission will reduce the burden on a contract market to retrieve information and will receive relevant position information from all members who heard deliberations on the emergency action, including members who attended the meeting but did not actively participate in it.

The revised provisions also incorporate the CME's comments that customer position information should include documentation of net, rather than gross, positions and all position information should include documentation only of the contract months affected by the action. When meeting customer futures and option positions, a contract market should express option positions in terms of futures equivalents.

The Commission recognizes that net positions, and even gross positions in certain cases, may not provide an accurate indication in every case of whether a member has potentially benefitted as a result of an emergency action. For example, a large grain corporation may be more likely to be influenced by its cash market positions than its gross or net futures market positions in a vote on an emergency action. In addition, the Commission recognizes that positions held by firms related to a governing board member's affiliated firm, such as a wholly-owned subsidiary, could influence a governing board member's vote. Because such information may not be necessary to assess every emergency action, the Commission has determined to request relevant cash market, gross customer, and related firm position information on a case-by-case basis, under regulation 1.41(f)(3)(vii). This regulatory provision permits the Commission to request such other information as the Commission may require. One example of an emergency action where the Commission reviewed cash market positions was the short silver emergency of 1979 and 1980.⁷ The Commission also has determined to require, under regulation 1.41(f)(3)(vi), that a governing board member who voted on an emergency action must represent whether or not he had actual knowledge of any of his affiliated firm's individual customer positions. If the governing board member did have actual

knowledge, gross customer position information could be required from that member.

A contract market also will have to provide specific position information and will not be able to submit only general indications of whether a position is de minimus, small, medium, or large. The Commission has requested position information for purposes of determining whether the governing board acted in bad faith.⁸ In making this determination, the Commission needs to review specific position information for any indication that a governing board member may have been influenced in his voting by his relevant market positions. Examples of acceptable documentation of position information are account statements and monthly summaries of futures and option positions.

The Commission also will permit limited extensions of time in certain circumstances for submitting position information, in response to Nymex's comment that it will be burdensome to provide this information in the five-day time period. In addition, as noted in the preamble to the proposed rule, position information is subject to the confidentiality provisions of section 8 of the Commodity Exchange Act. The Commission believes that it is unnecessary to cross reference this section in the emergency regulations.

Many of the comments regarding position information related to establishing standards for conflicts of interest. The Commission notes that section 217 of the Futures Trading Act directly addresses voting by interested members. Thus, the Commission intends to establish guidelines governing conflicts of interest in regulations promulgated under section 217 and not in these emergency regulations. The Commission also notes that section 217 directs a contract market to adopt rules and procedures that require, at a minimum, that an authorized member or contract market official must review the positions of the members of its governing board prior to deliberations. A contract market, therefore, will have to collect position information independent from the governing board member's knowledge and disclosure of his positions under section 217.⁹

⁸ Additional guidance in this area will be provided by the forthcoming proposed rules under section 217 of the Futures Trading Act, which prohibits voting by interested members.

⁹ The Commission further notes that a governing board member who receives notice of an emergency rule meeting but does not attend the meeting will be subject to regulation 1.59 and section 214 of the Futures Trading Act.

⁷ The Silver Market of 1979/1980: Actions of the Chicago Board of Trade and the Commodity Exchange, Inc., Investigative Report of the Division of Trading and Markets.

In addition, the Commission wishes to note the difference between regulation 1.41(f)(3)(ii), which requires a contract market to provide the Commission with a summary of any disclosure made by a member of the governing board regarding positions, and 1.41(f)(v), which requires a contract market to submit documentation of positions to the Commission. For regulation 1.41(f)(2)(ii), the contract market must provide information only on disclosures made by governing board members. For regulation 1.41(f)(v), the contract market must provide documentation, such as account statements, of governing board members' positions.

E. Standard of Review

1. Proposed Regulation

Proposed regulation 1.41(f)(4) provided that the Commission would make a determination either to permit a temporary emergency rule to remain in effect or to suspend the effect of a rule pending review under section 5a(a)(12)(A) or otherwise. The determination would be made generally within 10 days of the receipt from a contract market of notice and all supplementary information. Proposed regulation 1.41(f)(5) further provided that the Commission would make a determination to permit the temporary emergency rule to remain in effect, consistent with paragraph (f)(1), unless, based on the information available to the Commission at the time, it found that the contract market's emergency action was arbitrary, capricious, or an abuse of discretion; lacking a reasonable basis in fact; or taken in bad faith by the contract market or its officials. If the Commission determined that the contract market's emergency action failed to meet this standard, then the Commission could, in its discretion and upon such terms and conditions as it deemed appropriate, suspend the effect of the rule if it found that suspension was not contrary to the public interest and the purposes of section 5a(a)(12) of the Commodity Exchange Act.

2. Comments Received

The CBT requested clarification or deletion of the phrase "or otherwise" in the regulation. As stated in the proposed rule, the Commission may suspend the effect of a temporary emergency rule "pending review either under the procedures of section 5a(a)(12)(A) or otherwise." The CSCE also commented on the standard of review, stating that the Commission should establish a standard whereby participation by

interested members in board decisions would not constitute "bad faith."

3. Regulation 1.41(f)(4)

The standard of review in this regulation is based on section 213 of the Futures Trading Act and Commission Interpretative Letter No. 79-2. The "or otherwise" language noted by the CBT is required by section 213. This language is intended to provide the Commission with the flexibility to take appropriate action when it has determined to suspend the effect of a temporary emergency rule. An example of one action that may be taken under this "or otherwise" provision is a Commission emergency action under section 8a(9) of the Commodity Exchange Act. For purposes of clarifying this section, the Commission has added regulation 1.41(f)(9) to the final rules, which states that "[n]othing in this regulation prevents the Commission from taking emergency action under section 8a(9) of the Act." Another action that may be taken under this "or otherwise" provision is a Commission enforcement action. Thus, regulation 1.41(f)(9) also states that nothing in this section prevents the Commission from taking any enforcement action under sections 6(c), 6(d), 6b, or 6c of the Act.

In response to the CSCE's request for guidance on the definition of "bad faith," the Commission believes that it is not appropriate to make generalizations about the "bad faith" standard. Numerous courts and the Commission have applied the standard in reviewing actions by contract market governing boards.¹⁰ As indicated by these decisions, a bad faith determination must be based on the facts of each case. A contract market may refer to these cases and Commission determinations for guidance in this area.

The Commission also has determined to clarify proposed regulations 1.41(f)(4) and (5) by consolidating the provisions. Consolidation of these provisions is intended to emphasize that there is only one standard of review. Under this standard, the Commission will permit a contract market's temporary emergency rule to remain in

effect unless the emergency action is arbitrary, capricious, or an abuse of discretion; lacking a reasonable basis in fact; or taken in bad faith by the contract market or its officials. The Commission will consider a rule that has met this standard as one that is consistent with the policies and purposes of the Act.

Where an emergency is of such scope and complexity that the Commission cannot make a final judgment as to whether a contract market satisfied this standard at the time of its initial review, the Commission will submit a report to Congress and the contract market indicating that, based on the information reviewed, the Commission has no reason to believe that the action is arbitrary, capricious, or an abuse of discretion; lacking a reasonable basis in fact; or taken in bad faith, but that further review of the action is necessary. An example of an emergency action that required extensive review is the 1979-to-1980 short silver emergency.¹¹ During the pendency of the Commission's review of an emergency action, the contract market's emergency rule may remain in effect, subject to the time limits on emergency actions imposed by regulation 1.41(f)(1) and to any superseding emergency action taken by the Commission under section 8a(9). The Commission will submit a final report to Congress and the contract market upon completion of its review of the emergency action.

F. Permissible Emergency Actions

1. Proposed Regulation

Proposed regulation 1.41(f)(8) amended existing law by adding new examples to the list of possible emergency actions. These new examples expanded the non-exhaustive list in the current provision by including such actions as altering delivery terms or conditions, modifying price limits and circuit breakers, and suspending a contract market prohibition against dual trading.

2. Comments Received

The CBT commented that the Commission should specify in the dual trading provision that a contract market may suspend the effect of a prohibition against dual trading "implemented pursuant to section 101 of the Futures Trading Act and regulations adopted by the Commission." It also stated that the Commission should specify in the dual trading rule that a contract market may

¹⁰ See, e.g., *Sam Wong & Son, Inc. v. Nymex*, 735 F.2d 653, 677 (2d Cir. 1984); *Miller v. New York Produce Exchange*, 550 F.2d 762, 766 (2d Cir.) cert. denied, 434 U.S. 823 (1977); *Lagorio v. CBT*, 529 F.2d 1290, 1291-92 (7th Cir.), cert. denied, 426 U.S. 950 (1976); *Daniel v. CBT*, 164 F.2d 815 (7th Cir. 1947); *P.J. Toggares Co. v. Nymex*, 476 F.Supp. 72, 76-77 (S.D.N.Y. 1979); *Compania de Salvadorena de Cafe v. CFTC and CSCE, Inc.* 446 F. Supp. 687, 691 (S.D.N.Y. 1978); *In the Matter of CME* (1977-1980 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 20,436 (CFTC DKT. No. 75-9) (1977) aff'd (CFTC 1981).

¹¹ See *The Silver Market of 1979/1980: Actions of the Chicago Board of Trade and the Commodity Exchange, Inc., Investigative Report of the Division of Trading and Markets*.

take emergency action regarding its dual trading rule.

For purposes of clarification, the CSCE commented that the Commission should explicitly refer to option contracts in this provision. Existing law and the proposed rule state that a governing board may take emergency action that affects "contracts." Neither provision specifically refers to "option contracts."

3. Regulation 1.41(f)(7)

Based on review of these comments, the Commission has made the proposed regulation final as written. To clarify, however, the dual trading reference was added to the provision that refers to modifying or suspending a contract market's own rules. As will be noted in the forthcoming *Federal Register* release on dual trading regulations, the addition of this reference to a contract market's dual trading rule is intended to emphasize that a contract market may take emergency action by modifying or suspending dual trading rules that are promulgated pursuant to section 101 of the Futures Trading Act.

In response to CSCE's request for clarification, the term "contracts" in this provision encompasses both futures and option contracts. The Commission recognizes that the term "commodity options" is used in conjunction with the term "contracts" in other provisions to indicate futures and option contracts.¹² Thus, the Commission has amended regulations 1.41 (a) and (f) to use only the term "contracts" to include both futures and option contracts. These amendments are not intended to alter the meaning of any other regulation. Thus, a governing board may take emergency action that affects option, as well as futures, contracts.

G. Contract Market Rules

1. Proposed Regulation and Comment Received

The proposed regulation required a contract market to maintain in effect rules that are consistent with this section. The CME wrote that a contract market should not have to submit rules that were consistent with this regulation since this submission would merely repeat the Commission's regulation.

2. Regulation 1.41(f)(8)

Certain contract markets currently have rules in effect which are inconsistent with this section. The purpose of the proposed rule was to ensure that these contract markets did not maintain in effect rules that were inconsistent with these amendments.

The Commission, therefore, is amending regulation 1.41(f)(8) to clarify that a contract market need only submit its deletion of inconsistent rules and need not submit new rules that duplicate the amendments. The Commission does not contemplate that all contract markets will have to delete portions of their emergency rules; however, certain contract markets will have to do so. For example, several futures exchanges define the term "emergency" as any occurrence or circumstance deemed by its governing board to be an emergency. With the new, more specific definition of "emergency," these contract markets will have to delete these definitions to remain consistent with the amendments.

H. Physical Emergencies

1. Proposed Regulation and Comments Received

Existing and proposed regulation 1.41(g) govern physical emergencies that do not involve the implementation, modification, or termination of a temporary emergency rule by a contract market governing board. Under proposed amendments to this regulation, the Commission added a requirement that a contract market must notify the Commission as soon as possible after implementing, modifying, or terminating a physical emergency action. No comments were received on this proposal; however, the CSCE requested a modification to the existing and proposed regulations. In response to the recent bombing of the World Trade Center, the futures exchange noted that the mandatory five-day time limit on physical emergencies that are declared by a designated official in regulation 1.41(g) should be changed to permit an extended suspension of trading. Although the New York contract markets did not have to suspend trading completely for more than five days following this emergency, they were forced to shorten trading days for a longer time period.

2. Regulation 1.41(g)

As circumstances have indicated, situations could arise where it was necessary for a contract market to suspend trading for more than five days. Thus, the Commission has amended regulation 1.41(g) to provide that a designated official of a contract market may suspend trading for more than five days when the contract market has submitted and the Commission has granted a written request for an extension of time, for good cause shown. The Commission also has made

final the proposed amendments to regulation 1.41(g).

IV. Conclusion

The final amendments to regulation 1.41 implement the statutory directive in section 213 of the Futures Trading Act.

These amendments require a contract market to notify the Commission prior to implementation, modification, or termination of a contract market temporary emergency rule. They also articulate procedures that will be followed by the Commission in its review of a contract market temporary emergency rule. The regulations should provide guidance to a contract market in any determination to take emergency action.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") 5 U.S.C. 601 *et seq.*, requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The proposed amendments to regulation 1.41 affect contract markets. The Commission previously has established that contract markets are not "small entities" for purposes of the RFA, and that the Commission, therefore, need not consider the effect of the proposed amendments on contract markets. 47 FR 18618, 18619 (April 30, 1982). Therefore, the Acting Chairman hereby certifies, pursuant to 5 U.S.C. 605(b), that the action taken herein will not have a significant economic impact on a substantial number of small entities.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. 3501 *et seq.*, imposes certain requirements on federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. In compliance with the PRA, the Commission previously submitted this rule in proposed form and its associated information collection requirements to the Office of Management and Budget ("OMB"). The OMB approved the collection of information associated with this rule on January 27, 1993 and assigned OMB control number 3038-0022 to the rule. The burden associated with the entire collection, including these final amendments, is as follows:

Average burden hours per response:

612.26

Number of respondents: 4281

Frequency of response: on occasion

The burden associated with the proposed amendments is as follows:

Average burden hours per response: 2.0

¹² See, e.g., Regulation 1.41(a)(4)(iii).

Number of respondents: 239

Frequency of response: on occasion

Copies of the OMB approved information collection package associated with this rule may be obtained from Gary Waxman, Office of Management and Budget, Room 3220 NEOB, Washington, DC 20503, (202) 395-7340.

List of Subjects in 17 CFR Part 1

Definitions, Registration, Minimum financial and related reporting requirements, Prohibited trading in commodity options, Customer's money, Securities and property, Recordkeeping and miscellaneous.

In consideration of the foregoing and pursuant to the authority contained in the Commodity Exchange Act and, in particular, section 5a(a) (12) and 8a(5) thereof, 7 U.S.C. 7a(a) (12) and 12a(5), the Commission has amended part 1 of title 17 of the Code of Federal Regulations as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 2, 2a, 4, 4a, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 7, 7a, 7b, 8, 9, 12, 12c, 13a, 13a-1, 16, 16a, 19, 21, 23 and 24, unless otherwise noted.

2. Section 1.41 is amended by revising paragraph (a)(4) and adding paragraph (a)(8); by revising paragraphs (f) (2) and (3) and adding paragraph (f) (4) through (9); and by revising paragraph (g) to read as follows:

§ 1.41 Contract market rules; submission of rules to the Commission, exemption of certain rules.

(a) * * *

(4) The term *emergency* means any occurrence or circumstance listed in this paragraph (a)(4) which, in the opinion of the governing board of the contract market, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any contracts on such contract market. Occurrences and circumstances which a governing board of a contract market may deem emergencies are limited to the following:

- (i) Any manipulative activity or attempted manipulative activity;
- (ii) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions;
- (iii) Any circumstances which may materially affect the performance of

contracts traded on the contract market, including failure of the payment system;

(iv) Any action taken by the United States or any foreign government or any state or local governmental body, any other contract market, board of trade, or any other exchange or trade association (foreign or domestic), which may have a direct impact on trading on the contract market;

(v) Any circumstances which may have a severe, adverse effect upon the physical functions of a contract market including, for example, fire or other casualty; bomb threats; substantial inclement weather; power failures; communications breakdowns; computer system breakdowns; screen-based trading system breakdowns; malfunctions of plumbing, heating, ventilation and air conditioning systems; and transportation breakdowns.

(vi) The bankruptcy or insolvency of any member or member firm of the contract market or the imposition of any injunction or other restraint by any government agency, court or arbitrator upon a member of the contract market which may affect the ability of that member to perform on its contracts;

(vii) Any circumstance in which it appears that a member or any other person has failed to perform contracts, is insolvent, or is in such financial or operational condition or is conducting business in such a manner that such person cannot be permitted to continue in business without jeopardizing the safety of customer funds, members of the contract market, or the contract market; and

(viii) Any other unusual, unforeseeable and adverse circumstance with respect to which it is not practicable for the contract market to submit, in a timely fashion, a rule to the Commission for prior review under section 5a(a)(12)(A) of the Act.

* * * * *

(8) The term "affiliated firm" of a person means any firm in which the person is a general partner, officer, director, principal, employee, or owner of more than ten percent of the equity interest.

* * * * *

(f) * * *

(2)(i) A contract market must make every effort practicable to provide notice to the Commission that it intends to implement, modify or terminate a temporary emergency rule prior to implementing, modifying or terminating the rule. If it is not practicable for the contract market to notify the Commission prior to taking emergency action, the contract market shall provide

the Commission with notice of the implementation, modification, or termination of any emergency rule at the earliest possible time. Notice must be given to the Director of the Division of Trading and Markets or any employee of the Commission, as may be designated by the Director for such purpose. The contract market must provide notice to the Commission by the fastest means available and must use its best efforts to ensure that the notice is actually received by one of the authorized persons above. Notice should include:

(A) To the extent practicable, a complete explanation of the contract market action intended or taken to meet the emergency and a description of the nature of the emergency;

(B) In any instance where a contract market does not provide prior notice of an emergency action, an explanation of why it was not practicable for a contract market to provide such notice; and

(C) An explanation of why it was not practicable for the contract market to submit the temporary emergency rule to the Commission for prior review under section 5a(a)(12)(A) of the Act.

(ii) Any available documentation of the nature of the emergency conditions and the intended or actual emergency action should be submitted at the time of notification.

(3) On or before the fifth day after the day that a contract market provides notice under paragraph (f)(2), except as described in paragraph (f)(4), the contract market shall supplement its notice by submitting the following information to the Commission at its Washington, DC headquarters:

(i) A written copy of the temporary emergency rule and any modification to or termination of the rule;

(ii) A complete written explanation of the emergency action, which explanation must include a complete description of any matter voted on that related to the emergency; a summary of the substantive reasons in support of and in opposition to any matter voted on that related to the emergency given at a meeting in which the members implemented, modified, or terminated a temporary emergency rule; the names of all persons who were members of the governing board at the time of the meeting; the names of all persons who attended the meeting in person or who were otherwise present by electronic means; the name of any person who rescued himself from the meeting, the reason for refusal, and the time that the refusal occurred; the approximate time that notice of the meeting was given to each governing board member and the times that the meeting began and ended; the name of any person who was

directed to abstain from deliberating or voting at the meeting; an itemized list of how each governing board member voted; and a summary of any disclosure made by a person of his or her positions in any subject contract market, including disclosure of positions held in any personal account, controlled account, other account in which a person has an interest, and customer and proprietary accounts at a person's affiliated firm;

(iii) Any documentation, not previously provided, relating to the emergency conditions and the emergency action, including documentation regarding the reasons for the specific emergency action taken;

(iv) A description of the basis for and procedures followed by a governing board in making any determination as to the eligibility of an interested person to deliberate or to vote on matters relating to the emergency;

(v) Documentation of the gross positions held in any personal account, controlled account, other account in which the governing board member has an interest, and proprietary accounts at an affiliated firm, as well as documentation of the net customer positions held at an affiliated firm, by a governing board member who attended the meeting for the contract months that the contract market reasonably expects could be affected by the emergency action, provided that the contract market explains its reasons in writing for selecting less than all contract months in the subject contract market;

(vi) A representation from each governing board member who voted on an emergency action as to whether or not he had actual knowledge of individual customer positions at his affiliated firm at the time of the vote; and

(vii) Such other information as the Commission may require.

(4)(i) Within 10 days of the receipt from a contract market of all of the information required by paragraphs (2) and (3), or as soon as practicable thereafter, the Commission will make a determination to permit the temporary emergency rule to remain in effect, consistent with paragraph (1), unless it finds that the contract market's emergency action is:

(A) Arbitrary, capricious or an abuse of discretion;

(B) Lacking a reasonable basis in fact; or

(C) Taken in bad faith by the contract market or its officials.

(ii) If the Commission determines that the contract market's emergency action is arbitrary, capricious or an abuse of discretion; lacking a reasonable basis in

fact; or taken in bad faith, then the Commission may, in its discretion and upon such terms and conditions as it deems appropriate, suspend the effect of the rule pending review under section 5a(a)(12)(A) or otherwise if it finds that suspension of the rule is not contrary to the public interest and the purposes of section 5a(a)(12) of the Act.

(5) The Commission will submit a report on its determination pursuant to paragraph (4) and the basis for this determination to:

- (i) The affected contract market;
- (ii) The Committee on Agriculture of the House of Representatives; and
- (iii) The Committee on Agriculture, Nutrition, and Forestry of the Senate.

If the report is submitted more than 10 days after the Commission receives all of the information required under paragraphs (2) and (3) from a contract market, the report will include an explanation of why submission within 10 days from receipt of notification and explanation was not practicable.

(6) A determination by the Commission to suspend the effect of a rule under subparagraph (4)(ii) of this regulation will be subject to judicial review on the same basis as an emergency determination under section 8a(9) of the Act.

(7) A temporary emergency rule may provide for, or may authorize the contract market, or the governing board thereof or any committee thereof, to undertake actions necessary or appropriate to meet the emergency, including, but not limited to, such actions as:

(i) Limiting trading to liquidation only, in whole or in part, or limiting trading to liquidation only except for new sales by parties who have the commodity to delivery pursuant to such sales;

(ii) Extending or shortening the expiration date for trading in contracts;

(iii) Altering delivery terms or conditions;

(iv) Modifying price limits;

(v) Modifying circuit breakers;

(vi) Ordering the liquidation of contracts, the fixing of a settlement price or the reduction in positions;

(vii) Ordering the transfer of contracts, and the money, securities, and property securing such contracts, held on behalf of customers by a member of the contract market to another member, or other members, of the contract market willing to assume such contracts or obligated to do so;

(viii) Extending, limiting or changing hours of trading;

(ix) Suspending trading; and

(x) Modifying or suspending any provision of the rules of the contract

market, including any contract market prohibition against dual trading.

(8) A contract market shall not maintain in effect rules that are inconsistent with this regulation.

(9) Nothing in this section prevents the Commission from taking emergency action under section 8a(9) of the Act or from taking any enforcement action under section 6(c), 6(d), 6b, or 6c of the Act.

(g) *Physical emergencies.* In the event the physical functions of a contract market are, or are threatened to be, severely and adversely affected by a "physical emergency," such as fire or other casualty, bomb threats, substantial inclement weather, power failures, communications breakdowns, computer system breakdowns, screen-based trading system breakdowns or transportation breakdowns, a contract market official, duly authorized to take such action for and on behalf of the contract market with respect to such a "physical emergency" pursuant to a rule of the contract market that has been approved by the Commission or has become effective pursuant to section 5a(a)(12) of the Act and these regulations, may take any action authorized by such rule necessary or appropriate to deal with the emergency, including, but not limited to, suspending trading on the contract market. Suspension of trading in the contract market by such a designated official shall not continue in effect for more than five (5) days, except where the contract market has submitted in writing and the Commission has granted, for good cause shown, a request for an extension of time. A request for an extension of time must be given to the Director of the Division of Trading and Markets or any employee of the Commission, as may be designated by the Director for such purpose. If so authorized by such a rule of the contract market, the designated official may also order restoration of trading on the contract market, or removal of other restrictions imposed by the official as permitted by this paragraph (g), in the absence of action by the governing board of the contract market, upon a determination by such official that the "physical emergency" has sufficiently abated to permit the physical functions of the contract market to continue in an orderly manner. A contract market must notify the Director of the Division of Trading and Markets or any employee of the Commission, as may be designated by the Director for such purpose, of the implementation, modification or termination of a physical emergency

action as soon as possible after taking the action.

3. Section 1.41c is added to read as follows:

§ 1.41c Delegation of authority to the Director of the Division of Trading and Markets to receive notice of an emergency action.

The Commission hereby delegates authority to receive notification and explanation of a temporary emergency rule, notification of a physical emergency action, and a request for an extension of time for suspension of trading for a physical emergency, until the Commission orders otherwise, to the Director of the Division of Trading and Markets. This authority may be exercised by the Director or by another employee or employees of the Commission as may be designated from time to time by the Director.

Issued in Washington, DC, April 26, 1993, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 93-10182 Filed 4-30-93; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900-AF13

Dependents' Education; Verification of Pursuit and Continued Enrollment

AGENCY: Department of Veterans Affairs.

ACTION: Delay of effective date.

SUMMARY: This document contains a delay of the effective date for final regulations which were published Tuesday, June 9, 1992. The regulations provided new rules for release of payments of dependents' educational assistance.

EFFECTIVE DATE: Effective May 3, 1993, the effective date for regulations published at 57 FR 24366 is delayed to August 1, 1999.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer (225), Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, 202-233-2092.

SUPPLEMENTARY INFORMATION:

Need for Correction

As published in the Federal Register, amendments to § 21.4138 and § 21.4204 require that an eligible person enrolled

in a course leading to a standard college degree must verify monthly that he or she is still pursuing a program of education before VA (Department of Veterans Affairs) will pay that month's dependents' educational assistance. An amendment to § 21.4135 provided for discontinuance dates in the event the eligible person discontinued training. These were predicated upon implementation of a new verification processing system.

These regulations were published with a future effective date of August 1, 1993. At the time the final regulations appeared in the Federal Register, VA planned on having the new system in place by August 1, 1993. However, due to limited resources, the department has found that it will be unable to begin the new verification system by that date. Accordingly, these final regulations will not become effective until August 1, 1999.

List of Subjects in 38 CFR Part 21

Civil rights, Claims, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

For the reasons set forth in the preamble, the effective date for the regulations at 57 FR 24366, affecting §§ 21.4135, 21.4138, and 21.4204, is delayed to August 1, 1999.

Approved: April 20, 1993.

Michael B. Berger,

Director, Records Management Service.

[FR Doc. 93-9740 Filed 4-30-93; 8:45 am]

BILLING CODE 8320-01-M

38 CFR Part 21

RIN 2900-AF77

Veterans Education; Implementation of the Veterans' Educational Assistance Amendment of 1991

AGENCY: Department of Veterans Affairs.

ACTION: Final regulations.

SUMMARY: The Veterans' Educational Assistance Amendment of 1991 contains several provisions which affect the payment of benefits to those receiving educational assistance under the programs VA (Department of Veterans Affairs) administers. These provisions include restoring lost entitlement to reservists called to active duty and certain individuals on active duty during the Persian Gulf War, and an improvement in payments to these individuals. This final regulation will inform the public of the way in which

VA will implement these provisions of law with respect to Dependents' Educational Assistance and the Montgomery GI Bill—Active Duty. Regulations designed to implement these provisions of law with respect to the other education programs VA administers will be proposed at a later date.

EFFECTIVE DATE: These amendments, like the provisions of law they implement are retroactively effective on Oct. 10, 1991; except the amendments to §§ 21.4135, 21.4136, 21.4137, 21.7135 and 21.7139, like the provisions of law they implement, are retroactively effective on Aug. 1, 1990.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer (225), Assistant Director for Policy and Program Administration, Education Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233-2092.

SUPPLEMENTARY INFORMATION: Many persons receiving benefits under the Montgomery GI Bill—Active Duty are servicemembers on active duty, while many others are veterans serving as members of the Selected Reserve. Moreover, some individuals receiving benefits under the Dependents' Educational Assistance program are also Reserve members. Consequently, many of these benefit recipients are among those reservists called to active duty during the Persian Gulf War or were among those on active duty whose assignments or responsibilities changed due to the war. In many instances these individuals had to discontinue their training in the middle of a term or other enrollment period. Under the law then in effect, these individuals would have lost the entitlement used in pursuit of those discontinued courses unless their educational institutions discovered a method whereby the individuals could receive a grade for those courses. This could have adversely affected the ability of these individuals to complete their programs of education. Furthermore, in order to pay these individuals to the date they discontinued training, VA would have to determine in the individual case whether mitigating circumstances existed for these discontinuances.

The Veterans' Educational Assistance Amendments of 1991 was enacted in order to prevent eligible individuals from suffering these setbacks while serving the country during the Persian Gulf War. This Act contains several provisions which improve the educational assistance benefits for those who serve on duty during the Persian

Gulf War. These include restoring lost entitlement to those who were called to active duty in the middle of an enrollment and to some of those on active duty during the Persian Gulf War, and providing for payment to the date these individuals withdrew from their courses without requiring VA to make mitigating circumstance determinations. These regulations implement such provisions of law for those receiving benefits under the Dependents' Educational Assistance and the Montgomery GI Bill—Active Duty program.

The Department of Veterans Affairs has determined that these amended regulations do not contain a major rule as that term is defined by E.O. 12291, entitled Federal Regulation. The regulations will not have a \$100 million annual effect on the economy, and will not cause a major increase in costs or prices for anyone. They will have no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

VA finds for good cause that publishing these regulations for prior public comment is unnecessary and would serve no good purpose since these changes simply implement statutory requirements. Therefore, notice of proposed rulemaking will not be published for these regulations.

Since a notice of proposed rulemaking will not be published for these amended regulations, these changes do not fall within the definition of a rule in the Regulatory Flexibility Act. Nevertheless, these amended regulations will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), the amended regulations, therefore, are exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

The amended regulations directly affect only individuals. They will have no significant economic impact on small entities, i.e., small businesses, small private and nonprofit organizations and small governmental jurisdictions.

The Department of Veterans Affairs finds that good cause exists for making the amendments to §§ 21.4135, 21.4137, 21.7135 and 21.7139, like the provisions of law they implement, retroactively effective on Aug. 1, 1990. The Department of Veterans Affairs finds that good cause exists for making the amendments to the remainder of the

regulations retroactively effective on Oct. 10, 1991.

It is necessary to implement these provisions of law as soon as possible. These provisions are intended to achieve a benefit for the individual. The maximum benefits intended in the legislation will be achieved through prompt implementation. Hence, a delayed effective date would be contrary to statutory design, would complicate administration of these provisions of law; and might result in the denial of a benefit to someone who is entitled to it.

The Catalog of Federal Domestic Assistance numbers for the programs affected by this final rule are 64.117 and 64.124.

List of Subjects in 38 CFR Part 21

Civil rights, Claims, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Approved: February 11, 1993.
Jesse Brown,
Secretary of Veterans Affairs.

For the reasons set out in the preamble 38 CFR part 21, subparts C, D and K are amended as set forth below.

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart C—Survivors' and Dependents' Educational Assistance Under 38 U.S.C. Chapter 35

1. The authority citation for part 21, subpart C is revised to read as follows:

Authority: 38 U.S.C. 3500-3566.

2. In § 21.3045 paragraphs (b)(2) introductory text, (b)(4)(ii) and (c) introductory text are revised; paragraphs (d), (e), (f), (g), (h), (i) and (j) are redesignated as paragraphs (e), (f), (g), (h), (i), (j) and (k), respectively; a new paragraph (d) and its authority citation are added; newly designated paragraphs (e) introductory text and (e)(1) introductory text are revised; and the authority citation for paragraph (b)(4) is revised to read as follows:

§ 21.3045 Entitlement charges.

* * *

(b) * * *

(2) When an eligible spouse or surviving spouse is pursuing a course leading to a secondary school diploma or an equivalency certificate as described in § 21.4235 of this part, the following circumstances will always result in VA's making a charge against his or her entitlement unless the provisions of paragraph (d) of this

section would exempt the spouse or surviving spouse from receiving an entitlement charge.

* * *

(4) * * *

(ii) VA will make a charge against the entitlement of an eligible person for pursuit in excess of the pursuit described in paragraph (b)(4)(i) unless the provisions of paragraph (d) of this section would exempt the eligible person from receiving an entitlement charge.

(Authority: 38 U.S.C. 3511(a), 3533(a); Pub. L. 100-689, Pub. L. 102-127 (Oct. 10, 1991))

(c) Other courses for which entitlement will be charged. Except when the requirements of paragraph (d) of this section are met, VA will make a charge against the period of entitlement—

* * *

(d) Exemption from entitlement charge. (1) VA will not make a charge against the entitlement of an eligible person for the pursuit of any course or courses when VA finds that the eligible person—

(i) Had to discontinue pursuit of the course or courses as the result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672 (a), (d), or (g), 673, 673b, or 688 of title 10, U.S. Code; and

(ii) Failed to receive credit or training time toward completion of the eligible person's approved educational, professional or vocational objective as a result of having to discontinue, as described in paragraph (d)(1)(i) of this section, his or her course pursuit.

(2) The period for which VA will not make a charge against entitlement shall not exceed the portion of the period of enrollment in the course or courses for which the eligible person failed to receive credit or with respect to which the eligible person lost training time.

(Authority: 38 U.S.C. 3511(a); Pub. L. 102-127 (Oct. 10, 1991))

(e) Determining entitlement charge. The provisions of this paragraph apply to all courses except those courses for which VA is not making a charge against the eligible person's entitlement, apprenticeship or other on-job training, correspondence courses, and courses offered solely through independent study.

(1) After making any adjustments required by paragraph (e)(3) of this section, VA will make a charge against entitlement—

* * *

Subpart D—Administration of Educational Benefits; 38 U.S.C. Chapters 34, 35 and 36

3. The authority citation for part 21, subpart D continues to read as follows:

Authority: 38 U.S.C. 501(a).

4. In § 21.4135 paragraphs (e) heading and (e)(1) introductory text, (s)(2)(ii) and (s)(3) introductory text are revised to read as follows:

§ 21.4135 Discontinuance dates.

(e) *Course discontinued; course interrupted; course terminated; course not satisfactorily completed or withdrawn from §§ 21.4136(k) and 21.4137.* (1) If the individual withdraws from all courses; receives all nonpunitive grades; there are no mitigating circumstances as provided in § 21.4136(k) or § 21.4137(h); and the withdrawal did not occur because the individual was ordered to active duty, VA will terminate the individual's educational assistance allowance effective the later of the following:

(s) *Reduction in rate of pursuit of course (§ 21.4270).*

(2) * * *

(ii) There are mitigating circumstances, or the individual receives a punitive grade for the portion of the course from which he or she withdrew, or the withdrawal occurred because the individual was ordered to active duty.

(3) If the individual reduces training by withdrawing from a part of a course and the withdrawal does not occur because the individual was ordered to active duty; there are not mitigating circumstances; and the individual receives a nonpunitive grade for that portion of the course from which he or she withdrew, VA will reduce the individual's educational assistance allowance effective the later of the following:

5. In § 21.4136 paragraph (k)(1) and paragraph (k)(2)(vii) are revised and an authority citation for paragraph (k)(1) is added to read as follows:

§ 21.4136 Rates; educational assistance allowance; 38 U.S.C. Chapter 34.

(k) *Mitigating circumstances.* (1) VA will not pay benefits to a veteran for a course from which the veteran withdraws or receives a nonpunitive grade which is not used in computing requirements for graduation unless the provisions of this paragraph (k)(1) are met.

(i) The veteran withdraws because he or she is ordered to active duty; or
(ii) All of the following criteria are met:

(A) There are mitigating circumstances;

(B) The veteran submits a description of the circumstances in writing to VA either within one year from the date VA notifies the veteran that he or she must submit the mitigating circumstances or at a later date if the veteran is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the description of the mitigating circumstances; and

(C) The veteran submits evidence supporting the existence of mitigating circumstances within one year of the date that evidence is requested by VA.

(Authority: 38 U.S.C. 3680(a); Pub. L. 102-127 (Aug. 1, 1990))

(2) * * *

(vii) Unanticipated active duty for training.

6. In § 21.4137 paragraph (h)(1) and paragraph (h)(2)(vii) are revised and an authority citation for paragraph (h)(1) is added to read as follows:

§ 21.4137 Rates; educational assistance allowance—38 U.S.C. Chapter 35.

(h) *Mitigating circumstances.* (1) VA will not pay benefits to any eligible person for a course from which the eligible person withdraws or receives a nonpunitive grade which is not used in computing the requirements for graduation unless the provisions of this paragraph are met.

(i) The eligible person withdraws because he or she is ordered to active duty; or

(ii) All of the following criteria are met:

(A) There are mitigating circumstances;

(B) The eligible person submits a description of the circumstances in writing to VA either within one year from the date VA notifies the eligible person that he or she must submit the mitigating circumstances or at a later date if the eligible person is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the description of the mitigating circumstances; and

(C) The eligible person submits evidence supporting the existence of mitigating circumstances within one year of the date that evidence is requested by VA.

(Authority: 38 U.S.C. 3680(a); Pub. L. 102-127 (August 1, 1990))

(2) * * *

(vii) Unanticipated active duty for training.

Subpart K—All Volunteer Force Educational Assistance Program (New GI Bill)

7. The authority citation for part 21, subpart K continues to read as follows:

Authority: 38 U.S.C. chapter 30. Public Law 98-525; 38 U.S.C. 501(a).

8. In § 21.7020 paragraph (b)(19)(i)(G) is revised and paragraph (b)(41) and its authority citation are added to read as follows:

§ 21.7020 Definitions.

(b) *Other definitions.*

(19) *Mitigating circumstances.* (i)

(G) Unanticipated active duty for training.

(41) *Persian Gulf War.* The term "Persian Gulf War" means the period beginning on August 2, 1990, and ending on the date thereafter prescribed by Presidential proclamation or by law.

(Authority: 38 U.S.C. 101(33); Pub. L. 102-25)

9. In § 21.7072 paragraph (f) and its authority citation are revised to read as follows:

§ 21.7072 Entitlement to basic educational assistance.

(f) *Limitation on entitlement.* Except as provided in § 21.7076(e) and § 21.7135(s) of this part no one is entitled to more than 36 months of full-time basic educational assistance (or its equivalent in part-time educational assistance).

(Authority: 38 U.S.C. 3013(c), 3013(f); Pub. L. 98-525, Pub. L. 102-127 (Oct. 10, 1991))

10. In § 21.7076 introductory text is added to paragraph (b); paragraph (e) and its authority citation are added to read as follows:

§ 21.7076 Entitlement charges.

(b) *Determining entitlement charge.* This paragraph states how VA generally will determine the charge against the entitlement of a servicemember or veteran who is receiving educational assistance. However, when the circumstances described in paragraph (e) apply to a servicemember or veteran, VA will use that paragraph to determine

an entitlement charge instead of this paragraph.

(e) *No entitlement charge for some individuals.* When the criteria described in this paragraph are met, VA will make no charges against entitlement as described in paragraph (b) of this section.

(1) VA will make no charge against an individual's entitlement when the individual—

(i) Either—

(A) While not serving on active duty, had to discontinue pursuit of a course or courses as a result of being ordered, in connection with the Persian Gulf War, to serve on active duty under section 672 (a), (d), or (g), 673, 673b, or 688 of title 10, U.S. Code; or

(B) While serving on active duty, had to discontinue pursuit of a course or courses as a result of being ordered, in connection with the Persian Gulf War, to a new duty location or assignment or to perform an increased amount of work.

(ii) Failed to receive credit or lost training time toward completion of the individual's approved educational, professional or vocational objective as a result of having to discontinue his or her course pursuit.

(2) The period for which receipt of educational assistance allowance is not charged against the entitlement of an individual described in paragraph (e)(1) of this section shall not exceed the portion of the period of enrollment in the course or courses for which the individual failed to receive credit or with respect to which the individual lost training time.

(Authority: 38 U.S.C. 3013(f); Pub. L. 102-127 (Oct. 10, 1991))

11. In § 21.7135 introductory text is added for paragraph (f); paragraphs (e)(1), (e)(2) introductory text, (f)(1) and (f)(2) are revised and authority citations are added for paragraphs (e)(1) and (f)(2) to read as follows:

§ 21.7135 Discontinuance dates.

(e) *Course discontinued; course interrupted; course terminated; course not satisfactorily completed or withdrawn from.* (1) If the veteran or servicemember, for reasons other than being called or ordered to active duty, withdraws from all courses or receives all nonpunitive grades, and in either case there are no mitigating circumstances, VA will terminate or reduce educational assistance effective the first date of the term in which the withdrawal occurs or the first date of

the term for which nonpunitive grades are assigned.

(Authority: 38 U.S.C. 3680(a); Pub. L. 102-127 (Aug. 1, 1990))

(2) If the veteran or servicemember withdraws from all courses with mitigating circumstances or withdraws from all courses such that a punitive grade is or will be assigned for those courses or the veteran withdraws from all courses because he or she is ordered to active duty, VA will terminate educational assistance for—

(f) *Reduction in the rate of pursuit of the course.* If the veteran or servicemember reduces the rate of training by withdrawing from part of a course, but continues training in part of the course, the provisions of this paragraph apply.

(1) If the reduction in the rate of training occurs other than on the first date of the term, VA will reduce the veteran's or servicemember's educational assistance at the end of the month or the end of the term in which the withdrawal occurs, whichever is earlier, either when—

(i) A nonpunitive grade is assigned for the part of the course from which he or she withdraws; and

(A) The veteran or servicemember withdraws because he or she is ordered to active duty; or

(B) The withdrawal occurs with mitigating circumstances; or

(ii) A punitive grade is assigned for the part of the course from which the reservist withdraws.

(2) VA will reduce educational assistance effective the first date of the enrollment in which the reduction occurs when—

(i) The reduction occurs on the first date of the term; or

(ii) The veteran or servicemember—

(A) Receives a nonpunitive grade for the part of the course from which he or she withdraws; and

(B) Withdraws without mitigating circumstances; and

(C) Does not withdraw because he or she is ordered to active duty.

(Authority: 38 U.S.C. 3680(a); Pub. L. 102-127 (Aug. 1, 1990))

12. In § 21.7139, paragraph (b) and its authority citation are revised to read as follows:

§ 21.7139 Conditions which result in reduced rates.

(b) *Withdrawals and nonpunitive grades.* Withdrawal from a course or receipt of a nonpunitive grade affects

payments to a veteran or servicemember. VA will not pay benefits to a veteran or servicemember for pursuit of a course from which the veteran or servicemember withdraws or receives a nonpunitive grade which is not used in computing requirements for graduation unless the provisions of this paragraph are met.

(1) The veteran withdraws because he or she is ordered to active duty; or

(2) Both of the following exist:

(i) There are mitigating circumstances; and

(ii) The veteran or servicemember submits a description of the circumstances in writing to VA either within one year from the date VA notifies the veteran or servicemember that he or she must submit the mitigating circumstances, or at a later date if the veteran or servicemember is able to show good cause why the one-year time limit should be extended to the date on which he or she submitted the description of the mitigating circumstances.

(Authority: 38 U.S.C. 3034, 3680(a); Pub. L. 98-525, Pub. L. 102-127 (Aug. 1, 1990))

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL-4625-4]

Vermont; Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency.

ACTION: Immediate final rule.

SUMMARY: Any State which seeks to administer and enforce a hazardous waste program pursuant to section 3006(b) of RCRA, may develop, and, after notice and opportunity for public hearing, submit to the Administrator of EPA, or his or her designee, an application for authorization of such program. A state's application for authorization must be consistent with 40 CFR part 271. EPA will approve a state hazardous waste program which is equivalent to, and no less stringent than the federal requirements for those provisions for which a state seeks authorization. Upon authorization, a state is authorized to carry out its authorized program in lieu of the Federal program.