applicable to section 4(c) contract market transactions under the Act and Commission Rules 33.9 and 33.10.¹³ All other provisions of the Act and Commission rules, including those related to, among other things, segregation of customer funds, adjusted net capital (except for the capital requirements of certain IBs as discussed *infra*), supervision, bankruptcy (see discussion *infra*), exchange emergency actions, reparations proceedings and private rights of action, will continue to apply.

Nevertheless, the Commission, as discussed below, is modifying section 36.3 to provide greater specificity with respect to the trading procedures that are permissible under this exemptive relief. Moreover, in responding to the public comment on the proposed rules, the Commission has provided guidance on the scope and operation of the exemption beyond that which was provided in the Notice of Proposed Rulemaking.

b. Definitions

Several commenters held opposing views regarding the nature of the instruments to be included within the proposed broad definition of "section 4(c) contract market transaction," 14 In adopting Part 36, the Commission is exercising its authority under section 4(c) of the Act, 7 U.S.C. 6(c), to exempt certain instruments and transactions from certain provisions of the Act and Commission rules. Accordingly, the proposed definition of "section 4(c) contract market transaction" is included to make clear that an election by a contract market to trade an instrument on a section 4(c) contract market pursuant to the Part 36 exemptive system will be deemed to be an election to submit that instrument to the Act and Commission rules in accordance with this Part.15

In addition, an industry trade association expressed concern that

proposed section 36.1(b) may have created an ambiguity regarding the treatment of these transactions under the United States Bankruptcy Code. According to the commenter, the absence in proposed section 36.1(b) of the words "designated as" before the phrase "a contract market within the meaning of the Act" could leave open to question the applicability of the special protective provisions ¹⁶ of the Bankruptcy Code with respect to commodity broker bankruptcies in the context of section 4(c) contract market transactions. ¹⁷

The Commission intends that its Part 190 Bankruptcy Rules will apply in the context of Part 36.¹⁸ To remove any perceived ambiguity, the Commission is modifying the language of the final rule as suggested by the commenter. Accordingly, the Commission is adding to section 36.1(b) the words "designated as" before the phrase "a contract market within the meaning of the Act."

c. Eligible Participants

As proposed, the definition of a 'section 4(c) contract market transaction" included the requirement that an agreement, contract, or transaction be executed by, or on behalf of, an "eligible participant." Proposed section 36.1(c)(2) defined "eligible participant," by setting forth a list of those individuals and entities permitted to trade section 4(c) contract market transactions. This list, with several additions tailored to the operation and structure of this particular market, was modeled on the list of "appropriate persons" set forth in section 4(c)(3) (A) through (J) of the Act, and on the definition of "eligible swap participant" under Part 35 of the Commission's Rules. However, as proposed, the definition of "eligible participant" under Part 36 differed in several respects from the definition of "eligible swap participant" under Part 35. The

proposed differences related to employee benefit plans, municipalities, and certain types of investment vehicles. The Commission also sought comment on whether the definition of "eligible swap participant" under Part 35 should be conformed to the proposed revisions. Many of the comments focused on these proposed revisions, which are discussed in greater detail below.

i. Employee Benefit Plans

As proposed, section 36.1(c)(2)(vii)would have limited employee benefit plans eligible to participate in section 4(c) contract market transactions to those subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), or similar foreign plans, with total assets exceeding \$5 million and (rather than the "or" provided in section 4(c)(3)(G) of the Act and in section 35.1(b)(2)(vii)) whose investment decisions were made by a bank, trust company, insurance company, investment adviser ("IA") under the Investment Advisers Act of 1940, or a CTA under the Act. 19 The Commission specifically sought comment concerning whether there is an asset level for an employee benefit plan which should qualify it as an eligible participant irrespective of whether its investment decisions are made by a bank, trust company, insurance company, IA or CTA and whether Part 36 should be conformed to Part 35 in this regard.

Several commenters, including three exchanges, an industry trade association and a bar association committee, stated the view that Part 36 should conform to the existing language of Part 35, so that those currently eligible to participate in swap transactions also could participate in section 4(c) contract market transactions. Moreover, the Department of Labor and the FIA opposed this revision in the proposed rule, reasoning that requiring an employee benefit plan to use a bank, trust company, insurance company, IA or CTA to make its investment decisions with respect to section 4(c) contract market transactions would create burdens for large sophisticated plans that manage plan assets in-house.

The Commission has carefully considered these comments in the context of the Act and Part 35 and does not believe that it should be more difficult for an employee benefit plan to

¹³The remainder of Part 36 sets forth the duration of the exemption (36.1(a)), definitions for purposes of Part 36 (36.1(c)), mandatory conditions and prohibited transactions (36.2) and a procedure for suspension or revocation of the exemption (36.8).

¹⁴ Proposed Section 36.1(c)(1) defined a "Section 4(c) contract market transaction" as "[a]ny agreement, contract, or transaction (or class thereof) entered into on or subject to the rules of a contract market in accordance with the provisions of this Part, and that is executed by a member of the Section 4(c) contract market that is an eligible participant for its own account, or a futures commission merchant or floor broker for its own account or on behalf of an eligible participant."

¹⁵ Any instrument meeting the criteria of Part 36, except for those specifically excluded thereunder, could be eligible to trade under these rules. See H.R. Rep. No. 978, 102d Cong., 2d Sess. 82–83 (1992).

¹⁶The commenter noted that these provisions are designed to enhance the integrity of the futures markets by preventing the trustee of an insolvent customer or FCM from, among other things, (1) avoiding contractual obligations, (2) rescinding transfers of margins and positions, or (3) impeding the liquidation of defaulted contracts.

¹⁷ See 11 U.S.C. 761–766. Presumably, this conclusion could be based upon the Commission's definition of "commodity contract" for purposes of its Bankruptcy Rules, which incorporates by reference Section 761(4) of the Bankruptcy Code. See, Commission Rule 190.01(g). The Bankruptcy Code defines "commodity contract" as a "contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade" (11 U.S.C. 761(4) (A) and (D)) and defines a "contract market" as a "board of trade designated as a contract market by the Commission under the Act." 11 U.S.C. 761(7) (emphasis added).

¹⁸ See 59 FR 54139, 54144.

¹⁹The Commission's proposed asset floor for an eligible employee benefit plan in this context, \$5 million, was five times the \$1 million asset floor for an employee benefit plan set forth in section 4(c)(3)(G) of the Act, but the same as specified under the Part 35 swaps exemption.