participate in a transaction under Part 36 than in an exempt swap transaction under Part 35. In adopting section 36.1(c)(2)(vii), therefore, the Commission is substituting the word "or" for the proposal's "and." Accordingly, employee benefit plans with total assets exceeding \$5 million will not be required to have their investment decisions with respect to section 4(c) contract market transactions made by a bank, trust company, insurance company, IA or CTA.

The Department of Labor also objected to the level of the asset floor set forth in proposed Rule 36.1(c)(2)(vii). Although it recognized that this threshold is five times that set forth in section 4(c)(3)(G) of the Act, it stated its belief that \$5 million is too low a threshold to be an accurate gauge of sophistication or understanding of complex financial instruments. The Department recommended that the asset floor for an employee benefit plan be \$50 million if an outside investment advisor is used and \$100 million, otherwise. The SEC, without setting forth a specific dollar amount, also advocated a substantially higher threshold.

The Commission has carefully considered these comments, but does not believe that it is appropriate to make the threshold amount higher for section 4(c) contract market transactions than for OTC transactions exempted under Part 35. However, it should be emphasized that Rule 36.1(c)(2)(vii) sets forth *minimum* standards for eligibility. As the administrator of ERISA, the Department of Labor can establish a higher, controlling standard of eligibility for participation in section 4(c) contract market transactions by employee benefit plans subject to ERISA.20

ii. Municipalities

In proposing section 36.1(c)(2)(viii), the Commission questioned whether municipalities should be included as eligible participants and, if so, whether any limitations on their participation would be appropriate. All of those commenting on the issue, except for the SEC, strongly supported the proposed

inclusion of municipalities as eligible participants without limitation. An association of state and local government finance officials opined that, although certain government entities have experienced trading losses, municipalities as a class are no more or less sophisticated than other types of eligible investors.²¹ Several commenters further reasoned that limitation of the investment authority of municipalities is a function more appropriately reserved to the various states. In contrast, the SEC expressed concern that there are no qualifying standards for municipalities, noting that municipalities are not included in the definitions of "qualified institutional buyer" under SEC Rule 144A or "accredited investor" under SEC Regulation D.22

After carefully considering the comments, the Commission is persuaded that, as a matter of state/ Federal comity, it should continue to refrain from precluding the participation of municipalities in exempt transactions. This policy applies both to section 4(c) contract market transactions and to exempt swap agreements under Part 35 of the Commission's rules. Accordingly, the Commission is adopting section 36.1(c)(2)(viii) as proposed.

Nevertheless, the Commission has emphasized in several reports, Congressional testimony and administrative proceedings, that all institutions, including municipalities, need to establish and implement strong internal controls and risk management practices with respect to financial market transactions. The Commission also notes that representatives of the President's Working Group on Financial Markets ²³ have met with representatives of various state and local government associations to discuss sharing and disseminating information on

appropriate investment guidelines for governmental entities, and to promote their use. The Commission and its staff stand ready to meet with such associations or any other appropriate entity to pursue the development of such guidelines or to otherwise provide information concerning risk management practices relevant to the exchange markets subject to its supervision. The Commission also will provide further guidance on the responsibilities of FCMs for supervision of such accounts.

iii. Other Entities

Proposed Part 36 specifying the list of eligible participants for section 4(c) contract market transactions also included certain technical or clarifying changes from that used in defining eligible swap participants under Part 35. Many, if not all, commenters were of the view, however, that conformity between the two exemptions should be maintained, to the greatest degree possible. In light of these views, the Commission, in adopting section 36.1(c)(2) has attempted to conform the substance, and the language, of Part 36 to that of Part 35, wherever possible. In a few instances, however, the final Part 36 rules do not mirror precisely their counterparts in Part 35.

For example, as proposed, section 36.1(c)(2)(iv) required that to be an eligible participant, investment companies be regulated under the Investment Company Act of 1940 ("ICA") or subject to foreign regulation, provided that such investment company was not formed solely for the purpose of constituting an eligible participant and has total assets exceeding \$5 million. This proposed rule differs from its Part 35 counterpart defining investment companies as eligible swap participants by including a \$5 million asset floor and by the language requiring that the investment company be regulated under the ICA, rather than subject to regulation.24

In adopting section 36.1(c)(2)(iv), the Commission has modified the proposal to refer to investment companies *subject to regulation* under the ICA, more closely conforming the provision to its Part 35 counterpart.²⁵ This modification

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²⁰ An association representing state and local finance officers requested clarification whether proposed Section 36.1(c)(2)(vii) included both private and public employee benefit plans. In adopting Section 36.1(c)(2)(vii), the Commission notes that the rule includes the phrase "subject to ERISA." Because ERISA does not cover public employee benefit plans, such plans are not encompassed in Section 36.1(c)(2)(vii), but rather would be included under Section 36.1(c)(2)(viii), as an instrumentality, agency or department of a governmental entity or subdivision, thereof. See note 22 infra.

²¹ Orange County, California, recently suffered trading losses of approximately \$1.7 billion, primarily from transactions in government securities and governmental agency obligations and declared bankruptcy in December 1994. The commenter noted, in this regard, that Orange County would have been considered a sophisticated investor by any common measure.

²² 17 CFR 230.144A and 230.501(1995), respectively. However, any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, shall be deemed a "qualified institutional buyer" if it owns at least \$100 million in securities of issuers that are not affiliated with the plan, and shall be deemed an "accredited investor" if it has total assets in excess of \$5 million. 17 CFR 230.144A(a)(1)(i)(D) and 230.501(a)(1)(1995), respectively.

 $^{^{23}\,\}mathrm{The}$ Working Group includes the Secretary of the Department of the Treasury and the Chairs of the Federal Reserve Board, the SEC and the CFTC.

²⁴ *Compare* proposed 36.1(c)(2)(iv) with Section 35.1(b)(iy).

 $^{^{25}\,} The$ Commission is also adopting similar conforming changes to the language of Section 36.1(c)(2)(v), relating to commodity pools. Specifically, the language requiring that, to be an eligible participant, a commodity pool be formed and operated by a person regulated under the Act, is being modified to read subject to regulation. The remaining conditions, that the commodity pool is not formed solely for the purpose of constituting an