

employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.

Subsection (g)(2) provides further:

A financial institution, and a director, officer, employee, or agent of any financial institution, who voluntarily reports a suspicious transaction, or that reports a suspicious transaction pursuant to this section or any other authority, may not notify any person involved in the transaction that the transaction has been reported.

Subsection (g)(3) provides that neither a financial institution, nor any director, officer, employee, or agent of any financial institution

that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority * * * shall * * * be liable to any person under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

Finally, subsection (g)(4)(B) requires the Secretary of the Treasury, "to the extent practicable and appropriate," to designate "a single officer or agency of the United States to whom such reports shall be made."⁵ The designated agency is in turn responsible for referring any report of a suspicious transaction to "any appropriate law enforcement or supervisory agency."

In the USA Patriot Act, Congress specifically addressed the issue of suspicious transaction reporting by FCMs. Section 356(b) of the USA Patriot Act provides that Treasury, in consultation with the CFTC, may issue a regulation under 31 U.S.C. 5318(g) requiring FCMs to report suspicious transactions. Treasury has decided that FCMs and IB-Cs are among the class of financial institutions from which suspicious transaction reporting should be required. FinCEN consulted extensively with the CFTC in the development of the proposed and amended rules.

B. Potential Money Laundering through FCMs and IB-Cs

FCMs engage in the offer and sale of futures contracts and commodity options on behalf of customers. While FCMs may accept money, securities, or property from customers in connection with such offers and sales, such money,

securities, and property typically are in the form of checks or wire transfers. FCMs do not normally receive or disburse currency to customers, and FCMs generally do not accept money orders or other monetary instruments from customers for deposit into the customers' futures or options accounts.

IB-Cs also receive orders for futures and options transactions, but IB-Cs may not accept money, securities, or property from their customers.⁶ Instead, FCMs maintain customer funds on behalf of an IB-C's customers and physically transmit or cause to be transmitted payments to margin, guarantee, secure, transfer, adjust, or settle futures and options transactions. Thus, all funds relating to introduced accounts are held with an FCM, and account statements reflecting such transactions must be issued by the FCM. Nevertheless, both FCMs and IB-Cs facilitate transfers or transmittals of funds for their customers.

Money laundering may occur through an FCM or IB-C, as it can occur through all categories of financial institutions.⁷ One way in which money laundering can be effected through an FCM or IB-C is through wash or other fictitious transactions that violate Section 4c(a)(2) of the CEA.⁸ In a wash transaction, a trader may engage in equal and opposite buy and sell transactions at the same or similar prices with the result that there is little or no change in the trader's financial position, and thus little or no market risk.⁹ To conceal wash trades, the trader may use multiple trading accounts established in the trader's own

name or the name of an affiliated person or may enlist confederates to assist the trader in the illegal venture. To move or transfer funds offshore, the trader may engage in wash transactions through the use of multiple trading accounts or accounts established in various jurisdictions. Traders also may use a futures account, not for trading purposes, but rather solely as a vehicle for moving funds where they can be used to fund terrorist activity and other criminal activities.

FinCEN has received reports of suspicious activity through futures accounts that have included structuring, unusual currency deposits (amounts not commensurate with business), unusual currency withdrawals, and reports of large cash deposits followed immediately by the wiring of the funds to foreign countries. In addition, as FCMs and IB-Cs play an important role in the global economy, they could be used to facilitate the layering and integration of illicit funds.

Through their contacts with customers and their involvement in the order flow process, both FCMs and IB-Cs may be well situated to detect and deter suspicious transactions. Suspicious transactions may occur at the account-opening stage, in the order flow process, or at any time after an account is opened. Suspicious transactions may occur in an FCM's back office, on the trading floor, or through trading conducted on an electronic trading platform.

C. Application of the BSA to FCMs and IB-Cs

Notwithstanding the BSA's definition of "financial institution," application of the BSA to a business largely depends upon whether the business is included in the definition of "financial institution" at 31 CFR 103.11(n) of the BSA regulations, which currently does not include FCMs or IB-Cs. Thus, FCMs and IB-Cs have not been subject to the general BSA reporting and recordkeeping requirements. Although those BSA requirements have been inapplicable to FCMs and IB-Cs, certain BSA requirements have applied to these businesses since the BSA regulations were first promulgated. In particular, FCMs and IB-Cs have been subject since 1972 to the requirement to report the transportation of currency or monetary instruments into or out of the United States¹⁰ and the requirement to report

⁶ In certain circumstances, an IB-C may accept a check made payable to an FCM for deposit in a qualifying account or for forwarding to the FCM. See 17 CFR 1.57(c).

⁷ See, e.g., *United States v. Kneeland*, 148 F.3d 6 (1st Cir. 1998) (funds obtained in connection with a fraudulent scheme to solicit "advance fees" for purported loan transactions transferred from corporation to defendant's personal bank accounts, from there to defendant's brokerage account, from brokerage account to commodities broker, and finally, from commodities broker back to personal bank account).

⁸ 7 U.S.C. 6c(a)(2).

⁹ See, e.g., *In re Collins* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,902 (CFTC April 14, 1986) ("the common denominator of the specific abuses prohibited in section 4c(a)—wash sales, cross trades, and accommodation trades—and the central characteristic of the general category of fictitious sales, is the use of trading techniques that give the appearance of submitting trades to the open market while negating the price or price competition incidental to such a market."). See also *In re Bear Stearns & Co.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,663 (CFTC January 25, 1991) (although in a wash transaction a trader gives the appearance of making independent decisions to buy and sell, the trader's actual intention is to "create a financial and position nullity extraneous to the price discovery and risk-shifting functions of the futures markets.")

⁵ This designation does not preclude the authority of supervisory agencies to require financial institutions to submit other reports to the same agency or another agency "pursuant to any other applicable provision of law." 31 U.S.C. 5318(g)(4)(C).

¹⁰ Under 31 CFR 103.23, persons transporting (or causing to be transported) currency or other monetary instruments of more than \$10,000 into or out of the United States must make a report to Treasury using the Form 4790, Report of