

foreign financial accounts,<sup>11</sup> as both of these requirements apply to persons without regard to whether they are financial institutions. In addition, certain FCMs have been subject to suspicious transaction reporting since 1996. In particular, FCMs that are affiliates or subsidiaries of banks or bank holding companies generally have been required to report suspicious transactions by virtue of rules issued by the federal bank supervisory agencies (the Board of Governors of the Federal Reserve System ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA")).<sup>12</sup> The proposed suspicious activity rule, discussed below, applies to all FCMs and IB-Cs, without regard to whether they are affiliates or subsidiaries of banks or bank holding companies.<sup>13</sup>

The release accompanying the issuance of a suspicious activity reporting rule for securities brokers or dealers ("BDs")<sup>14</sup> clarified that dual registrants—persons registered both with the CFTC as FCMs<sup>15</sup> and with the

Securities and Exchange Commission ("SEC") as BDs<sup>16</sup>—are not required to file SARs under that rule with respect to transactions that are subject to the CFTC's exclusive jurisdiction. This was intended to preserve the status quo while FinCEN consulted with the CFTC about the development of a SAR requirement for FCMs. Upon the effectiveness of a rule covering all FCMs, the need for such a carve out will be mooted. The same form (Form SAR-SF)<sup>17</sup> will be used for reporting by members of both the securities and futures industries. So long as an entity required to report under either the BD or FCM rule files the form for a given suspicious transaction, it will be in compliance with its SAR obligation.

FCMs and IB-Cs also are subject to new provisions added to the BSA by the USA Patriot Act. For example, FCMs and IB-Cs are subject to the anti-money laundering program rules of 31 U.S.C. 5318(h).<sup>18</sup> Further, FinCEN has issued a joint notice of proposed rulemaking with the CFTC that would require FCMs and IB-Cs to establish procedures to verify the identity of customers opening accounts, maintain records of the information used to verify customer identity, and consult lists of known or suspected terrorists and terrorist organizations.<sup>19</sup>

#### *D. The Registration and Regulation of FCMs and IB-Cs*

An FCM is defined in the CEA as an individual, association, partnership, corporation, or trust that is engaged in soliciting or accepting orders and funds for the purchase or sale of a commodity for future delivery on or subject to the rules of a contract market or derivatives transaction execution facility ("DTEF").<sup>20</sup> An IB-C is similarly defined,<sup>21</sup> except that an IB-C may not accept money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts. The CEA requires FCMs and IB-Cs to register pursuant to the procedures of Section 4f(a)(1) of the CEA.<sup>22</sup> As of December 31, 2002, there were 168 FCMs and 1,423 IB-Cs (domestic and foreign) that had registered with the CFTC pursuant to this provision.

The Commodity Futures Modernization Act of 2000 ("CFMA")<sup>23</sup> amended both the CEA and the Exchange Act to remove a long-standing statutory prohibition on the trading of security futures products ("SFPs").<sup>24</sup> A person may not effect SFP transactions unless the person registers with both the SEC and the CFTC. The CFMA amended both the CEA and the Exchange Act to permit "notice registration" procedures for persons that are required to register with the CFTC or the SEC solely because they are effecting SFP transactions. Under these notice registration procedures with respect to SFPs, an FCM or IB-C can register with the SEC as a "Notice BD,"<sup>25</sup> and a BD can register with the CFTC as a "Notice FCM" or "Notice IB-C,"<sup>26</sup> simply by filing a notice with the other regulator. Notice BDs are exempt from certain substantive provisions of the Exchange Act,<sup>27</sup> and Notice FCMs and Notice IB-Cs are exempt from certain substantive provisions of the CEA.<sup>28</sup> These streamlined notice registration provisions allow FCMs, IB-Cs, and securities BDs to participate in SFP business without being subject to conflicting and/or duplicative regulation. The CFMA further amended the Exchange Act to clarify that an FCM or IB-C that also is a Notice BD to effect SFP transactions is not subject to routine periodic examination by the SEC.<sup>29</sup>

The regulation of the futures industry in general, and of FCMs and IB-Cs in particular, relies on both the CFTC and the designated self-regulatory organizations ("DSROs"). At present, the DSROs consist of any board of trade that is designated as a contract market,<sup>30</sup> and any futures association registered,

International Transportation of Currency or Monetary Instruments ("CMIR").

<sup>11</sup> Under 31 CFR 103.24, persons subject to the jurisdiction of the United States must make a report to Treasury if the person has a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country. The report is made on Form TD F 90.22-1, Report of Foreign Bank and Financial Accounts ("FBAR").

<sup>12</sup> In April 1996, banks, thrifts, and other banking organizations became subject to a requirement to report suspicious transactions pursuant to final rules issued by FinCEN, under the authority contained in 31 U.S.C. 5318(g). In collaboration with FinCEN, the federal bank supervisors concurrently issued suspicious transaction reporting rules under their own authority. See 12 CFR 208.62 (Federal Reserve Board); 12 CFR 21.11 (OCC); 12 CFR 353.3 (FDIC); 12 CFR 563.180 (OTS); and 12 CFR 748.1 (NCUA). Certain bank supervisory agency rules apply to banks, non-depository institution affiliates and subsidiaries of banks and bank holding companies (including FCMs), and bank holding companies (including bank holding companies that are themselves FCMs). See, e.g., 12 CFR 225.4(f), which subjects non-bank subsidiaries of bank holding companies to the suspicious transaction reporting requirements of Regulation H of the Board of Governors at 12 CFR 208.62.

<sup>13</sup> On December 24, 2002, Federal Reserve staff issued a supervisory letter stating that a nonbank subsidiary of a bank holding company or state member bank subject to the Federal Reserve's SAR rules will be deemed to be in compliance with such rules if it makes reports of suspicious transactions under a separately applicable Treasury regulation. The supervisory letter also provides that the Federal Reserve Board is expected to revise the relevant regulations in early 2003. See SR 02-24 (available at <http://www.federalreserve.gov/boarddocs/SRLTERS/2002/sr0224.htm>).

<sup>14</sup> 67 FR 44048 (July 1, 2002).

<sup>15</sup> Section 4f(a)(1) of the CEA, 7 U.S.C. 6f(a)(1).

<sup>16</sup> Section 15(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78o(b)(1).

<sup>17</sup> See *infra* note 44.

<sup>18</sup> Regulations implementing this provision were issued April 29, 2002. See 67 FR 21110.

<sup>19</sup> See 67 FR 48328 (July 23, 2002).

<sup>20</sup> 7 U.S.C. 1a(20).

<sup>21</sup> 7 U.S.C. 1a(23) (defining the term "introducing broker").

<sup>22</sup> 7 U.S.C. 6d(a)(1).

<sup>23</sup> Pub. L. 103-556, 114 Stat. 2763 (December 21, 2000).

<sup>24</sup> A "security future" is defined in the CEA and the Exchange Act as a contract of sale for future delivery on a single security or narrow-based security index (7 U.S.C. 1a(31) and 15 U.S.C. 78c(a)(55)), and an SFP is defined as a security future or any put, call, straddle, option, or privilege on any security future (7 U.S.C. 1a(32) and 15 U.S.C. 78c(a)(56)). The CFMA amended the Exchange Act definitions of "security" and "equity security" to include security futures (15 U.S.C. 78c(a)(1) and 15 U.S.C. 78c(a)(11), respectively). As a result of these amendments, an SFP is both a security and a futures contract (or option thereon) and is thus subject to the jurisdiction of both the CFTC and the SEC.

<sup>25</sup> Section 15b(11) of the Exchange Act, 15 U.S.C. 78o(b)(11).

<sup>26</sup> Section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2).

<sup>27</sup> See 15 U.S.C. 78o(b)(11)(b).

<sup>28</sup> See 7 U.S.C. 4f(a)(4)(A).

<sup>29</sup> Section 17(b) of the Exchange Act, 15 U.S.C. 78q(b)(4)(A).

<sup>30</sup> Section 5 of the CEA, 7 U.S.C. 7.