

under the CEA.³¹ To date, the National Futures Association ("NFA") is the only registered futures association.³²

II. Specific Provisions

A. 103.11(ii)—Meaning of Terms

1. Definitions of Futures Commission Merchant and Introducing Broker-Commodities

The definition of "financial institution" in 31 CFR 103.11(n) would be amended to add FCMs and IB-Cs as these terms are proposed to be defined in paragraphs (zz) and (aaa), respectively. Adding FCMs and IB-Cs to the definition of financial institution is intended to affirm the Secretary's view that such firms are among the class of financial institutions that present possible money laundering risks and thus should be subject to regulations designed to deter and detect money laundering and other criminal activities.

Including FCMs and IB-Cs in the definition of financial institution under the BSA regulations will subject these businesses to the general BSA recordkeeping and record retention rules.³³ Most of the records specifically identified in the BSA regulations are documents that FCMs and IB-Cs must obtain and retain pursuant to existing CFTC regulations. In addition, FCMs and IB-Cs will be required to report currency transactions under 31 CFR 103.22 and maintain records associated with such reports under 103.28, as well as comply with the funds transfer rule requirements of 103.33(f). As a result, once the final rule based on this notice of proposed rulemaking is implemented, FCMs and IB-Cs will no longer be subject to cash reporting under 31 U.S.C. 5331.³⁴

Proposed paragraphs (zz) and (aaa) set forth the definitions of FCM and IB-C, respectively. These terms would be defined as any person registered or required to be registered as an FCM or IB-C with the CFTC,³⁵ but would

exclude BDs that have notice registered with the CFTC as FCMs or IB-Cs for the sole purpose of effecting SFP transactions. For these persons, FinCEN believes that the BSA rules of the primary federal supervisory agency for such entities should apply, and that authority to examine for compliance with those rules must remain with the agency with which the entities are primarily registered. Thus, a BD that is notice registered with the CFTC must comply with the BSA rules applicable to BDs, and further, such BD will be examined for BSA compliance by the SEC. A parallel change also is being made to the definition of "broker or dealer in securities" in the BSA regulations. Thus, an FCM or IB-C that is notice registered with the SEC must comply with the BSA rules applicable to FCMs and IB-Cs, and further, such FCM or IB-C shall be examined for BSA compliance by the CFTC and the relevant DSRs.

With respect to those entities that are dual registrants with both the CFTC and the SEC for purposes of futures and securities transactions other than SFPs, FinCEN intends for this rule to have the same effect as 31 CFR 103.19(ii), which is the rule that requires suspicious activity reporting for BDs. That is, dual registrants who are in compliance with the suspicious activity reporting requirements for BDs under 31 CFR 103.19(ii) also shall be deemed to be in compliance with this proposed rule, and dual registrants who are in compliance with this rule shall be deemed to be in compliance with 31 CFR 103.19(ii). In this way, it is anticipated that dual registrants will not be subject to different or conflicting suspicious activity reporting requirements for the various aspects of their businesses.

2. Definitions of Transaction, Commodity, Contract of Sale, and Option

The definition of "transaction" in the regulations under the BSA, which is set forth in paragraph (ii), conforms generally to the definition Congress added to title 18 when it criminalized money laundering in 1986.³⁶ The term is broad and is intended to reach all of the various types of transactions that may occur at a financial institution. Amended paragraph (ii) would specifically add futures transactions, *i.e.*, transactions involving any contract of sale of a commodity for future delivery, any option on any contract of

sale for future delivery, and any option on a commodity, to the list of transactions subject to BSA requirements. The definition is not restricted to transactions conducted on a designated contract market or a DTEF.³⁷

Proposed paragraphs (xx), (yy), and (bbb) set forth definitions of "commodity," "contract of sale," and "option on a commodity." These are definitions based on Sections 1a(4), 1a(7), and 1a(26), respectively, in the CEA.³⁸

B. 103.17—Reports by FCMs and IB-Cs of Suspicious Transactions

1. *General.* Proposed section 103.17 would require FCMs and IB-Cs to report suspicious transactions that are conducted or attempted by, at, or through an FCM or IB-C and involve or aggregate at least \$5,000 in funds or other assets. It is important to recognize that transactions are reportable under this proposal and 31 U.S.C. 5318(g) whether or not they involve currency.³⁹ The proposal also contains language designed to encourage the reporting of transactions that appear relevant to possible violations of law or regulation even in cases in which the rule does not explicitly so require, for example in the case of a transaction falling below the \$5,000 threshold in the rule.

Proposed paragraph (a)(2) would require reporting if the FCM or IB-C knows, suspects, or has reason to suspect that the transaction (or pattern of transactions of which the transaction is a part) is one of four classes of transactions (described more fully below) requiring reporting. The "knows, suspects, or has reason to suspect" standard incorporates a concept of due diligence in the reporting requirement.

The first class of transactions requiring reporting, described in proposed paragraph (a)(2)(i), includes transactions involving funds derived from illegal activity or intended or conducted in order to hide or disguise

³¹ Section 17 of the CEA, 7 U.S.C. 21.

³² As a result of amendments made to the CEA by the CFMA, however, a DTEF may serve as DSR. To date, there are no registered DTEFs.

³³ See 31 CFR 103.33 and 103.38.

³⁴ See 31 U.S.C. 5331(c) and 26 U.S.C. 60501(c).

³⁵ There are two types of IB-Cs, guaranteed and non-guaranteed. A guaranteed IB is one that elects to operate pursuant to a written guarantee agreement with an FCM instead of independently meeting its own capital requirements. *See, e.g.*, 17 CFR 1.17(a)(2)(ii). An independent IB-C, by contrast, is one that elects to meet its own capital requirements. Both types of IB-Cs engage in the offer and sale of futures contracts and commodity options on behalf of customers and facilitate transfers or transmittals of funds for their customers. Thus, they present the same or similar money laundering risks, and Treasury sees no reason to draw a distinction between IB-Cs that are

guaranteed and those that are not. Therefore, all IB-Cs would be covered by the proposed rule as IB-Cs.

³⁶ See Pub. L. 99-570, Title XIII, 1352(a), 100 Stat. 3207-18 (Oct. 27, 1986), codified at 18 U.S.C. 1956.

³⁷ Thus, for example, the term "transaction" would include any transaction by an FCM or IB-C in a foreign currency futures contract, any option on any foreign currency futures contract, or any option on a foreign currency that occurs on an off-exchange basis. *See* 7 U.S.C. 2(c)(1)-(2).

³⁸ 7 U.S.C. 1a(4), 1a(7) and 1a(26), respectively.

³⁹ Many currency transactions are not indicative of money laundering or other violations of law, a fact recognized both by Congress, in authorizing reform of the currency transaction reporting system, and by FinCEN in issuing rules to implement that system (*see* 31 U.S.C. 5313(d) and 31 CFR 103.22(d), 63 FR 50147 (September 21, 1998)). But many non-currency transactions (for example, funds transfers) can indicate illicit activity, especially in light of the breadth of the statutes that make money laundering a crime. *See* 18 U.S.C. 1956 and 1957.