

funds or assets derived from illegal activity. The second class of transactions, described in proposed paragraph (a)(2)(ii), involves transactions designed, whether through structuring or other means, to evade the requirements of the BSA. The third class of transactions, described in proposed paragraph (a)(2)(iii), involves transactions that appear to serve no business or apparent lawful purpose, and for which the FCM or IB-C knows of no reasonable explanation after examining the available facts relating to the transaction and the parties. The fourth class of transactions, described in proposed paragraph (a)(2)(iv), involves the use of the FCM or IB-C to facilitate a criminal transaction.

A determination as to whether a report is required must be based on all the facts and circumstances relating to the transaction and customer in question. Different fact patterns may lead to different determinations. In some cases, the facts of the transaction may indicate the need to report. For example, frequent and large-scale usage of wire transfers, including wire transfers to or from locations outside of the United States, from an account with only nominal futures activity may be indicative of suspicious activity. In other instances, the transaction or activity itself may be sufficiently suspicious to warrant reporting, notwithstanding the facts. Thus, if a customer engages in wash transactions or other fictitious or non-bona fide transactions that violate the CEA, a suspicious activity report must be filed.<sup>40</sup> Similarly, the fact that a customer unreasonably refuses to provide information necessary for the FCM or IB-C to make required reports, retain records as required, identify or verify the identity of a customer, or otherwise comply with the BSA; provides information that the FCM or IB-C determines to be false; or seeks to change or cancel a transaction after such person is informed of currency transaction reporting or information verification or recordkeeping requirements relevant to the transaction, would all indicate that a suspicious activity report should be filed. As the proposed rule would make clear, the FCM or IB-C may not notify the customer that it intends to file or has

filed a suspicious transaction report with respect to the customer's activity.

In other situations, a more involved analysis and judgment may be needed to determine whether a transaction is suspicious within the meaning of the proposed rule. Transactions that raise the need for such judgments may include, for example: (i) Transmission or receipt of funds transfers without normal identifying information or in a manner that indicates an attempt to disguise or hide the country of origin or destination or the identity of the customer sending the funds or of the beneficiary to whom the funds are sent; (ii) repeated pattern activity by the customer, such as where the customer repeatedly makes unexplainable, frequent deposits or withdrawals; or (iii) repeated use of an account as a temporary resting place for funds from multiple sources without a clear business purpose. The judgments involved also will extend to whether the facts and circumstances and the institution's knowledge of its customer provide a reasonable explanation for the transaction or activity that removes it from the suspicious category.

An FCM may carry, and an IB-C may introduce, intermediated accounts including omnibus accounts and accounts for collective investment vehicles such as commodity pools. In such circumstances, the FCM and IB-C may have little or no contact with or information about the ultimate beneficial owners of such accounts. FinCEN has proposed anti-money laundering program rules for commodity pools, and is today also proposing such rules CTAs. Monitoring for suspicious transactions is an integral part of such programs. These independent suspicious activity reporting obligations of intermediaries such as CTAs, however, do not reduce the obligation on an FCM or IB-C imposed by this proposed rule to monitor transactions based on the facts and circumstances with which it is presented, in order to determine if a transaction is suspicious. In addition, omnibus accounts maintained for certain foreign financial institutions fall within the definition of "correspondent account" under section 312 of the USA Patriot Act and as such are subject to due diligence, and possibly enhanced due diligence, requirements under that section of that Act and the implementing regulations.<sup>41</sup>

The means of commerce and the techniques of money launderers are

continually evolving, and there is no way to provide an exhaustive list of suspicious transactions. FinCEN will continue its dialogue with the CFTC, NFA, the futures exchanges, and the futures industry itself about the manner in which a combination of government guidance, training programs, and government-industry information exchange can smooth the way for operation of the new suspicious activity reporting system in as flexible and cost-efficient a way as possible.

**2. Reporting Threshold.** FinCEN is aware of industry concern that the \$5,000 threshold would operate mechanically to require FCMs and IB-Cs to establish programs to examine every transaction occurring at or above the threshold level. The suspicious transaction reporting rules, however, are not intended to operate (and indeed cannot properly operate) in a mechanical fashion. Rather, the suspicious transaction reporting requirements are intended to function in such a way as to have financial institutions evaluate customer activity and relationships for money laundering risks.<sup>42</sup>

**3. Transactions Involving Both an FCM and an IB-C.** Proposed paragraph (a)(3) provides that the obligation to identify and report properly a suspicious transaction rests with each FCM and IB-C involved in the transaction. While the proposed rule sets forth the general principle regarding the obligation to report when a transaction involves both an FCM and an IB-C, the proposed rule also provides that only one report needs to be filed with FinCEN as long as the report that is filed contains all the relevant facts concerning the transaction. This provision is intended to avoid duplicative and redundant reporting. FinCEN expects that in these situations, an FCM and IB-C will consult with each other in preparing the report to ensure that only one accurate and complete report is filed concerning a particular transaction.

**4. Filing Procedures.** Proposed paragraph (b) sets forth the filing procedures to be followed by an FCM or IB-C making reports of suspicious transactions. Within 30 days after an FCM or IB-C becomes aware of a suspicious transaction, the business must report the transaction by

<sup>40</sup> As discussed below, however, proposed paragraph (c)(1)(ii) would provide an exception from the suspicious reporting requirements for violations of the CEA by the FCM, IB-C, or any of its officers, directors, employees, or associated persons that are reported to the CFTC, a registered futures association or any "registered entity," as that term is defined in 7 U.S.C. 1a(29).

<sup>41</sup> See 67 FR 37736 (May 30, 2002) (proposed rule) and 67 FR 48348 (July 23, 2002) (interim final rule).

<sup>42</sup> Thus, for example, sizable futures transactions conducted for a well established commodity pool operated in accordance with Part 4 of the CFTC's regulations may require less scrutiny than a futures transaction conducted for an individual customer located in a jurisdiction that has been identified as a non-cooperative country or territory by the Financial Action Task Force on Money Laundering.