

completing a SAR-SF and filing it in a central location to be determined by FinCEN.<sup>43</sup> The proposed rule also makes special provision for situations that require immediate attention, such as ongoing money laundering schemes or terrorist financing. In that event, the FCM or IB-C would have to notify immediately, by telephone, an appropriate law enforcement authority in addition to filing a SAR-SF. The proposed rule also permits, but does not require, FCMs and IB-Cs to notify the CFTC in addition to contacting law enforcement and filing a SAR-SF.<sup>44</sup>

5. *Exceptions.* Proposed paragraph (c) sets forth two exceptions to the reporting requirement that would apply to an FCM or IB-C. A report would not have to be filed to report a robbery or burglary that is reported to law enforcement. A report also would not have to be filed concerning possible violations of the CEA, the rules promulgated by the CFTC, or the rules of any registered futures association or registered entity by an employee or other associated person of an FCM or IB-C, provided that such violations are reported to the CFTC, a registered futures association, or a registered entity. This exception would not encompass reports of BSA violations made to the CFTC or a registered futures association.

6. *Retention of Records.* Proposed paragraph (d) would require FCMs and IB-Cs to maintain a copy of any SAR-SF that is filed with FinCEN and all original related supporting documentation for a period of five years from the date of filing. Nothing in the proposed rule modifies, limits, or supersedes section 101 of the Electronic Records in Global and National Commerce Act,<sup>45</sup> and thus an FCM or IB-C may make and maintain records either as originals or in electronic format as permitted under existing CFTC rules.<sup>46</sup> Regardless, the FCM or IB-C would have to make the

supporting documentation available to FinCEN, the CFTC, NFA, any appropriate law enforcement agency, and, as explained below, any registered futures association or registered entity as permitted in paragraph (g), upon request.

7. *Non-Disclosure.* Proposed paragraph (e) reflects the statutory bar against the disclosure of information filed in, or the fact of filing, a suspicious activity report (whether the report is required by the proposed rule or is filed voluntarily).<sup>47</sup> Thus, the paragraph specifically prohibits persons filing a SAR-SF from making any disclosure either about the report or the supporting documentation unless the disclosure is made to law enforcement, relevant regulatory agencies such as the CFTC, or a DSRO.

8. *Safe Harbor from Civil Liability.* Proposed paragraph (f) incorporates the BSA's statutory protection from civil liability for making or filing a report of a suspicious transaction or for failing to disclose the fact that a report has been made or filed. The specific reference to arbitration reflects the clarification provided in the USA Patriot Act that the safe harbor for suspicious transaction reporting would apply in arbitration proceedings. Because some disputes in the futures industry are resolved under a reparations procedure provided for by the CEA,<sup>48</sup> paragraph (f) proposes to clarify that the safe harbor also applies in reparations proceedings. FinCEN intends to work with the CFTC, the DSROs, and industry representatives to ensure that appropriate educational materials are delivered to compliance and litigation personnel.

It must be noted that, while the proposal reiterates and clarifies the broad statutory protection from liability for making reports of suspicious transactions and for failing to disclose the fact of such reporting, the regulatory provisions do not extend the scope of either the statutory prohibition or the statutory protection. The prohibition on disclosure (other than as required under the proposed rule) applies regardless of any protection from liability. This means, for instance, that during an arbitration or reparations proceeding, an FCM or IB-C would not be permitted to provide a copy of a SAR-SF, or disclose the fact that one had been filed, to any participant in the proceeding, including as applicable, the arbitrator, judgment officer, or administrative law judge.

9. *Examination.* Proposed paragraph (g) notes that compliance with the obligation to report suspicious

transactions will be examined, and provides that failure to comply with the rule may constitute a violation of the BSA and the BSA regulations. This paragraph also clarifies that an FCM or IB-C must provide access to any SAR-SF that it has filed, along with any supporting documentation, to the CFTC and any registered futures association or registered entity that has authority to examine the institution.

10. *Proposed Effective Date.* Proposed paragraph (h) provides that the new suspicious transaction reporting requirements would be effective 180 days after the date on which the final regulations to which this notice of proposed rulemaking relates are published in the **Federal Register**.

#### C. 103.33—Records To Be Made and Retained by Financial Institutions

The addition of FCMs and IB-Cs to the "financial institution" definition also will make such persons subject to the recordkeeping and reporting requirements set forth in section 103.33. This paragraph requires specific records concerning transfers and transmittals of funds in the amount of \$3,000 or more. The proposed amendments to paragraphs (e)(6)(i) and (f)(6)(i) of Section 103.33 would set forth exceptions for any transfers or transmittals of funds involving either an FCM or an IB-C. The proposed inclusion of FCMs and IB-Cs within the exceptions is intended to provide parallel treatment for records required to be made and kept by banks, BDs, FCMs, and IB-Cs.

#### D. 103.56—Examination

Under the current BSA delegation framework, the Internal Revenue Service is responsible for examining all financial institutions (except for BDs) that are not examined by the federal bank supervisory agencies. As a result, the Internal Revenue Service is the agency charged with examining FCMs and IB-Cs for compliance with the BSA requirements currently applicable to them.<sup>49</sup> This proposed rule would expand the scope of the BSA rules applicable to FCMs and IB-Cs by including them in the regulatory definition of "financial institution." FinCEN believes that it therefore is appropriate to shift the responsibility for examining FCMs and IB-Cs under the BSA, from the Internal Revenue Service to the CFTC. Thus, 31 CFR 103.56, which sets forth delegations of BSA authority, is proposed to be

<sup>43</sup> A draft of the SAR-SF was published for comment in the **Federal Register** on August 5, 2002; 67 FR 50751 (August 5, 2002); the form became final on December 26, 2002 and is available on FinCEN's Web site at <http://www.fincen.gov>. Once the proposed rule is finalized, FinCEN intends to conform the instructions to the SAR-SF to specifically address FCM responsibilities under the rule.

<sup>44</sup> In addition, the proposed rule reminds FCMs and IB-Cs of FinCEN's Financial Institutions Hotline (1-866-556-3974) for use by financial institutions wishing voluntarily to report to law enforcement suspicious transactions that may relate to terrorist activity. FCMs and IB-Cs reporting suspicious activity by calling the Financial Institutions Hotline must still file a timely SAR-SF to the extent required by the proposed rule.

<sup>45</sup> Pub. L. 106-229, 114 Stat. 464 (15 U.S.C. 7001) (E-Sign Act).

<sup>46</sup> See, e.g., 17 CFR 1.4 and 1.31.

<sup>47</sup> See 31 U.S.C. 5318(g)(2).

<sup>48</sup> See 7 U.S.C. 18 and 7 CFR Part 12.

<sup>49</sup> NFA, however, also examines FCMs and IB-Cs for compliance with the AML program requirement, based on NFA Compliance Rule 2-9(c).