

as opposed to general business dealings such as those established in connection with an FCM's own operations or premises. Second, in order to clarify the covered relationships, the final rule refers to transactions in "contracts of sale of a commodity for future delivery, options on any contract of sale of a commodity for future delivery, or options on a commodity."

Two commenters requested that the final rule codify the "transfer exception" to the definition of an "account." The NPRM stated that transfers of accounts from one FCM to another that are not initiated by the customer fall outside the scope of section 326 of the Act,¹⁷ and would not be covered by the proposed rule.¹⁸ The final rule codifies this exception¹⁹ by excluding from the definition of "account" any account that an FCM acquires through an acquisition, merger, purchase of assets, or assumption of liabilities.²⁰

guarantee or clearing services provided by an FCM. It would also include an FCM's provision of financial services involving any foreign currency futures contract, option on any foreign currency futures contract, or option on a foreign currency that occurs on an off-exchange basis. See 7 U.S.C. 2(c)(1)–(2).

¹⁷ Section 326 of the Act applies with respect to persons seeking to open an account at a financial institution. If a financial institution acquires an account through a non-customer initiated transaction, such as a transfer due to the insolvency of an FCM, the customer is not seeking to open an account with the financial institution.

By the same reasoning, the final rule does not, as one commenter requested, expand the "transfer exception" to include transfers where a customer account follows an associated person who moves from one firm to another, because such transfers are, at a minimum, undertaken with the acquiescence of the customer. Nonetheless, as discussed, *infra*, while the final rule requires that certain minimum customer information be obtained prior to opening an account, verification of the customer's identity may be done within a reasonable time before or after the account is opened.

¹⁸ See NPRM, 67 FR at 48330 (discussion of definition of the term "customer").

¹⁹ Nevertheless, there may be situations involving the transfer of accounts where it would be appropriate for an FCM, as part of its anti-money laundering compliance program (see, *infra*, note 89 and accompanying text) to verify the identity of customers associated with accounts that it acquires from another financial institution. For example, it may be appropriate to verify transferred account holders if the accounts are coming from a financial institution that has failed to establish or maintain a CIP. Treasury and the Federal functional regulators expect financial institutions to implement reasonable procedures to detect money laundering in any account, however acquired.

²⁰ This "transfer exception" includes bulk transfers made in accordance with CFTC Rule 1.65, 17 CFR 1.65, or as required by the CFTC's minimum financial requirements in CFTC Rule 1.17(a)(4), 17 CFR 1.17(a)(4). This exception would also cover transfers of accounts that result when an IB changes its introducing relationship from one FCM to another. For customers that open accounts after the transfer, however, the IB and the new FCM would

The final rule also excludes from the definition of "account" those accounts that are opened for the purpose of participating in an employee benefit plan established pursuant to the Employee Retirement Income Security Act of 1974. These accounts are less susceptible to being used for the financing of terrorism and money laundering because, among other reasons, they are funded through payroll deductions in connection with employment plans that must comply with Federal regulations imposing, among other requirements, low contribution limits and strict distribution requirements.

Section 103.123(a)(2) Commission. The proposed rule defined "Commission" as the United States Commodity Futures Trading Commission. There were no comments on the definition, and Treasury and the CFTC have adopted it as proposed.

Section 103.123(a)(3) Commodity. The proposed rule defined "commodity" by reference to Section 1a(4) of the CEA, 7 U.S.C. 1a(4). There were no comments on the definition, and Treasury and the CFTC have adopted it as proposed.

Section 103.123(a)(4) Contract of sale. The final rule adds a definition of "contract of sale." The term is used in the definition of "account."²¹ The final rule defines "contract of sale" as any sale, agreement of sale or agreement to sell as described in Section 1a(7) of the CEA, 7 U.S.C. 1a(7).

Section 103.123(a)(5) Customer. The proposed rule defined "customer" to mean any person who opens a new account with an FCM, and any person granted authority to effect transactions in an account.²² For consistency with the text of section 326 of the Act, the final rule defines "customer" as "a person that opens a new account." Except in the case of minors and informal groups with a common interest (e.g., civic clubs), this means that the "customer" is the person identified as the account holder, or persons in the case of a joint account. It does not refer to a person who fills out the account opening paperwork or provides information necessary to open an account, if such person is not the account holder as well. Thus, an FCM or IB is not required to look through a trust or similar account to its beneficiaries, and is required only to

need to meet the requirements in paragraph (b)(6) (including entering into a contract and providing certifications) to the extent they intend to rely on each other to undertake CIP requirements with respect to these customers.

²¹ See final rule, 103.123(a)(1).

²² See NPRM, 67 FR at 48337.

verify the identity of the named account holder.²³ The final rule provides for similar treatment of intermediated accounts.

As stated in the NPRM,²⁴ the focus of the CIP with respect to intermediated accounts will be the intermediary itself. If the intermediary is the account holder, such as in the case of an omnibus account, an FCM is not required to look through the intermediary to the underlying beneficiaries. Likewise, if the intermediary opens an account in the name of a collective investment vehicle, such as commodity pools, an FCM or IB is not required to look through the collective investment vehicle to the underlying participants.²⁵

After revisiting the "authorized person" component of the proposed "customer" definition, Treasury and the CFTC have determined that requiring limited resources to be expended on verifying the identities of persons with authority over accounts could interfere with an FCM's or IB's ability to focus on customers that present a higher risk of not being properly identified.

Accordingly, the final rule does not include persons with authority to effect transactions in accounts within the definition of "customer." Instead, paragraph (b)(2)(ii)(C) of the final rule requires FCMs and IBs to address situations where they will take additional steps to verify the identity of a customer that is not an individual by seeking information about individuals with authority or control over the account in order to verify the customer's identity.

The definition of "customer" has been revised to clarify the treatment of

²³ However, as discussed below, under paragraph (b)(2)(ii)(C) of the final rule, an FCM or IB, based on its risk-assessment of a new account, may need to take additional steps to verify the identity of a non-individual, such as obtaining information about persons with control over the account. In addition, the due diligence procedures required under other provisions of the BSA or the futures laws may require FCMs and IBs to look through to owners of certain types of accounts.

²⁴ See NPRM, 67 FR at 48331.

²⁵ This is not because the FCM or IB is relying upon the intermediary to perform its required due diligence. It is because under the final rule, FCMs and IBs are required only to verify the identity of their customers, and when an intermediary opens an account in its own name (or in the name of its collective investment vehicle), the intermediary (or collective investment vehicle) is the firm's "customer."

By contrast, if an intermediary were to open an account not in its own name (or the name of a collective investment vehicle) but in the name of its client, then under the final rule the FCM's or IB's customer would be the client. In this situation, the FCM or IB may indeed seek to rely upon the intermediary for performance of its CIP procedures with respect to these shared customers. See discussion *infra* regarding final rule, 103.123(b)(6) (reliance on other financial institutions).