

accounts for an individual who lacks legal capacity (such as a minor) and accounts for an entity that is not a legal person (such as informal groups with a common interest, which includes civic clubs).²⁶ In the case of a minor child or informal group, the “customer” for purposes of the rule is the individual who undertakes to open the account in the name of the minor or group. Generally, this will be the person who fills out the account opening paperwork and provides the information necessary to open the account in the name of the minor or group.

In order to make the rule less burdensome, the final rule excludes from the definition of “customer” certain readily identifiable entities, including: (1) Financial institutions regulated by a Federal functional regulator; (2) banks regulated by a state bank regulator; and (3) persons described in § 103.22(d)(2)(ii)–(iv), which includes entities such as governmental agencies and instrumentalities and companies that are publicly traded.²⁷ The definition of “customer” also excludes a person who has an existing account, provided that the FCM or IB has a reasonable belief that it knows the true identity of the person.²⁸

Finally, the proposed definition of “customer” stated that when an account is introduced to an FCM by an IB, the person or individual opening the account shall be deemed to be a customer of both the FCM and the IB. There were no comments on this portion of the definition, and Treasury and the CFTC have adopted it as proposed.²⁹

Section 103.123(a)(6) Federal functional regulator. The final rule adds a definition of “Federal functional regulator.” The term is used in the revised definition of “customer” and in a new provision allowing FCMs and IBs to rely on certain other financial

institutions to perform procedures of their CIPs.³⁰ The final rule defines “Federal functional regulator” by reference to § 103.120(a)(2).

Section 103.123(a)(7) Financial institution. The final rule adds a definition of “financial institution.” The term is used in the revised definition of “customer” and in a new provision allowing FCMs and IBs to rely on certain other financial institutions to perform procedures of their CIPs.³¹ This new definition cross-references the BSA, 31 U.S.C. 5312(a)(2) and (c)(1). This is a more expansive definition of “financial institution” than that in 31 CFR 103.11, and includes entities such as FCMs.

Section 103.123(a)(8) FCM. The proposed rule defined “FCM” as any person registered or required to be registered as an FCM with the CFTC under the CEA, except persons who register pursuant to section 4f(a)(2) of the CEA solely to effect transactions in SFPs. There were no comments on the definition, and Treasury and the CFTC have adopted it as proposed.

Section 103.123(a)(9) IB. The proposed rule defined “IB” as any person registered or required to be registered as an IB with the CFTC under the CEA, except persons who register pursuant to section 4f(a)(2) of the CEA solely to effect transactions in SFPs. There were no comments on the definition, and Treasury and the CFTC have adopted it as proposed with the addition of a U.S.C. citation for section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2).

Section 103.123(a)(10) Option. The final rule adds a definition of “option.” The term is used in the definition of “account.”³² The final rule defines “option” as an agreement, contract or transaction described in Section 1a(26) of the CEA, 7 U.S.C. 1a(26).

Section 103.12(a)(11) Taxpayer identification number. The proposed rule defined “taxpayer identification number” (TIN) by reference to the provisions of section 6109 of the Internal Revenue Code of 1986 and the regulations of the Internal Revenue Service (IRS) promulgated thereunder. There were no comments on the definition, and Treasury and the CFTC have adopted it substantially as proposed.

Section 103.123(a)(12) U.S. Person and § 103.123(a)(13) Non-U.S. person. The proposed rule defined “U.S. person” as an individual who is a U.S. citizen, or an entity established or

organized under the laws of a State or the United States.³³ A “non-U.S. person” was defined as a person who did not satisfy either of these criteria.³⁴

Under these definitions, an FCM or IB will not necessarily need to establish whether a potential customer is a U.S. citizen. As described in greater detail below, the FCM or IB will have to ask each customer for a U.S. TIN (social security number, employer identification number, or individual TIN). If a customer cannot provide one, the FCM or IB may then obtain an identification number from some other form of government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard. There were no comments on these definitions, and Treasury and the CFTC have adopted them as proposed.

Section 103.123(b) Customer Identification Program: Minimum Requirements

Section 103.123(b)(1) In general. Treasury and the CFTC proposed to require that each FCM and IB implement a written CIP as part of its AML program required under 31 U.S.C. 5318(h),³⁵ and that the procedures of the CIP enable each FCM and IB to form a reasonable belief that it knows the true identity of each customer.³⁶ The CIP procedures were to be based on the type of identifying information available and on an assessment of relevant risk factors, including the FCM’s or IB’s size, location and methods of opening accounts, the types of accounts maintained and the types of transactions executed for customers, and the FCM’s or IB’s reliance on another FCM or IB with which it shares an account relationship.

The NPRM discussed these risk factors and explained that, although the rule would require certain minimum identifying information and suitable verification methods, FCMs and IBs should consider on an ongoing basis

³³ The proposed rule contained a definition of “person” that cross-referenced the definition in 31 CFR 103.11(z). See NPRM, 67 FR at 48337. Since the final rule is being codified in 31 CFR Part 103, it will incorporate the definition in § 103.11(z) without the need for a specific cross-reference. Therefore, the definition has been removed from the final rule. The definition of “person” in § 103.11(z) is: “an individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, an Indian tribe (as that term is defined in the Indian Gaming Regulatory Act), and all entities cognizable as legal personalities.”

³⁴ See NPRM, 67 FR at 48337.

³⁵ National Futures Association (NFA) Compliance Rule 2–9(c) sets forth minimum requirements for these AML programs.

³⁶ See NPRM, 67 FR at 48337–48338.

²⁶ See final rule, 103.123(a)(5)(i)(B).

²⁷ See final rule, 103.123(a)(5)(ii)(A)–(B). Section 103.22(d)(2)(iv) exempts such companies only to the extent of their domestic operations. Accordingly, an FCM’s or IB’s CIP will apply to any foreign offices, affiliates, or subsidiaries of such entities that open new accounts.

²⁸ The proposed rule provided for similar treatment of existing customers, however, it included this exclusion in a different paragraph of the rule. Whereas the existing customer exclusion appears in the final rule’s definition of “customer,” this exclusion appeared in the proposed rule’s paragraph detailing the required verification procedures. Compare 103.123(a)(5)(ii) with NPRM, 67 FR at 48338 (proposed 103.123(d)).

²⁹ Treasury and the CFTC believe that the revisions made to the definition of “customer” in the proposed rule address the suggestion by one commenter that a risk-based approach be taken to determining who is a customer whose identity must be verified.

³⁰ See final rule, 103.123(a)(5) and (b)(6), respectively.

³¹ *Id.*

³² See final rule, 103.123(a)(5).