

The proposed rule included an exception from the requirement to obtain a TIN from a customer opening a new account.<sup>46</sup> The exception would have allowed an FCM or IB to open an account for a customer that has applied for, but has not yet received, an employer identification number (EIN).<sup>47</sup> Treasury and the CFTC are adopting an expanded version of this exception in the final rule. As proposed, the exception was limited to customers that are not natural persons.<sup>48</sup> On further consideration, Treasury and the CFTC have determined that it is appropriate to expand the exception to include natural persons who have applied for, but have not received, a TIN. Treasury and the CFTC also have modified the exception to reduce the recordkeeping burden. The proposed rule would have required an FCM or IB to retain a copy of the customer's application for a TIN.<sup>49</sup> The FCM's or IB's CIP must include procedures to confirm that the application was filed before the customer opens the account and to obtain the TIN within a reasonable period of time after the account is opened. The final rule permits the FCM or IB to exercise discretion in determining how to confirm that a customer has filed an application.

#### *Section 103.123(b)(2)(ii) Customer Verification*

Treasury and the CFTC proposed to require that an FCM's or IB's CIP include procedures for verifying the identity of customers, to the extent reasonable and practicable, using the information obtained under the rule.<sup>50</sup> Treasury and the CFTC also proposed to require such verification to occur within a reasonable time before or after the customer's account is opened. The NPRM stated that an FCM or IB need not establish the accuracy of each piece of identifying information if it is able to

by a customer is reliable. Treasury and the CFTC recognize that a foreign business or enterprise may not have an identification number. Therefore the final rule notes that when opening an account for such a customer, the FCM or IB must request alternative government-issued documentation certifying the existence of the business or enterprise.

<sup>46</sup> See NPRM, 67 FR at 48337–48338.

<sup>47</sup> This position is analogous to that in regulations issued by the IRS concerning "awaiting—TIN certificates." The IRS permits a taxpayer to furnish an "awaiting—TIN certificate" in lieu of a TIN to exempt the taxpayer from the withholding of taxes owed on reportable payments (*i.e.*, interest and dividends) on certain accounts. See 26 CFR 31.3406(g)–3.

<sup>48</sup> In the NPRM, Treasury and the CFTC explained that the exception was for businesses that may need to open an account before they receive an EIN from the IRS. See NPRM, 67 FR at 48332–48333.

<sup>49</sup> See NPRM, 67 FR at 48338.

<sup>50</sup> *Id.*

form a reasonable belief that it knows the customer's identity after verifying only certain of the information.<sup>51</sup> The NPRM also stated that the flexibility to undertake verification within a reasonable time must be exercised in a reasonable manner.<sup>52</sup>

The sole commenter on this aspect of the proposed rule suggested that the rule should require verification each time the customer opens a new type of account, and not each time the customer establishes a different account at the FCM to trade the same type of product. As discussed above, however, the definition of "customer" in the final rule has been changed to exclude persons who have an existing account, provided the FCM or IB has a reasonable belief that it knows the customer's true identity. Accordingly, FCMs and IBs will not be required to verify the identities of such persons, which may include persons who open successive accounts of either the same type or multiple types to trade either the same or different products.

The final rule adopts the customer verification requirements substantially as proposed. The final rule requires that an FCM's or IB's CIP contain procedures for verifying the identity of the customer, using the customer information obtained in accordance with paragraph (b)(2)(i), within a reasonable time before or after the account is opened. As stated in the NPRM, FCMs and IBs must reasonably exercise the flexibility to undertake verification before or after an account is opened.<sup>53</sup> The appropriate amount of time may depend on various factors, such as the type of account opened, whether the customer opens the account in person, and the type of identifying information that is available.<sup>54</sup>

Although the location of the provision has been moved, the final rule continues to require that an FCM's or IB's CIP include procedures that describe when the firm will use documents, non-documentary methods, or a combination of both to verify customer identities.<sup>55</sup> Depending on the type of customer and the method of opening an account, it may be more appropriate to use either

documentary or non-documentary methods, and in some cases it may be appropriate to use both methods. The CIP should set forth guidelines describing when documents, non-documentary methods, or a combination of both will be used. These guidelines should be based on the FCM's or IB's assessment of the relevant risk factors.

#### *Section 103.123(b)(2)(ii)(A) Customer Verification—Through Documents*

Treasury and the CFTC proposed to require that an FCM's or IB's CIP describe documents that the firm will use to verify a customer's identity. There were no comments directly addressing the documentary verification provisions of the proposed rule, and the final rule adopts the documentary verification provisions substantially as proposed. Specifically, the final rule requires an FCM's or IB's CIP to contain procedures that set forth the documents that the firm will use to verify a customer's identity. Each FCM or IB will conduct its own risk-based analysis of the types of documents that it believes will enable it to verify the true identities of its customers.

In light of recent increases in identity theft and the availability of fraudulent documents, Treasury and the CFTC believe that the value of documentary verification is enhanced by redundancy. Treasury and the CFTC encourage each FCM and IB to obtain more than one type of documentary verification to ensure that it has a reasonable belief that it knows its customer's true identity. Moreover, Treasury and the CFTC encourage FCMs and IBs to use a variety of methods to verify the identity of a customer, especially when it does not have the ability to examine original documents. The final rule continues to include, without significant change, an illustrative list of identification documents. For an individual, these documents may include unexpired government-issued identification evidencing nationality or residence and bearing a photograph or similar safeguard, such as a driver's license or passport.<sup>56</sup> For a person other than an individual, these documents may include documents showing the existence of the entity, such as certified articles of incorporation, a government-issued business license, a partnership agreement, or a trust instrument.<sup>57</sup> An FCM or IB may use other documents,<sup>58</sup> provided they allow the firm to form a

<sup>51</sup> See NPRM, 67 FR at 48333.

<sup>52</sup> *Id.*

<sup>53</sup> See NPRM, 67 FR at 48333.

<sup>54</sup> An FCM or IB member of NFA would violate CFTC Rule 1.37 and NFA Compliance Rule 2–30, however, if it allowed a natural person to transact business before obtaining specified information about the individual's true identity. Moreover, an FCM or IB must also comply with Treasury's Office of Foreign Asset Control's (OFAC) regulations prohibiting transactions involving designated foreign countries or their nationals. See 31 CFR Part 500.

<sup>55</sup> See final rule, 103.123(b)(2)(ii).

<sup>56</sup> See final rule, 103.123(b)(2)(ii)(A)(1).

<sup>57</sup> See final rule, 103.123(b)(2)(ii)(A)(2).

<sup>58</sup> The list of documents in the rule is meant to be illustrative. Other documents, such as trust certificates and legal opinions, also may be appropriate for verification.