

when verifying the identifying information obtained) need only be retained for five years after the record is made. The final rule continues to provide that in all other respects, these records shall be maintained in accordance with the provisions of the CFTC's recordkeeping rule 1.31.⁷⁷

Section 103.123(b)(4) Comparison With Government Lists

Treasury and the CFTC proposed to require that an FCM's or IB's CIP have procedures for determining whether the customer appears on any list of known or suspected terrorists or terrorist organizations prepared by any Federal government agency and made available to the firm.⁷⁸ In addition, the proposed rule provided that FCMs and IBs must follow all Federal directives issued in connection with such lists.

Although there were no comments on this aspect of the proposed rule, commenters on the other Federal functional regulators' proposed CIP rulemakings raised a number of concerns regarding this provision. Some commenters were concerned about how a financial institution would be able to determine what lists should be checked and how these lists would be made available. Other commenters suggested that all such lists be consolidated or provided through a designated government agency, such as FinCEN, that would serve as a clearinghouse. Still other commenters suggested that the rule should allow for the lists to be checked after an account is opened.

The final rule provides that an FCM's or IB's CIP must include procedures for determining whether the customer appears on any list of known or suspected terrorists or terrorist organizations issued by any Federal government agency and designated as such by Treasury in consultation with the Federal functional regulators. Because Treasury and the Federal functional regulators have not yet designated any such lists, the final rule cannot be more specific with respect to the lists that FCMs and IBs must check. However, FCMs and IBs will not have an affirmative duty under this rule to seek out all lists of known or suspected terrorists or terrorist organizations compiled by the Federal government. Instead, they will receive notification by way of separate guidance regarding the lists that they must consult for purposes of this provision.

Treasury and the CFTC have modified the proposed rule to provide that the CIP's procedures must require the FCM

or IB to determine whether a customer appears on a list "within a reasonable period of time" after the account is opened, or earlier if required by another Federal law or regulation or by a Federal directive issued in connection with the applicable list. The final rule also requires an FCM's or IB's CIP to include procedures that require the firm to follow all Federal directives issued in connection with such lists. Again, because no lists have yet been designated under this provision, the final rule cannot provide more guidance in this area.⁷⁹

Section 103.123(b)(5) Customer Notice

Treasury and the CFTC proposed to require that an FCM's or IB's CIP include procedures for providing customers with adequate notice that the firm is requesting information to verify their identities.⁸⁰ The NPRM stated that an FCM or IB could satisfy that notice requirement by generally notifying its customers about the firm's verification procedures.⁸¹ It also stated that if an account is opened electronically, such as through an Internet website, the FCM or IB could provide notice electronically.⁸²

Section 326 of the Act provides that the regulations issued "shall at a minimum, require financial institutions to * * * [give] customers * * * adequate notice" of the procedures they adopt concerning customer identification. Based on this statutory requirement, the final rule requires an FCM's or IB's CIP to include procedures for providing customers with adequate notice that the firm is requesting information to verify their identities.

The final rule contains additional guidance regarding what constitutes adequate notice and the timing of the notice requirement. The final rule provides that notice is adequate if the FCM or IB describes the identification requirements of the final rule and provides notice in a manner reasonably designed to ensure that a customer is able to view the notice, or is otherwise given notice, before opening an account. The final rule also provides that, depending on how an account is opened, an FCM or IB may post a notice in the lobby or on its website, include

the notice on its account applications, or use any other form of oral or written notice.⁸³ In addition, the final rule includes sample language that, if appropriate, will be deemed adequate notice to an FCM's or IB's customers when provided in accordance with the requirements of the final rule.

Section 103.123(b)(6) Reliance on Other Financial Institutions

In the proposed rule, Treasury and the CFTC included as a risk factor an FCM's or IB's reliance on another FCM or IB to perform procedures of its CIP.⁸⁴ In the NPRM, Treasury and the CFTC stated that this would require an assessment of whether the FCM or IB can rely on another FCM or IB, with which it shares an account relationship, to undertake any of the steps required by the firm's CIP with respect to the shared account.

Treasury and the CFTC have expanded the reliance provision of the proposed rule in recognition that there may be circumstances in which an FCM or IB should be able to rely on the performance by another financial institution of some or all of the elements of the firm's CIP. The final rule provides that an FCM's or IB's CIP may include procedures that specify when the firm will rely on the performance by another financial institution (including an affiliate) of any procedures of the firm's CIP, and thereby satisfy the FCM's or IB's obligations under the rule. Reliance is permitted if a customer of the FCM or IB is opening, or has opened, an account or has established a similar business relationship with the other financial institution to provide or engage in services, dealings, or other financial transactions.

In order for an FCM or IB to rely on the other financial institution: (1) Such reliance must be reasonable under the circumstances; (2) the other financial institution must be subject to a rule implementing the AML compliance program requirements of 31 U.S.C. 5318(h) and be regulated by a Federal functional regulator, and (3) the other financial institution must enter into a contract requiring it to certify annually to the FCM or IB that it has implemented an AML program and that it will perform (or its agent will perform) the specified requirements of

⁷⁹ This is not to say, however, that FCMs and IBs do not have obligations under other laws to screen their customers against government lists. For example, FCMs and IBs should already have AML compliance programs in place to ensure they comply with OFAC's rules. See *supra* note 54; see also OFAC's *Foreign Assets Control Regulations For The Securities Industry* (<http://www.ustreas.gov/offices/enforcement/ofac/regulations/t11facsc.pdf>).

⁸⁰ See NPRM, 67 FR at 48338.

⁸¹ See NPRM, 67 FR at 48334.

⁸² *Id.*

⁸³ One commenter suggested that a firm's posting of the required notice on its Internet Web site should be deemed sufficient notice for all customers, regardless of how any particular account is opened. Because such posting would not ensure that every customer would be able to view the notice before opening an account, Treasury and the CFTC do not believe that this approach would satisfy the statutory requirement of section 326 of the Act.

⁸⁴ See NPRM, 67 FR at 48331-48332.

⁷⁷ 17 CFR 1.31.

⁷⁸ See NPRM, 67 FR at 48338.