

the FCM's or IB's CIP.⁸⁵ The contract and certification will provide a standard means for an FCM or IB to demonstrate the extent to which it is relying on another financial institution to perform its CIP, and that the other institution has, in fact, agreed to perform those functions.⁸⁶ If it is not clear from these documents, an FCM or IB must be able to otherwise demonstrate when it is relying on another financial institution to perform its CIP with respect to a particular customer.

An FCM or IB will not be held responsible for the failure of the other financial institution to fulfill adequately the FCM's or IB's CIP obligations, provided that the FCM or IB can establish that its reliance was reasonable and that it has the requisite contracts and certifications. Treasury and the CFTC emphasize that the FCM or IB and the other financial institution upon which it relies must satisfy all the conditions for reliance set forth in the final rule. If they do not, then the FCM or IB remains solely responsible for applying its own CIP to each customer in accordance with the rule.

This reliance provision of the final rule does not affect the ability of an FCM or IB to contractually delegate the implementation and operation of its CIP procedures to a service provider. Nor does the final rule alter an FCM's or IB's ability to use an agent to perform services on its behalf. Treasury and the CFTC note, however, that in contrast to the reliance provision in the rule, in these situations the FCM or IB remains solely responsible for assuring compliance with the rule, and therefore must actively monitor the operation of its CIP, assesses its effectiveness, and ensure that examiners are able to obtain information and records relating to the CIP.⁸⁷

⁸⁵ As discussed in the NPRM, the required contractual commitments in the case of shared accounts involving FCMs and IBs may be made a part of an introducing agreement (in the context of introduced business) or a give-up agreement (in the context of give-up business). See NPRM, 67 FR at 48332. And as urged by one commenter, the required annual certification under the final rule may cover all customers for which the two financial institutions share an account relationship, and need not be on a customer-by-customer basis.

⁸⁶ FCMs and IBs must obtain annual certifications acknowledging performance of CIP functions from financial institutions that are affiliates as well as those that are non-affiliates. This requirement maintains parity with the CIP rule applicable to securities broker-dealers, many of which are dually registered as FCMs.

⁸⁷ Two commenters suggested that the final rule should allow FCMs and IBs to rely upon foreign financial institutions in general, and foreign affiliates in particular to perform CIP procedures. Such a liberalization of the rule, however, could undermine the purpose of the Act in combating international money laundering and the financing

All of the Federal functional regulators are adopting comparable provisions in their CIP rules to permit such reliance. Furthermore, the Federal functional regulators expect to share information and cooperate with each other to determine whether the institutions subject to their jurisdiction are in compliance with the reliance provision of the rule.

Section 103.123(c) Exemptions

The proposed rule provided that the CFTC, with the concurrence of the Secretary, may exempt any FCM or IB that registers with the CFTC or any type of account from the requirements of the rule. It excluded from this exemptive authority FCMs or IBs that register pursuant to section 4f(a)(2) of the CEA solely because they deal in transactions involving SFPs. The exemptive authority with respect to these firms will be in the final rule issued jointly by Treasury and the SEC for securities broker-dealers. There were no comments on this provision of the proposed rule, and Treasury and the CFTC have adopted it substantially as proposed.

Section 103.123(d) Other Requirements Unaffected

The final rule adds a provision stating that nothing in § 103.123 shall relieve an FCM or IB of its obligation to comply with any other provision of Part 103, including provisions concerning information that must be obtained, verified, or maintained in connection with any account or transaction. A parallel provision similarly has been included in the final CIP rules issued by Treasury and the other Federal functional regulators.

B. Requirement for CIP Approval Removed

The NPRM required that the CIP be approved by the FCM's or IB's board of directors, managing partners, board of managers or other governing body performing similar functions, or by a person or persons specifically authorized by such bodies to approve the CIP.⁸⁸ The final rule requires the CIP to be a part of the overall AML program

of terrorism. Accordingly, the final rule permits reliance only on a financial institution that is subject to a rule requiring an AML program under the Act and that is regulated by a Federal functional regulator, which will exclude foreign entities.

This does not prevent an FCM or IB from utilizing a foreign affiliate or other foreign financial institution to perform procedures of its CIP. Rather, it means only that the FCM's or IB's relationship with the foreign firm will be treated the same as if the firm contractually delegated the implementation and operation of its CIP procedures to a service provider.

⁸⁸ See NPRM, 67 FR at 48338.

required of FCMs and IBs under 31 U.S.C. 5318(h). NFA Compliance Rule 2-9(c) requires these AML programs to be approved in writing by a member of the FCM's or IB's senior management.⁸⁹

Treasury and the CFTC have omitted the approval requirement from the final rule because it is unnecessary given the approval requirements for AML programs set forth in NFA Compliance Rule 2-9(c). Treasury and the CFTC note, however, that an FCM or IB with an approved AML program must nonetheless obtain approval of a new CIP because it would constitute a material change to the AML program.

III. Regulatory Analysis

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* (1994 & Supp. II 1996), requires Federal agencies, in proposing rules, to consider the impact of those rules on small businesses. The rules adopted herein would affect FCMs and IBs. The CFTC has previously established certain definitions of "small entities" to be used by the CFTC in evaluating the impact of its rules on small entities in accordance with the RFA.⁹⁰ The CFTC has previously determined that FCMs are not small entities for the purposes of the RFA. With respect to IBs, the CFTC has stated that it is appropriate to evaluate within the context of a particular rule proposal whether some or all of the affected entities should be considered small entities and, if so, to analyze the economic impact on them of any rule.⁹¹

In this regard, the rules being adopted herein would not require any IB significantly to change its current method of doing business. As noted in the NPRM, Treasury and the CFTC believe that IBs already obtain from their customers most, if not all, of the information required under the proposed rule.⁹² In addition, FCMs and IBs already must have AML programs that include procedures for customer identification and verification. The flexibility incorporated into the final rule also will permit each IB to tailor its CIP to fit its own size and needs. As a result, Treasury and the CFTC believe that expenditures associated with establishing and implementing a CIP should be commensurate with the size of the firm. If an IB is small, with a limited number of customers, the burden to comply with the rule should

⁸⁹ Compliance with NFA Compliance Rule 2-9(c) is deemed to satisfy the requirements of 31 U.S.C. 5318(h)(1). See 31 CFR 103.120(c).

⁹⁰ 47 FR 18618-21 (Apr. 30, 1982).

⁹¹ *Id.* at 18618-21.

⁹² See NPRM, 67 FR at 48335 n.17.