

subjective standard, as suggested by NFA, would be unwieldy in practice and could require the Commission to expend significant resources. To make a determination as suggested by NFA would require the Commission to conduct a broad evaluation of, among other things, a country's banking, monetary, and economic policies and systems.

FIA suggested that the Commission expand the definition to include any country with which the Commission has an information sharing arrangement. When the Commission enters into an information sharing arrangement with another country, it does not undertake a complete analysis of the country's laws, policies, and systems, as they would pertain to the holding of customer funds. Moreover, a country may deny sharing information with the Commission under these arrangements if, among other things, it would constitute a violation of applicable laws. Accordingly, the Commission has decided not to extend the definition of money center country as suggested by FIA.

In addition to the money center countries, an FCM or DCO also could hold any particular currency in the country of origin of that currency,<sup>12</sup> except that customer funds may not be held in any of the restricted countries subject to sanctions by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of Treasury.<sup>13</sup>

Proposed Rule 1.49(c)(3) provided that funds could be held outside the U.S. only to the extent specifically authorized by the customer. It further required the FCM to make and maintain a written record detailing the terms and conditions of any such authorization. For the reasons explained below, the Commission has significantly revised paragraph (c). As revised, paragraph (c) makes clear that customer consent will be required only when customer funds are held outside of the U.S. in a jurisdiction other than a money center country or the country of origin of the currency.

As discussed above, an FCM or DCO may hold customer segregated funds in the following denominations: (1) In U.S. dollars; (2) in the currency deposited by the customer or converted at the customer's request; or (3) in the currency in which funds have accrued to the customer as the result of trading on a U.S. contract market or registered

DTF. In the absence of customer instructions to the contrary, the Commission believes that a customer that deposits funds with an FCM or DCO in a foreign currency or requests that the funds on deposit be converted to a foreign currency should assume that the currency will be held in an account outside of the U.S. in the currency's country of origin. Similarly, accruals in a foreign currency should also be deemed to be held in the country of origin.<sup>14</sup> Consequently, the Commission has concluded that requiring an FCM or DCO to obtain a customer's consent to hold a foreign currency in the currency's country of origin is unnecessary.

With respect to money center countries, the Commission has previously determined that customer segregated funds denominated in a foreign currency may be held in a money center country. As the Commission noted in proposing Rule 1.49:

The G7 countries represent the world's largest industrial democracies. Furthermore, representatives from these countries meet several times a year to coordinate their cooperation on issues of economic policy. In this regard, the United States and its financial regulatory agencies have had successful cooperation with the respective financial regulatory agencies of these countries.

In these circumstances and in the absence of customer instructions to the contrary, the Commission believes that it would be appropriate for an FCM or DCO to hold customer funds denominated in a foreign currency in a money center country without receiving the customer's prior consent.

Because funds held outside of the U.S. other than in the currency's country of origin or a money center country might pose different risks and different operational costs and benefits, the Commission believes that the customer must be able to choose whether, and to what extent, to incur such risks and costs. The Commission, however, is not establishing a particular format that a customer authorization must follow. A customer may authorize the holding of funds outside the U.S., a money center country, or in a country other than the currency's country of origin, in writing or orally.<sup>15</sup> Authorization may be satisfied where a customer fails to object when informed that the customer's funds will be held outside the U.S., a money center

country, or in a country other than the currency's country of origin. Moreover, the Commission notes that, just as under Rule 1.49(b)(1)(ii) regarding the conversion of customer funds, authorization may be obtained as part of the account agreement.

The rule does not require that a separate customer signature be obtained. Rule 1.49(c) simply requires that an FCM make and maintain a contemporaneous written record of any customer authorization to hold funds outside the U.S. in a country other than the currency's country of origin or a money center country. An FCM may choose to comply with this requirement in whatever manner it finds easiest. An FCM, if it chooses, may comply with this requirement as part of the account opening documents or, if done orally, by making a written memorandum or notation to be placed in the customer's file. The confirmation statement required pursuant to Commission Rule 1.33(b) may serve the purpose of meeting the requirement of a written record under Rule 1.49(c). If, after receiving the confirmation statement, the customer objects to the transaction, the FCM must, of course, take steps to address the customer's concerns.

FCMs and DCOs should also be aware that the Financial Action Task Force ("FATF") of the Organization for Economic Co-Operation and Development maintains a list of non-cooperative countries or territories with respect to anti-money laundering programs and that the Secretary of the Treasury may designate, in accordance with Section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001,<sup>16</sup> certain countries as areas of primary money laundering concern.<sup>17</sup> Before holding any customer funds in a depository in any of these countries or territories, FCMs and DCOs should undertake due diligence to assure themselves that the depository is reputable, has appropriate operational systems to safeguard customer funds, and has an adequate program to deter money laundering.<sup>18</sup>

<sup>16</sup> Pub. L. 107-56; 115 Stat. 272 (2001).

<sup>17</sup> The list of non-cooperative countries and territories may be viewed on FATF's Web site at: <http://www1.oecd.org/fatf/>. Countries that have been designated by the Secretary of the Treasury as being of primary money laundering concern may be viewed on the Department of Treasury Web site at: <http://www.ustreas.gov>.

<sup>18</sup> On April 23, 2002, the Commission approved NFA Compliance Rule 2-9(c) and a related Interpretive Notice that set forth minimum standards for anti-money laundering programs of NFA FCM members.

<sup>12</sup> For the Euro, the country of origin includes any country that is a member of the European Union and has recognized the Euro as its official currency.

<sup>13</sup> The list of restricted countries may be viewed on OFAC's Web site at <http://www.ustreas.gov/ofac>.

<sup>14</sup> As noted earlier, a customer may request that any such accruals be converted to U.S. dollars.

<sup>15</sup> See *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082 (2d Cir. 1997); [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,052.