

section or any other authority, reports a suspicious transaction to a government agency * * * the financial institution, director, officer, employee, or agent may not notify any person involved in the transaction that the transaction has been reported.

Subsection (g)(3) provides that any financial institution, director, officer, employee, or agent of any financial institution

that makes a voluntary disclosure of any possible violation of law or regulation * * * or makes a disclosure pursuant to this subsection or any other authority * * * shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision [thereof] * * * for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.

Finally, subsection (g)(4)(A) requires the Secretary of the Treasury, "to the extent practicable and appropriate," to designate "a single officer or agency of the United States to whom such reports shall be made."⁵ The designated agency is in turn responsible for referring any report of a suspicious transaction to "any appropriate law enforcement or supervisory agency."⁶

B. FCMs and IB-Cs: Regulation and Money Laundering

The final suspicious activity reporting rule contained in this document applies to FCMs and IB-Cs. An FCM is defined in the CEA as an individual, association, partnership, corporation, or trust that is engaged in soliciting or accepting orders and funds for the purchase or sale of a commodity for future delivery on or subject to the rules of a contract market or derivatives transaction execution facility ("DTEF").⁷ An IB-C is similarly defined,⁸ except that an IB-C may not accept money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts. The CEA requires FCMs and IB-Cs to register pursuant to the procedures of Section 4f(a)(1) of the CEA.⁹ As of May 31, 2003, there were 185 FCMs and 1,591 IB-Cs (domestic and foreign) that had registered with the CFTC pursuant to this provision.

This final rule is just one of several steps taken by the Secretary of the

Treasury to address comprehensively the risk of money laundering in the futures industry. In April 2002, FinCEN issued an interim final rule requiring FCMs and IB-Cs to develop and implement AMLPs to prevent them from being used to launder money or finance terrorist activities, which includes achieving and monitoring compliance with the applicable requirements of the Bank Secrecy Act and the Secretary of the Treasury's implementing regulations.¹⁰

This final rule follows other recent actions that expand the application of the BSA to additional financial institutions and require those financial institutions to report suspicious transactions. For example, since April 1996, rules issued by FinCEN under the authority contained in 31 U.S.C. 5318(g) have required banks, thrifts, and other banking organizations to report suspicious transactions.¹¹ In collaboration with FinCEN, the federal bank supervisors concurrently issued suspicious transaction reporting rules under their own authority.¹² The bank supervisory agency rules apply to banks, bank holding companies, and non-depository institution affiliates and subsidiaries of banks and bank holding companies. Money services businesses have been required to report suspicious transactions to the Department of the Treasury since the beginning of 2002.¹³ In July 2002, FinCEN took a further step in the creation of a comprehensive system for the reporting of suspicious transactions by the major categories of financial institutions operating in the United States by requiring brokers and dealers in securities ("BDs") to report suspicious transactions.¹⁴ In October 2002, FinCEN issued a final rule requiring casinos to report suspicious transactions, and a proposed rule that would require certain insurance companies to report suspicious transactions. The final rule contained in this document will extend this and other BSA requirements to FCMs and

IB-Cs. The reporting and recordkeeping provisions of the BSA, including suspicious transaction reporting by FCMs and IB-Cs can provide highly useful information in law enforcement and regulatory investigations and proceedings, and in the conduct of intelligence activities to protect against international terrorism.¹⁵

II. Notice of Proposed Rulemaking and Comments

On May 5, 2003, FinCEN published a notice of proposed rulemaking (the "Notice")¹⁶ that would extend the reporting and recordkeeping obligations of the BSA, including suspicious transaction reporting, to FCMs and IB-Cs. FinCEN received two comment letters on the Notice: one comment from NFA and one comment from the Futures Industry Association, an industry trade association. Both commenters support the proposed rule, but each suggested certain changes and clarifications they believe would be appropriate. Changes and clarifications resulting from these comments are discussed below in the section-by-section analysis.

III. Section-by-Section Analysis

A. 103.11(ii)—Meaning of Terms

1. *Definitions of Futures Commission Merchant and Introducing Broker-Commodities.* Under this final rule, the definition of "financial institution" in 31 CFR 103.11(n) includes FCMs and IB-Cs as these terms are defined in paragraphs (zz) and (aaa), respectively. There were no comments concerning these definitions, and FinCEN is adopting them as proposed.

These terms encompass any person registered or required to be registered as an FCM or IB-C with the CFTC,¹⁷ but exclude securities BDs that have notice registered with the CFTC as FCMs or IB-Cs for the sole purpose of effecting transactions in security futures products ("SFPs").¹⁸ For these persons, FinCEN

¹⁵ See 31 U.S.C. 5311 (stating purpose of the reporting authority under the BSA).

¹⁶ 68 FR 23653 (May 5, 2003).

¹⁷ There are two types of IB-Cs, guaranteed and non-guaranteed. A guaranteed IB-C is one that elects to operate pursuant to a written guarantee agreement with an FCM instead of independently meeting its own capital requirements. See, e.g., 17 CFR 1.17(a)(2)(ii). An independent IB-C, by contrast, is one that elects to meet its own capital requirements. Both types of IB-Cs engage in the offer and sale of futures contracts and commodity options on behalf of customers and facilitate transfers or transmittals of funds for their customers. Thus, they present the same or similar money laundering risks, and Treasury sees no reason to draw a distinction between IB-Cs that are guaranteed and those that are not. Therefore, all IB-Cs will be covered by the final rule.

¹⁸ A "security future" is defined in the CEA and the Securities Exchange Act of 1934 ("Exchange

⁵ This designation does not preclude the authority of supervisory agencies to require financial institutions to submit other reports to the same agency or another agency "pursuant to any other applicable provision of law." 31 U.S.C. 5318(g)(4)(C).

⁶ 31 U.S.C. 5318(g)(4)(B).

⁷ 7 U.S.C. 1a(20).

⁸ 7 U.S.C. 1a(23) (defining the term "introducing broker").

⁹ 7 U.S.C. 6f(a)(1).

¹⁰ See 67 FR 21111. Compliance with this rule is deemed satisfied if FCMs and IB-Cs comply with the AML rule (Compliance Rule 2-9(c)) that was approved by the CFTC and issued by the National Futures Association ("NFA"), the only registered futures association. *Id.*

¹¹ See 31 CFR 103.18 (requiring banks, thrifts, and other banking organizations to report suspicious transactions).

¹² See 12 CFR 21.11 (issued by the Office of the Comptroller of the Currency); 12 CFR 208.62 (issued by the Board of Governors of the Federal Reserve System); 12 CFR 353.3 (issued by the Federal Deposit Insurance Corporation); 12 CFR 563.180 (issued by the Office of Thrift Supervision); and 12 CFR 748.1 (issued by the National Credit Union Administration).

¹³ See 65 FR 13683 (March 14, 2000).

¹⁴ See 67 FR 44048 (July 1, 2002).