

believes that the BSA rules of their primary federal supervisory agency should apply, and that authority to examine for compliance with those rules should remain with the agency with which the entities are primarily registered. Thus, a BD that is notice registered with the CFTC must comply with the BSA rules applicable to BDs, and will be examined for BSA compliance by the Securities and Exchange Commission ("SEC"). A parallel change also is being made to the definition of "broker or dealer in securities" in the BSA regulations. Thus, an FCM or IB-C that is notice registered with the SEC must comply with the BSA rules applicable to FCMs and IB-Cs, and will be examined for BSA compliance by the CFTC and the relevant designated self-regulatory organizations ("DSROs").

With respect to those entities that are dual registrants with both the CFTC and the SEC for purposes of futures and securities transactions other than SFPs, FinCEN intends for this rule to have the same effect as 31 CFR 103.19, which is the rule that requires suspicious transaction reporting for BDs. That is, dual registrants in compliance with the suspicious transaction reporting requirements under 31 CFR 103.19 also shall be deemed to be in compliance with this rule, and dual registrants who are in compliance with this rule shall be deemed to be in compliance with 31 CFR 103.19. This will prevent dual registrants from being subjected to different or conflicting suspicious transaction reporting requirements for the various aspects of their businesses.

**2. Definitions of Transaction, Commodity, Contract of Sale, and Option.** The definition of "transaction" in the regulations under the BSA, which is set forth in paragraph (ii), conforms generally to the definition Congress added to title 18 when it criminalized money laundering in 1986.<sup>19</sup> The term is broad and is intended to reach all of the various types of transactions that

may occur at a financial institution. Amended paragraph (ii) specifically adds futures transactions, *i.e.*, transactions involving any contract of sale of a commodity for future delivery, any option on any contract of sale for future delivery, and any option on a commodity, to the list of transactions subject to BSA requirements. The definition is not restricted to transactions conducted on a designated contract market or a DTEF.<sup>20</sup>

Paragraphs (xx), (yy), and (bbb) set forth definitions of "commodity," "contract of sale," and "option on a commodity." These are definitions based on Sections 1a(4), 1a(7), and 1a(26), respectively, in the CEA.<sup>21</sup> There were no comments concerning these definitions, and FinCEN is adopting them as proposed.

#### *B. 103.17—Reports by FCMs and IB-Cs of Suspicious Transactions*

**1. Reporting standard.** Section 103.17 requires FCMs and IB-Cs to report suspicious transactions that are conducted or attempted by, at, or through an FCM or IB-C and involve or aggregate at least \$5,000 in funds or other assets. It is important to recognize that transactions are reportable whether or not they involve currency.<sup>22</sup> Paragraph (a)(1) also permits, but does not require, the reporting of transactions that appear relevant to possible violations of law or regulation even in cases in which the rule does not explicitly so require, for example in the case of a transaction falling below the \$5,000 threshold.

Paragraph (a)(2) requires reporting if the FCM or IB-C knows, suspects, or has reason to suspect that the transaction (or pattern of transactions of which the transaction is a part) is one of four classes of transactions (described more fully below) requiring reporting. The "knows, suspects, or has reason to suspect" standard incorporates a concept of due diligence in the reporting requirement.

<sup>20</sup> Thus, for example, the term "transaction" includes any transaction by an FCM or IB-C in a foreign currency futures contract, any option on any foreign currency futures contract, or any option on a foreign currency that occurs on an off-exchange basis. See Section 2(c)(1) and (2) of the CEA, 7 U.S.C. 2(c)(1)–(2).

<sup>21</sup> 7 U.S.C. 1a(4), 1a(7), and 1a(26), respectively.

<sup>22</sup> Many currency transactions are not indicative of money laundering or other violations of law, a fact recognized both by Congress, in authorizing reform of the currency transaction reporting system, and by FinCEN in issuing rules to implement that system (see 31 U.S.C. 5313(d) and 31 CFR 103.22(d), 63 FR 50147 (September 21, 1998)). But many non-currency transactions (for example, funds transfers) can indicate illicit activity, especially in light of the breadth of the statutes that make money laundering a crime. See 18 U.S.C. 1956 and 1957.

The first class of transactions requiring reporting, described in paragraph (a)(2)(i), includes transactions involving funds derived from illegal activity or intended or conducted in order to hide or disguise funds or assets derived from illegal activity. The second class of transactions, described in paragraph (a)(2)(ii), involves transactions designed, whether through structuring or other means, to evade the requirements of the BSA. The third class of transactions, described in paragraph (a)(2)(iii), involves transactions that appear to serve no business or apparent lawful purpose, and for which the FCM or IB-C knows of no reasonable explanation after examining the available facts relating to the transaction and the parties. The fourth class of transactions, described in paragraph (a)(2)(iv), involves the use of the FCM or IB-C to facilitate a criminal transaction.

A determination as to whether a report is required must be based on all the facts and circumstances relating to the transaction and customer in question. Different fact patterns may lead to different determinations. In some cases, the facts of the transaction may indicate the need to report. For example, frequent and large-scale usage of wire transfers, including wire transfers to or from locations outside of the United States, from an account with only nominal futures activity may be indicative of suspicious activity. In other instances, the transaction or activity itself may be sufficiently suspicious to warrant reporting. Thus, if a customer engages in wash transactions or other fictitious or non-bona fide transactions that violate the CEA, a suspicious activity report must be filed.<sup>23</sup> Similarly, the fact that a customer unreasonably refuses to provide information necessary for the FCM or IB-C to make required reports, retain records as required, identify or verify the identity of a customer, or otherwise comply with the BSA; provides information that the FCM or IB-C determines to be false; or seeks to change or cancel a transaction after such person is informed of currency transaction reporting or information

<sup>23</sup> As discussed below, however, paragraph (c)(1)(ii) provides an exception from the suspicious transaction reporting requirements for violations of the CEA by the FCM, IB-C, or any of its officers, directors, employees, or associated persons that are reported to the CFTC, a registered futures association, or any "registered entity," as that term is defined in Section 1a(29) of the CEA, 7 U.S.C. 1a(29). As discussed in more detail below, dual registrants can report these violations either to these entities, or to the SEC or a securities self-regulatory organization ("SRO"), as defined in section 3(a)(26) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(26), whichever is appropriate.

Act") as a contract of sale for future delivery of a single security or narrow-based security index (7 U.S.C. 1a(31) and 15 U.S.C. 78c(a)(55)), and an SFP is defined as a security future or any put, call, straddle, option, or privilege on any security future (7 U.S.C. 1a(32) and 15 U.S.C. 78c(a)(56)). The Commodity Futures Modernization Act of 2000 ("CFMA"), Pub. L. 103–556, 114 Stat. 2763 (December 21, 2000), amended the Exchange Act definitions of "security" and "equity security" to include security futures (15 U.S.C. 78c(a)(1) and 15 U.S.C. 78c(a)(11), respectively). As a result of these amendments, an SFP is both a security and a futures contract (or option thereon) and is thus subject to the jurisdiction of both the CFTC and the SEC.

<sup>19</sup> See Pub. L. 99–570, Title XIII, 1352(a), 100 Stat. 3207–18 (October 27, 1986), codified at 18 U.S.C. 1956.