

verification or recordkeeping requirements relevant to the transaction, would all indicate that a suspicious activity report should be filed. The FCM or IB-C may not notify the customer that it intends to file or has filed a suspicious transaction report with respect to the customer's activity.

In other situations, a more involved analysis and judgment may be needed to determine whether a transaction is suspicious within the meaning of the rule. Transactions that raise the need for such judgments may include, for example: (i) Transmission or receipt of funds transfers without normal identifying information or in a manner that indicates an attempt to disguise or hide the country of origin or destination or the identity of the customer sending the funds or of the beneficiary to whom the funds are sent; (ii) a repeated pattern of unusual activity by the customer, such as where the customer repeatedly makes unexplainable, frequent deposits or withdrawals; or (iii) repeated use of an account as a temporary resting place for funds from multiple sources without a clear business purpose. The judgments involved also will extend to whether the facts and circumstances and the institution's knowledge of its customer provide a reasonable explanation for the transaction or activity that removes it from the suspicious category.

An FCM may carry, and an IB-C may introduce, intermediated accounts including omnibus accounts and accounts for collective investment vehicles such as commodity pools. In such circumstances, the FCM and IB-C may have little or no contact with or information about the ultimate beneficial owners of such accounts. FinCEN has proposed AMLP rules for CTAs and commodity pools, and monitoring for suspicious transactions is an integral part of such programs. Any AMLP obligations of intermediaries such as CTAs, however, would not reduce the obligation on an FCM or IB-C imposed by this rule to monitor transactions based on the facts and circumstances with which it is presented, in order to determine if a transaction is suspicious. In addition, omnibus accounts maintained for certain foreign financial institutions ultimately may fall within the definition of "correspondent account" under section 312 of the USA Patriot Act.<sup>24</sup>

**2. Reporting Threshold.** There were no comments concerning the \$5,000

reporting threshold and FinCEN is adopting it as proposed. FinCEN reminds FCMs and IB-Cs, however, that the suspicious transaction reporting rules are not intended to operate (and indeed cannot properly operate) in a mechanical fashion. Rather, the suspicious transaction reporting requirements are intended to function in such a way as to have financial institutions evaluate customer activity and relationships for money laundering risks.<sup>25</sup>

**3. Transactions Involving Both an FCM and an IB-C.** Proposed paragraph (a)(3) provided that the obligation to identify and report properly a suspicious transaction rests with each FCM and IB-C involved in the transaction. It also provided, though, that when a transaction involves both an FCM and an IB-C, only one report needs to be filed with FinCEN as long as that report contains all the relevant facts concerning the transaction. This provision was intended to avoid duplicative and redundant reporting.

Both commenters observed that FCMs and IB-Cs frequently handle complex transactions that involve one or more FCMs, and not just an FCM and an IB-C. They noted that the language in the proposed rule only addressed the situation in which both an FCM and an IB-C are involved in a transaction and did not clearly apply to a situation where two FCMs are involved in the same transaction on behalf of the same customer. Accordingly, FinCEN has clarified the language to extend to the latter situation as well, as long as the suspicious activity report ("SAR") that is filed (FCMs and IB-Cs will use the Form SAR-SF)<sup>26</sup> contains all of the necessary information. Thus, for example, in a "give-up" arrangement involving a clearing and an executing FCM, one FCM's SAR-SF could satisfy the obligation of both FCMs to report suspicious transactions. As a corollary, FinCEN also wishes to clarify that, as in the case of an FCM and IB-C involved in a transaction, two FCMs involved in a transaction (such as a clearing and an

executing FCM) may consult with each other and share information, including the SAR-SF itself, to enable them to file a single report.<sup>27</sup>

**4. Filing Procedures.** Paragraph (b) sets forth the filing procedures to be followed by an FCM or IB-C making reports of suspicious transactions. Within 30 days after an FCM or IB-C becomes aware of a suspicious transaction, it must report the transaction by completing a SAR-SF and filing it in a central location determined by FinCEN. The rule also makes special provision for situations that require immediate attention, such as ongoing terrorist financing or money laundering schemes. In that event, the FCM or IB-C must notify immediately, by telephone, an appropriate law enforcement authority in addition to filing a SAR-SF. The rule also permits, but does not require, FCMs and IB-Cs to notify the CFTC in addition to contacting law enforcement and filing a SAR-SF.<sup>28</sup> There were no comments that addressed these procedures.

**5. Exceptions.** Paragraph (c) sets forth two exceptions to the reporting requirement. A report does not have to be filed to report a robbery or burglary that is reported to law enforcement. A report also does not have to be filed concerning possible violations of the CEA, the rules promulgated by the CFTC, or the rules of any registered futures association or registered entity by an employee or other associated person of an FCM or IB-C, provided that such violations are reported to the CFTC, a registered futures association, or a registered entity. This exception does not encompass reports of BSA violations made to the CFTC or a registered futures association.<sup>29</sup>

One commenter suggested that the rule make clear that an entity dually registered with the CFTC and the SEC is permitted to rely on the reporting exception if it appropriately reports violations to the CFTC, a registered futures association or a registered entity, or to the SEC or applicable securities

<sup>27</sup> Information sharing procedures among BSA-defined financial institutions generally are set forth in 31 CFR 103.110. FinCEN will be issuing guidance on how financial institutions can file joint SARs in the appropriate circumstances.

<sup>28</sup> In addition, the rule reminds FCMs and IB-Cs of FinCEN's Financial Institutions Hotline (1-866-556-3974) for use by financial institutions wishing voluntarily to report to law enforcement suspicious transactions that may relate to terrorist activity. FCMs and IB-Cs reporting suspicious activity by calling the Financial Institutions Hotline must still file a timely SAR-SF to the extent required by the proposed rule.

<sup>29</sup> Specifically, this exception does not apply to a BSA violation that is reported to the CFTC pursuant to CFTC Rule 42.2, 17 CFR 42.2, which was adopted after the issuance of the proposed rule.

<sup>24</sup> FCMs and IB-Cs have been temporarily exempted from the correspondent account due diligence requirements of Section 312, although they are subject to its private banking due diligence requirements. See 67 FR 48348 (July 23, 2002) (interim final rule).

<sup>25</sup> Thus, for example, sizable futures transactions conducted for a well established commodity pool operated in accordance with Part 4 of the CFTC's regulations may require less scrutiny than a futures transaction conducted for an individual customer through a financial institution located in a jurisdiction that has been identified as a non-cooperative country or territory by the Financial Action Task Force.

<sup>26</sup> A draft of the SAR-SF was published for comment in the *Federal Register* on August 5, 2002; 67 FR 50751 (August 5, 2002); the form became final on December 26, 2002 and is available on FinCEN's Web site at [www.fincen.gov](http://www.fincen.gov). FinCEN intends to conform the instructions to the SAR-SF to specifically address FCM responsibilities under this rule.