

SRO, whichever is most appropriate under the circumstances. In the proposing release, FinCEN made clear its intent that the rule will have the same effect as 31 CFR 103.19, which is the rule that requires suspicious transaction reporting for BDs. FinCEN stated that dual registrants who are in compliance with the suspicious transaction reporting requirements for BDs under 31 CFR 103.19 will also be deemed to be in compliance with this rule, and further, that dual registrants that are in compliance with this rule will also be deemed to be in compliance with 31 CFR 103.19.<sup>30</sup>

FinCEN is guided by the legislative history of Title II of the USA Patriot Act,<sup>31</sup> which specifically urged Treasury to take steps to provide for a reporting process for entities registered as both a BD and an FCM that requires only a single report, and to act to prevent inconsistent regulations for dual registrants. Accordingly, FinCEN agrees with this comment and clarifies that an FCM dually registered as a BD can rely on the exception from SAR filing by reporting the violation to either an appropriate securities or futures regulator or SRO. Similarly, a BD that is dually registered as an FCM can rely on the exception by reporting the violation to the CFTC or a registered futures association or registered entity in the same way that an FCM is permitted to do so.

Both commenters also noted that the proposed rule did not specifically address what documentation is sufficient to demonstrate reliance upon an exception. In contrast, the SAR rule for BDs provides that a Form RE-3, U-4, or U-5 is sufficient documentation to demonstrate reliance. One commenter suggested that FinCEN specifically state that a Form 8-T, U-5, RE-3, or any other form properly filed with a futures or securities regulator is sufficient documentation. FinCEN agrees with this comment, and the final rule reflects this change.<sup>32</sup>

Finally, in response to one comment, FinCEN clarifies that FCMs and IB-Cs have the same ability as BDs to rely on the reporting exception whether their

reporting procedures are "formal or informal."<sup>33</sup>

6. *Retention of Records.* Paragraph (d) requires FCMs and IB-Cs to maintain a copy of any SAR-SF that is filed with FinCEN and all original related supporting documentation for a period of five years from the date of filing. Nothing in the rule modifies, limits, or supersedes section 101 of the Electronic Records in Global and National Commerce Act,<sup>34</sup> and thus an FCM or IB-C may make and maintain records either as originals or in electronic format as permitted under existing CFTC rules.<sup>35</sup> Accordingly, the FCM or IB-C must make the supporting documentation available to FinCEN, the CFTC, or any other appropriate law enforcement or regulatory agency, and, consistent with paragraph (g), to any registered futures association, registered entity, or SRO. There were no comments addressing this record retention provision, and FinCEN is adopting it as proposed.

7. *Non-Disclosure.* Paragraph (e) reflects the statutory bar against the disclosure of information filed in, or the fact of filing, a suspicious activity report (whether the report is required by the rule or is filed voluntarily).<sup>36</sup> Thus, the paragraph specifically prohibits persons filing a SAR-SF from making any disclosure either about the report or the supporting documentation unless the disclosure is made to FinCEN, the CFTC, another appropriate law enforcement or regulatory agency, or, consistent with paragraph (g), a registered futures association, registered entity, or SRO. There were no comments concerning this provision, and FinCEN is adopting it as proposed.

8. *Safe Harbor from Civil Liability.* Paragraph (f) incorporates the BSA's statutory protection from civil liability for making or filing a report of a suspicious transaction or for failing to disclose the fact that a report has been made or filed. The specific reference to arbitration reflects the clarification provided in the USA Patriot Act that the safe harbor for suspicious transaction reporting would apply in arbitration proceedings. Because some disputes in the futures industry are resolved under a reparations procedure provided for by the CEA,<sup>37</sup> paragraph (f) clarifies that

the safe harbor also applies in reparations proceedings. FinCEN intends to work with the CFTC, the DSROs, and industry representatives to ensure that appropriate educational materials are delivered to compliance and litigation personnel.

It must be noted that, while the rule reiterates and clarifies the broad statutory protection from liability for making reports of suspicious transactions and for failing to disclose the fact of such reporting, the regulatory provisions do not extend the scope of either the statutory prohibition or the statutory protection. The prohibition on disclosure (other than as required under the rule) applies regardless of any protection from liability. This means, for instance, that during an arbitration or reparations proceeding, an FCM or IB-C would not be permitted to provide a copy of a SAR-SF, or disclose the fact that one had been filed, to any participant in the proceeding, including as applicable, the arbitrator, judgment officer, or administrative law judge.

Both commenters requested that the safe harbor protection from civil liability under this rule, and under FinCEN's rule implementing Section 314(b) of the USA Patriot Act,<sup>38</sup> be extended to protect disclosures to foreign financial institutions to the extent that an FCM or IB-C needs to obtain information from that foreign entity.<sup>39</sup> However, foreign entities are not "financial institutions" and thus are not eligible for these protections that the BSA extends to financial institutions. Moreover, FinCEN and the relevant examining authority in the United States have the ability to require U.S.-regulated financial institutions to protect adequately sensitive information involved in reporting a suspicious transaction. That said, it may be appropriate in certain circumstances for an FCM or IB-C to question carefully the foreign financial institution about the customer or the transaction to understand more fully whether the FCM should report the transaction as

<sup>38</sup> 31 CFR 103.110(b)(5).

<sup>39</sup> These provisions are different and serve different purposes. The safe harbor in the SAR rule provides total immunity for filing the SAR. Those financial institutions permitted to file a joint SAR must be able to share information, including the SAR itself, in order to prepare and file the SAR. Under Section 314(b) of the USA Patriot Act, however, information sharing relates to the underlying transactional and customer information; nothing in the rule implementing Section 314(b) authorizes the sharing of actual SARs. 31 CFR 103.10. If other financial institutions, e.g., CTAs, become subject to final rules requiring them to have an AMLP, FCMs and IB-Cs can qualify for the safe harbor under Section 314(b) when they share underlying transactional and customer information with those financial institutions.

<sup>30</sup> 68 FR at 23656.

<sup>31</sup> HR Rep. 107-250 at 65.

<sup>32</sup> The final rule also clarifies that any report filed with a securities or futures regulator in reliance upon an exception to suspicious activity reporting and other related documentation shall be made available, upon request, to the CFTC, SEC, and any registered futures association, registered entity, or securities self-regulatory organization that is examining an FCM, IB-C, or BD for compliance with SAR requirements.

<sup>33</sup> 67 FR at 44,051 (noting that BDs may rely on the reporting exception whether their reporting follows existing formal or informal industry procedures).

<sup>34</sup> Pub. L. 106-229, 114 Stat. 464 (15 U.S.C. 7001) (E-Sign Act).

<sup>35</sup> See, e.g., 17 CFR 1.4 and 1.31.

<sup>36</sup> See 31 U.S.C. 5318(g)(2).

<sup>37</sup> See Section 14 of the CEA, 7 U.S.C. 18 and 7 CFR Part 12.