

suspicious. The FCM could not however, disclose the fact that it is contemplating the filing of a SAR. FinCEN recognizes that, particularly with respect to international transactions, the balance between obtaining sufficient information and protecting the confidentiality of suspicious activity reporting is a difficult one for FCMs and IB-Cs to achieve, but it is one that is faced by all financial institutions subject to a SAR requirement, and one which they are generally successful in achieving.

9. *Examination.* Paragraph (g) notes that compliance with the obligation to report suspicious transactions will be examined for by Treasury through FinCEN or its delegate, and provides that failure to comply with the rule may constitute a violation of the BSA and the BSA regulations. This paragraph also clarifies that an FCM or IB-C must provide access to any SAR-SF that it has filed, along with any supporting documentation, to the CFTC and any registered futures association, any registered entity that has authority to examine the institution, or to the SEC or an SRO in the case of dual registrants.

10. *Effective Date.* Paragraph (h) provides that the new suspicious transaction reporting requirements will be effective 180 days after the date on which the final regulations to which this notice of rulemaking relates are published in the **Federal Register**.

C. 103.33—Records To Be Made and Retained by Financial Institutions

The addition of FCMs and IB-Cs to the “financial institution” definition make such persons subject to the recordkeeping and reporting requirements set forth in section 103.33. This paragraph requires specific records concerning transfers and transmittals of funds in the amount of \$3,000 or more. The amendments to paragraphs (e)(6)(i) and (f)(6)(i) of Section 103.33 set forth exceptions for any transfers or transmittals of funds involving either an FCM or an IB-C. The inclusion of FCMs and IB-Cs within the exceptions is intended to provide parallel treatment for records required to be made and kept by banks, BDs, FCMs, and IB-Cs. There were no comments concerning this provision, and FinCEN is adopting it as proposed.

D. 103.56—Examination

Under the current BSA delegation framework, the Internal Revenue Service is responsible for examining all financial institutions (except for BDs) that are not examined by the federal bank supervisory agencies. This rule will expand the scope of the BSA rules

applicable to FCMs and IB-Cs by including them in the regulatory definition of “financial institution,” and shift the responsibility for examining FCMs and IB-Cs under the BSA from the Internal Revenue Service to the CFTC. Thus, 31 CFR 103.56, which sets forth delegations of BSA authority, is amended to provide the CFTC with examination authority with respect to FCMs and IB-Cs for compliance with the BSA regulations.

IV. Regulatory Flexibility Act

FinCEN certifies that this final regulation will not have a significant economic impact on a substantial number of small entities. As noted above, the inclusion of FCMs and IB-Cs within the “financial institution” definition in the BSA regulations will make these entities subject to all of the same requirements that apply to similarly situated financial institutions, such as banks and broker-dealers in securities. Nevertheless, FinCEN does not believe that these requirements modify the existing obligations of FCMs and IB-Cs, since the transactional information required to be made and retained under the rules will be information that already is required to be made and retained in the ordinary course of an FCM’s or IB-C’s business.

Concerning the filing of SARs by FCMs and IB-Cs, FinCEN does not believe that the economic impact of the rule will be significant. Due to mandatory provisions of the USA Patriot Act⁴⁰ and obligations imposed by the NFA,⁴¹ FCMs and IB-Cs already are obligated to establish AMLPs that include policies, procedures, and internal controls that are reasonably designed to assure compliance with the BSA and the implementing regulations. A set of systems and procedures designed to detect and require reporting of suspicious activity complements these existing program requirements. As the NFA’s interpretive notice to Compliance Rule 2–9(c) makes clear, an FCM or IB-C may tailor its program based on the type of its business, the size and complexity of its operations, the breadth and scope of its customer base, the number of its employees, and its resources.

V. Executive Order 12866

The Department of the Treasury has determined that this final regulation is not a “significant regulatory action” for purposes of Executive Order 12866.

VI. Unfunded Mandates Act of 1995 Statement

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 (“Unfunded Mandates Act”), March 22, 1995, requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. FinCEN has determined that it is not required to prepare a written statement under section 202 and has concluded that on balance these rules provide the most cost-effective and least burdensome alternative to achieve the objectives of the rules.

VII. Paperwork Reduction Act

The collection of information contained in this final regulation has been approved by the Office of Management and Budget (“OMB”) in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1506–0019. The estimated average burden associated with the collection of information in this final rule is 4 hours per respondent.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 (or by the Internet to jlackeyj@omb.eop.gov).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. FinCEN received no comments on its recordkeeping burden estimate.

List of Subjects in 31 CFR Part 103

Authority delegations (Government agencies), Banks and banking, Brokers, Commodity futures, Currency, Investigations, Law enforcement, Penalties, Reporting and recordkeeping requirements, Securities.

Amendments to the Regulations

■ For the reasons set forth above in the preamble, 31 CFR Part 103 is amended as follows:

⁴⁰ 31 U.S.C. 5318(h).

⁴¹ NFA Compliance Rule 2–9(c).