(BILLING CODE: 4810-02-P)

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA44

Financial Crimes Enforcement Network; Proposed Amendments to the Bank Secrecy Act Regulations; Definition of Futures Commission Merchants and Introducing Brokers in Commodities as Financial Institutions; Requirement that Futures Commission Merchants and Introducing Brokers in Commodities Report Suspicious Transactions

AGENCY: Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed amendments to the regulations implementing the statute generally referred to as the Bank Secrecy Act. The proposed amendments would add futures commission merchants and introducing brokers in commodities to the regulatory definition of "financial institution" and would require that they report suspicious transactions to FinCEN. This is the most recent proposal to be issued by FinCEN concerning the reporting of suspicious transactions by the major categories of financial institutions operating in the United States as a part of the counter-money laundering program of the Department of the Treasury.

DATES: Comments on the proposed rules must be received by [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Commenters are encouraged to submit comments by electronic mail because paper mail in the Washington, D.C., area may be delayed. Comments submitted by electronic mail may be sent to regcomments@fincen.treas.gov, with a caption, in the body of the text, "Attention: NPRM--Suspicious Transaction Reporting—Futures

Commission Merchants and Introducing Brokers in Commodities." Comments also may be submitted by paper mail to: Office of Chief Counsel, Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, Virginia 22183, Attention: NPRM: Suspicious Transaction Reporting—Futures Commission Merchants and Introducing Brokers in Commodities. Comments should be sent by one method only. For additional instructions on the submission of comments, see SUPPLEMENTARY INFORMATION under the heading "Submission of Comments."

Inspection of comments. Comments may be inspected, between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354-6400.

FOR FURTHER INFORMATION CONTACT: Alma M. Angotti, Senior Enforcement Counsel, and Judith R. Starr, Chief Counsel, FinCEN, at (703) 905-3590; David Vogt, Associate Director, and Donald Carbaugh, Chief, Depository Institutions, Office of Regulatory Programs, FinCEN, (202) 354-6400.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. General Statutory Provisions

The Bank Secrecy Act, Pub. L. 91-508, codified as amended at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314; 5316-5332 ("BSA"), authorizes the Secretary of the Treasury, inter alia, to issue regulations requiring financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism, and to implement counter-

money laundering programs and compliance procedures.[1] Regulations implementing Title II of the BSA (codified at 31 U.S.C. 5311 et seq.) appear at 31 CFR part 103. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.

The BSA defines the term "financial institution" to include, among other broad categories of institutions, any "broker or dealer in securities or commodities."[2] Section 321(b) of the USA Patriot Act amended the BSA to expressly include in the definition of "financial institution" futures commission merchants ("FCMs") that are registered, or required to register, with the Commodity Futures Trading Commission ("CFTC") under the Commodity Exchange Act ("CEA").[3]

The Secretary of the Treasury was granted authority in 1992, with the enactment of 31 U.S.C. 5318(g),[4] to require financial institutions to report suspicious transactions. Subsection (g)(1) states generally:

> The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.

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[1] Language expanding the scope of the BSA to intelligence or counter-intelligence activities to protect against international terrorism was added by Section 358 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 ("USA Patriot Act"), Pub. L. 107-56.

[2] 31 U.S.C. 5312(a)(2)(H). The Secretary has clarified that the term "broker or dealer in commodities" in the BSA includes introducing brokers in commodities ("IB-Cs"). See 67 FR 21110, 21111 n.5 (April 29, 2002) (anti-money laundering programs for certain financial institutions); 67 FR 48328, 48329 n.2 (July 23, 2002) (customer identification procedures for FCMs and IB-Cs).

[3] 7 U.S.C. 1 et seq. Section 321(b) also provided that the term "financial institution" includes any commodity pool operator ("CPO") and any commodity trading advisor ("CTA") registered, or required to register, under the CEA. See 31 U.S.C. 5312(c). FinCEN has proposed rules that require unregistered investment companies, including commodity pools, to have anti-money laundering programs ("AMLPs"). FinCEN also intends to propose rules requiring CTAs to have AMLPs. A requisite element of these AMLPs is the requirement to have policies, procedures, and controls that are reasonably designed to ensure compliance with the BSA and its implementing regulations.

[4] 31 U.S.C. 5318(g) was added to the BSA by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act, Title XV of the Housing and Community Development Act of 1992, Pub. L. 102-550; it was expanded by section 403 of the Money Laundering Suppression Act of 1994, Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103-325, to require designation of a single government recipient for reports of suspicious transactions.

Subsection (g)(2) provides further:

> A financial institution, and a director, officer, employee, or agent of any financial institution, who voluntarily reports a suspicious transaction, or that reports a suspicious transaction pursuant to this section or any other authority, may not notify any person involved in the transaction that the transaction has been reported.

Subsection (g)(3) provides that neither a financial institution, nor any director, officer, employee, or agent of any financial institution

> that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority . . . shall . . . be liable to any person under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

Finally, subsection (g)(4)(B) 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."

In the USA Patriot Act, Congress specifically addressed the issue of suspicious transaction reporting by FCMs. Section 356(b) of the USA Patriot Act provides that Treasury, in consultation with the CFTC, may issue a regulation under 31 U.S.C. 5318(g) requiring FCMs to report suspicious transactions. Treasury has decided that FCMs and IB-Cs are among the class of financial institutions from which suspicious transaction reporting should be required. FinCEN consulted extensively with the CFTC in the development of the proposed and amended rules.

B. Potential Money Laundering through FCMs and IB-Cs

FCMs engage in the offer and sale of futures contracts and commodity options on behalf of customers. While FCMs may accept money, securities, or property from customers in connection with such offers and sales, such money, securities, and property typically are in the form of checks or wire transfers. FCMs do not normally receive or disburse currency to customers, and FCMs generally do not accept money orders or other monetary instruments from customers for deposit into the customers' futures or options accounts.

IB-Cs also receive orders for futures and options transactions, but IB-Cs may not accept money, securities, or property from their customers.[6] Instead, FCMs maintain customer funds on behalf of an IB-C's customers and physically transmit or cause to be transmitted payments to margin, guarantee, secure, transfer, adjust, or settle futures and options transactions. Thus, all funds relating to introduced accounts are held with an FCM, and account statements reflecting such transactions must be issued by the FCM. Nevertheless, both FCMs and IB-Cs facilitate transfers or transmittals of funds for their customers.

Money laundering may occur through an FCM or IB-C, as it can occur through all categories of financial institutions.[7] One way in which money laundering can be effected through an FCM or IB-C is through wash or other fictitious transactions that violate

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[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] In certain circumstances, an IB-C may accept a check made payable to an FCM for deposit in a qualifying account or for forwarding to the FCM. See 17 CFR 1.57(c).

[7] See, e.g., United States v. Kneeland, 148 F.3d 6 (1st Cir. 1998) (funds obtained in connection with a fraudulent scheme to solicit "advance fees" for purported loan transactions transferred from corporation to defendant's personal bank accounts, from there to defendant's brokerage account, from brokerage account to commodities broker, and finally, from commodities broker back to personal bank account).

Section 4c(a)(2) of the CEA.[8] In a wash transaction, a trader may engage in equal and opposite buy and sell transactions at the same or similar prices with the result that there is little or no change in the trader's financial position, and thus little or no market risk.[9] To conceal wash trades, the trader may use multiple trading accounts established in the trader's own name or the name of an affiliated person or may enlist confederates to assist the trader in the illegal venture. To move or transfer funds offshore, the trader may engage in wash transactions through the use of multiple trading accounts or accounts established in various jurisdictions. Traders also may use a futures account, not for trading purposes, but rather solely as a vehicle for moving funds where they can be used to fund terrorist activity and other criminal activities.

FinCEN has received reports of suspicious activity through futures accounts that have included structuring, unusual currency deposits (amounts not commensurate with business), unusual currency withdrawals, and reports of large cash deposits followed immediately by the wiring of the funds to foreign countries. In addition, as FCMs and IB-Cs play an important role in the global economy, they could be used to facilitate the layering and integration of illicit funds.

Through their contacts with customers and their involvement in the order flow process, both FCMs and IB-Cs may be well situated to detect and deter suspicious transactions. Suspicious transactions may occur at the account-opening stage, in the

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[8] 7 U.S.C. 6c(a)(2).

[9] See, e.g., In re Collins [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,982 at 31,902 (CFTC April 14, 1986) ("the common denominator of the specific abuses prohibited in section 4c(a)—wash sales, cross trades, and accommodation trades—and the central characteristic of the general category of fictitious sales, is the use of trading techniques that give the appearance of submitting trades to the open market while negating the price or price competition incidental to such a market."). See also In re Bear Stearns & Co., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,994 at 37,663 (CFTC January 25, 1991) (although in a wash transaction a trader gives the appearance of making independent decisions to

order flow process, or at any time after an account is opened. Suspicious transactions may occur in an FCM's back office, on the trading floor, or through trading conducted on an electronic trading platform.

C. Application of the BSA to FCMs and IB-Cs

Notwithstanding the BSA's definition of "financial institution," application of the BSA to a business largely depends upon whether the business is included in the definition of "financial institution" at 31 CFR 103.11(n) of the BSA regulations, which currently does not include FCMs or IB-Cs. Thus, FCMs and IB-Cs have not been subject to the general BSA reporting and recordkeeping requirements. Although those BSA requirements have been inapplicable to FCMs and IB-Cs, certain BSA requirements have applied to these businesses since the BSA regulations were first promulgated. In particular, FCMs and IB-Cs have been subject since 1972 to the requirement to report the transportation of currency or monetary instruments into or out of the United States[10] and the requirement to report foreign financial accounts,[11] as both of these requirements apply to persons without regard to whether they are financial institutions. In addition, certain FCMs have been subject to suspicious transaction reporting since 1996. In particular, FCMs that are affiliates or subsidiaries of banks or bank holding companies generally have been required to report suspicious transactions by virtue of rules issued by the federal bank supervisory agencies (the Board of Governors of the Federal Reserve

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buy and sell, the trader's actual intention is to "create a financial and position nullity extraneous to the price discovery and risk-shifting functions of the futures markets.")

[10] Under 31 CFR 103.23, persons transporting (or causing to be transported) currency or other monetary instruments of more than $10,000 into or out of the United States must make a report to Treasury using the Form 4790, Report of International Transportation of Currency or Monetary Instruments ("CMIR").

[11] Under 31 CFR 103.24, persons subject to the jurisdiction of the United States must make a report to Treasury if the person has a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country. The report is made on Form TD F 90.22-1, Report of Foreign Bank and Financial Accounts ("FBAR").

System ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA")).[12] The proposed suspicious activity rule, discussed below, applies to all FCMs and IB-Cs, without regard to whether they are affiliates or subsidiaries of banks or bank holding companies.[13]

The release accompanying the issuance of a suspicious activity reporting rule for securities brokers or dealers ("BDs")[14] clarified that dual registrants -- persons registered both with the CFTC as FCMs[15] and with the Securities and Exchange Commission ("SEC") as BDs[16] -- are not required to file SARs under that rule with respect to transactions that are subject to the CFTC's exclusive jurisdiction. This was intended to preserve the status quo while FinCEN consulted with the CFTC about the development of a SAR requirement for FCMs. Upon the effectiveness of a rule covering all FCMs, the need for such a carve out will be mooted. The same form (Form SAR-SF)[17] will be used for reporting by members of both the securities and futures industries. So long as an

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[12] In April 1996, banks, thrifts, and other banking organizations became subject to a requirement to report suspicious transactions pursuant to final rules issued by FinCEN, under the authority contained in 31 U.S.C. 5318(g). In collaboration with FinCEN, the federal bank supervisors concurrently issued suspicious transaction reporting rules under their own authority. See 12 CFR 208.62 (Federal Reserve Board); 12 CFR 21.11 (OCC); 12 CFR 353.3 (FDIC); 12 CFR 563.180 (OTS); and 12 CFR 748.1 (NCUA). Certain bank supervisory agency rules apply to banks, non-depository institution affiliates and subsidiaries of banks and bank holding companies (including FCMs), and bank holding companies (including bank holding companies that are themselves FCMs). See, e.g., 12 CFR 225.4(f), which subjects non-bank subsidiaries of bank holding companies to the suspicious transaction reporting requirements of Regulation H of the Board of Governors at 12 CFR 208.62.

[13] On December 24, 2002, Federal Reserve staff issued a supervisory letter stating that a nonbank subsidiary of a bank holding company or state member bank subject to the Federal Reserve's SAR rules will be deemed to be in compliance with such rules if it makes reports of suspicious transactions under a separately applicable Treasury regulation. The supervisory letter also provides that the Federal Reserve Board is expected to revise the relevant regulations in early 2003. See SR 02-24 (available at www.federalreserve.gov/boarddocs/SRLETTERS/2002/sr0224.htm).

[14] 67 FR 44048 (July 1, 2002).

[15] Section 4f(a)(1) of the CEA, 7 U.S.C. 6f(a)(1).

[16] Section 15(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78*o*(b)(1).

[17] See infra note 44.

entity required to report under either the BD or FCM rule files the form for a given suspicious transaction, it will be in compliance with its SAR obligation.

FCMs and IB-Cs also are subject to new provisions added to the BSA by the USA Patriot Act. For example, FCMs and IB-Cs are subject to the anti-money laundering program rules of 31 U.S.C. 5318(h).[18] Further, FinCEN has issued a joint notice of proposed rulemaking with the CFTC that would require FCMs and IB-Cs to establish procedures to verify the identity of customers opening accounts, maintain records of the information used to verify customer identity, and consult lists of known or suspected terrorists and terrorist organizations.[19]

D. The Registration and Regulation of 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").[20] An IB-C is similarly defined,[21] 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.[22] As of December 31, 2002, there were 168 FCMs and 1,423 IB-Cs (domestic and foreign) that had registered with the CFTC pursuant to this provision.

[18] Regulations implementing this provision were issued April 29, 2002. See 67 FR 21110.
[19] See 67 FR 48328 (July 23, 2002).
[20] 7 U.S.C. 1a(20).
[21] 7 U.S.C. 1a(23) (defining the term "introducing broker").
[22] 7 U.S.C. 6d(a)(1).

The Commodity Futures Modernization Act of 2000 ("CFMA")[23] amended both the CEA and the Exchange Act to remove a long-standing statutory prohibition on the trading of security futures products ("SFPs").[24] A person may not effect SFP transactions unless the person registers with both the SEC and the CFTC. The CFMA amended both the CEA and the Exchange Act to permit "notice registration" procedures for persons that are required to register with the CFTC or the SEC solely because they are effecting SFP transactions. Under these notice registration procedures with respect to SFPs, an FCM or IB-C can register with the SEC as a "Notice BD,"[25] and a BD can register with the CFTC as a "Notice FCM" or "Notice IB-C,"[26] simply by filing a notice with the other regulator. Notice BDs are exempt from certain substantive provisions of the Exchange Act,[27] and Notice FCMs and Notice IB-Cs are exempt from certain substantive provisions of the CEA.[28] These streamlined notice registration provisions allow FCMs, IB-Cs, and securities BDs to participate in SFP business without being subject to conflicting and/or duplicative regulation. The CFMA further amended the Exchange Act to clarify that an FCM or IB-C that also is a Notice BD to effect SFP transactions is not subject to routine periodic examination by the SEC.[29]

The regulation of the futures industry in general, and of FCMs and IB-Cs in particular, relies on both the CFTC and the designated self-regulatory organizations

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[23] Pub. L. 103-556, 114 Stat. 2763 (December 21, 2000).
[24] A "security future" is defined in the CEA and the Exchange Act as a contract of sale for future delivery on 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 CFMA 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.
[25] Section 15b(11) of the Exchange Act, 15 U.S.C. 78*o*(b)(11).
[26] Section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2).
[27] See 15 U.S.C. 78*o*(b)(11)(b).

("DSROs"). At present, the DSROs consist of any board of trade that is designated as a contract market,[30] and any futures association registered, under the CEA.[31] To date, the National Futures Association ("NFA") is the only registered futures association.[32]

II. SPECIFIC PROVISIONS

A. 103.11(ii)—Meaning of terms

1. Definitions of Futures Commission Merchant and Introducing Broker-Commodities.

The definition of "financial institution" in 31 CFR 103.11(n) would be amended to add FCMs and IB-Cs as these terms are proposed to be defined in paragraphs (zz) and (aaa), respectively. Adding FCMs and IB-Cs to the definition of financial institution is intended to affirm the Secretary's view that such firms are among the class of financial institutions that present possible money laundering risks and thus should be subject to regulations designed to deter and detect money laundering and other criminal activities.

Including FCMs and IB-Cs in the definition of financial institution under the BSA regulations will subject these businesses to the general BSA recordkeeping and record retention rules.[33] Most of the records specifically identified in the BSA regulations are documents that FCMs and IB-Cs must obtain and retain pursuant to existing CFTC regulations. In addition, FCMs and IB-Cs will be required to report currency transactions under 31 CFR 103.22 and maintain records associated with such reports under 103.28, as well as comply with the funds transfer rule requirements of 103.33(f). As a result, once

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[28] See 7 U.S.C. 4f(a)(4)(A).
[29] Section 17(b) of the Exchange Act, 15 U.S.C. 78q(b)(4)(A).
[30] Section 5 of the CEA, 7 U.S.C. 7.
[31] Section 17 of the CEA, 7 U.S.C. 21.
[32] As a result of amendments made to the CEA by the CFMA, however, a DTEF may serve as DSRO. To date, there are no registered DTEFs.
[33] See 31 CFR 103.33 and 103.38.

the final rule based on this notice of proposed rulemaking is implemented, FCMs and IB-Cs will no longer be subject to cash reporting under 31 U.S.C. 5331.[34]

Proposed paragraphs (zz) and (aaa) set forth the definitions of FCM and IB-C, respectively. These terms would be defined as any person registered or required to be registered as an FCM or IB-C with the CFTC,[35] but would exclude BDs that have notice registered with the CFTC as FCMs or IB-Cs for the sole purpose of effecting SFP transactions. For these persons, FinCEN believes that the BSA rules of the primary federal supervisory agency for such entities should apply, and that authority to examine for compliance with those rules must 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 further, such BD will be examined for BSA compliance by the 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 further, such FCM or IB-C shall be examined for BSA compliance by the CFTC and the relevant 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(ii), which is the rule that requires

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[34] See 31 U.S.C. 5331(c) and 26 U.S.C. 6050I(c).

[35] There are two types of IB-Cs, guaranteed and non-guaranteed. A guaranteed IB 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 would be covered by the proposed rule as IB-Cs.

suspicious activity reporting for BDs. That is, dual registrants who are in compliance with the suspicious activity reporting requirements for BDs under 31 CFR 103.19(ii) also shall be deemed to be in compliance with this proposed rule, and dual registrants who are in compliance with this rule shall be deemed to be in compliance with 31 CFR 103.19(ii). In this way, it is anticipated that dual registrants will not be subject to different or conflicting suspicious activity 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.[36] 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) would specifically add 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.[37]

Proposed 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.[38]

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[36] See Pub. L. 99-570, Title XIII, 1352(a), 100 Stat. 3207-18 (Oct. 27, 1986), codified at 18 U.S.C. 1956.
[37] Thus, for example, the term "transaction" would include 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 7 U.S.C. 2(c)(1)-(2).
[38] 7 U.S.C. 1a(4), 1a(7) and 1a(26), respectively.

B. 103.17--Reports by FCMs and IB-Cs of suspicious transactions

1. General. Proposed section 103.17 would require 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 under this proposal and 31 U.S.C. 5318(g) whether or not they involve currency.[39] The proposal also contains language designed to encourage 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 in the rule.

Proposed paragraph (a)(2) would require 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.

The first class of transactions requiring reporting, described in proposed 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 proposed 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 proposed

[39] 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.

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 proposed 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, notwithstanding the facts. 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.[40] 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 verification or recordkeeping requirements relevant to the transaction, would all indicate that a suspicious activity report should be filed. As the proposed rule would

[40] As discussed below, however, proposed paragraph (c)(1)(ii) would provide an exception from the suspicious 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 7 U.S.C. 1a(29).

make clear, 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 proposed 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) repeated pattern 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 anti-money laundering program rules for commodity pools, and is today also proposing such rules CTAs. Monitoring for suspicious transactions is an integral part of such programs. These independent suspicious activity reporting obligations of intermediaries such as CTAs, however, do not reduce the obligation on an FCM or IB-C imposed by this proposed 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 fall within the definition of "correspondent account" under section 312 of the USA Patriot Act and as such are subject to due diligence, and possibly enhanced due diligence, requirements under that section of that Act and the implementing regulations.[41]

The means of commerce and the techniques of money launderers are continually evolving, and there is no way to provide an exhaustive list of suspicious transactions. FinCEN will continue its dialogue with the CFTC, NFA, the futures exchanges, and the futures industry itself about the manner in which a combination of government guidance, training programs, and government-industry information exchange can smooth the way for operation of the new suspicious activity reporting system in as flexible and cost-efficient a way as possible.

2. Reporting Threshold. FinCEN is aware of industry concern that the $5,000 threshold would operate mechanically to require FCMs and IB-Cs to establish programs to examine every transaction occurring at or above the threshold level. The suspicious transaction reporting rules, however, 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.[42]

3. Transactions Involving Both an FCM and an IB-C. Proposed paragraph (a)(3) provides that the obligation to identify and report properly a suspicious transaction rests

[41] See 67 FR 37736 (May 30, 2002) (proposed rule) and 67 FR 48348 (July 23, 2002) (interim final rule).
[42] 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

with each FCM and IB-C involved in the transaction. While the proposed rule sets forth the general principle regarding the obligation to report when a transaction involves both an FCM and an IB-C, the proposed rule also provides that only one report needs to be filed with FinCEN as long as the report that is filed contains all the relevant facts concerning the transaction. This provision is intended to avoid duplicative and redundant reporting. FinCEN expects that in these situations, an FCM and IB-C will consult with each other in preparing the report to ensure that only one accurate and complete report is filed concerning a particular transaction.

4. Filing Procedures. Proposed 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, the business must report the transaction by completing a SAR-SF and filing it in a central location to be determined by FinCEN.[43] The proposed rule also makes special provision for situations that require immediate attention, such as ongoing money laundering schemes or terrorist financing. In that event, the FCM or IB-C would have to notify immediately, by telephone, an appropriate law enforcement authority in addition to filing a SAR-SF. The proposed 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.[44]

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conducted for an individual customer located in a jurisdiction that has been identified as a non-cooperative country or territory by the Financial Action Task Force on Money Laundering.

[43] 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 website at www.fincen.gov. Once the proposed rule is finalized, FinCEN intends to conform the instructions to the SAR-SF to specifically address FCM responsibilities under the rule.

[44] In addition, the proposed 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.

5. Exceptions. Proposed paragraph (c) sets forth two exceptions to the reporting requirement that would apply to an FCM or IB-C. A report would not have to be filed to report a robbery or burglary that is reported to law enforcement. A report also would 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 would not encompass reports of BSA violations made to the CFTC or a registered futures association.

6. Retention of Records. Proposed paragraph (d) would require 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 proposed rule modifies, limits, or supersedes section 101 of the Electronic Records in Global and National Commerce Act,[45] 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.[46] Regardless, the FCM or IB-C would have to make the supporting documentation available to FinCEN, the CFTC, NFA, any appropriate law enforcement agency, and, as explained below, any registered futures association or registered entity as permitted in paragraph (g), upon request.

7. Non-Disclosure. Proposed paragraph (e) reflects the statutory bar against the disclosure of information filed in, or the fact of filing, a suspicious activity report

[45] Pub. L. 106-229, 114 Stat. 464 (15 U.S.C. 7001) (E-Sign Act).
[46] See, e.g., 17 CFR 1.4 and 1.31.

(whether the report is required by the proposed rule or is filed voluntarily).[47] 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 law enforcement, relevant regulatory agencies such as the CFTC, or a DSRO.

8. Safe Harbor from Civil Liability. Proposed 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,[48] paragraph (f) proposes to clarify 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 proposal 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 proposed 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

[47] See 31 U.S.C. 5318(g)(2).
[48] See 7 U.S.C. 18 and 7 CFR Part 12.

fact that one had been filed, to any participant in the proceeding, including as applicable, the arbitrator, judgment officer, or administrative law judge.

9. Examination. Proposed paragraph (g) notes that compliance with the obligation to report suspicious transactions will be examined, 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 or registered entity that has authority to examine the institution.

10. Proposed Effective Date. Proposed paragraph (h) provides that the new suspicious transaction reporting requirements would be effective 180 days after the date on which the final regulations to which this notice of proposed 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 also will 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 proposed amendments to paragraphs (e)(6)(i) and (f)(6)(i) of Section 103.33 would set forth exceptions for any transfers or transmittals of funds involving either an FCM or an IB-C. The proposed 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.

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. As a result, the Internal Revenue Service is the agency charged with examining FCMs and IB-Cs for compliance with the BSA requirements currently applicable to them.[49] This proposed rule would expand the scope of the BSA rules applicable to FCMs and IB-Cs by including them in the regulatory definition of "financial institution." FinCEN believes that it therefore is appropriate to 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 proposed to be amended to provide the CFTC with examination authority with respect to FCMs and IB-Cs for BSA compliance.

III. SUBMISSION OF COMMENTS

All comments will be available for public inspection and copying, and no material in any comments, including the name of any person submitting comments, will be recognized as confidential. Accordingly, material not intended to be disclosed to the public should not be submitted.

IV. REGULATORY FLEXIBILITY ANALYSIS

The Regulatory Flexibility Act ("RFA")[50] requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The rules proposed today would affect FCMs and IB-Cs. The CFTC has established certain definitions of "small entities" to be used by the CFTC in evaluating the impact of its rules on such entities in

[49] NFA, however, also examines FCMs and IB-Cs for compliance with the AML program requirement, based on NFA Compliance Rule 2-9(c).

accordance with the RFA.[51] The CFTC previously has determined that FCMs are not small entities for the purpose of the RFA.[52] Therefore, the requirements of the RFA do not apply to those entities.

With respect to IB-Cs, the CFTC has stated that it would evaluate within the context of a particular proposal whether all or some affected IB-Cs should be considered small entities, and if so, that it would analyze the economic impact on them of any rule.[53] All IB-Cs, including small IB-Cs, would be affected by the proposed rules. As noted above, the inclusion of IB-Cs within the "financial institution" definition in the BSA regulations would make IB-Cs subject to all of the same requirements that apply to other financial institutions, such as banks and introducing and clearing BDs. Nevertheless, FinCEN does not believe that these requirements modify the existing obligations of IB-Cs, since the transactional information required to be made and retained under the proposed rules would be information that already is required to be made and retained in the ordinary course of an IB-C's business.

Concerning the filing of suspicious activity reports by IB-Cs**,** FinCEN does not believe that the economic impact of the proposed rule will be significant. Due to mandatory provisions of the USA Patriot Act[54] and obligations imposed by the NFA,[55] 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

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[50] 5 U.S.C. 601 et seq.
[51] 47 FR 18618 (April 30, 1982).
[52] Id. at 18619-20.
[53] 47 FR 18618, 18618-18620 (April 30, 1982).
[54] 31 U.S.C. 5318(h).
[55] NFA Compliance Rule 2-9(c).

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 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 firm employees, and the firm's resources.

Based on the foregoing, FinCEN does not believe the proposed rules will have a significant economic impact on a substantial number of small entities. Accordingly, FinCEN hereby certifies, pursuant to Section 3(a) of the RFA,[56] that the proposed rules will not have a significant economic impact on a substantial number of small entities.

V. EXECUTIVE ORDER 12866

The Department of the Treasury has determined that this proposed rule 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 this proposal provides the most cost-effective and least burdensome alternative to achieve the objectives of the rule.

VII. PAPERWORK REDUCTION ACT

The collection of information contained in this notice of proposed rulemaking is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act ("PRA").[57] Comments on the collection of information should be sent (preferably by fax (202-395-6974)) to Desk Officer for the Department of 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) with a copy to FinCEN by mail or the Internet at the addresses previously specified. Comments on the collection of information should be received by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

In accordance with the PRA[58] and its implementing regulations,[59] the following information concerning the collection of information as required by the proposed rules[60] is presented to assist those persons wishing to comment on the information collection.

FinCEN anticipates that the proposed suspicious activity reporting requirements, if adopted as proposed, would result in the annual filing of a total of 1,591 SAR-SFs by FCMs and IB-Cs. This result is an estimate based on the size of the current FCM and IB-C community.

Description of Respondents: FCMs and IB-Cs that are or are required to be registered with the CFTC, excluding notice-registered FCMs and IB-Cs.

Estimated Number of Respondents: 1,591 (168 FCMs and 1423 IB-Cs).

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[56] 5 U.S.C. 605(b).
[57] 44 U.S.C. 3507(d).
[58] 44 U.S.C. 3506(c)(2)(A).
[59] 5 CFR 1320.

Frequency: As required.

Estimate of Burden: The reporting burden of 31 CFR 103.17 will be reflected in the burden of the Form, SAR-SF. The recordkeeping burden of 31 CFR 103.17 is estimated as an average of four hours per form, which is based on the estimate for BDs.

Estimate of Total Annual Recordkeeping Burden on Respondents: 6,364 hours.

FinCEN specifically invites comments on the following subjects: (a) whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including whether the information shall have practical utility; (b) the accuracy of FinCEN's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to maintain the information.

In addition, the PRA requires agencies to estimate the total annual cost burden to respondents or recordkeepers resulting from the collection of information. Thus, FinCEN also specifically requests comments to assist with this estimate. In this connection, FinCEN requests commenters to identify any additional costs associated with the completion of the form. These comments on costs should be divided into two parts: (a) any additional costs associated with reporting; and (b) any additional costs associated with recordkeeping.

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[60] 31 CFR 103.17.

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.

Proposed Amendments to the Regulations

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

PART 103--FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 is amended to read as follows:

Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314, 5316-5332; title III, sec. 314 Pub. L. 107-56, 115 Stat. 307; 12 U.S.C. 1818; 12 U.S.C. 1786(q).

2. Section 103.11 is amended by revising paragraph (f), adding paragraphs (n)(8) and (n)(9), revising paragraph (ii)(1), and adding paragraphs (xx), (yy), (zz), (aaa), and (bbb) to read as follows:

§ 103.11 Meaning of terms.

* * * * *

(f) Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934, except persons who register pursuant to section 15(b)(11) of the Securities Exchange Act of 1934.

* * * * *

(n) * * *

(8) A futures commission merchant;

(9) An introducing broker in commodities.

* * * * *

(ii) Transaction. (1) Except as provided in paragraph (ii)(2) of this section, transaction means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase, or sale of any stock, bond, certificate of deposit, or other monetary instrument, security, contract of sale of a commodity for future delivery, option on any contract of sale of a commodity for future delivery, option on a commodity, purchase or redemption of any money order, payment or order for any money remittance or transfer, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

* * * * *

(xx) Commodity. Any good, article, service, right, or interest described in Section 1a(4) of the Commodity Exchange Act ("CEA"), 7 U.S.C. 1a(4).

(yy) Contract of sale. Any sale, agreement of sale, or agreement to sell as described in Section 1a(7) of the CEA, 7 U.S.C. 1a(7).

(zz) Futures commission merchant. Any person registered or required to be registered as a futures commission merchant with the Commodity Futures Trading Commission ("CFTC") under the CEA, except persons who register pursuant to section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2).

(aaa) Introducing Broker-Commodities. Any person registered or required to be registered as an introducing broker with the CFTC under the CEA, except persons who register pursuant to section 4f(a)(2) of the CEA, 7 U.S.C. 6f(a)(2).

(bbb) Option on a Commodity. Any agreement, contract, or transaction described in Section 1a(26) of the CEA, 7 U.S.C. 1a(26).

3. Section 103.17 is added to read as follows:

§ 103.17 Reports by futures commission merchants and introducing brokers in commodities of suspicious transactions.

(a) General -- (1) Every futures commission merchant ("FCM") and introducing broker in commodities ("IB-C") within the United States shall file with FinCEN, to the extent and in the manner required by this section, a report of any suspicious transaction relevant to a possible violation of law or regulation. An FCM or IB-C may also file with FinCEN a report of any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by this section. Filing a report of a suspicious transaction does not relieve an FCM or IB-C from the responsibility of complying with any other reporting requirements imposed by the Commodity Futures Trading Commission ("CFTC") or any registered futures association or registered entity as those terms are defined in the Commodity Exchange Act ("CEA"), 7 U.S.C. 21 and 7 U.S.C. 1a(29).

(2) A transaction requires reporting under the terms of this section if it is conducted or attempted by, at, or through an FCM or IB-C, it involves or aggregates funds or other assets of at least $5,000, and the FCM or IB-C knows, suspects, or has

reason to suspect that the transaction (or a pattern of transactions of which the transaction is a part):

(i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any federal law or regulation or to avoid any transaction reporting requirement under federal law or regulation;

(ii) Is designed, whether through structuring or other means, to evade any requirements of this part or of any other regulations promulgated under the Bank Secrecy Act ("BSA"), Public Law 91-508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314, 5316-5332;

(iii) Has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the FCM or IB-C knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or

(iv) Involves use of the FCM or IB-C to facilitate criminal activity.

(3) The obligation to identify and properly and timely to report a suspicious transaction rests with each FCM and IB-C involved in the transaction, provided that no more than one report is required to be filed by the FCM and IB-C involved in the particular transaction (as long as the report filed contains all relevant facts).

(b) Filing procedures -- (1) What to file. A suspicious transaction shall be reported by completing a Suspicious Activity Report--Securities and Futures Industry ("SAR-

SF"), and collecting and maintaining supporting documentation as required by paragraph (d) of this section.

(2) Where to file. The SAR-SF shall be filed with FinCEN in a central location, to be determined by FinCEN, as indicated in the instructions to the SAR-SF.

(3) When to file. A SAR-SF shall be filed no later than 30 calendar days after the date of the initial detection by the reporting FCM or IB-C of facts that may constitute a basis for filing a SAR-SF under this section. If no suspect is identified on the date of such initial detection, an FCM or IB-C may delay filing a SAR-SF for an additional 30 calendar days to identify a suspect, but in no case shall reporting be delayed more than 60 calendar days after the date of such initial detection. In situations involving violations that require immediate attention, such as terrorist financing or ongoing money laundering schemes, the FCM or IB-C should immediately notify by telephone an appropriate law enforcement authority in addition to filing a SAR-SF. FCMs and IB-Cs wishing voluntarily to report suspicious transactions that may relate to terrorist activity may call FinCEN's Financial Institutions Hotline at 1-866-556-3974 in addition to filing timely a SAR-SF if required by this section. The FCM or IB-C may also, but is not required to, contact the CFTC to report in such situations.

(c) Exceptions -- (1) An FCM or IB-C is not required to file a SAR-SF to report--

(i) A robbery or burglary committed or attempted that is reported to appropriate law enforcement authorities;

(ii) A violation otherwise required to be reported under the CEA (7 U.S.C. 1 et seq.), the regulations of the CFTC (17 CFR 1 et seq.), or the rules of any registered futures association or registered entity as those terms are defined in the

CEA, 7 U.S.C. 21 and 7 U.S.C. 1a(29), by the FCM or IB-C or any of its officers, directors, employees, or associated persons, as long as such violation is appropriately reported to the CFTC or a registered futures association or registered entity. This exception does not apply to a report of a violation of the BSA and its implementing regulations.

(2) An FCM or IB-C may be required to demonstrate that it has relied on an exception in paragraph (c)(1) of this section, and must maintain records of its determinations to do so for the period specified in paragraph (d) of this section.

(d) Retention of records. An FCM or IB-C shall maintain a copy of any SAR-SF filed and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR-SF. Supporting documentation shall be identified as such and maintained by the FCM or IB-C, and shall be deemed to have been filed with the SAR-SF. An FCM or IB-C shall make all supporting documentation available to FinCEN, the CFTC, any other appropriate law enforcement agency or regulatory agency, and for purposes of paragraph (g) of this section, to any registered futures association or registered entity, upon request.

(e) Confidentiality of reports. No financial institution, and no director, officer, employee, or agent of any financial institution, who reports a suspicious transaction under this part, may notify any person involved in the transaction that the transaction has been reported, except to the extent permitted by paragraph (a)(3) of this section. Thus, any person subpoenaed or otherwise requested to disclose a SAR-SF or the information contained in a SAR-SF, except where such disclosure is requested by FinCEN, the CFTC, another appropriate law enforcement or regulatory agency, or for purposes of paragraph

(g) of this section, a registered futures association or registered entity, shall decline to produce the SAR-SF or to provide any information that would disclose that a SAR-SF has been prepared or filed, citing this paragraph and 31 U.S.C. 5318(g)(2), and shall notify FinCEN of any such request and its response thereto.

(f) Limitation of liability. An FCM or IB-C, and any director, officer, employee, or agent of such FCM or IB-C, that makes a report of any possible violation of law or regulation pursuant to this section or any other authority (or voluntarily) shall not be liable to any person under any law or regulation of the United States (or otherwise to the extent also provided in 31 U.S.C. 5318(g)(3), including in any arbitration or reparations proceeding) for any disclosure contained in, or for failure to disclose the fact of, such report.

(g) Examination and enforcement. Compliance with this section shall be examined by the Department of the Treasury, through FinCEN or its delegates, under the terms of the BSA. Reports filed under this section shall be made available to the CFTC and any registered futures association or registered entity examining an FCM or IB-C for compliance with the requirements of this section. Failure to satisfy the requirements of this section may constitute a violation of the reporting rules of the BSA or of this part.

(h) Effective date. This section applies to transactions occurring after [date that is 180 days after the publication in the Federal Register of a final rule based on this notice of proposed rulemaking].

4. Section 103.33 is amended by redesignating paragraphs (e)(6)(i)(E), (F), and (G) as paragraphs (e)(6)(i)(G), (H), and (I), respectively; adding new paragraphs (e)(6)(i)(E) and (F); redesignating paragraphs (f)(6)(i)(E), (F), and (G) as paragraphs

(f)(6)(i)(G), (H), and (I), respectively, and adding new paragraphs (f)(6)(i)(E) and (F) to read as follows:

§ 103.33 Records to be made and retained by financial institutions.

* * * * *

(e) * * *

(6) * * *

(i) * * *

(E) A futures commission merchant or an introducing broker in commodities;

(F) A wholly-owned domestic subsidiary of a futures commission merchant or an introducing broker in commodities;

(G) The United States;

(H) A state or local government; or

(I) A federal, state, or local government agency or instrumentality; and

* * * * *

(f) * * *

(6) * * *

(i) * * *

(E) A futures commission merchant or an introducing broker in commodities;

(F) A wholly-owned domestic subsidiary of a futures commission merchant or an introducing broker in commodities;

(G) The United States;

(H) A state or local government; or

(I) A federal, state, or local government agency or instrumentality; and

* * * * *

5. Section 103.56 is amended by revising paragraph (b)(8) and adding a new paragraph (b)(9) to read as follows:

§ 103.56 Enforcement.

* * * * *

(b) * * *

(8) To the Commissioner of Internal Revenue with respect to all financial institutions, except brokers or dealers in securities, futures commission merchants, introducing brokers in commodities, and commodity trading advisors, not currently examined by Federal bank supervisory agencies for soundness and safety; and

(9) To the Commodity Futures Trading Commission with respect to futures commission merchants, introducing brokers in commodities, and commodity trading advisors.

* * * * *

Dated: _____

_____
James F. Sloan
Director,
Financial Crimes Enforcement Network