

customer before an account is opened or a customer is granted authority to effect transactions with respect to an account. The specified information must include, at a minimum:

- (i) Name;
- (ii) Date of birth, for a natural person;
- (iii) Addresses:
  - (A) Residence and mailing (if different) for a natural person; or
  - (B) Principal place of business and mailing (if different) for a person other than a natural person; and
- (iv) Identification numbers:

(A) A taxpayer identification number from each customer that is a U.S. person; or

(B) A taxpayer identification number, passport number and country of issuance, alien identification card number, or number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard from each customer that is not a U.S. person.

(2) *Limited exception.* In the case of a person other than a natural person that has applied for, but has not received, an employer identification number, the CIP may allow such information to be provided within a reasonable period of time after the account is established, if the mutual fund obtains a copy of the application for the employer identification number prior to such time.

(d) *Required verification procedures.* The CIP shall include procedures for verifying the identity of customers, to the extent reasonable and practicable, using information obtained pursuant to paragraph (c) of this section. Such verification must occur within a reasonable time before or after the customer's account is opened or the customer is granted authority to effect transactions with respect to an account:

(1) *Verification through documents.* The CIP must describe when the mutual fund will verify customers' identities through documents and describe the documents that the mutual fund will use for this purpose. Suitable documents for verification may include:

(i) For natural persons, unexpired government-issued identification evidencing nationality or residence and bearing a photograph or similar safeguard; and

(ii) For persons other than natural persons, documents showing the existence of the entity, such as registered articles of incorporation, a government-issued business license, partnership agreement, or trust instrument.

(2) *Verification through non-documentary methods.* The CIP must

describe non-documentary methods a mutual fund will use to verify customers' identities and when these methods will be used in addition to, or instead of, relying on documents. Non-documentary verification methods may include contacting a customer; independently verifying information through credit bureaus, public databases, or other sources; and checking references with other financial institutions. Non-documentary methods shall be used when a customer who is a natural person is unable to present an unexpired, government-issued identification document that bears a photograph or similar safeguard; the mutual fund is presented with unfamiliar documents to verify the identity of a customer; or the mutual fund does not obtain documents to verify the identity of a customer, does not meet face-to-face a customer who is a natural person, or is otherwise presented with circumstances that increase the risk the mutual fund will be unable to verify the true identity of a customer through documents.

(e) *Government lists.* The CIP shall include procedures for determining whether a customer's name appears on any list of known or suspected terrorists or terrorist organizations prepared by any federal government agency and made available to the mutual fund. Mutual funds shall follow all federal directives issued in connection with such lists.

(f) *Customer notice.* The CIP shall include procedures for providing customers with adequate notice that the mutual fund is requesting information to verify the customer's identity.

(g) *Lack of verification.* The CIP shall include procedures for responding to circumstances in which the mutual fund cannot form a reasonable belief that it knows the true identity of a customer.

(h) *Recordkeeping.* The CIP shall include procedures for maintaining a record of all information obtained pursuant to the CIP. A mutual fund must retain all records made or obtained when verifying the identity of a customer pursuant to its CIP until five years after the date the account of the customer is closed. Records subject to the requirements in this paragraph (h) include:

(1) All identifying information provided by a customer pursuant to paragraph (c) of this section, and copies of any documents that were relied on pursuant to paragraph (d)(1) of this section evidencing the type of document and any identification number it may contain;

(2) The methods and results of any measures undertaken to verify the

identity of a customer pursuant to paragraph (d)(2) of this section; and

(3) The resolution of any discrepancy in the identifying information obtained.

(i) *Approval by the board.* The CIP shall be approved by the mutual fund's board of directors or trustees.

(j) *Exemptions.* The Commission, with the concurrence of the Secretary, may by order or regulation exempt any mutual fund or type of account from the requirements of this section. The Commission and the Secretary shall consider whether the exemption is consistent with the purposes of the Bank Secrecy Act (31 U.S.C. 5311 *et seq.*) and in the public interest, and may consider other necessary and appropriate factors.

Dated: July 15, 2002.

**James F. Sloan,**

*Director, Financial Crimes Enforcement Network.*

Dated: July 12, 2002.

By the Securities and Exchange Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 1

RIN 3038-AB90

## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

RIN 1506-AA34

## Customer Identification Programs for Futures Commission Merchants and Introducing Brokers

**AGENCIES:** Financial Crimes Enforcement Network, Treasury; United States Commodity Futures Trading Commission.

**ACTION:** Joint notice of proposed rulemaking.

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**SUMMARY:** Treasury, through the Financial Crimes Enforcement Network (FinCEN), and the United States Commodity Futures Trading Commission (CFTC or Commission) are jointly issuing a proposed regulation to implement section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (the Act). Section 326 of the Act requires Treasury to jointly prescribe with the CFTC a regulation that, at a minimum, requires

futures commission merchants and introducing brokers to implement reasonable procedures to verify the identity of any person seeking to open an account, to the extent reasonable and practicable, maintain records of the information used to verify the person's identity, and determine whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the futures commission merchant or introducing broker by any government agency.

**DATES:** Written comments on the proposed rule may be submitted on or before September 6, 2002.

**ADDRESSES:** Because paper mail in the Washington, DC area may be subject to delay, commenters are encouraged to e-mail or fax comments. Comments should be sent by one method only. Futures commission merchants and introducing brokers (and their respective trade associations) are encouraged to submit comments only to the CFTC. Other commenters are encouraged to submit comments only to FinCEN. All comments will be considered by Treasury and the CFTC in formulating the final rule.

**CFTC:** Comments should be sent to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Attention: Office of the Secretariat. Comments may be sent by facsimile transmission to (202) 418-5521, or by e-mail to [secretary@cftc.gov](mailto:secretary@cftc.gov). Reference should be made to "Proposed Section 326 Rule "Customer Identification."

**FinCEN:** Comments may be mailed to FinCEN, Section 326 Futures Industry Comments, PO Box 39, Vienna, VA 22183, or sent to Internet address [regcomments@fincen.treas.gov](mailto:regcomments@fincen.treas.gov) with the caption "Attention: Section 326 Futures Industry Rule Comments" in the body of the text. Comments may be inspected at FinCEN 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 (not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:**

**CFTC:** Office of the General Counsel, (202) 418-5120, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.

**Treasury:** Office of the Chief Counsel (FinCEN), (703) 905-3590; Office of the Assistant General Counsel for Enforcement (Treasury), (202) 622-1927; or the Office of the Assistant General Counsel for Banking & Finance (Treasury), (202) 622-0480.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Section 326 of the USA PATRIOT Act*

On October 26, 2001, President Bush signed into law the USA PATRIOT Act.<sup>1</sup> Title III of the Act, captioned "International Money Laundering Abatement and Anti-terrorist Financing Act of 2001," adds several new provisions to the Bank Secrecy Act (BSA), 31 U.S.C. 5311 *et seq.* These provisions are intended to facilitate the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 326 of the Act adds a new subsection (l) to 31 U.S.C. 5318 that requires the Secretary of the Treasury (Secretary) to prescribe regulations setting forth minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at the financial institution.

Section 326 applies to all "financial institutions." This term is defined very broadly in the BSA to encompass a variety of entities including banks, agencies and branches of foreign banks located in the United States, thrifts, credit unions, brokers and dealers in securities or commodities,<sup>2</sup> futures commission merchants, insurance companies, travel agents, pawnbrokers, check-cashers, casinos, and telegraph companies, among many others. See 31 U.S.C. 5312(a)(2), 5312(c)(1)(A).

For any financial institution engaged in financial activities described in section 4(k) of the Bank Holding Company Act of 1956 (section 4(k) institutions), the Secretary is required to prescribe the regulations issued under section 326 jointly with each of the CFTC, the Securities and Exchange Commission (SEC), and the banking agencies, namely, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration (collectively referred to as the banking agencies). Final regulations implementing section 326 must be effective by October 25, 2002.

<sup>1</sup> Pub. L. 107-56.

<sup>2</sup> Treasury has previously expressed the opinion that introducing brokers are "brokers or dealers in commodities" and therefore come within this definition of "financial institution." See Financial Crimes Enforcement Network; Anti-Money Laundering Programs For Financial Institutions, 67 FR 21110, 21111 n.5 (April 29, 2002) (citing 31 U.S.C. 5312 (a)(2)(h)). Nonetheless, Treasury takes this opportunity to clarify formally that section 5312 (a)(2)(H) includes "introducing brokers" within the definition of "financial institution."

Section 326 provides that the regulations must require, at a minimum, financial institutions to implement reasonable procedures for (1) verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person's name appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency. In prescribing these regulations, the Secretary is directed to take into consideration the various types of accounts maintained by various types of financial institutions, the various methods of opening accounts, and the various types of identifying information available.

The following proposal is being issued jointly by Treasury, through FinCEN, and the Commission. It applies only to persons registered, or required to be registered, with the Commission as either futures commission merchants or introducing brokers under the Commodity Exchange Act (CEA) (7 U.S.C. 1 *et seq.*), except persons who register pursuant to section 4f(a)(2) of the CEA. Accordingly, this rule does not apply to persons who register, or are required to register, as futures commission merchants or introducing brokers solely because they effect transactions in security futures products. These section 4f(a)(2) futures commission merchants and introducing brokers must be registered with the SEC as brokers or dealers, and they are therefore the subject of rules issued jointly by Treasury and the SEC implementing section 326. Regulations governing the applicability of section 326 to other financial institutions, such as those regulated by the banking agencies, are also the subject of separate regulations.

Treasury, the Commission, the SEC and the banking agencies consulted extensively in the development of all rules implementing section 326 of the Act. All of the participating agencies intend the effect of the rules to be uniform throughout the financial services industry.

The Secretary has determined that the records required to be kept by section 326 of the Act have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, to protect against international terrorism.

### *B. Codification of the Joint Proposed Rule*

The substantive requirements of the joint proposed rule will be codified with other Bank Secrecy Act regulations as part of Treasury's regulations in 31 CFR part 103. To minimize potential confusion by affected entities regarding the scope of the joint proposed rule, the CFTC is also proposing to add a provision in its own regulations in 17 CFR part 1 that will cross-reference the regulations in 31 CFR part 103. Although no specific text is being proposed at this time, the cross-reference will be included in a final rule published by the CFTC concurrently with the joint final rule issued by Treasury and the CFTC implementing section 326 of the Act.

## **II. Section-by-Section Analysis**

### *A. Section 103.123(a) Definitions*

Section 103.123 (a)(1) Account. The proposed rule's definition of "account" is intended to include all types of futures and commodity option accounts maintained or introduced by futures commission merchants and introducing brokers. These include, but are not limited to: accounts to purchase or sell contracts of sale for future delivery, options on contracts of sale for future delivery, or options on physicals in any commodity; cash accounts; margin accounts; prime brokerage accounts that consolidate trading done at a number of firms; and accounts for repurchase and commodity loan transactions.

Section 103.123(a)(2) Commission. The proposed rule defines "Commission" as the United States Commodity Futures Trading Commission.

Section 103.123(a)(3) Commodity. The proposed rule defines "commodity" as any good, article, service, right, or interest described in Section 1a(4) of the Commodity Exchange Act, 7 U.S.C. 1a(4).

Section 103.123(a)(4) Customer. The proposed rule defines "customer" as any person who opens a new account at a futures commission merchant or is granted authority to effect transactions with respect to an account at a futures commission merchant. Where an account is introduced to a futures commission merchant by an introducing broker, a person opening the account or granted authority to effect transactions with respect to the account is a customer of both the futures commission merchant and the introducing broker.

Under this definition, a person who has an account at the futures commission merchant prior to the

effective date of the proposed rule would not be a "customer." However, such a person becomes a "customer" if the person opens a different account thereafter. Moreover, a person becomes a "customer" each time they open a different type of account at a futures commission merchant.

Similarly, an outside advisor with trading authority prior to the effective date of the regulation is not a "customer." However, such a person being granted trading authority after the effective date is a customer. This is true even if the person is granted authority with respect to an account that existed prior to the effective date or the person had been granted authority for another account prior to the effective date.

The requirements of section 326 apply to "customers" (*i.e.*, persons opening new accounts or certain persons being granted trading authority), but do not apply to persons seeking information about an account such as a schedule of transaction fees, if an account is not opened. In addition, transfers of accounts from one futures commission merchant to another that are not initiated by the customer, for example as a result of a bankruptcy, merger, acquisition, or purchase of assets or assumption of liabilities, fall outside of the scope of section 326, and are not covered by the proposed rule.<sup>3</sup>

Section 103.123(a)(5) Futures Commission Merchant. The proposed rule defines "futures commission merchant" as (and therefore applies to) any persons registered, or required to be registered, with the Commission as futures commission merchants under the CEA, except persons who register, or are required to be registered, solely because they effect transactions in security futures products. These latter futures commission merchants, who register with the Commission pursuant to section 4f(a)(2) of the CEA, will be subject to regulations issued jointly by Treasury and the SEC implementing section 326.

Section 103.123(a)(6) Introducing Broker. The proposed rule defines "introducing broker" as (and therefore applies to) any persons registered, or required to be registered, with the Commission as introducing brokers under the CEA, except persons who register, or are required to be registered,

<sup>3</sup> However, there may be situations involving the transfer of accounts where it would be appropriate for a futures commission merchant to verify the identity of customers associated with the accounts it is acquiring. Therefore, Treasury and the Commission expect procedures for transfers of accounts to be part of a futures commission merchant's overall anti-money laundering program required under section 352 of the USA PATRIOT Act.

solely because they effect transactions in security futures products. These latter introducing brokers, who register with the Commission pursuant to section 4f(a)(2) of the CEA, will be subject to regulations issued jointly by Treasury and the SEC implementing section 326.

Section 103.123(a)(7) Option. The proposed rule defines "option" as an agreement, contract or transaction described in Section 1a(26) of the Commodity Exchange Act, 7 U.S.C. 1a(26).

Section 103.123(a)(8) Person. The proposed rule defines "person" as having the same meaning as provided in section 103.11(z). Thus, the term includes natural persons, corporations, partnerships, trusts or estates, joint stock companies, associations, syndicates, joint ventures, any unincorporated organizations or groups, Indian Tribes, and all other entities cognizable as legal entities. This means that any such entity will be considered a "customer" for the purposes of this rule if, after the effective date, the person opens an account or is granted trading authority with respect to an account.

Section 103.123(a)(9) U.S. person. The proposed rule defines "U.S. person" because U.S. citizens and persons incorporated under U.S. laws will be required to provide U.S. tax identification numbers whereas other persons, who may not have a U.S. tax identification number, will be required to provide other similar numbers. Thus, the rule defines "U.S. person" to mean a U.S. citizen or, for persons other than natural persons, an entity established or organized under the laws of a State or the United States. The terms "State" and "United States" are defined in sections 103.11(ss) and 103.11(nn), respectively. A non-U.S. person is defined in § 103.123(a)(10) as a person who does not satisfy these criteria.

Section 103.123(a)(11) Taxpayer identification number. The proposed rule provides that the provisions of Section 6109 of the Internal Revenue Code and the regulations of the Internal Revenue Service thereunder determine what constitutes a taxpayer identification number.

### *B. Section 103.123(b) Customer Identification Program*

As indicated above, section 326 requires the Secretary and the Commission to prescribe regulations requiring futures commission merchants and introducing brokers to implement "reasonable procedures" for: verifying the identity of customers "to the extent reasonable and practicable;" maintaining records associated with

such verification; and consulting lists of known or suspected terrorists or terrorist organizations. Paragraph (b) of the proposed rule sets forth the requirement that futures commission merchants and introducing brokers must develop and operate a customer identification program (CIP).

Paragraph (b) also sets forth certain requirements that each CIP must possess. These factors include the type of identifying information available and six assessments based upon the business operations of the futures commission merchant or introducing broker.

The first factor identified in paragraph (b) is the type of identifying information available. Thus, in implementing and updating their CIPs, futures commission merchants and introducing brokers should consider the type of identifying information that customers can provide. They should also consider the methods available to verify that information, and should consider on an on-going basis whether any additional information or methods are appropriate, particularly as they become available in the future.

The six business-operations-based risk factors include assessments of the futures commission merchant's or introducing broker's (1) size; (2) location; (3) methods of opening accounts; (4) types of accounts and transactions; (5) customer base; and (6) reliance, if any, on another futures commission merchant or introducing broker with which it shares an account relationship. These specific factors are discussed below in general terms.<sup>4</sup>

The first risk factor to consider is the futures commission merchant's or introducing broker's size. For example, a large futures commission merchant or introducing broker that opens a substantial number of accounts on any given day will have different risks than one that opens a new account no more than once or twice a month. The same is true when comparing a futures commission merchant or introducing broker that has many branches with one that has a single office.

The second risk factor is the location of the futures commission merchant or introducing broker. Futures commission merchants and introducing brokers should assess whether they are located or have offices in areas where money laundering activities have been known

<sup>4</sup> This discussion of the risk factors is included because we believe it is helpful in providing some meaning and context with respect to the factors. However, we are not attempting to provide comprehensive definitions of these risk factors or an exhaustive description of the considerations involved in assessing them. Instead, we intend our discussion to serve as a starting point for defining and assessing them.

to exist or that otherwise increase the risk that attempts will be made to open accounts for money laundering purposes.

The third risk factor is the method by which customers open accounts. Accounts opened exclusively on-line present different, and perhaps greater, risks than those opened in-person on the premises of the futures commission merchant or introducing broker.

The fourth risk factor is the type of accounts and transactions that are offered by the futures commission merchant or introducing broker. Futures commission merchants and introducing brokers should assess whether there are different risks (and degrees of risk) associated with the various types of accounts they provide to customers (e.g., futures, options on futures, prime-brokerage) and transactions they execute in those accounts (e.g., longs, shorts, spreads).

The fifth risk factor to be considered is customer base. Futures commission merchants and introducing brokers should assess the risks associated with different types of customers. For example, futures commission merchants and introducing brokers should examine whether they are opening accounts for customers located in countries the Secretary determines to be of "primary money laundering concern" pursuant to section 311 of the Act. In addition, certain legal entities may pose greater risks (e.g., a closely-held corporation as opposed to one that is publicly traded).

Each CIP also should address the risks that may be posed by different types of intermediated accounts. With respect to intermediated accounts, such as omnibus accounts and accounts for commodity pools and other collective investment vehicles,<sup>5</sup> a futures commission merchant or introducing broker may have little or no information about the identities and transaction activities of the underlying participants or beneficiaries of such accounts.<sup>6</sup> In

<sup>5</sup> The term "collective investment vehicle" is not defined in regulations under the CEA but is commonly used to describe an entity through which persons combine funds (i.e., cash) or other assets, which are invested and managed by the entity. See generally 65 FR 24127 (April 25, 2000) (CFTC rule regarding exclusion for certain persons from the definition of the term "commodity pool operator").

<sup>6</sup> Similarly, when a customer has given a commodity trading advisor discretionary trading authority over its account, the commodity trading advisor and not the futures commission merchant (or introducing broker) may be the financial institution with the most information regarding the customer. Treasury, however, has temporarily exempted commodity trading advisors from the requirement to establish anti-money laundering programs as required by section 352 of the Act. 67 FR 21110, 21112 (April 29, 2002). At such time as Treasury proposes or promulgates regulations

most instances, given Treasury's risk-based approach to anti-money laundering programs for financial institutions generally, it is expected that the focus of each futures commission merchant's and introducing broker's CIP will be the intermediary itself, and not the underlying participants or beneficiaries. Thus, futures commission merchants and introducing brokers should assess the risks associated with different types of intermediaries based upon an evaluation of relevant factors, including the type of intermediary; its location; the statutory and regulatory regime that applies to a foreign intermediary (e.g., whether the jurisdiction complies with the European Union anti-money laundering directives or has been identified as non-cooperative by the Financial Action Task Force); the futures commission merchant's or introducing broker's historical experience with the intermediary; references from other financial institutions regarding the intermediary; and whether the intermediary is itself a BSA financial institution required to have an anti-money laundering program.<sup>7</sup>

The sixth risk factor requires an assessment of whether the futures commission merchant or introducing broker can rely on another futures commission merchant or introducing broker, with which it shares an account relationship, to undertake any of the steps required by this proposed rule with respect to the shared account.<sup>8</sup> A shared account relationship may occur in at least two different circumstances: (1) An introducing broker introduces a customer to a futures commission merchant and (2) an executing futures commission merchant executes a customer's order and then "gives up" this filled order to a clearing futures

requiring commodity trading advisors to establish anti-money laundering programs, it will provide guidance regarding the permissible interrelation between commodity trading advisors and futures commission merchants (or introducing brokers) in order to satisfy their respective BSA obligations.

<sup>7</sup> Treasury's interim final rule requiring mutual funds to establish anti-money laundering programs provided for similar treatment of omnibus accounts. 67 FR 21117 (April 29, 2002); see also proposed 31 CFR 103.131.

<sup>8</sup> Treasury and the Commission recognize that a related issue arises in the context of a firm that is registered both with the SEC as a broker-dealer and with the Commission as a futures commission merchant or introducing broker. Neither Treasury nor the Commission intend the effect of this proposed rule to require that both the securities and futures firm identify, and verify the identity of, their customers. For example, if a futures firm has a bifurcated compliance department handling, respectively, the securities and futures sides of its business, the futures firm could perform the required customer identification and verification procedures and the securities firm could rely on it.

commission merchant who carries the customer's account.<sup>9</sup> We anticipate that futures commission merchants and introducing brokers sharing accounts may realize efficiencies by dividing up the requirements in this proposed rule pursuant to either their introducing agreements (in the context of introduced business) or give-up agreements (in the context of give-up business).<sup>10</sup> For example, the introducing broker may undertake to obtain the identifying information from customers as required in paragraph (c) and the futures commission merchant may undertake the verification procedures as required in paragraph (d). Or, in another example, the clearing futures commission merchant may undertake the procedures required for paragraphs (c) and (d) both for its own behalf and on behalf of the executing futures commission merchant. Nonetheless, in both examples, each financial institution would still be responsible for ensuring that each requirement in the proposed rule is met with respect to a customer. Accordingly, a futures commission merchant or introducing broker must assess whether the other firm can be relied on to fulfill its allocated responsibilities. Moreover, a futures commission merchant or introducing broker is expected to cease such reliance if it is no longer reasonable.

Paragraph (b) also requires that the identity verification procedures must

<sup>9</sup> Although no formal survey has been conducted, the Commission has been advised that a significant percentage of all customer trades on U.S. exchanges are effected using an executing futures commission merchant. A customer may elect to use one or more executing futures commission merchants for a number of reasons. In certain circumstances, the customer's carrying futures commission merchant may not be a member of a particular exchange on which the contract in question is listed for trading. In others, particularly in the case of larger institutional customers, the customer may elect to use one or more executing futures commission merchants in order not to disclose its intentions to other market participants. Finally, certain futures commission merchants simply develop a reputation for being able to execute transactions in particular contracts well.

<sup>10</sup> An executing futures commission merchant subject to this proposed rule could obtain from a clearing futures commission merchant, either as part of a give-up agreement or on a transaction-by-transaction basis, a certification that the latter has performed the required customer identification or verification functions. For example, the U.K.'s Joint Money Laundering Steering Group (JMLSG), an association of U.K. Financial Services Industry Trade Associations, recommends that its members employ a variation of the certification approach. For give-up business, the JMLSG's Money Laundering Guidance Notes state: "Where an executing broker and a clearing broker are undertaking an exchange transaction on behalf of the same customer, the clearing broker should provide the appropriate written assurance that it will have obtained and recorded evidence of the identity of the underlying client." See [www.jmlsg.org.uk](http://www.jmlsg.org.uk).

enable each futures commission merchant and introducing broker to form a reasonable belief that it knows the true identity of its customers. This provision makes clear that, while there is flexibility in establishing these procedures, each futures commission merchant and introducing broker is responsible for exercising reasonable efforts to ascertain the identity of each customer.

Finally, paragraph (b) requires that futures commission merchants and introducing brokers incorporate their CIPs into their overall anti-money laundering programs required under section 352 of the Act (31 U.S.C. 5318(h)) and National Futures Association (NFA) Compliance Rule 2-9(c).<sup>11</sup> This requirement is intended to make clear that the CIP is not a separate program, but is merely one component of each futures commission merchant's and introducing broker's overall anti-money laundering program that is designed to ensure compliance with all other applicable rules and regulations promulgated under the Act and the BSA.

### C. Section 103.123(c) Required Information

The first step in verifying identity is obtaining identifying information from customers. Paragraph (c) of the proposed rule provides that each futures commission merchant's and introducing broker's CIP must specify identifying information that customers are required to provide. It also sets forth certain information that must be obtained at a minimum and provides that the CIP must require the futures commission merchant and introducing broker to obtain this minimum information before an account is opened or trading authority is granted.

The minimum information that must be obtained from each customer is (1) name, (2) date of birth, if applicable, (3) address, and (4) U.S. taxpayer identification number (*e.g.*, social security number or employer identification number) or if the person is not a U.S. person, a U.S. taxpayer identification number, an alien identification card number, or the number and country of issuance of any other government-issued document

<sup>11</sup> Section 352 requires financial institutions to establish anti-money laundering programs that, at a minimum, include (1) the development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. On April 23, 2002, the Commission approved rule changes submitted by the NFA setting forth for member futures commission merchants and introducing brokers the minimum requirements for these programs.

evidencing nationality or residence and bearing a photograph or similar safeguard.<sup>12</sup> The term "similar safeguard" is included to permit the use of any biometric identifiers that may be used in addition to, or instead of, photographs. With respect to the address requirement, each customer must provide both a mailing and residence address (if a natural person) or principal place of business (if not a natural person).

The rule only specifies the minimum identifying information that must be obtained from each customer. Futures commission merchants and introducing brokers, in assessing the risk factors in paragraph (b), should determine whether additional identifying information is necessary to form a reasonable belief as to the true identity of each customer. There may be certain types of customers or circumstances where it is reasonable to obtain other identifying information in addition to the minimum. If a futures commission merchant or introducing broker, in examining the nature of its business and operations, determines that additional information should be obtained in certain cases, it should set forth guidelines in its CIP indicating when this shall occur.

Treasury and the Commission recognize that a new business may need access to an account at a futures commission merchant or introducing broker before it has received an employer identification number from the Internal Revenue Service. For this reason, the proposed regulation contains a limited exception to the requirement that a taxpayer identification number must be provided prior to establishing or adding a signatory to an account. Accordingly, a CIP may permit a futures commission merchant or introducing broker to open or add a signatory to an account for a person other than an individual (such as a corporation, partnership, or trust) that has applied for, but has not received, an employer identification number. However, in such a case, the CIP must require that the futures commission merchant or introducing broker obtain a copy of the application before it opens or adds a signatory to the account and obtain the employee identification number within a reasonable period of time after an account is established or a signatory is added to an account. Currently, the IRS indicates that the issuance of an employer identification number can

<sup>12</sup> Treasury and the Commission understand these categories of identification numbers for foreign citizens generally are applicable to natural persons. Accordingly, we seek comment on the types of numbers that could be provided by other persons.

take up to five weeks. This length of time, coupled with when the person applied for the employer identification number, should be considered by the futures commission merchant or introducing broker in determining the reasonable period of time within which the person should provide its employer identification number to the futures commission merchant or introducing broker.

#### *D. Section 103.123(d) Required Verification Procedures*

After obtaining identifying information from a customer, futures commission merchants and introducing brokers must take steps to verify the accuracy of that information in order to reach a point where they can form a reasonable belief as to the true identity of the customer. Accordingly, paragraph (d) of the proposed rule requires each futures commission merchant's and introducing broker's CIP to have procedures for verifying the accuracy of the identifying information provided by the customer. Because the proposed rule requires futures commission merchants and introducing brokers to form a reasonable belief that they know the true identity of each customer, the extent of the verification for each customer will depend on the steps necessary for futures commission merchants and introducing brokers to form such a belief.

Paragraph (d) requires that the verification procedures must be undertaken within a reasonable time before or after a customer's account is opened or a customer is granted authority to effect transactions with respect to an account. This flexibility must be exercised in a reasonable manner, given that verifications too far in advance may become stale and verifications too long after an account is opened may provide money laundering opportunities to persons who would not have had such opportunities if verification occurred sooner. The amount of time it will take a futures commission merchant or introducing broker to verify the identity of a customer may depend on the type of account opened, whether the customer opens the account in person, and on the type of identifying information available. In addition, although an account is opened, a futures commission merchant or introducing broker may choose to place limits on the account, such as restricting the number of transactions or the dollar value of transactions, until a customer's identity is verified. Therefore, the proposed rule provides futures commission merchants and introducing brokers with the

flexibility to use a risk-based approach to determine when the identity of a customer must be verified relative to the opening of an account or granting of trading authority.<sup>13</sup>

As mentioned above, a person becomes a customer each time they open a new account or are granted trading authority. Therefore, upon the opening of each account, the verification requirements of this rule would apply. However, if a customer whose identification has been verified previously opens a new account, a futures commission merchant or introducing broker would not need to verify the customer's identity a second time, provided it (1) previously verified the customer's identity in accordance with procedures consistent with this rule, and (2) continues to have a reasonable belief that it knows the true identity of the customer.

The rule provides for two methods of verifying identifying information: use of documents and use of non-documentary means. For example, using documents would include obtaining a driver's license or passport from a natural person or articles of incorporation from a company. Non-documentary methods would include cross-checking the information provided by a customer against that supplied by a credit bureau or consumer reporting agency.

The proposed rule requires each futures commission merchant's and introducing broker's CIP to address both methods of verification. Depending on the type of customer and the method of opening an account, it may be more appropriate to use either documents or non-documentary methods. However, in some cases, it may be appropriate to use both methods. The CIP should set forth guidelines describing when documents, non-documentary methods, or a combination of both will be used.

The risk that a futures commission merchant or introducing broker will not know a customer's identity will be heightened for certain types of accounts, such as accounts opened in the name of a corporation, partnership, or trust that is created or conducts substantial business in jurisdictions designated as primary money laundering concerns or that have been designated as non-cooperative by an international body, such as the Financial Action Task Force.

Obtaining sufficient information to verify a given customer's identity can

reduce the risk that a futures commission merchant or introducing broker will be used as a conduit for money laundering and terrorist financing. Each futures commission merchant's and introducing broker's identity verification procedures must be based on its assessment of the factors described in paragraph (b) of the proposed rule. Accordingly, when those assessments suggest a heightened risk, the futures commission merchant and introducing broker should prescribe additional verification measures.

#### 1. Verification Through Documents

Paragraph (d)(1) provides that the CIP must describe when a futures commission merchant or introducing broker will verify identity through documents and set forth the documents that will be used for this purpose. The rule also lists certain documents that are suitable for verification. For natural persons, these documents may include: unexpired government-issued identification evidencing nationality or residence and bearing a photograph or similar safeguard. For other persons, suitable documents would be ones showing the existence of the entity, such as registered articles of incorporation, a government-issued business license, a partnership agreement, or a trust instrument.

#### 2. Verification Through Non-Documentary Methods

Paragraph (d)(2) provides that the CIP must describe non-documentary verification methods and when such methods will be employed in addition to, or instead of, using documents. The rule allows for the exclusive use of non-documentary methods because some accounts are opened by telephone, mail, or over the Internet. However, even if the customer presents documents, it may be appropriate to use non-documentary methods as well. In the end, each futures commission merchant and introducing broker is responsible for employing sufficient verification methods to be able to form a reasonable belief that it knows the true identity of the customer.

The proposed rule sets forth certain non-documentary methods that would be suitable for verifying identity. These methods include contacting a customer after the account is opened; obtaining a financial statement; comparing the identifying information provided by the customer against fraud and bad check databases to determine whether any of the information is associated with known incidents of fraudulent behavior (negative verification); comparing the identifying information with

<sup>13</sup> Treasury and the Commission note that it is possible that futures commission merchants and introducing brokers could violate other laws by permitting a customer to transact business prior to verifying the customer's identity. See, e.g., 31 CFR part 500, prohibiting transactions involving designated foreign countries or their nationals.

information available from a trusted third party source, such as a credit report from a credit bureau or consumer reporting agency (positive verification); and checking references with other financial institutions. Futures commission merchants and introducing brokers also may wish to analyze whether there is logical consistency between the identifying information provided, such as the customer's name, street address, ZIP code, telephone number (if provided), date of birth, and social security number (logical verification).

Paragraph (d)(2) also provides that the CIP must require the use of non-documentary methods in certain cases; specifically, when a natural person is unable to present an unexpired government issued identification document that bears a photograph or similar safeguard or when a futures commission merchant or introducing broker is presented with unfamiliar documents to verify the identity of a customer, does not obtain documents to verify the identity of a customer, does not meet a customer face-to-face, or is otherwise presented with circumstances that increase the risk the futures commission merchant or introducing broker will be unable to verify the true identity of a customer through documents.

Thus, non-documentary methods should be used when the futures commission merchant or introducing broker cannot examine original documents. In addition, Treasury and the Commission recognize that identification documents, including those issued by a government entity, may be obtained illegally and may be fraudulent. In light of the recent increase in identity fraud, futures commission merchants and introducing brokers are encouraged to use non-documentary methods, even when a customer has provided identification documents.

#### *E. Section 103.123(e) Government Lists*

Section 326 of the Act also requires reasonable procedures for determining whether a customer's name appears on any list of known or suspected terrorists or terrorist organizations provided by any government agency. The proposed rule implements this requirement and clarifies that the requirement applies only with respect to lists circulated by the Federal government.

In addition, the proposed rule states that futures commission merchants and introducing brokers must follow all Federal directives issued in connection with such lists. This provision makes clear that futures commission merchants

and introducing brokers must have procedures for responding to circumstances when a customer is named on a list.

#### *F. Section 103.123(f) Customer Notice*

Section 326 of the Act contemplates that financial institutions will provide their customers with "adequate notice" of the customer identification procedures. Therefore, each futures commission merchant's and introducing broker's CIP must include procedures for providing customers with adequate notice that the futures commission merchant or introducing broker is requesting information to verify their identity. A futures commission merchant or introducing broker may satisfy the notice requirement by generally notifying its customers about the procedures it must comply with to verify their identities. For example, a futures commission merchant or introducing broker may post a sign in its lobby or provide customers with any other form of written or oral notice. If an account is opened electronically, such as through an Internet website, the futures commission merchant or introducing broker may provide notice electronically.

#### *G. Section 103.123(g) Lack of Verification*

Paragraph (g) of the proposed rule states that each futures commission merchant's and introducing broker's CIP must include procedures for responding to circumstances in which it cannot form a reasonable belief that it knows the true identity of a customer.

Generally, each futures commission merchant and introducing broker should only maintain an account for a customer when it has a reasonable belief that it knows the customer's true identity.<sup>14</sup> Thus, each futures commission merchant's and introducing broker's CIP should specify the actions to be taken when it cannot form a reasonable belief. There also should be guidelines for when an account will not be opened. In addition, the CIP should address the terms under which a customer may conduct transactions while a customer's identity is being verified. The CIP should specify at what point, after attempts to verify a customer's identity have failed, an account that has been opened should be closed. Finally, the procedures should include a process for determining whether, in connection

with conducting customer identification or verification, a Suspicious Activity Report should be filed.

#### *H. Section 103.123(h) Recordkeeping*

Section 326 of the Act requires procedures for maintaining records of the information used to verify a person's identity, including name, address, and other identifying information. Paragraph (h) of the proposed rule sets forth recordkeeping procedures that must be included in each futures commission merchant's and introducing broker's CIP. These procedures must provide for the maintenance of all information and documents obtained pursuant to the CIP. Information that must be maintained includes all identifying information provided by a customer pursuant to paragraph (c). Thus, the futures commission merchant and introducing broker must make a record of each customer's name, date of birth (if applicable), addresses, and tax identification number or other number. Futures commission merchants and introducing brokers also must maintain copies of any documents that were relied upon to verify identity pursuant to paragraph (d)(1), evidencing the type of document and any identification number it may contain. For example, if a customer produces a driver's license, the futures commission merchant or introducing broker must make a copy of the driver's license that clearly indicates it is a driver's license and legibly depicts any identification number on the license.

Futures commission merchants and introducing brokers also must make and maintain records evidencing the methods and results of measures undertaken to verify the identity of a customer pursuant to paragraph (d)(2). For example, if a futures commission merchant or introducing broker obtains a report from a credit bureau concerning a customer, the report must be maintained. Futures commission merchants and introducing brokers also must make and maintain records of the resolution of any discrepancy in the identifying information obtained. To continue with the previous example, if the customer provides a residence address that is different from the address shown on the credit report, the futures commission merchant or introducing broker must document how it resolved this discrepancy or, if the discrepancy was not resolved, how it formed a reasonable belief notwithstanding the discrepancy.

Futures commission merchants and introducing brokers must retain all of these records for five years after the date an account is closed or the grant of

<sup>14</sup> There are some exceptions to this basic rule. For example, a futures commission merchant or introducing broker may introduce or maintain an account, at the direction of law enforcement, notwithstanding that it does not know the true identity of a customer.



authority to effect transactions with respect to an account is revoked. In all other respects, the records must be maintained in accordance with the requirements of Commission Rule 1.31.<sup>15</sup>

Nothing in this proposed rule modifies, limits or supersedes section 101 of the Electronic Records in Global and National Commerce Act, Public Law 106-229, 114 Stat. 464 (15 U.S.C. 7001) (E-Sign Act). Thus, futures commission merchants and introducing brokers may use electronic records to satisfy the requirements of this rule, as long as the records are maintained in accordance with Commission Rules 1.4 and 1.31.<sup>16</sup>

Treasury and the Commission emphasize that the collection and retention of information about a customer as an ancillary part of collecting identifying information, do not relieve futures commission merchants and introducing brokers from their obligations to comply with anti-discrimination laws or regulations.

#### *I. Section 103.123(i) Approval of Program*

Paragraph (i) of the proposed rule requires that each futures commission merchant's and introducing broker's CIP be approved by its most senior level (e.g., board of directors, managing partners, board of managers or other governing body performing similar functions) or by persons specifically authorized by that body to approve such a program.

#### *J. Section 103.123(j) Exemptions*

Section 326 states that the Secretary and the Federal functional regulator jointly issuing the rule may by order or regulation exempt any financial institution or type of account from this rule in accordance with such standards and procedures as the Secretary may prescribe. The proposed rule provides that the Commission, with the concurrence of the Secretary, may exempt any futures commission merchant or introducing broker that registers with the Commission. However, it excludes from this exemptive authority futures commission merchants and introducing brokers that register pursuant to section 4f(a)(2) of the CEA. These are firms that register as futures commission merchants or introducing brokers solely because they deal in security futures products. The exemptive authority with respect to these firms is addressed in the rule issued jointly by Treasury and the SEC.

In issuing exemptions under the proposed rule, the Secretary and the Commission shall consider whether the exemption is consistent with the purposes of the BSA, and in the public interest, and may consider other necessary and appropriate factors.

### **III. Request for Comments**

Treasury and the Commission invite comment on all aspects of the proposed rule, and specifically seek comment on the following issues:

1. Whether the proposed definition of "account" is appropriate.

2. How the proposed rule should apply to various types of accounts that are designed to allow a customer to transact business immediately.

3. Ways that futures commission merchants and introducing brokers can comply with the requirement to obtain both the address of a person's residence, and, if different, the person's mailing address in situations involving natural persons who lack a permanent address.

4. Whether non-U.S. persons that are not natural persons will be able to provide futures commission merchants and introducing brokers with the identifying information required in § 103.123(c)(4), or whether other categories of identifying information should be added to this section. Commenters on this issue should suggest other means of identification that futures commission merchants and introducing brokers currently use or should use in this circumstance.

5. Whether the proposed rule will subject futures commission merchants and introducing brokers to conflicting State laws. Treasury and the Commission request that commenters cite and describe any potentially conflicting State laws.

6. The extent to which the verification procedures required by the proposed rule make use of information that futures commission merchants and introducing brokers currently obtain in the account opening process. We note that the legislative history of section 326 indicates that Congress intended "the verification procedures prescribed by Treasury [to] make use of information currently obtained by most financial institutions in the account opening process." See H.R. Rep. No. 107-250, pt. 1, at 63 (2001).

### **IV. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. Because this proposed rulemaking

contains information collection requirements within the meaning of the PRA, FinCEN has submitted the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for its review in accordance with 44 U.S.C. 3507(d).

An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

The proposed rule requires futures commission merchants and introducing brokers to implement reasonable procedures to (1) maintain records of the information used to verify the person's identity and (2) provide notice of these procedures to customers. These recordkeeping and disclosure requirements are required under section 326 of the Act.

The Commission estimates that approximately 188 futures commission merchants and 1593 introducing brokers will need to implement a CIP. Further, the Commission estimates that each futures commission merchant and introducing broker will need to spend approximately 10 hours per year to meet the recordkeeping requirements of the proposed rule.<sup>17</sup> Further, Treasury and the Commission estimate that each futures commission merchant and introducing broker will need to spend approximately one hour per year to meet the disclosure requirements of the new rule. Therefore, the estimated paperwork burden of this proposed rule is calculated as follows:

*Estimated number of respondents:* 1781.

*Estimated average annual burden for the recordkeeping requirements of the proposed rule for each respondent:* 10 hours.

*Estimated average annual burden for the disclosure requirements of the proposed rule per each respondent:* 1 hour.

*Estimated total annual burden:* 19,591 hours.

<sup>17</sup> The Commission believes that futures commission merchants and introducing brokers already obtain from their customers most, if not all, of the information required under the proposed rule. See Commission Rule 1.37, 17 CFR 1.37 (requiring futures commission merchants and introducing brokers to obtain the customer's true name, address, principal occupation or business, name of guarantor, and name of person controlling the account), and NFA Compliance Rule 2-30 (futures commission merchants and introducing brokers are required to obtain, with respect to customers that are individuals, the customer's true name, address, principal occupation or business, estimated annual income and net worth, and approximate age). Futures commission merchants and introducing brokers are required to maintain these records pursuant to Commission Rule 1.31, 17 CFR 1.31, and NFA Compliance Rule 2-10.

<sup>15</sup> 17 CFR 1.31.

<sup>16</sup> 17 CFR 1.4, 1.31.



Treasury and the Commission invite comment on:

(1) Whether the collections of information contained in the notice of proposed rulemaking are necessary for the proper performance of each agency's functions, including whether the information has practical utility;

(2) The accuracy of the Commission's estimate of the burden of the proposed information collections;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) Ways to minimize the burden of the information collections on respondents, including the use of automated collection techniques or other forms of information technology; and

(5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of services to provide information.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them (preferably by fax (202-395-6974)) 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 [jlackey@omb.eop.gov](mailto:jlackey@omb.eop.gov)), with a copy to FinCEN by mail or the Internet at the addresses previously specified.

#### V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The rule proposed today would affect futures commission merchants and introducing brokers. The CFTC previously established certain definitions of "small entities" to be used in evaluating the impact of its rules in accordance with the RFA.<sup>18</sup> The Commission has previously determined that futures commission merchants are not small entities for the purpose of the RFA.<sup>19</sup> With respect to introducing brokers, the Commission has stated that it would evaluate within the context of a particular rule proposal whether all or some affected introducing brokers would be considered to be small entities and, if so, the economic impact on them of any rule.<sup>20</sup> The Commission believes that all introducing brokers will be affected by this rule, including small introducing brokers. However, the Commission does not believe that the

economic impact of the rule will be significant. First, the information being collected by introducing brokers is, for the most part, already required to be collected by CFTC rules and by self-regulatory organization rules.<sup>21</sup> Second, each introducing broker will be able to tailor its CIP to fit its own size and needs; the rule provides for flexibility in how they will meet their requirements. Lastly, the CFTC believes that any expenditure associated with establishing and implementing a CIP will be commensurate with the size of an introducing broker. If an introducing broker is small, its economic burden should be *de minimis*. For these reasons, the Commission does not expect the rule, as proposed herein, to have a significant economic impact on a substantial number of small entities. Accordingly, it is hereby certified pursuant to 5 U.S.C. 605(b), that the proposed rule will not have a significant economic impact on a substantial number of small entities. Treasury and the Commission invite the public to comment on this finding.

#### VI. Commission's Analysis of the Costs and Benefits Associated With the Proposed Rule

Section 15(a) of the CEA requires the CFTC to consider the costs and benefits of its action before issuing a new regulation. The CFTC understands that, by its terms, section 15(a) does not require the CFTC to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Nor does it require that each proposed rule be analyzed in isolation when that rule is a component of a larger package of rules or rule revisions. Rather, section 15(a) simply requires the CFTC to "consider the costs and benefits" of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the CFTC could in its discretion give greater weight to any one of the five enumerated areas of concern and could in its discretion determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

Section 326 of the Act requires Treasury and the Commission to prescribe regulations setting forth minimum standards for futures commission merchants and introducing brokers regarding the identities of customers that shall apply in connection with the opening of an account. The statute also provides that the regulations issued by Treasury and the Commission must, at a minimum, require financial institutions to implement reasonable procedures for: (1) Verification of customers' identities; (2) determination of whether a customer appears on a government list; and (3) maintenance of records related to customer verification. The proposed rule implements this statutory mandate by requiring futures commission merchants and introducing brokers to (1) establish a CIP; (2) obtain certain identifying information from customers; (3) verify identifying information of customers; (4) check customers against lists provided by federal agencies; (5) provide notice to customers that information may be requested in the process of verifying their identities; and (6) make and maintain records. The Commission believes that these requirements are reasonable and practicable, as required by section 326 and, therefore, that the costs associated with them are attributable to the statute. Moreover, while the proposed rule specifies certain minimum requirements, futures commission merchants and introducing brokers will be able to design their CIPs in a manner most appropriate to their business models and customer bases. This flexibility should help them to tailor their CIPs appropriately, while still meeting the statutory requirements of section 326.

The proposed rule is not related to the marketplace and thus should not affect the protection of market participants; the efficiency, competitiveness, and financial integrity of futures markets; price discovery; or sound risk management practices. This proposed rule does, however, address other public interest considerations, namely, the prevention and detection of money laundering and financing of terrorism. As noted elsewhere in this preamble, the CFTC believes the costs associated with implementing CIPs, which are mandated by section 326 of the Act, will be small. On the other hand, the benefits include a reduced risk of futures commission merchants and introducing brokers unwittingly aiding criminals, including terrorists, in laundering money or moving funds for illicit purposes. Additionally, the

<sup>18</sup> See 47 FR 18618 (April 30, 1982).

<sup>19</sup> See 47 FR at 18619.

<sup>20</sup> See *id.*

<sup>21</sup> See, *supra*, page 34 n.17.

implementation of such programs should make it more difficult for persons to successfully engage in fraudulent activities involving identity theft.

## VII. Executive Order 12866

Treasury has determined that this proposed rule is not a "significant regulatory action" for purposes of Executive Order 12866. The rule follows closely the requirements of section 326 of the Act. Moreover, as indicated above, Treasury and the Commission believe that futures commission merchants and introducing brokers already have procedures in place that fulfill most of the requirements of the proposed rule. First, the procedures are a matter of good business practice. Second, futures commission merchants and introducing brokers already are required to have BSA compliance programs that address many of the requirements detailed in this notice of proposed rulemaking. Third, futures commission merchants and introducing brokers should already have compliance programs in place to ensure they comply with Treasury's Office of Foreign Assets Control rules prohibiting transactions with certain foreign countries or their nationals. Accordingly, a regulatory impact analysis is not required.

### Lists of Subjects in 31 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Banks, Banking, Brokers, Commodity futures, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Law enforcement, Penalties, Reporting and recordkeeping requirements, Securities.

### Authority and Issuance

For the reasons set forth in the preamble, part 103 of title 31 of the Code of Federal Regulations 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 revised to read as follows:

**Authority:** 12 U.S.C. 1786(q), 1818, 1829b and 1951–1959; 31 U.S.C. 5311–5332; title III, secs. 312, 313, 314, 319, 326, 352, Pub L. 107–56, 115 Stat. 307.

2. Subpart I of part 103 is amended by adding new section 103.123 to read as follows:

### § 103.123 Customer Identification Programs for futures commission merchants and introducing brokers.

(a) *Definitions.* For the purposes of this section:

(1) *Account* means any formal business relationship with a futures commission merchant, including, but not limited to, those established to effect transactions in contracts of sale for future delivery, options on contracts of sale for future delivery, or options on physicals in any commodity.

(2) *Commission* means the United States Commodity Futures Trading Commission.

(3) *Commodity* means any good, article, service, right, or interest described in Section 1a(4) of the Commodity Exchange Act, 7 U.S.C. 1a(4).

(4) *Customer.* (i) The term customer means:

(A) Any person who opens a new account with a futures commission merchant; and

(B) Any person who is granted authority to effect transactions with respect to an account with a futures commission merchant.

(ii) Where an account is introduced to a futures commission merchant by an introducing broker, a person opening the account or granted authority to effect transactions with respect to the account is a customer of both the futures commission merchant and the introducing broker.

(5) *Futures commission merchant* means any person registered or required to be registered as a futures commission merchant with the Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.), except persons who register pursuant to section 4f(a)(2) of the Commodity Exchange Act, 7 U.S.C. 6f(a)(2).

(6) *Introducing broker* means any person registered or required to be registered as an introducing broker with the Commission under the Commodity Exchange Act, except persons who register pursuant to section 4f(a)(2) of the Commodity Exchange Act.

(7) *Option* means an agreement, contract or transaction described in Section 1a(26) of the Commodity Exchange Act, 7 U.S.C. 1a(26).

(8) *Person* has the same meaning as that term is defined in § 103.11(z).

(9) *U.S. person* means:

(i) A U.S. citizen; or

(ii) A corporation, partnership, trust or person (other than an individual) that is established or organized under the laws of a State or the United States.

(10) *Non-U.S. person* means a person that is not a *U.S. person*.

(11) *Taxpayer identification number.* The provisions of section 6109 of the

Internal Revenue Code of 1986 (26 U.S.C. 6109) and the regulations of the Internal Revenue Service promulgated thereunder shall determine what constitutes a taxpayer identification number.

(b) *Customer Identification Program.* Each futures commission merchant and introducing broker shall implement a written Customer Identification Program (Program) that shall be based on the type of identifying information available and on an assessment of the varying risks associated with the futures commission merchant's or the introducing broker's size, location, methods of opening accounts, types of accounts and transactions, customer base, and reliance, if any, on another futures commission merchant or introducing broker with which it shares an account relationship. Each futures commission merchant's and introducing broker's procedures must enable it to form a reasonable belief that it knows the true identity of its customers. The Program should be a part of each futures commission merchant's and introducing broker's anti-money laundering program required under 31 U.S.C. 5318(h).

(c) *Required information—*(1) *General.* Except as permitted by paragraph (c)(2) of this section, each Program shall require the futures commission merchant or the introducing broker to obtain specified identifying information about each of their customers. The Program shall require that this minimum information be obtained prior to opening a customer's account or granting a customer authority to effect transactions with respect to an account. At a minimum, the specified identifying information shall include:

(i) Name;

(ii) Date of birth, for natural persons;

(iii) Addresses:

(A) Residence and mailing (if different) for natural persons; or

(B) Principal place of business and mailing (if different) for persons other than natural persons; and

(iv) Identification number:

(A) For U.S. persons, a U.S. taxpayer identification number (e.g., social security number, or employer identification number); or

(B) For non-U.S. persons, a U.S. taxpayer identification number, a passport number and country of issuance, an alien identification card number, or the number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard.

(2) *Limited exception.* The Program may permit the futures commission

merchant or introducing broker to open or add a signatory to an account for a person other than an individual (such as a corporation, partnership, or trust) that has applied for, but has not received, an employer identification number. However, in such a case, the futures commission merchant or introducing broker must obtain a copy of the application before it opens or adds a signatory to the account and obtain the employer identification number within a reasonable period of time after it opens or adds a signatory to the account.

(d) *Required verification procedures.* Each Program shall contain risk-based procedures for verifying the identity of customers, to the extent reasonable and practicable. Such verification must occur within a reasonable time before or after the customer's account is opened or the customer is granted authority to effect transactions with respect to an account. A futures commission merchant or introducing broker need not verify the information about an existing customer who opens a new account or who is granted authority to effect transactions with respect to a new account, if it previously verified the customer's identity in accordance with procedures consistent with this paragraph (d), and continues to have a reasonable belief that it knows the true identity of the customer.

(1) *Verification through documents.* Each Program must describe when the futures commission merchant or introducing broker will verify identity through documents and set forth the documents that it will use for this purpose. Suitable documents for verification may include:

(i) For natural persons, an unexpired government-issued identification evidencing nationality or residence and bearing a photograph or similar safeguard; and

(ii) For persons other than natural persons, documents showing the existence of the entity, such as registered articles of incorporation, a government-issued business license, a partnership agreement, or a trust instrument.

(2) *Verification through non-documentary methods.* Each Program must describe non-documentary methods the futures commission merchant or introducing broker will use to verify their customer's identity and

when these methods will be used in addition to, or instead of, relying on documents. These non-documentary methods may include, but are not limited to, contacting a customer; obtaining a financial statement; independently verifying information through credit bureaus, public databases, or other sources; and checking references with other financial institutions. Non-documentary methods shall be used when: a natural person is unable to present an unexpired government-issued identification document that bears a photograph or similar safeguard; the futures commission merchant or introducing broker is presented with unfamiliar documents to verify the identity of a customer; the futures commission merchant or introducing broker does not obtain documents to verify the identity of a customer; does not meet a customer face-to-face; or is otherwise presented with circumstances that increase the risk the futures commission merchant or introducing broker will be unable to verify the true identity of a customer through documents.

(e) *Government lists.* Each Program shall include procedures for determining whether a customer's name appears on any list of known or suspected terrorists or terrorist organizations provided to the futures commission merchant or introducing broker by any federal government agency. Futures commission merchants and introducing brokers shall follow all federal directives issued in connection with such lists.

(f) *Customer notice.* Each Program shall include procedures for providing customers with adequate notice that the futures commission merchant or introducing broker is requesting information to verify their identity.

(g) *Lack of verification.* Each Program shall include procedures for responding to circumstances in which the futures commission merchant or introducing broker cannot form a reasonable belief that it knows the true identity of a customer.

(h) *Recordkeeping.* (1) The Program shall include procedures for maintaining a record of all information obtained pursuant to the Program, including:

(i) All identifying information provided by a customer pursuant to paragraph (c) of this section, and copies

of any documents that were relied on pursuant to paragraph (d)(1) of this section evidencing the type of document and any identification number it may contain;

(ii) The methods and results of any measures undertaken to verify the identity of a customer through non-documentary methods pursuant to paragraph (d)(2) of this section; and

(iii) The resolution of any discrepancy in the identifying information obtained.

(2) Futures commission merchants and introducing brokers must retain all records made or obtained when verifying the identity of a customer pursuant to a Program until five years after the date the account of the customer is closed or the grant of authority to effect transactions with respect to an account is revoked. In all other respects, the records shall be maintained pursuant to the provisions of 17 CFR 1.31.

(i) *Approval of program.* Each Program shall be approved by the futures commission merchant's or introducing broker's board of directors, managing partners, board of managers or other governing body performing similar functions or by a person or persons specifically authorized by such bodies to approve the Program.

(j) *Exemptions.* The Commission, with the concurrence of the Secretary, may by order or regulation exempt any futures commission merchant or introducing broker that registers with the Commission (except futures commission merchants or introducing brokers that register pursuant to section 4f(a)(2) of the Commodity Exchange Act) or any type of account from the requirements of this section. In issuing such exemptions, the Commission and the Secretary shall consider whether the exemption is consistent with the purposes of the Bank Secrecy Act, and in the public interest, and may consider other necessary and appropriate factors.

Dated: July 15, 2002.

**James F. Sloan,**

*Director, Financial Crimes Enforcement Network.*

Dated: July 10, 2002.

**Jean A. Webb,**

*Secretary of the Commodity Futures Trading Commission.*

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