FUTURES INDUSTRY ASSOCIATION
INC.
2001 Pennsylvania Avenue N.W. • Suite 600 • Washington, DC 20006-1807 • (202) 466-5460
Fax: (202) 296-3184

July 7, 2003

Judith R. Starr, Chief Counsel
Financial Crimes Enforcement Network
Department of the Treasury
Vienna, VA 22183

Attention: NPRM—Suspicious Transaction Reporting—Futures Commission Merchants and Introducing Brokers in Commodities, 68 Fed. Reg. 23,653 (May 5, 2003)

Dear Ms. Starr:

The Futures Industry Association ("FIA")[1] appreciates this opportunity to express its support of the proposed Suspicious Transaction Reporting Rule for Futures Commission Merchants ("FCMs") and Introducing Brokers in Commodities ("IB-Cs") (hereafter "Proposed FCM SAR Rule"), proposed by the Department of the Treasury ("Treasury") pursuant to the USA PATRIOT Act of 2001 ("PATRIOT Act")[2]. FIA supports Treasury's anti-money laundering efforts and has worked with Treasury and the Commodity Futures Trading Commission ("CFTC") to propose anti-money laundering rules for the futures industry. FIA welcomes Treasury's clarification of its Bank Secrecy Act ("BSA") reporting responsibilities and its suspicious activity reporting ("SAR") responsibilities.

Our comments below are designed primarily to seek clarification on certain points and to suggest revisions that will enhance further the SAR reporting program of FCMs and IB-Cs. This letter addresses certain issues with respect to the Proposed FCM SAR Rule as follows: (1) whether dually-registered FCM/broker-dealers can rely on the reporting exception for the filing of SARs, where they report violations to the Securities and Exchange Commission

---

[1] FIA is a principal spokesperson for the commodity futures and options industry. Our regular membership is comprised of approximately 40 of the largest futures commission merchants in the United States. Among our approximately 150 associate members are representatives of virtually all other segments of the futures industry, both national and international, including U.S. and international exchanges, banks, legal and accounting firms, introducing brokers, commodity trading advisors, commodity pool operators and other market participants, and information and equipment providers. Reflecting the scope and diversity of our membership, FIA estimates that our members effect more than 90 percent of all customer transactions executed on U.S. contract markets. (More information about FIA is available on its home page: http://www.futuresindustry.org.)

[2] "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001," Pub. L. No. 107-56 (2001), signed into law by President Bush on October 26, 2001.

("SEC") or a self-regulatory organization ("SRO") (collectively, "Securities Regulators") as part of their responsibilities as registered broker-dealers; (2) whether two U.S. FCMs that participate in the same transaction on behalf of the same customer (*e.g.,* in a give-up arrangement) can file a single suspicious activity report ("SAR-SF") in the same way that an FCM and IB-C are permitted in the context of a sharing arrangement; and (3) whether the ability to share information in the context of a sharing arrangement between an FCM and IB-C also applies where the introducing firm is a non-U.S. firm that is not registered with the CFTC, or where one of the brokers in a give-up arrangement is a non-U.S. firm, or where an FCM shares customers with a commodity trading advisor ("CTA").

1. Reporting Exceptions from SAR Filings for Filing a Violation with the Securities Regulators

The Proposed FCM SAR Rule sets forth an exception for an FCM or IB-C from reporting suspicious activities through the filing of a SAR-SF if it reports "[a] violation otherwise required to be reported under the CEA, ... the regulations of the CFTC ... or the rules of any registered futures association [*i.e.*, the National Futures Association ("NFA")] or registered entity [*e.g.,* a board of trade designated as a contract market] ... [if] such violation is appropriately reported to the CFTC or registered futures association or registered entity."[3] (The exception does not apply to violations of the BSA.) Under the rule implementing section 356(a) of the PATRIOT Act (the "Broker-Dealer SAR Rule"),[4] broker-dealers are similarly exempt from the SAR reporting requirement for any violation of the securities laws or SRO rules that a broker-dealer is required to report and appropriately reports under existing industry procedures, so long as the reportable event does not involve a violation of the BSA rules.[5]

It is unclear, however, whether an FCM that is a dual-registrant can rely on the reporting exception if it appropriately reports a non-BSA violation of the commodities laws to the Securities Regulators (*e.g.*, on a Form U-4, a U-5 or an RE-3), since the exception only refers to instances in which the FCM reports such violations to the CFTC, a registered futures association or a registered entity. One situation where this issue would logically arise is where a non-registered employee is terminated for embezzling funds from a customer, and the FCM files an RE-3 with the Securities Regulators. In this situation, it would not seem to be necessary for the FCM to file a SAR-SF, as well. Although it seems logical that a dually registered FCM reporting a violation to the Securities Regulators should be able to rely on the

---

[3] 31 C.F.R. § 103.17(c)(1)(ii).

[4] 31 C.F.R. § 103.19; 67 Fed. Reg. 44,048 (July 1, 2002).

[5] 31 C.F.R. § 103.19(c)(ii).

exception, Treasury did not address this scenario in the Proposed FCM SAR Rule or in the Preamble to the Proposed Rule.

We believe that an FCM that is dually registered as a broker-dealer should be able to rely on the exception to the SAR rule where it reports to the Securities Regulators in the same way that broker-dealers are permitted to do so, provided that it also files a copy of the form with the CFTC or registered futures association or registered entity. Indeed, Treasury notes in the Preamble to the Proposed Rule that it intends the Proposed Rule to "have the same effect" as the Broker-Dealer SAR Rule.[6] FIA therefore requests that, under the Final FCM SAR Rule, dually-registered FCMs be permitted to rely on the reporting exception to suspicious activity reporting contained in the FCM SAR Rule, if they appropriately report violations to the CFTC, a registered futures association or a registered entity or to the SEC, or applicable SRO.[7]

The Broker-Dealer SAR Rule also provides that to the extent a Form RE-3, Form U-4 or Form U-5 is filed consistent with SRO rules, the document is deemed a sufficient record for purposes of the SAR filing exception.[8] FIA requests Treasury similarly to provide that the filing of a comparable futures regulatory document (*e.g.*, Forms 8-T, 3-R, 7-R and 8-R) consistent with applicable regulatory rules will be deemed a sufficient record for purposes of the SAR filing exception in the Final FCM SAR Rule.

In addition, broker-dealers can rely on the reporting exception to the Broker-Dealer SAR Rule whether their reporting procedures are "formal or informal."[9] Treasury does not specifically address the issue of formal versus informal reporting in the Proposed FCM SAR Rule or its Preamble. We assume that where informal reporting would satisfy a futures industry requirement to report a violation (other than a violation of the BSA and its implementing regulations), such informal reporting would fall within the exception from SAR reporting in the Proposed FCM SAR Rule. FIA requests that the final rule recognize the ability of FCMs to make such reports on a formal or informal basis, as presently permitted under the Broker-Dealer SAR Rule.

---

[6] 68 Fed. Reg. 23,653, 23,656 (May 5, 2003).

[7] Conversely, FIA believes that under the Broker-Dealer SAR Rule, a broker-dealer that is dually-registered as an FCM should be able to rely on the exception for reporting violations to the CFTC or registered futures association or registered entity in the same way that an FCM is permitted to do so.

[8] 31 C.F.R. § 103.19(c)(2).

[9] 67 Fed. Reg. at 44,051.

2. Single Filing of SAR-SFs for U.S. FCMs that Share Customer Relationships

The Proposed FCM SAR Rule explicitly provides only one scenario involving the filing of a single SAR-SF by an FCM and another financial institution—that of an IB-C. Specifically, the Proposed Rule provides that "[t]he 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 the IB-C involved in the particular transaction (as long as the report filed contains all relevant facts)."[10] In contrast, the Broker-Dealer SAR Rule provides "[t]he obligation to identify and properly and timely to report a suspicious transaction rests with *each broker-dealer* involved in the transaction, provided that no more than one report is required to be filed by the *broker-dealers* involved in a particular transaction (so long as the report filed contains all relevant facts)."[11]

Moreover, Treasury indicates in the Preamble that it anticipates that the FCM and the IB-C will consult with each other in preparing the SAR-SF to ensure that only one accurate and complete SAR-SF is filed. This sharing of information is explicitly permitted under the provision in the Proposed FCM SAR Rule addressing "Confidentiality of Reports."[12] That section prohibits a financial institution from notifying any person involved in the transaction that the transaction is reported, "except to the extent permitted under paragraph (a)(3) of this section," which allows FCMs and IB-Cs to file a single SAR.

The Preamble and the language of the Proposed FCM SAR Rule itself specifically only address the situation in which both an FCM and an IB-C are involved in a transaction. Therefore, the single filing provision does not clearly apply to a situation where two U.S. FCMs participate in the same transaction on behalf of the same customer (*e.g.*, "give-up" arrangements involving a U.S. clearing FCM and a U.S. executing FCM), where both FCMs are involved in reviewing a suspicious transaction.[13] Likewise, while Treasury recognizes that the exception to the confidentiality requirements of the Proposed Rule allows an FCM and an IB-C to discuss a suspicious transaction, it does not specifically address the issue of

---

[10] 31 C.F.R. § 103.17(a)(3); 68 Fed. Reg. at 23,657.

[11] 31 C.F.R. § 103.19(a)(3) (emphasis added).

[12] 31 C.F.R. § 103.17(e).

[13] We address situations involving a non-U.S. futures broker, below. For a more detailed discussion of give-up arrangements, *see* FIA's March 6, 2003 comment letter to the USA PATRIOT Act Task Force of Treasury, entitled "Anti-Money Laundering Rules Affecting Futures Commission Merchants."

information sharing between a U.S. clearing FCM and a U.S. executing FCM in the context of a give-up arrangement.

There is no reason to treat U.S. FCMs differently than broker-dealers in this context. As the identical responsibilities and procedures could easily apply to such arrangements, and the relationship between the clearing and executing FCMs and their shared customer in a give-up arrangement are clearly analogous in this particular context to that of an FCM and IB-C in a sharing arrangement, FIA requests that the provision allowing the single filing of a SAR-SF and the related sharing of information be expanded in the Final FCM SAR Rule to include situations in which two or more U.S. FCMs participate in the same transaction on behalf of the same customer, such as give-up arrangements between U.S. clearing and U.S. executing FCMs.[14]

3. Application of Sharing Provision Between a U.S. FCM and Certain Other Entities

As noted, FCMs and IB-Cs are not prohibited from sharing information with one another when discussing a suspicious activity. Under the regulations implementing the BSA, an "Introducing Broker-Commodities" is defined as "[a]ny 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) [a notice-registered IB-C]."[15] Since introducing firms that are foreign brokers are not required to register with the CFTC,[16] they would not fall within the definition of IB-Cs under the BSA. Thus, an FCM sharing a customer with an introducing firm that is a foreign broker technically could not rely on the sharing provisions under the Proposed FCM SAR Rule.

While we recognize that the FCM cannot rely in this context on the foreign introducing firm for purposes of a single SAR filing,[17] we believe that it is important for the FCM to be able to obtain information from the foreign introducing broker without concern as

---

[14] When two broker-dealers file a single SAR-SF under the Broker-Dealer SAR Rule, Treasury also permits the broker-dealer that filed the SAR-SF to share with the other broker-dealer a copy of the filed SAR-SF. 67 Fed. Reg. at 44,052. FIA requests that this provision be applied to the single filing of SAR-SFs under the Final FCM SAR Rule.

[15] 31 C.F.R. § 103.11(aaa).

[16] A firm meeting the CFTC's definition of "foreign broker" that conducts transactions on behalf of its non-U.S. customers through an FCM, is not required to register with the CFTC. *See* 48 Fed. Reg. 35,248, 35,261 (Aug. 3, 1983).

[17] A foreign broker is not required under the BSA to report suspicious activities. However, it is likely that it would be obligated to file such reports under non-U.S. law.

to whether it is covered by the Proposed Rule's exception to confidentiality pursuant to section 103.17(e).[18] In fact, an FCM could not in most instances make a determination whether to file a SAR-SF without a discussion with the foreign broker.

A similar situation arises when a U.S. FCM is involved in a give-up arrangement with a non-U.S. futures broker. While the latter has no obligation to report suspicious activities under U.S. law, the non-U.S. futures broker can be the primary contact with the customer or possess significant information with respect to a suspicious transaction. The U.S. FCM may therefore depend on obtaining information from the non-U.S. futures broker to complete its suspicious activity investigative and reporting responsibilities.

Yet another similar situation involves the sharing of customers between FCMs and CTAs. Since CTAs can be the primary contact with customers or possess significant information with respect to a suspicious transaction, it would be logical to extend the exception to confidentiality provision to situations where FCMs and CTAs share customers, so that the FCM can complete its suspicious activity investigative and reporting responsibilities in these situations as well.

As such customer sharing arrangements are common and identical procedural safeguards could easily apply in these particular contexts as well, FIA requests that Treasury clarify that FCMs that share accounts either with introducing firms that are foreign brokers, or other non-U.S. futures brokers, or CTAs, be permitted to share information, under the exception to confidentiality provision contained in the Proposed FCM SAR Rule.

Thank you for the opportunity to relate our positions on these important issues. We hope the above issues and concerns will be carefully considered by the Treasury in the finalization of the Proposed Rule. If you wish to receive additional information related to our comments, please feel free to contact us.

Sincerely,

/s/

Barbara Wierzynski
General Counsel and Executive Vice President

cc: Patrick J. McCarty, General Counsel, Commodity Futures Trading Commission
Edward Riccobene, Counsel to Director, Division of Enforcement,
Commodity Futures Trading Commission

---

[18] This is even more important in the context of this rule since FCMs cannot share information with such a foreign introducing broker through the use of Section 314 (b) of the PATRIOT Act. *See* 31 C.F.R. § 103.110.

Thomas W. Sexton III, General Counsel, National Futures Association

Larson, Stacie

From: Foley, Kevin M. [kmfoley@uhlaw.com]
Sent: Monday, July 07, 2003 5:24 PM
To: regcomments@fincen.treas.gov
Cc: Barbara Wierzynski (E-mail); Patrick J. McCarthy (E-mail); Edward Riccobene (E-mail); Thomas W. Sexton III (E-mail)
Subject: NPRM-Suspicious Transaction Reprting-Futures Commission Merchants and Introducing Brokers in Commodities

Suspicious ransaction Reporti..

Ladies and Gentlemen:

On behalf of the Futures Industry Association, attached is a comment letter on the above referenced proposed rule. If you have any questions or comments concerning the matters discussed in this comment letter, please contact Barbara Wierzynski, General Counsel, Futures Industry Association, at (202) 466-5460.

With best regards,

Kevin M. Foley

<<Suspicious Transaction Reporting Comment Letter.doc>>