hours may include hours conducted through on-line training.

(b) A course of instruction that provides a coordinated and comprehensive overview of ADR theory and practice.

(c) Practicum that includes a method of objective evaluation individualized feedback for the student.

(d) Staff qualifications, which include but are not limited to, the overall staff being trained in the theory and practice of ADR techniques and workplace issues.

**§ 1480.24 Review of programs.**

A review of the programs for educational institutions for the purpose of pre-accreditation will occur every three (3) years; a review of the programs for training providers for the purpose of pre-accreditation will occur every two (2) years.

**§ 1480.25 Training programs.**

FMCS will offer a comprehensive training program for the purpose of providing the applicants the opportunity to obtain the maximum number of points under the Point System for Determining Qualifications for the FMCS Registry of Neutrals. Applicants will not be required to attend the FMCS program, nor will applicants who attend the program be given preferential treatment over pre-accredited providers.

**Appendix A—Schedule of Fees**

1. *Application fee:* $250.00 for each application (In the event the applicant does not obtain the minimum of 10 points necessary to obtain consideration of his/her application, but submits additional information within one year of the original application, he/she will not be required to pay an additional fee for consideration of the application.

2. *Annual listing fees for neutrals:* This will be established based on the number of neutrals listed on the Registry of Neutrals.

3. *Request for panel of neutrals:* $50.00 for each panel request (includes subsequent appointments).

4. *Requests for appointment of neutral:* $50.00 for appointment when a panel is not requested.

5. *Requests for pre-accreditation:* To be determined based on expenses and number of hours required to review the process.

**Appendix B—Point System for Determining Qualifications for the FMCS Registry of Neutrals**

A list of the categories in which a candidate is able to obtain points towards selection for the FMCS Registry of Neutrals is set forth in this Appendix. A minimum of 10 points will be required for inclusion on the FMCS Registry of Neutrals.

1. *ADR experience* (0–9 points, at least 1 point is required in this area) *

9 points: Substantial ADR experience with large and complex cases of significance (large money cases, large number of complex issues or complex relationships between the parties, cases of national significance)

7 points: Conduct or co-conduct 120 ADR procedures in employment dispute cases

5 points: Conduct or co-conduct 80 employment cases or 120 other cases, of which 40 must be employment cases

3 points: Conduct or co-conduct 40 employment cases or 80 other cases, of which 20 must be employment cases

1 point: Conduct or co-conduct 20 employment cases or 50 other cases, of which 10 must be employment cases

* ADR experience may include acting as a third party neutral in any dispute procedure that is used in lieu of adjudication to resolve issues in controversy including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials or any combination thereof. For the purpose of this application, arbitration is specifically excluded from the definition of alternative dispute resolution procedure. To count as a case, the neutral must have been present for at least one face-to-face, or electronic meeting, between/among participants.

2. *ADR education/training* (0–5 points, at least 1 point is required in this area **)

5 points: Documentation of successful completion of an established academic course of study in conflict resolution conducted by FMCS, its academic partners or other academic institutions, with a letter of recommendation from a faculty member who has observed the applicant in an ADR session, or documentation that the alternative dispute resolution program met equivalent standards as those accredited by FMCS. A course must include at least 200 classroom hours of instruction and role-play to be considered as an established course of study in conflict resolution.

3 points: 160 hours of documented training in conflict resolution with proof of individualized feedback in ADR procedures practice or role-play

1 point: 120 hours of documented training in conflict resolution with proof of individualized feedback in ADR procedures practice or role-play

3. *Substantive experience in roster content area* (0–2 points, at least one point must be received in either this area or the area of substantive education in the roster area)

2 points: 10 years of experience in workplace conflict resolution. Examples: employment law attorney, human resource director, labor organization representative, equal employment opportunity specialist

1 point: 5 years of experience in workplace conflict resolution

4. *Substantive education in roster content area* (0–2 points, at least one point must be received in either this area or the area of substantive experience in the workplace area.) **

2 points: Possesses a significant educational background in the employment or dispute resolution area (degree or in roster area, such as labor-management relations, human resource management, employment law, etc.)

1 point: Attendance in a documented introductory training program of at least 40 hours of classroom hours in the workplace area.

** Educators can be awarded points in these areas for teaching; however, they can not be awarded points for teaching the same class more than once; they can be awarded points for teaching more than one class in the area, as long as it does not cover substantially the same material.

**John J. Toner,**

*Chief of Staff, Federal Mediation and Conciliation Service.*

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**BILLING CODE 6372–01–M**

## DEPARTMENT OF THE TREASURY

## 31 CFR Part 103

**RIN 1506–AA28**

## Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Commodity Trading Advisors

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** FinCEN is issuing this proposed rule to prescribe minimum standards applicable to certain commodity trading advisors pursuant to the revised provision in the Bank Secrecy Act that requires financial institutions to establish anti-money laundering programs and to delegate its authority to examine such commodity trading advisors to the Commodity Futures Trading Commission.

**DATES:** Written comments may be submitted to FinCEN on or before July 7, 2003.

**ADDRESSES:** Commenters are encouraged to submit comments by electronic mail because paper mail in the Washington area may be delayed. Comments submitted by electronic mail may be sent to *regcomments@fincen.treas.gov* with the caption in the body of the text, ''Attention: Section 352 CTA Regulations.'' Comments may also be submitted by paper mail to FinCEN, P.O. Box 39, Vienna, VA 22183, Attn: Section 352 CTA Regulations. Comments should be sent by one method only. 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:** Office of Chief Counsel (FinCEN), (703)

905–3590; Office of the Assistant General Counsel for Banking & Finance (Treasury), (202) 622–0480; or Office of the General Counsel (Treasury), (202) 622–1927 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

## I. Background

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Pub. L. 107–56) (the Act). Title III of the Act makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (BSA), which are codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 352(a) of the Act, which became effective on April 24, 2002, amended section 5318(h) of the BSA. As amended, section 5318(h)(1) requires every financial institution to establish an anti-money laundering program that includes, at a minimum: (i) The development of internal policies, procedures, and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test programs. Section 5318(h)(2) authorizes the Secretary of the Treasury (Secretary), after consulting with the appropriate Federal functional regulator,[1] to prescribe minimum standards for anti-money laundering programs, and to exempt from the application of those standards any financial institution that is not subject to BSA regulation.

Commodity trading advisors (CTAs) that are registered or required to register with the CFTC are defined as ''financial institutions'' under the BSA.[2] CTAs, as well as futures commission merchants and commodity pool operators (CPOs), which are also CFTC registrants, were added to the statutory definition of ''financial institution'' by the Act,[3] and thus are subject to the BSA's anti-money laundering program requirements. Previously, Treasury and FinCEN temporarily exempted certain financial institutions, including CTAs and CPOs, from the requirement that they establish anti-money laundering programs.[4] In addition, FinCEN has issued interim final rules for numerous types of financial institutions[5] and proposed rules for other financial institutions,[6] and is studying how to design such standards for numerous other types of financial institutions.

FinCEN, in this proposed rule, identifies and defines those CTAs that will be subject to the requirement that financial institutions have anti-money laundering programs, and sets forth minimum requirements for an anti-money laundering program for these entities that are based on the minimum standards set forth in BSA section 5318(h)(1).

FinCEN also is proposing today a similar rule for investment advisers, which is published elsewhere in this issue of the **Federal Register**.

## II. Money Laundering and Commodity Trading Advisors

Money laundering occurs when money from illegal activity is moved through the financial system in such a way as to make it appear that the funds came from legitimate sources. Money laundering usually involves three stages: the placement, layering, and integration stages. In the placement stage, cash or cash equivalents are placed into the financial system. In the layering stage, the money is transferred or moved to other accounts through a series of financial transactions designed to obscure the origin of the money. Finally, in the integration stage, the funds are reintroduced into the economy so that the funds appear to have come from legitimate sources. The crime of money laundering also encompasses the movement of funds to support terrorism or terrorist organizations.[7] These funds may be from illegitimate or legitimate sources. Even where the funds derive from legitimate sources, their movement may follow the money laundering pattern described above in order to disguise the identity of the originator of the funds.

Commodity futures and options accounts are vehicles that could be used to launder illicit funds. CTAs who direct such accounts are in a unique position to observe activity that may be indicative of money laundering. As such, they need to be aware of what types of activity may indicate potential money laundering or terrorist financing and implement a compliance program designed, among other things, to deter and detect such activity.[8]

## III. Section-by-Section Analysis

### *A. Definition of Commodity Trading Advisor*

Section 103.133(a)(1) of the proposed rule defines ''commodity trading advisor'' as any person registered or required to be registered with the CFTC as a CTA under the Commodity Exchange Act (CEA)[9] and that directs client commodity futures or options accounts. Section 103.133(a)(2) defines ''directs'' in this context based upon the definition of ''direct'' in the CFTC's regulations.[10]

The CEA defines a CTA generally as any person who, for compensation or profit, engages in the business of advising others, either directly or indirectly, as to the value or advisability of trading futures contracts or commodity options authorized under the CEA, or issues analyses or reports concerning trading futures or commodity options.[11] CTAs are required to register with the CFTC,[12] although there are a limited number of

[1] The Federal functional regulator for commodity trading advisors is the Commodity Futures Trading Commission (CFTC).

[2] 31 U.S.C. 5312(c).

[3] Section 321(b).

[4] *See* 31 CFR 103.170, 67 FR 67547 (Nov. 6, 2002).

[5] *Anti-Money Laundering Programs for Financial Institutions,* 67 FR 21110 (April 29, 2002); *Anti-Money Laundering Programs for Mutual Funds,* 67 FR 21117 (April 29, 2002); *Anti-Money Laundering Programs for Money Services Businesses,* 67 FR 21114 (April 29, 2002); *Anti-Money Laundering Programs for Operators of a Credit Card System,* 67 FR 21121 (April 29, 2002).

[6] *Anti-Money Laundering Programs for Unregistered Investment Companies,* 67 FR 60617 (Sept. 26, 2002); *Anti-Money Laundering Programs for Insurance Companies,* 67 FR 60625 (Sept. 26, 2002); *Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels,* 68 FR 8480 (Feb. 21, 2003).

[7] 18 U.S.C. 1956, 2339A and 2339B.

[8] 18 U.S.C. 1956 and 1957 make it a crime for any person, including an individual or company, to engage knowingly in a financial transaction with the proceeds from any of a long list of crimes or ''specified unlawful activity.'' Although the standard of knowledge required is ''actual knowledge,'' actual knowledge includes ''willful blindness.'' Thus, a person could be deemed to have knowledge that proceeds were derived from illegal activity if he or she ignored ''red flags'' that indicated illegality.

[9] 7 U.S.C. 1 *et seq.*

[10] CFTC Rule 4.10(f), 17 CFR 4.10(f), provides that the term ''direct'' refers to ''agreements whereby a person is authorized to cause transactions to be effected for a client's commodity interest account without the client's specific authorization.'' CFTC Rule 4.10(a), 17 CFR 4.10(a), defines ''commodity interest'' as ''(1) any contract for the purchase or sale of a commodity for future delivery; and (2) any contract, agreement or transaction subject to [CFTC] regulation under section 4c or 19 of the [CEA].''

[11] The CEA defines the term ''commodity trading advisor'' as ''any person who * * * for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in'' futures or commodity options, or who ''for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports'' concerning trading in futures or commodity options. 7 U.S.C. 1a(6).

[12] 7 U.S.C. 6m. According to the National Futures Association (NFA), the self-regulatory organization for the futures industry, as of January 31, 2003 there were 2,734 CTAs registered with the CFTC.

exemptions.[13] One important exemption is for persons who neither direct client accounts nor provide commodity trading advice tailored to the commodity interest or cash market positions or other circumstances or characteristics of particular clients.[14] This exemption includes, among other categories, persons who publish newsletters, maintain non-customized Internet web sites, and create non-customized computer software.[15] Although these persons are exempt from registration, according to the NFA, a small number of them have opted to register with the CFTC. Nonetheless, even if they are registered, FinCEN believes it is appropriate to exclude these persons from the scope of this proposed anti-money laundering program rule, because they do not direct client accounts and thus, in light of their lack of information about particular clients, they are in no position to observe activity that may indicate the presence of money laundering or terrorist financing.

Although CTAs that provide commodity trading advice tailored to the commodity interest or cash market positions or other circumstances or characteristics of particular clients are not covered by this exemption, FinCEN has determined to exclude them as well, so that only those CTAs that direct client accounts will be subject to the proposed rule.[16] This is because a CTA that only provides commodity trading advice, without directing the account, is not in a position to actually observe potentially suspicious activity; indeed, a CTA whose service is limited to providing trading advice may not even know whether the client actually follows that advice.[17] Only CTAs that direct accounts are in a position to observe potential money laundering or terrorist financing activity.

In some instances, CTAs that would be subject to the proposed rule advise pooled investment vehicles that are themselves required to maintain anti-money laundering programs under BSA rules,[18] such as unregistered investment companies, or that are sponsored or administered by financial institutions subject to such requirements.[19] To prevent overlap and redundancy, the proposed rule would permit CTAs covered by the rule to exclude from their anti-money laundering programs any investment vehicle they advise that is subject to an anti-money laundering program requirement under BSA rules.

*B. The Anti-Money Laundering Program*

1. Individualized Program

Section 103.133(b) of the proposed rule would require each CTA subject to the proposed rule to develop and implement a program reasonably designed to prevent the CTA from being used for money laundering or terrorist financing, and to achieve and monitor compliance with other applicable requirements of the BSA and FinCEN's implementing regulations. The legislative history of the Act explains that the requirement to have an anti-money laundering program is not a one-size-fits-all requirement. The general nature of the requirement reflects Congress' intent that each financial institution should have the flexibility to tailor its program to fit its business, taking into account factors such as its size, location, activities, and risks or vulnerabilities to money laundering. This flexibility is designed to ensure that all financial institutions subject to the Act, from the largest to the smallest, have in place policies and procedures appropriate to monitor for anti-money laundering compliance.[20]

The proposed rule is designed to give CTAs flexibility to tailor their programs to their specific circumstances so long as the minimum requirements are met. For example, a CTA that directs a wide variety of commodity interest trading accounts may require more extensive oversight by its compliance officer than would a CTA that directs a smaller number of individual accounts. The former also would require more frequent independent review. Similarly, the educational component of the program should be tailored towards the size of the CTA, the type of trading or investing, and the identities of the CTA's clients.

To assure that the requirement to have an anti-money laundering program receives the highest level of attention, the proposed rule would require that each CTA's program be approved in writing by the board of directors or trustees, or if it doesn't have one, by its sole proprietor, general partner, or other persons who have similar functions.[21] The four required elements of the anti-money laundering program are discussed below.

2. The Four Required Elements of Each Anti-Money Laundering Program

(1) *Establish and Implement Policies, Procedures, and Internal Controls Reasonably Designed To Prevent the CTA From Being Used To Launder Money or Finance Terrorist Activities, Including But Not Limited To Achieving Compliance With the Applicable Provisions of the BSA and FinCEN's Implementing Regulations*

Each CTA subject to the proposed rule would be required to develop a written program reasonably designed to prevent it from being used to launder money or finance terrorist activities and to achieve compliance with applicable requirements of the BSA and FinCEN's implementing regulations. As described below, this would require each CTA to review the types of services it provides and the nature of its clients to identify its vulnerabilities to money laundering

[13] *See* Section 4m of the CEA, 7 U.S.C. 6m, and CFTC Rule 4.14(a), 17 CFR 4.14(a). These provisions exempt from the registration requirement a number of persons who meet the definition of CTA. For example, section 4m(3) of the CEA, 7 U.S.C. 6m(3), exempts from the registration requirement persons who are registered as investment advisers with the Securities and Exchange Commission and whose business does not consist primarily of acting as a CTA and who do not act as a CTA to an entity that is primarily engaged in trading commodity interests. Another example is CFTC Rule 4.14(a), which exempts from registration, among other entities, certain persons who are registered with the CFTC in other capacities. Any person who is not registered as a CTA by virtue of 7 U.S.C. 6m or CFTC Rule 4.14(a) is not a ''financial institution'' pursuant to section 5312 of the BSA and is excluded from the scope of this proposed rule. It should be noted that some of these exempt persons may have anti-money laundering obligations due to their registration in another capacity.

[14] *See* CFTC Rule 4.14(a)(9), 17 CFR 4.14(a)(9).

[15] The CFTC has determined to minimize the regulatory impact on speech, other than deceptive or misleading speech. For this reason, the CFTC exempts from registration those persons who meet the definition of CTA, but whose advice to clients is limited to non-customized communications, such as newsletters or Internet web sites, and who do not direct client accounts. 65 FR 12938 (March 10, 2000).

[16] The NFA estimates that approximately one quarter of all registered CTAs direct client accounts.

[17] It should be noted that futures commission merchants are not required to furnish account statements to CTAs that merely provide trading advice to clients and do not direct their accounts. *Compare* CFTC Rule 1.33(d), 17 CFR 1.33(d).

[18] CTAs advise commodity pools as well as individual customers. A ''pool'' is defined in CFTC Rule 4.10 as ''any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests.'' 17 CFR 4.10(d)(1).

[19] For example, a CTA may act as advisor to other investment vehicles, such as certain unregistered investment companies or an insurance company's separate accounts, that will be subject to anti-money laundering program rules under pending FinCEN proposals. *See, e.g., Anti-Money Laundering Programs for Unregistered Investment Companies,* 67 FR 60617 (Sept. 26, 2002); *Anti-Money Laundering Programs for Insurance Companies,* 67 FR 60625 (Sept. 26, 2002).

[20] *See* USA PATRIOT Act of 2001: Consideration of H.R. 3162 Before the Senate (October 25, 2001) (statement of Sen. Sarbanes), 147 Cong. Rec. S10990–02; Financial Anti-Terrorism Act of 2001: Consideration Under Suspension of Rules of H.R. 3004 Before the House of Representatives (October 17, 2001) (statement of Rep. Kelly) (provisions of the Financial Anti-Terrorism Act of 2001 were incorporated as Title III in the Act), 147 Cong. Rec. H6924–01.

[21] The board's approval could be given at its first regularly scheduled meeting after the program is adopted.

and terrorist financing activity. The CTA would then develop and implement procedures and controls that would reasonably address each vulnerability and assure compliance with these requirements, and periodically assess the effectiveness of its procedures and controls.

A CTA's vulnerabilities to money laundering and terrorist financing activity are minimal with respect to clients for whom the CTA does not direct accounts. CTAs that direct accounts for some clients may have other clients for whom the CTA provides very different services, such as trading advice, newsletters or research reports. Accordingly, a CTA could exclude from its anti-money laundering program clients for whom it does not direct accounts.

CTAs face higher vulnerability to money laundering when clients place their assets with a futures commission merchant and the funds are directed by the CTA. A CTA's procedures for these clients, for example, would seek to identify unusual transactions whereby clients deposit checks drawn on (or wire transfers made from) accounts of third parties with no family or business relation to the client, or through numerous checks or transfers from one or more issuers or institutions. In addition, a CTA's procedures would identify unusual transactions, such as those involving the subsequent withdrawal of assets from the futures commission merchant through transfers to unrelated or numerous accounts, or to accounts in countries in which drugs are known to be produced or other countries at high-risk for money laundering or terrorist financing.[22]

A CTA's vulnerability to money laundering may rise further with respect to clients who make frequent additions to or withdrawals from their accounts held with futures commission merchants. A CTA would need to establish procedures to identify which clients engage in such activity and assess the reasonableness of the additions or withdrawals in light of the clients' investment objectives and the CTA's existing knowledge of the clients' personal finances or business operations.

A CTA faces the highest degree of vulnerability in the event that clients deposit or attempt to deposit assets in their accounts at futures commission merchants in the form of cash. Similar vulnerability exists if the client establishes custodial arrangements that allow the client to remain anonymous to other intermediaries. The CTA would need to establish procedures to assess whether there are legitimate circumstances underlying the client's request before proceeding with the relationship.

A CTA's program should take into account the extent to which it provides trading advice to pooled investment vehicles. As discussed above, CTAs to pooled investment vehicles that are subject to anti-money laundering program requirements under BSA rules may exclude the vehicles from their anti-money laundering programs. However, a CTA must include other pooled vehicles it advises in its anti-money laundering program.

CTAs providing advice to pooled investment vehicles that are not subject to BSA anti-money laundering program requirements and that are created and administered by a third party,[23] would have little or no information about the investors in the pooled vehicle or their transactions. In this situation, the CTA would need to establish procedures to assess whether the entity that administers the vehicle, or the nature of the vehicle itself, reduces the risk of money laundering. For example, an employee retirement savings plan sponsored by a public corporation that accepts assets only in the form of payroll deductions or rollovers from other similar plans presents no realistic opportunity for money laundering activity, whereas an offshore vehicle not itself subject to any anti-money laundering program requirement would present a more significant risk. The CTA's program would need to analyze the money laundering risks posed by a particular investment vehicle by using a risk-based evaluation of relevant factors including: the type of entity; its location; the statutory and regulatory regime of that location (*e.g.,* if the entity is organized or registered in a foreign jurisdiction, does the jurisdiction comply with the European Union anti-money laundering directives, and has the jurisdiction been identified by the Financial Action Task Force as non-cooperative); and the CTA's historical experience with the entity or the references of other financial institutions. As the entity's potential vulnerability to money laundering increases, the CTA's procedures would need to reasonably address these increased risks, such as by obtaining and reviewing information about the identity and transactions of the investors in the vehicle.

FinCEN recognizes that some elements of a CTA's anti-money laundering program may best be performed by personnel of these separate entities, such as futures commission merchants. It is permissible for a CTA to delegate contractually appropriate parts of the implementation and operation of its anti-money laundering program to another affiliated or unaffiliated entity. However, the CTA would remain responsible for the effectiveness of the program, as well as ensuring that federal examiners are able to obtain information and records relating to the anti-money laundering program and to inspect the third party for purposes of the program. Accordingly, the CTA would still be required to identify the particular procedures appropriate to address its vulnerability to money laundering and terrorist financing, and then undertake reasonable steps to assess whether the third party would carry out such procedures effectively. For example, it would not be sufficient simply to obtain a certification from the third party that it ''has a satisfactory anti-money laundering program.''

Certain CTAs also may be registered in other capacities, including as futures commission merchants or introducing brokers. These CTAs may already have anti-money laundering programs in place.[24] FinCEN does not require that such CTA's establish multiple anti-money laundering programs. The same program may apply to an entity that functions as more than one type of financial institution, so long as the program is appropriately designed to address the different risks posed by the different aspects of the entity's business and satisfies each of the anti-money laundering program requirements to which it is subject in each of its capacities.

Policies, procedures, and internal controls also should be reasonably designed to assure compliance with BSA requirements. The BSA currently requires CTAs to report on Form 8300 the receipt of cash or certain non-cash instruments totaling more than $10,000 in one transaction or two or more related transactions.[25] In order to

[22] *See, e.g., http://www.state.gov* for International Narcotics Control Reports listing states that are sponsors of terrorism or have narcotics problems, and *http://www.fincen.gov* for FinCEN Advisories identifying countries whose anti-money laundering regimes do not meet international standards.

[23] FinCEN understands that CTAs (acting in their capacity as a CTA) do not create or administer pooled investment vehicles, so that all CTAs advising pooled vehicles that are not subject to an anti-money laundering program requirement would fall within this description.

[24] Previously, the NFA issued a rule for its futures commission merchant members and introducing broker members, requiring them to implement anti-money laundering programs. NFA Rule 2–9(c).

[25] *See* 31 CFR 103.30. It should be noted, however, that CFTC Rule 4.30, 17 CFR 4.30, prohibits a CTA that is not also a futures

Continued

develop a compliant anti-money laundering program, the program should be reasonably designed to detect and report not only transactions required to be reported on Form 8300, but also to detect activity designed to evade such requirements. Such activity, commonly known as ''structuring,'' may involve making deposits into a trading or investment account of $10,000 or more with multiple money orders, travelers' checks, or cashier's checks or other bank checks, each with a face amount of less than $10,000. Such methods of payment may be indicative of money laundering, particularly when the payment instruments were obtained from different sources or the payments were made at different times on the same day or on consecutive days or close in time.

FinCEN is currently considering whether CTAs should be subject to additional BSA requirements, including filing suspicious activity reports pursuant to section 5318(g) of the BSA and complying with accountholder identification and verification procedures pursuant to section 326 of the Act. If CTAs become subject to additional requirements, they will need to update their compliance programs to include appropriate procedures, training, and testing functions.

(2) *Provide for Independent Testing for Compliance To Be Conducted by Company Personnel or by a Qualified Outside Party.*

It is necessary that a CTA provide for periodic testing of its anti-money laundering program in order to assure that the program is functioning as designed. The testing should be conducted by personnel knowledgeable regarding applicable BSA requirements. The testing may be accomplished by employees of the CTA, its affiliates, or unaffiliated service providers, so long as those same employees are not designated to implement and monitor the program under requirement (3) below. The frequency of such a review would depend upon factors such as the size and complexity of the CTA's business and the extent to which its business model may be subject to a higher risk of money laundering than other business models. A written assessment or report should be a part of the review, and any recommendations resulting from such review should be promptly addressed.

(3) *Designate a Person or Persons Responsible for Implementing and Monitoring the Operations and Internal Controls of the Program.*

The CTA must charge a person (or group of persons) with the responsibility for overseeing the anti-money laundering program. The person or group of persons should be competent and knowledgeable regarding applicable BSA requirements and money laundering risks, and empowered with full responsibility and authority to develop and enforce appropriate policies and procedures. Whether the person or group of persons is dedicated full time to BSA compliance would depend upon the size and complexity of the CTA's business. In addition, a person responsible for the overall supervision of the program should be an officer of the CTA.

(4) *Provide Ongoing Training for Appropriate Persons.*

Employee training is an integral part of any anti-money laundering program. Employees of the CTA must be trained in BSA requirements relevant to their functions and in recognizing possible signs of money laundering that could arise in the course of their duties, so that they can carry out their responsibilities effectively. Such training could be conducted by outside or in-house seminars, and could include computer-based training. The level, frequency, and focus of the training would be determined by the responsibilities of the employees and the extent to which their functions bring them in contact with BSA requirements or possible money laundering activity. Consequently, the training program should provide both a general awareness of overall BSA requirements and money laundering issues, as well as more job-specific guidance regarding particular employees' roles and functions in the anti-money laundering program.[26] For those employees whose duties bring them in contact with BSA requirements or possible money laundering activity, the requisite training should occur when the employee assumes those duties. Moreover, these employees should receive periodic updates and refreshers regarding the anti-money laundering program.

*C. Examination*

The proposed rule includes a provision under which FinCEN would delegate examination authority to the CFTC, to enable the CFTC to examine CTAs' compliance with the anti-money laundering program requirement.

*D. Voluntary Filing of Suspicious Activity Reports*

In addition to complying with the requirements of this proposed rule, CTAs are encouraged to adopt procedures for voluntarily filing Suspicious Activity Reports with FinCEN and for reporting suspected terrorist activities to FinCEN using its Financial Institutions Hotline (1–866–566–3974). The BSA provides immunity from civil liability for any financial institution, its directors, officers, employees, or agents that make such a disclosure of any possible violation of law or regulation.[27] The Act clarifies that this safe harbor immunity also applies in the case of any voluntary reporting of a suspicious transaction or under any contract or other legally enforceable agreement, such as an arbitration agreement.

## IV. Request for Comments

FinCEN requests comment on all aspects of this proposed rule. FinCEN specifically requests comment on the definition of ''commodity trading advisor'' in proposed rule 103.133(a) and whether this definition should include other categories of CTAs, such as any of those that are exempt from registration under CFTC rules, or that are required to register with the CFTC but do not direct client accounts. FinCEN also requests comment regarding the proposed provisions designed to avoid imposing overlapping or duplicative anti-money laundering program regulations of CTAs and other financial institutions that are (or are proposed to be) subject to anti-money laundering program requirements.

## V. Regulatory Flexibility Act

It is hereby certified that this proposed rule would not have a significant economic impact on a substantial number of small entities. The CFTC has stated that it would evaluate within the context of a

commission merchant, from receiving any funds, securities, or property from clients in the CTA's name. The Form 8300 requirement thus applies where the CTA transmits non-cash instruments such as cashier's checks made payable to the Futures Commission merchant for deposit into a client's account.

[26] Appropriate topics for an anti-money laundering program include, but are not limited to: BSA requirements, a description of money laundering, how money laundering is carried out, what types of activities and transactions should raise concerns, what steps should be followed when suspicions arise, and the Office of Foreign Assets Control and other government lists of suspected terrorists and terrorist organizations.

[27] *See Lee v. Bankers Trust Co.,* 166 F.3d 540, 544 (2nd Cir. 1999) (stating that in enacting 31 U.S.C. 5318(g), Congress ''broadly and unambiguously provide[d] * * * immunity from any law (except the federal Constitution) for any statement made in a [suspicious activity report] by anyone connected to a financial institution'').

particular proposed rule whether all or some affected CTAs should be considered to be small entities and, if so, that it would analyze the economic impact on them of any rule.[28] This proposed rule would affect CTAs of all sizes. However, the economic burden should be minimal. The costs associated with the development of anti-money laundering programs are attributable to the mandates of section 352 of the Act. In addition, the proposed rule would not impose significant burdens on those CTAs covered by the rule because they are already subject to Form 8300 reporting and may build on their existing risk management procedures and prudential business practices to ensure compliance with this rule. Similarly, the procedures currently in place at other financial institutions such as futures commission merchants and introducing brokers to comply with existing BSA rules should help guide CTAs in establishing their own anti-money laundering programs. Finally, CTAs subject to the proposed rule would not be compelled to obtain more sophisticated legal or accounting advice than that already required to run their businesses.

Finally, FinCEN believes that the flexibility incorporated into the proposed rule will permit each CTA to tailor its anti-money laundering program to fit its own size and needs. In this regard, FinCEN believes that expenditures associated with establishing and implementing an anti-money laundering program will be commensurate with the size of a CTA. If a CTA is small, the burden to comply with the proposed rule should be *de minimis*.

## VI. Executive Order 12866

This proposed rule is not a ''significant regulatory action'' as defined in Executive Order 12866. Accordingly, a regulatory assessment is not required.

## VII. Paperwork Reduction Act

The collection of information (recordkeeping requirement) contained in this proposed rule has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent (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 *jlackeyj@omb.eop.gov*), with a copy to FinCEN by mail or the Internet at the addresses previously specified. Comments on the collection of information should be received by July 7, 2003.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information subject to the Paperwork Reduction Act unless it displays a valid control number assigned by the Office of Management and Budget.

The collection of information (recordkeeping requirement) in this proposed rule is in 31 CFR 103.133(b). The information would be used by federal agencies to verify compliance by CTAs with the provisions of 31 CFR 103.133. The collection of information is mandatory.

In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR 1320, the following information concerning the collection of information as required by 31 CFR 103.133(b) is presented to assist those persons wishing to comment on the information collection.

*Description of Recordkeepers:* Commodity trading advisors as defined in 31 CFR 103.133(a).

*Estimated Number of Recordkeepers:* 650.

*Estimated Average Annual Burden Hours Per Recordkeeper:* The estimated average burden associated with the collection of information in this proposed rule is 1 hour per recordkeeper.

*Estimated Total Annual Recordkeeping Burden:* 650 hours.

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

## List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Banks and banking, Brokers, Commodity futures, Counter money laundering, Counter-terrorism, Currency, Reporting and recordkeeping requirements.

## 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 amended to read as follows:

**Authority:** 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, secs. 312, 313, 314, 319, 321, 326, 352, Pub. L. 107–56, 115 Stat. 307, 12 U.S.C. 1818, 12 U.S.C. 1786(q).

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

* * * * *

(b) * * *

(8) To the Commodity Futures Trading Commission with respect to futures commission merchants, introducing brokers, commodity pool operators and commodity trading advisors (as that term is defined in § 103.133(a));

(9) To the Commissioner of Internal Revenue with respect to all financial institutions for which examination authority is not otherwise delegated pursuant to this paragraph (b).

3. Subpart I of part 103 is amended by adding new § 103.133 to read as follows:

### § 103.133 Anti-money laundering programs for commodity trading advisors.

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

(1) The term ''*commodity trading advisor*'' means a person registered or required to be registered as a commodity trading advisor with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) and that directs client commodity futures or options accounts.

(2) For purposes of this definition the term ''*directs*'' refers to agreements whereby a person is authorized to cause transactions to be effected for a client's commodity futures or options account without the client's specific authorization.

(b) *Anti-money laundering program required.* Effective [date that is 90 days after the date of publication of a final rule in the **Federal Register**]:

(1) Each commodity trading advisor shall develop and implement a written

[28] 47 FR 18618, 18620 (April 30, 1982).

anti-money laundering program reasonably designed to prevent the commodity trading advisor from being used for money laundering or the financing of terrorist activities and to achieve and monitor compliance with the applicable provisions of the Bank Secrecy Act (31 U.S.C. 5311, *et seq.*) (BSA) and this part. The commodity trading advisor may exclude from its anti-money laundering program any pooled investment vehicle it advises that is subject to an anti-money laundering program requirement under another provision of this subpart.

(2) Each commodity trading advisor's anti-money laundering program must be approved in writing by its board of directors or trustees, or if it doesn't have one, by its sole proprietor, general partner, or other persons who have similar functions. A commodity trading advisor shall make its anti-money laundering program available for inspection by FinCEN or the Commodity Futures Trading Commission upon request.

(c) The anti-money laundering program shall, at a minimum:

(1) Establish and implement policies, procedures, and internal controls reasonably designed to prevent the commodity trading advisor from being used for money laundering or the financing of terrorist activities and to achieve and monitor compliance with the applicable provisions of the BSA and this part;

(2) Provide for independent testing for compliance to be conducted by the commodity trading advisor's personnel or by a qualified outside party;

(3) Designate a person or persons responsible for implementing and monitoring the operations and internal controls of the program; and

(4) Provide ongoing training for appropriate persons.

Dated: April 28, 2003.

**James F. Sloan,**

*Director, Financial Crimes Enforcement Network.*

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## DEPARTMENT OF THE TREASURY

### 31 CFR Part 103

**RIN 1506–AA28**

## Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Investment Advisers

**AGENCY:** Financial Crimes Enforcement Network (FinCEN), Department of the Treasury.

**ACTION:** Proposed rule.

**SUMMARY:** FinCEN is proposing to amend its Bank Secrecy Act rules to require certain investment advisers that manage client assets to establish anti-money laundering programs, to establish minimum requirements for such programs, and to delegate its authority to examine certain investment advisers for compliance with such program requirements to the Securities and Exchange Commission.

**DATES:** Written comments may be submitted to FinCEN on or before July 7, 2003.

**ADDRESSES:** Because paper mail in the Washington area may be subject to delay, commenters are encouraged to e-mail comments. Comments may be sent to Internet address *regcomments@fincen.treas.gov* with the caption ''Attention: Section 352 Investment Adviser Rule Comments'' in the body of the text. Comments may be mailed to FinCEN, Section 352 Investment Adviser Rule Comments, P.O. Box 39, Vienna, VA 22183. Comments should be sent by one method only. 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:** Office of Chief Counsel (FinCEN), (703) 905–3590; Office of the General Counsel (Treasury), (202) 622–1927; or Office of the Assistant General Counsel for Banking & Finance (Treasury), (202) 622–0480 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

### I. Background

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Public Law 107–56) (the Act). Title III of the Act makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (BSA), which are codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 352(a) of the Act, which became effective on April 24, 2002, amended section 5318(h) of the BSA. As amended, section 5318(h)(1) requires every financial institution to establish an anti-money laundering program that includes, at a minimum, (i) the development of internal policies, procedures, and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test programs. Section 5318(h)(2) authorizes the Secretary of the Treasury (Secretary), after consulting with the appropriate Federal functional regulator, which in the case of investment advisers is the Securities and Exchange Commission (SEC), to prescribe minimum standards for anti-money laundering programs. The Secretary has delegated the authority to administer the BSA to the Director of FinCEN. To date, FinCEN has issued interim final rules prescribing minimum anti-money laundering program requirements for numerous types of financial institutions,[1] has proposed rules for other financial institutions,[2] and is studying how to design such standards for numerous other types of financial institutions.

FinCEN is today proposing a similar rule for commodity trading advisors, which is published elsewhere in this issue of the **Federal Register**.[3]

### II. Investment Advisers Determined To Be Financial Institutions

The BSA does not expressly enumerate investment advisers among the entities defined as financial institutions under sections 5312(a)(2) and (c)(1).[4] Nevertheless, the BSA

[1] *Anti-Money Laundering Programs for Financial Institutions,* 67 FR 21110 (April 29, 2002); *Anti-Money Laundering Programs for Mutual Funds,* 67 FR 21117 (April 29, 2002); *Anti-Money Laundering Programs for Money Services Businesses,* 67 FR 21114 (April 29, 2002); *Anti-Money Laundering Programs for Operators of a Credit Card System,* 67 FR 21121 (April 29, 2002).

[2] *Anti-Money Laundering Programs for Unregistered Investment Companies,* 67 FR 60617 (Sept. 26, 2002); *Anti-Money Laundering Programs for Insurance Companies,* 67 FR 60625 (Sept. 26, 2002); *Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels,* 68 FR 8480 (Feb. 21, 2003).

[3] Commodity trading advisors, which are subject to regulation by the Commodity Futures Trading Commission (CFTC), were added to the statutory BSA list of ''financial institutions'' in section 321 of the Act.

[4] The BSA definition includes institutions that are already subject to federal regulation such as banks, savings associations, credit unions, securities broker-dealers, and futures commission merchants. Money services businesses (such as money transmitters and currency exchanges) are also defined as financial institutions under the BSA, and, like the former categories, under FinCEN's implementing regulations. The BSA definition also includes dealers in precious metals, stones, or jewels; pawnbrokers; loan or finance companies; private bankers; insurance companies; travel agencies; telegraph companies; sellers of vehicles, including automobiles, airplanes, and boats; persons engaged in real estate closings and settlements; investment bankers; investment companies; and commodity pool operators and