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October 2, 2014

Via Email

Policy Division
Financial Crimes Enforcement Network Department of the Treasury
P.O. Box 39
Vienna, VA 22183
Attn: Director Jennifer Shasky Calvery

Re: Customer Due Diligence Requirements for Financial Institutions
Regulatory Identification Number 1506-AB25
Docket Number FinCEN-2014-0001

Dear Director Shasky Calvery:

The Futures Industry Association ("FIA")[1] appreciates the opportunity to comment on the Financial Crimes Enforcement Network's ("FinCEN") Notice of Proposed Rulemaking pertaining to Customer Due Diligence ("CDD") Requirements for Financial Institutions (the "NPRM" or the "Proposal").[2] We understand that the Proposal is intended to elicit input from various industries concerning the potential application of a final CDD rule ("Final Rule" or "CDD Rule") that would include an express requirement for obtaining beneficial ownership. This Proposal follows FinCEN's March 5, 2012, Advance Notice of Proposed Rulemaking ("ANPRM")[3] and extensive industry outreach initiative.

FIA strongly supports the efforts of FinCEN in working with financial institutions to implement robust, risk-based anti-money laundering ("AML") compliance programs. We are

[1] FIA is the leading trade organization for the futures, options and cleared swaps markets worldwide. FIA's membership includes clearing firms, exchanges, clearinghouses and trading firms from more than 25 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's member firms play a critical role in the reduction of systemic risk in the global financial markets. FIA and its affiliates FIA Europe and FIA Asia make up the global alliance FIA Global, which seeks to address the common issues facing their collective memberships.

[2] *See* NPRM, Customer Due Diligence Requirements for Financial Institutions, 79 Fed. Reg. 45151 (Aug. 4, 2012), *available at* http://www.fincen.gov/statutes_regs/files/CDD-NPRM-Final.pdf.

[3] ANPRM, Customer Due Diligence Requirements for Financial Institutions, 77 Fed Reg. 13046 (Mar. 5, 2012), *available at* http://www.futuresindustry.org/downloads/FIA-Comment-Beneficial-Ownership-101812.pdf.

especially appreciative of FinCEN's outreach to the futures industry, and its willingness to engage in open and meaningful dialogue on this topic, including through public hearings.[4] We believe that this dialogue has led to meaningful changes in the NPRM from the initial ANPRM and we greatly appreciate FinCEN's receptiveness to the issues raised in our previous comment letter, dated October 18, 2012, ("ANPRM Comment Letter") and during the hearings. We remain committed to continuing our dialogue with FinCEN and welcome this opportunity to provide additional input.

Below we highlight our key comments with respect to the elements of the NPRM insofar as they are of particular concern to the futures industry. We note that the Securities Industry Financial Markets Association ("SIFMA") has also submitted a letter commenting on the NPRM to FinCEN dated October 2014 (the "SIFMA Letter"). We generally support the comments and recommendations in the SIFMA letter.

I. Background

As FinCEN is aware, the futures industry is comprised of futures commission merchants ("FCMs") and introducing brokers ("IB-Cs"), involves many types of business models (*e.g.*, retail, institutional, clearing and execution) and offers various and numerous trading products (*e.g.*, futures, options and other derivatives). Due to the global breadth of their business, FCMs often have an international presence in jurisdictions outside the United States, and, in particular, in the United Kingdom. Of particular importance, as part of their business, FCMs frequently establish omnibus relationships/accounts with financial intermediaries both inside and outside the United States to engage in futures transactions. Moreover, give-up transactions, which are particularly significant to the futures industry, occur when executing brokers give up trades to a clearing firm. In the clearing context, AML responsibilities have historically been allocated between FCMs and IB-Cs pursuant to a written allocation agreement in a manner that is unique to the clearing firm regulatory context. Our comments are focused on the application of the CDD Rule to the futures industry.

II. Description of the Proposal.

FinCEN proposes to adopt a rule requiring certain covered financial institutions subject to existing customer identification program ("CIP") requirements (hereinafter, the "CIP Rule")[5], including FCMs and IB-Cs, to obtain beneficial ownership information for certain legal entity customers. In addition, FinCEN proposes to amend the AML program rule for covered financial institutions, including FCMs and IB-Cs, by adding two additional elements to its AML program rules: (1) understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and (2) conducting ongoing monitoring to maintain and update customer information and to identify and report suspicious transactions.

[4] During 2012 FinCEN conducted an extended series of public hearings to gather additional industry input on its ANPRM. These hearings were held on Sept. 13, 2012 (Washington, DC), Sept. 28, 2012 (Chicago, IL), Oct. 5, 2012 (New York, NY), Oct. 29, 2012 (Los Angeles, CA) and Dec. 3, 2012 (Miami, FL).

[5] *See* NPRM, 79 Fed. Reg. at 45155 (citing 31 C.F.R. § 1026.220 ("FCM CIP Rule"), 31 C.F.R. § 1020.220 (bank CIP rule), 31 C.F.R. § 1023.220 (broker-dealer CIP rule) and 31 C.F.R. § 1024.220 (mutual fund CIP rule)).

III. Summary of Comments

FIA's principal concerns with respect to the CDD Proposal are reflected in the comments and proposals below.

With respect to the beneficial ownership requirement, FIA requests certain additional exemptions to the definition of legal entity customer, including: ERISA and ERISA type accounts; accounts acquired through mergers or acquisitions; and other entities which if included within the scope of the CDD Rule, because of their nature do not sufficiently advance the goals of the CDD Rule, *i.e.*, foreign publicly traded entities, foreign regulated entities, including foreign banks, foreign government entities and pooled investment vehicles.

We also suggest certain additions to the text of the CDD Rule that are presently found only in the Preamble to the CDD Rule ("Preamble"), including the inclusion of specific references to CIP guidance and provisions relating to CIP reliance. In this regard, we suggest the expansion of the reliance provision to enable covered financial institutions to rely, for CDD purposes, on certain foreign affiliates subject to a global AML policy as rigorous as that of the United States.

We also propose certain enhancements to the CDD procedures, including a provision permitting reliance on the USA PATRIOT Act ("PATRIOT Act") Foreign Bank Certification process; certain changes to the CDD Certification Form to enhance its effectiveness; and a safe harbor relating to the use of the CDD Certification Form. In addition, we suggest changing the language requiring CDD procedures be identical to the CIP Rule procedures to provide for more flexibility, given that the procedures for obtaining beneficial ownership information will be new and may not align completely with existing procedures under the CIP Rules.

Further, we respond to FinCEN's request for comments regarding pooled investment vehicles, the definition of customer risk profile, the retroactive application of the CDD Rule to existing accounts beyond what the CDD Rule presently provides, and the treatment of intermediated accounts, an area which is of particular importance to FIA. To that end, we point out two concerns relating to intermediated accounts that require clarification: the recognition by FinCEN that the Omnibus Guidance is not an exclusive roadmap for relying on intermediated accounts and a clarification that the addition of new sub-accounts would not make an existing omnibus account, those new sub-accounts or any previously established sub-accounts, new accounts subject to CDD. In addition, we request that FinCEN withdraw the March 2010 Beneficial Ownership Guidance and require that all regulators that have not already done so, make public their examination manuals setting forth their supervisory expectations.

Most importantly, and in response to FinCEN's specific request for comment, we question the need for the addition of the new fifth pillar to the AML program requirement. At a minimum, we seek guidance from FinCEN as to how this fifth pillar should be implemented. FIA strongly believes that (with the exception of the SAR reporting requirement already covered by Section 356 of the PATRIOT Act), and despite the presence of some of these provisions in the futures industry regulatory rules, all of the aspects of the fifth pillar are new AML requirements. For the reasons stated herein, we do not think these requirements are necessary

and, in certain cases, believe, based on FinCEN's discussion in the Preamble to the Proposed Rule, that they may be beyond FinCEN's authority. We urge FinCEN to provide additional clarification as to how these elements will work, if adopted, so that FIA can more fully comment on the application of this fifth pillar.

Finally, we ask that FinCEN expand the time frame for firms to implement the CDD Rule to 24 months, not only for the beneficial ownership requirement, but also for the two elements of the fifth pillar of the AML program requirements.

IV. The Beneficial Ownership Requirement for Legal Entity Customers Should be Clarified in Certain Respects and Expanded in Other Respects.

Since the ANPRM, FinCEN's definitions of beneficial owner and legal entity customer have been significantly clarified. Proposed section 1010.230(b) of the NPRM requires covered financial institutions to identify and verify the identity of beneficial owners of legal entity customers. Under this section, covered financial institutions must look beyond a nominal account holder to identify the natural person who owns or controls the legal entity customers. In the Proposal, FinCEN offers a definition of "beneficial owner" that includes two independent prongs: ownership and control. Accordingly, a covered financial institution has to identify each individual satisfying the ownership prong (*i.e.*, each natural person who owns 25 percent or more of the equity interests in a legal entity customer, even if that person is several entities removed from the legal entity customer), in addition to one individual satisfying the control prong (*i.e.*, an individual person with significant managerial control of a legal entity customer). FinCEN proposes a definition of "legal entity customer" to include a corporation, limited liability company, partnership, or other similar business entity (whether formed under the laws of a state or of the United States or of a foreign jurisdiction). In response to various comments from the industry, FinCEN proposes to incorporate several of the exemptions and exclusions already included in the CIP Rule.[6] In addition, FinCEN proposes including several other exemptions not applicable to the CIP Rule, for those entities whose information is available to covered financial institutions from other credible sources (hereinafter, "Credible Sources").[7]

FIA is greatly appreciative of FinCEN's recognition of the importance of these exemptions to an efficient and robust AML program. FIA requests that FinCEN clarify the application of the CDD Proposal to certain other exemptions that are imbedded in the CIP Rule

[6] *See* NPRM, 79 Fed. Reg. at 45159 (discussing application of CIP exemptions to CDD Rule).

[7] *See id*. (These entities include: an issuer of a class of securities under Section 12 of the Securities Exchange Act of 1934 ("'34 Act") or that is required to file reports under Section 15(d) of that act; any majority-owned domestic subsidiary of any entity whose securities are listed on a U.S. stock exchange; an investment company, as defined in Section 3 of the Investment Company Act of 1940 ("'40 Act"), that is registered with the SEC under the 40 Act; an investment adviser, as defined in Section 202(a)(11) of the '40 Act, that is registered with the SEC under the "40 Act; an exchange or clearing agency, as defined in Section 3 of the '34 Act, that is registered under Section 6 or 17A of the "34 Act; any other entity registered with the SEC under the '34 Act; a registered entity, commodity pool operator, commodity trading advisor, retail foreign exchange dealer, swap dealer, or major swap participant, each as defined in section 1a of the Commodity Exchange Act, that is registered with the CFTC; a public-accounting firm registered under section 102 of the Sarbanes-Oxley Act; and a charity or nonprofit entity that is described in Sections 501(c), 527, or 4947(a)(1) of the Internal Revenue Code of 1986, that has not been denied tax exempt status, and that is required to and has filed the most recently required annual information return with the Internal Revenue Service.).

and that FinCEN exclude certain other entities from the beneficial ownership requirement in the CDD Proposal because the beneficial ownership information for those entities is generally available from other Credible Sources or because obtaining that information does not advance the goals of the Proposal and is very burdensome for financial institutions to collect. In addition, FIA suggests a number of other enhancements to the Proposal to better facilitate the success of its goals.

A. FinCEN Should Clarify That Certain Additional Customers/Accounts Not Subject to the CIP Rule, Including Those Exempt Pursuant to CIP Guidance, Should Also Be Excluded from the CDD Rule.

1. ERISA and Certain Non-ERISA Employee Benefit Plan Accounts Should Not Be Subject to the CDD Rule.

Under the current CIP Rule, accounts opened for the purpose of participating in an employee benefit plan, including those established under the Employee Retirement Income Security Act of 1974 ("ERISA")[8] and certain non-ERISA employee retirement, benefit, or deferred compensation plans (collectively, "Non-ERISA Employee Benefit Plans") established for participants, are not considered "accounts" and are therefore not subject to the CIP Rule.[9] As FinCEN itself noted in the preamble to the CIP rule applicable to FCMs, ERISA "accounts are less susceptible to use for the financing of terrorism and money laundering, because, among other reasons, they are funded through payroll deductions in connection with employment plans that must comply with Federal regulations imposing, among other requirements, low contribution limits and strict distribution requirements."[10] For the same reason, ERISA accounts should also be exempt from CDD. Likewise, Non-ERISA Employee Retirement Benefit Plans should also continue to be exempt because, as FinCEN previously noted, "a participant in or beneficiary of such an account will not be deemed to be the bank's 'customer,' as such a person will not have initiated the relationship with the bank."[11] In the Final Rule, we ask that FinCEN make clear that such ERISA plans and Non-ERISA Employee Benefit Plans are not subject to the CDD Rule for the same reasons that FinCEN exempted them from the CIP Rule.

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[8] *See* 31 C.F.R. § 1026.100(a)(2)(ii)("For purposes of § 1026.220 . . . [a]ccount does not include. . . [a]n account opened for the purpose of participating in an employee benefit plan established under [ERISA]").

[9] *See* Interagency Interpretive Guidance on Customer Identification Program Requirements under Section 326 of the USA PATRIOT Act (April 28, 2005) at 6, Question 7, *available at* http://www.fincen.gov/statutes_regs/guidance/html/faqsfinalciprule.html (exempting from the CIP Rule certain participants who hold trust, custodial, or other administrative accounts established by an employer at a bank to maintain and administer assets under a non-ERISA employee retirement, benefit, or deferred compensation plans). Although not reflected in the rule itself, FinCEN makes clear in the preamble to the NPRM that most trust accounts are excluded from the CDD Rule. *See* NPRM, 79 Fed. Reg. at 45159.

[10] *See* Customer Identification Programs for Futures Commission Merchants and Introducing Brokers, 68 Fed. Reg. 25149, 25151 (May 9, 2003), *available at* http://www.fincen.gov/statutes_regs/frn/pdf/326fcmfinal.pdf (hereinafter, "Preamble to FCM CIP Rule").

[11] *See supra* note 9.

2. Accounts That are Acquired as a Result of Any Acquisition of Accounts, Merger, Purchase of Assets or Assumption of Liabilities Should be Exempt From the CDD Rule in the Same Way That Such Accounts are Currently Exempt From the CIP Rule.

Under the CIP Rule, there is a general exemption to the application of CIP to accounts that are acquired through an acquisition, merger, purchase of assets, or assumption of liabilities.[12] These accounts are only acquired through non-customer initiated transactions, such as a transfer due to a merger, acquisition or insolvency of an FCM.[13] To require covered financial institutions to obtain beneficial ownership information for each of these potentially numerous accounts would be very burdensome and disruptive, and difficult to implement from an operational perspective. Since customers do not initiate these account transfers, FinCEN concluded that these accounts do not fall within the scope of the CIP Rule.[14] It would make no sense to exempt these accounts from CIP and yet require CDD. Accordingly, FinCEN should provide an exemption for these accounts in the CDD Rule.

3. The Final Rule Should Specify in the Rule Itself, or, at a Minimum, in Guidance Issued at the Time of the Final Rule, that Existing CIP Regulatory Guidance with Respect to the Definition of "Customer" Continues to Remain in Effect.

In the Preamble to the NPRM, FinCEN makes clear that, with the exception of existing accountholders that open new accounts, a covered financial institution will not be required to identify beneficial owners of certain new accounts established for legal entities that are exempt from the current CIP Rule,[15] "including those entities that are exempt pursuant to CIP

[12] *See* 31 C.F.R. §1026.100(a)(2)(i) (exception applicable to FCMs and IB-Cs); *see also* 31 C.F.R. §§ 1020.100(a)(2)(ii) (exception applicable to banks), §1023.100(a)(2)(i) (exception applicable to broker-dealers) and §1024.100(a)(2)(i) (exception applicable to mutual funds).

[13] *See* Preamble to FCM CIP Rule, 68 Fed. Reg. at 25151 n.17.

[14] *See id.* at 25151 n.20 ("this 'transfer exception' includes bulk transfers made in accordance with CFTC Rule 1.65, 17 C.F.R. § 1.65, or as required by the CFTC's minimum financial requirements in CFTC Rule 1.17(a)(4), 17 C.F.R. § 1.17(a)(4). This exception would also cover transfers of accounts that result when an [IB-C] changes its introducing relationship from one FCM to another.") FIA recognizes that under the CIP Rule in certain instances it may be appropriate for covered financial institutions to verify the identity of customers associated with transferred accounts, such as in instances where "the accounts are coming from a broker-dealer that was found to have failed to establish or maintain an adequate CIP." *See also* Customer Identification Programs for Broker-Dealers, 68 Fed. Reg. 25113, 25115 n.22 (May 9, 2003), *available at* http://www.fincen.gov/statutes_regs/frn/pdf/326bdfinal.pdf. The same caveat would presumably apply to the application of the CDD Proposal.

[15] These entities include: (i) financial institutions regulated by a Federal functional regulator (*e.g.*, federally regulated banks, broker- dealers in securities, mutual funds, FCMs and IB-Cs) or a bank regulated by a State bank regulator; domestic government agencies and instrumentalities; (ii) certain legal entities that exercise governmental authority; (iii) publicly held companies traded on certain U.S. stock exchanges; and (iv) domestic subsidiaries of publicly held companies traded on certain U.S. stock exchanges. *See* NPRM, 79 Fed. Reg. at 45159. Notably, however, FinCEN also states that it "does not propose to include an exemption for legal entities with existing accounts that open new accounts after the implementation date of the rule", *see* NPRM, 79 Fed. Reg. at 45159 n.31—an exemption found in the CIP Rule.

Rule guidance issued by FinCEN and the federal functional regulators."[16] This point was of particular importance to FIA and was the subject of significant comment in the ANPRM Comment Letter.[17] Absent from the proposed text of the CDD Proposal is the acknowledgement that the CIP Rule guidance is also applicable. The relevant portion of the Proposal reads:

> (b) *Identification and verification.* With respect to legal entity customers, the covered financial institution's customer due diligence procedures should enable the institution to: (1) Identify the beneficial owner(s) of each legal entity customer, unless otherwise exempt pursuant to paragraph (d) of this section . . . and (2) Verify the identity of each beneficial owner identified to the covered financial institution, according to risk-based procedures to the extent reasonable and practicable. *At a minimum these procedures must be identical to the covered financial institution's Customer Identification Program procedures required for verifying the identity of customers that are individuals* under § 1020.220(a)(2) of this chapter (for banks); § 1023.220(a)(2) of this chapter (for brokers or dealers in securities); § 1024.220(a)(2) of this chapter (for mutual funds); or § 1026.220(a)(2) of this chapter (for futures commission merchants or introducing brokers in commodities).[18]

As noted throughout the Preamble, FinCEN, the CFTC and the federal functional regulators have previously issued joint guidance relating to the application of the CIP Rule to FCMs and IB-Cs, including guidance regarding omnibus accounts/relationships, give-up arrangements and introducing/clearing firm relationships.[19] In the Preamble, FinCEN indicates that this guidance would apply to the CDD Rule. This guidance, as well as FAQs relating to the application of the CIP Rule to FCMs,[20] which FIA specifically requested be incorporated into the Final Rule, is essential to the efficient operation of an FCM's and IB-C's business. For example, in 2006 FinCEN issued guidance making clear that, where intermediaries are involved, the FCM's "formal relationship" is with the intermediary, even in instances in which a sub-account is involved, as an FCM should not have to "look through" the intermediary to identify or verify the clients on whose behalf the intermediary is acting ("Omnibus Guidance").[21] In 2007,

[16] *See* NPRM, 79 Fed. Reg. at 45159 ("the definition of 'legal entity customer' for purposes of the beneficial ownership requirement excludes all the same types of entities as the definition of 'customer' for purposes of the CIP rules, *including exclusions based on guidance issued by FinCEN and the federal functional regulators with regard to the applicability of the CIP rules. For example, where previous guidance has clarified who a 'customer' is in a particular relationship, that same analysis would generally apply in determining whether an entity is a 'legal entity customer' for purposes of the proposed beneficial ownership requirement.*")(emphasis added).

[17] *See* ANPRM Comment Letter at pp. 3 to 7.

[18] NPRM, 79 Fed. Reg. at 45170 (emphasis added) (citing proposed section 31 C.F.R. § 1010.230(b)).

[19] *See id.* at 45159 n.34, at 45161 nn.39–42, at 45163 n.47, at 45165 n.63, and guidance cited therein.

[20] Joint Guidance from FinCEN, the CFTC, and the Department of the Treasury, "Questions and Answers Regarding Customer Identification Program Rule for Futures Commission Merchants and Introducing Brokers (31 CFR 103.123)" (June 14, 2004), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/CustomerID_QandA.pdf.

[21] *See* FinCEN Guidance, FIN-2006-G004, Frequently Asked Question regarding Customer Identification Programs for Futures Commission Merchants and Introducing Brokers (31 C.F.R. 103.123) (Feb. 14, 2006), *available at* http://www.fincen.gov/statutes_regs/guidance/html/futures_omnibus_account_qa_final.html; *see also* Preamble to FCM CIP Rule, 68 Fed. Reg. at 25151 (stating "the focus of the CIP with respect to intermediated accounts will be

FinCEN issued guidance relating to give-up arrangements that provides that an FCM's CIP obligations will not apply when it is operating solely as an executing broker in a give-up arrangement because the executing broker, unlike the clearing broker, does not establish a formal relationship with the commodity or options customer ("Give-Up Arrangement Guidance").[22] In addition, FinCEN has issued industry guidance that CIP requirements (as well as Section 312 requirements) should not ordinarily be imposed on clearing firms with respect to introduced accounts,[23] as well as guidance in the form of frequently asked questions relating to the definition of "customer" in the futures industry.[24] And, the CFTC has issued a No-Action letter, that in certain circumstances FCMs and IB-Cs are permitted to rely on commodity trading advisors ("CTAs") to conduct CIP on their behalf.[25] It is critical that these interpretations be preserved in the context of the CDD Proposal. Accordingly, while FIA greatly appreciates the fact that FinCEN intends for this guidance to remain in effect and spells that out in the Preamble to the CDD Rule, FIA believes that it is important that the text of the Final Rule specifically reference this guidance or, at a minimum, that FinCEN issue guidance at the same time it issues the Final Rule, making clear that the CIP-related guidance applies specifically to the CDD Rule. FIA believes that this approach will avoid any issues that may arise during examinations about the applicability of the CIP guidance to the CDD process.

Additionally, given that obtaining beneficial ownership information is a new requirement for covered financial institutions, and FCMs do not know how easily their CIP procedures will adapt to the process of obtaining CDD, FIA requests that FinCEN modify the text of the rule to a limited extent by changing the word "identical" to the word "similar." In this way, FinCEN can provide covered financial institutions with a certain amount of flexibility in adopting and applying their CIP procedures to the CDD Rule. The suggested revised rule would read ". . . *these procedures must be similar to the covered financial institution's Customer Identification Program procedures required for verifying the identity of customers that are individuals* . . ."

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the intermediary itself" and "[i]f the intermediary is the account holder, such as in the case of an omnibus account, an FCM is not required to look through the intermediary to the underlying beneficiaries.").

[22] FinCEN Guidance, FIN–2007–G001, Application of the Customer Identification Program Rule to Futures Commission Merchants Operating as Executing and Clearing Brokers in Give-Up Arrangements (April 20, 2007), *available at* http://www.fincen.gov/statutes_regs/guidance/html/cftc_fincen_guidance.html, referenced in NPRM, 79 Fed. Reg. at 45159 n.34, and 45161.

[23] *See* FinCEN Guidance, FIN-2008-G002, Customer Identification Program No-Action Position Respecting Broker Dealers Operating Under Fully Disclosed Clearing Agreements According to Certain Functional Allocations (Mar. 4, 2008), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2008-g002.pdf, referenced in NPRM, 79 Fed. Reg. at 45161 nn.40-41; *see also* FinCEN Guidance, FIN–2006–G009, Application of the Regulations Requiring Special Due Diligence Programs for Certain Foreign Accounts to the Securities and Futures Industries (May 10, 2006), *available at* http://www.fincen.gov/statutes_regs/guidance/html/312securities_futures_guidance.html, referenced in NPRM, 79 Fed. Reg. at 45161 (addressing application of Section 312 to clearing firms).

[24] *See supra* note 20.

[25] *See* CFTC No-Action Letter No. 05-05 (Mar. 14, 2005), *available at* http://www.cftc.gov/files/tm/letters/05letters/tm05-05.pdf, referenced in NPRM, 79 Fed. Reg. at 45163 n.47.

B. Other Legal Entities Whose Beneficial Ownership Information is Also Available From Credible Sources Or Who Are Already Subject to Significant Regulatory Scrutiny Should be Exempt From the Definition of Legal Entity Customer.

Under the Proposal, covered financial institutions would not be required to identify beneficial owners of certain legal entity customers where the beneficial ownership information is generally available from Credible Sources.[26] This approach, adopted by FinCEN and endorsed by FIA, recognizes the practicalities of conducting CDD on such entities and the lack of added value to law enforcement in conducting CDD on legal entity customers that publicly disclose CDD information. FIA urges FinCEN to broaden this exemption to include other substantial, well-known entities, such as: (1) foreign public companies (2) foreign regulated entities and (3) foreign government entities. In addition, FIA asks FinCEN to exempt those entities already subject to existing procedures for foreign financial institutions, including foreign banks.

1. The Exemptions From the Definition of Legal Entity Customer Should be Broadened to Include Foreign Entities That are "Publicly Traded."

At present, there is an exemption for most domestic public companies from the CIP Rule and the CDD Proposal. While we recognize that a customer that is a foreign public company is not presently exempt from the CIP Rule, in our view, there is no strong rationale for the distinction between obtaining such information on domestic and foreign public companies. Therefore, we urge FinCEN not to extend the distinction presently embodied in the CIP Rule to the CDD Proposal.[27] Like U.S. domestic companies, general information on foreign public companies is available from public websites. Like U.S. domestic companies, obtaining shareholder information on foreign public companies, which is constantly changing, creates unreasonable challenges for the industry, as does keeping this information up to date, without significantly advancing law enforcement interests. Like U.S. public companies, individuals with material ownership, as well as individuals holding other managerial positions, such as the Chief Executive Officers, at foreign public companies are generally listed in public filings and on public websites. Given the general availability of this information to the public, the gathering and recording of this information by financial institutions is of little added value to law enforcement and may misallocate important resources away from high-risk customers.[28] More problematic still, adding the requirement of obtaining beneficial ownership information on these managerial individuals and requiring the verification of that information is neither practicable nor an efficient use of firm resources. Indeed, in our view it would be a time consuming process with little benefit to either law enforcement or the goal of combatting money laundering.

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[26] *See supra* note 7.

[27] This would not be the first time that FinCEN took this approach in the CDD Proposal. In fact, we note that FinCEN did not require the application of the CDD Rule to registered investment advisors even though they are subject to the CIP Rule. *See* NPRM, 79 Fed. Reg. at 45159, 45170 (citing proposed 31 C.F.R. § 1010.320(d)(2)(v)).

[28] *See generally* NPRM, 79 Fed. Reg. at 45157.

Therefore, FIA urges FinCEN to exempt foreign public companies, including foreign regulated entities that are "publicly traded,"[29] from the definition of "legal entity customer." This is consistent with current AML requirements relating to correspondent accounts for foreign banks, in which publicly-owned foreign banks are exempt from providing information relating to their owners.[30] It is also consistent with Financial Action Task Force ("FATF")[31] guidance relating to the CDD requirements applicable to legal persons and arrangements, which recommends that it would not be necessary to identify and verify the identity of any shareholder or beneficial owner of certain public companies because identification data may be obtained from a public register, from the customer or from other reliable sources.[32]

To the extent that FinCEN has concerns about certain foreign entities that are publicly traded on exchanges in higher-risk jurisdictions, FinCEN could provide for a limited exemption to the definition of "legal entity customer" for foreign entities traded on exchanges or over-the-counter markets located in FATF jurisdictions or jurisdictions that are part of the International Organization of Securities Commissions ("IOSCO").[33] Such an approach would be consistent with the approach taken by FinCEN in the context of Section 312.[34] Alternatively, at a minimum, FIA urges FinCEN to provide a limited exemption such that the covered financial institution would only need to obtain information required under the control prong of the definition of beneficial owner of foreign entities (and not the beneficial ownership prong).

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[29] *See generally* 31 C.F.R. § 1010.610(b)(3)(ii)(B) (defining "publicly traded" to mean "shares that are traded on an exchange or organized over-the-counter market that is regulated by a foreign securities authority as defined in section 3(a)(50) of the Securities Exchange Act of 1934"); 15 U.S.C. § 78c(a)(50) ("The term 'foreign securities authority' means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.").

[30] *See* 31 C.F.R. § 1010.630.

[31] As FinCEN is aware, FATF is an intergovernmental organization founded in 1989 to develop policies to combat money laundering and terrorism financing. As noted in the Preamble, FinCEN's goal in proposing this CDD Proposal is to advance Treasury's work with FATF and other international bodies. *See* NPRM, 79 Fed. Reg. at 45155.

[32] *See, e.g.*, The FATF Recommendations at 61 (Feb. 2012), *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (hereinafter "The FATF Recommendations") ("Where the customer or the owner of the controlling interest is a company listed on a stock exchange and subject to disclosure requirements (either by stock exchange rules or through law or enforceable means) which impose requirements to ensure adequate transparency of beneficial ownership, or is a majority-owned subsidiary of such a company, it is not necessary to identify and verify the identity of any shareholder or beneficial owner of such companies. The relevant identification data may be obtained from a public register, from the customer or from other reliable sources.").

[33] IOSCO is an association of organizations that regulate the world's securities and futures markets; its members are typically the main financial regulator from each country (*e.g.*, the SEC and CFTC). *See* http://www.iosco.org/.

[34] FinCEN used a framework for enhanced due diligence requirements in Section 312 of the PATRIOT Act for jurisdictions it determined had elevated risk. Specifically, Section 312 requires enhanced due diligence when establishing or maintaining a correspondent account for a foreign bank that is operating: (1) under an offshore license; (2) in a jurisdiction found to be non-cooperative with international AML principles; or (3) in a jurisdiction found to be of primary money laundering concern under Section 311 of the PATRIOT Act.

2. Exemptions From the Definition of Legal Entity Customer Should be Broadened to Include Foreign Regulated Entities Even Where They are not Publicly Traded.

As FinCEN is aware, foreign regulated entities, such as foreign banks, broker-dealers, mutual funds and FCMs are subject to examination by regulators in their home jurisdictions. Certainly, such regulation should make it unnecessary for covered financial institutions to conduct CDD on these entities. As with publicly traded companies, there exist Credible Sources of public information relating to these foreign regulated entities, on foreign regulators' websites or directly from the foreign regulators by law enforcement. Under these circumstances, obtaining CDD information would not likely promote the goals of CDD, including law enforcement interests, while causing covered financial institutions to devote their important resources to managing derivative legal risk rather than fundamental illicit finance risk.[35] Again, FinCEN could limit these exemptions as appropriate to entities in FATF jurisdictions.

This is particularly true, where, as here, foreign regulated entities (and in particular, banks, broker-dealers, mutual funds and FCMs located in foreign jurisdictions) are already subject to the extensive requirements of Section 312, and in the case of foreign banks, Sections 313 and 319 of the PATRIOT Act. Section 312 of the PATRIOT Act requires U.S. financial institutions to perform due diligence with regard to correspondent accounts established or maintained for foreign regulated entities. Such due diligence requires: (1) determining whether any correspondent accounts are subject to enhanced due diligence pursuant to 31 C.F.R. § 1010.610(b) and (c); (2) assessing the money laundering risk presented by such correspondent account for such entities, based on an understanding of (i) the nature of the foreign regulated entity's business and the markets it serves; (ii) the type, purpose, and anticipated activity of such correspondent account; (iii) the nature and duration of the covered financial institution's relationship with the foreign regulated entity (and any of its affiliates); (iv) the AML and supervisory regime of the jurisdiction that issued the charter or license to the foreign regulated entity; and (v) information known or reasonably available to the covered financial institution about the foreign regulated entity's AML record; and (3) applying risk-based procedures and controls to each such correspondent account reasonably designed to detect and report known or suspected money laundering activity. Additionally, Section 312 of the PATRIOT Act requires a periodic review of correspondent account activity sufficient to determine consistency with information obtained about the type, purpose, and anticipated activity of the account. Given the extensive requirements of Section 312, which covered financial institutions are already required to implement with respect to these particular financial institutions, adding another overlay for those entities for purposes of the CDD Rule would be unnecessary.

We note that FinCEN has already extended this benefit to the beneficial owners of funds or assets in payable-through accounts of correspondent accountholders,[36] that are presently

[35] *See generally* NPRM, 79 Fed. Reg. at 45154.

[36] Although not spelled out in the text of the Final Rule, the Preamble makes clear that the beneficial owners of funds or assets in payable-through accounts are exempt from the definition of "legal entity customer." *See* NPRM, 79 Fed. Reg. at 45158-45159. Payable-through accounts are addressed in 31 C.F.R. § 1010.610(b)(1)(iii) which requires financial institutions, as part of the enhanced due diligence process, "to obtain information from the foreign bank about the identity of any person with authority to direct transactions through any correspondent account that is

covered under Section 312 of the PATRIOT Act. Specifically, FinCEN states, "compliance with the information requirements included in § 1010.610(b)(1)(iii) will suffice, and the particulars of this new requirement, such as use of a certification form with respect to the beneficial owner of funds or assets in a payable-through account, would not apply."[37] Thus, consistent with this exemption, FIA submits that foreign regulated entities should be exempt from these duplicative procedures which would not advance the goals of the CDD Proposal and would create an unnecessary burden. At a minimum, however, FIA urges FinCEN to provide a limited exemption such that the covered financial institution would only be required to obtain information from the foreign regulated entity under the control prong of the definition of beneficial owner (and not the beneficial ownership prong).

3. The Requirement to Obtain the CDD Certification Form from a Foreign Bank that is not Publicly Traded Should be Satisfied Upon Receipt of a Foreign Bank Certification under Sections 313 and 319 of the PATRIOT Act.

Covered financial institutions, such as FCMs or IB-Cs, are already obligated to maintain information relating to the 25 percent ownership[38] of foreign bank customers pursuant to Sections 313 and 319 of the PATRIOT Act and information relating to 10 percent owners pursuant to the due diligence requirements in 31 C.F.R. §§ 1010.610(b) and 1010.630(a)(2). This information is collected and maintained on a Foreign Bank Certification[39], which must be recertified every three years, if not sooner. Although ownership information that is collected pursuant to these requirements is not verified, it seems unnecessary to add a verification component to this requirement at this point in time. Indeed, we urge FinCEN not to change a process that has been performing reasonably well since 2002. Further, given that the same information that is currently captured on the Foreign Bank Certification will be captured on the CDD Certification Form, it would be an inefficient use of firm resources for FinCEN to require that firms obtain and maintain both forms. Accordingly, for the reasons discussed above, at a minimum, foreign-regulated customers that provide a Foreign Bank Certification to a covered financial institution should be exempt from the requirement to also provide a CDD Certification Form.

4. Foreign Government Entities Should Also be Exempt From the Definition of Legal Entity Customer.

The current Proposal exempts from the definition of legal entity customer "domestic governmental agencies and instrumentalities and certain legal entities that exercise governmental authority."[40] For the same reasons that domestic governmental entities are

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a payable-through account, and the sources and beneficial owner of funds or other assets in the payable-through account".

[37] *See* NPRM, 79 Fed. Reg. at 45158-45159.

[38] *See* 31 C.F.R. § 1010.610(b)(3)(ii)(A) ("Owner means any person who directly or indirectly owns, controls, or has the power to vote 10 percent or more of any class of securities of a foreign bank.").

[39] *See* 31 C.F.R. § 1010.605(b).

[40] *See id.*, NPRM, 79 Fed. Reg. at 45159.

exempt, we urge FinCEN to exempt foreign governmental agencies and instrumentalities from the CDD Rule. The ownership of these accounts should be the government itself, and indeed there would likely be no need for further inquiry once the CIP process has been conducted and it is determined that the account owner is the government. Requesting shareholder information is not likely to make sense to the accountholder. Obtaining the identity of individuals authorized to control an account established for a foreign government is part of the normal course of business. We question whether verification of that identity in this context is appropriate or necessary. Collecting information from foreign governments, and verifying the identity of beneficial owners, raises comity concerns not readily navigable by financial institutions.

At a minimum, FinCEN should consider a limited exemption—such as the one proposed for non-exempt pooled investment vehicles—wherein covered financial institutions would only be required to identify the beneficial owners of the accounts of foreign governmental agencies or instrumentalities under the control prong of the "beneficial owner" definition (as opposed to both the ownership prong and the control prong).[41]

C. FinCEN Should Adopt the Proposed Exemption for Non-Exempt Pooled Investment Vehicles, Such as Hedge Funds, From the Definition of Legal Entity Customer.

FIA urges FinCEN to adopt the proposed exemption from the beneficial ownership requirement for non-exempt pooled investment vehicles. Under the Proposal, non-exempt pooled investment vehicles, such as hedge funds (whose ownership structure may continuously fluctuate), are not currently exempt from the definition of "legal entity customer."[42] In the Proposal, however, FinCEN points out that it is considering, whether: (1) non-exempt pooled investment vehicles that are operated or advised by financial institutions that are proposed to be exempt (*e.g.*, Registered Investment Advisors), should also be exempt from the requirement that a covered financial institution obtain beneficial ownership information; and (2) if not exempted, whether a covered financial institution should only be required to identify the beneficial owners of non-exempt pooled investment vehicles under the control prong of the "beneficial owner" definition (as opposed to both the ownership and control prongs). FinCEN is also considering whether such an approach, if adopted, may best be addressed through inclusion of such vehicles within the scope of the CDD Proposal, followed by the issuance of either subsequent guidance or a specific exemption or exception from the application of the ownership prong of the requirement.

As noted in the ANPRM Comment Letter,[43] it is FIA's position that the beneficial ownership requirement should not apply to non-exempt pooled investment vehicles because

[41] *See, e.g.*, The FATF Recommendations at 64 (categorizing "public administrations or enterprises" as a type of customer that is "low risk" such that "it could be reasonable for a country to allow its financial institutions to apply simplified CDD measures.").

[42] The term "non-exempt pooled investment vehicle" means: "(i) any company that would be an investment company as defined in Section 3(a) of the ['40 Act], but for the exclusion provided by either Section 3(c)(1) or Section 3(c)(7) of that Act; or (ii) any commodity pool under section 1a(10) of the Commodity Exchange Act [("CEA")] that is operated by a commodity pool operator registered with the CFTC under Section 4m of the CEA. *See* NPRM, 79 Fed. Reg. at 45161 n.44.

[43] *See* ANPRM Comment Letter at p. 6.

obtaining information about persons who hold a certain ownership percentage, which could fluctuate on a daily basis, creates unreasonable and insurmountable operational and logistical challenges and such information is accurate only for a limited period of time. In addition, because such shareholders and investors do not exercise control over investment decisions or strategies or the day-to-day operations of the fund, requiring firms to obtain information about these persons adds no demonstrable value from a law enforcement perspective. Accordingly, FIA urges FinCEN to exempt non-exempt pooled investment vehicles from the definition of "legal entity customer" and to do so through the text of the Final Rule itself, rather than simply through guidance. If FinCEN does provide a limited exemption to covered financial institutions, such that the covered financial institution would only be required to obtain information under the control prong of the definition of beneficial owner, such limited exemption should also be included in the text of the Final Rule, and not simply extended to covered financial institutions through guidance.

D. The CDD Certification Form Should Include Instructions, Permit Covered Financial Institutions to Obtain Beneficial Ownership Information for Individuals With Less Than 25 Percent Ownership, be Accepted in an Electronic Format and Provide Covered Financial Institutions a Safe Harbor From Liability for any Omissions or Misstatements Caused by the Person Completing the Form.

The Proposal includes a certification form that covered financial institutions would be required to use to obtain and document the beneficial ownership of their legal entity customers (the "CDD Certification Form"). The Form would require an individual opening an account on behalf of a legal entity customer to: (1) provide the name, date of birth, address, and identification number for each beneficial owner of 25 percent or more and a control person; and (2) certify that the information provided on the Form is true and accurate to the best of his or her knowledge.

FIA is appreciative of the provision of this Form by FinCEN and offers a few suggestions which it believes will enhance the process of using the CDD Certification Form. First, FIA suggests that the CDD Certification Form include instructions explaining to the individual opening the account that he or she may have to look through multiple corporate entities and complex legal holding structures to determine which natural persons ultimately own 25 percent or more of the equity interests of the legal entity customer. We submit that inclusion of these instructions for the individuals opening the account would enhance the efficiency of the process by avoiding variations in instructions from administrative personnel and would therefore increase the likelihood that the CDD Certification Form is accurately completed.

Additionally, to the extent that it is the policy of a covered financial institution to obtain beneficial ownership information for individuals with less than 25 percent ownership (*i.e.*, for 10 percent beneficial owners), a covered financial institution should be permitted to

revise the CDD Certification Form to require individuals opening an account on behalf of a legal entity customer to provide information in accordance with the institution's policy.[44]

Further, FinCEN should permit covered financial institutions to obtain the information in the CDD Certification Form electronically, including obtaining an electronic signature from the individual completing the Form.

Finally, FinCEN should provide for a safe harbor from liability for a covered financial institution receiving a CDD Certification Form that contains factual errors. FinCEN should clarify in the Final Rule itself that covered financial institutions would not be liable for any omission or misrepresentation made by the individual completing the form.

V. FinCEN Should Exclude the Fifth Pillar from the Amended AML Program Requirement in the Final Rule or Provide Additional Clarification so That the Industry Can Adequately Provide Comment.

The Proposal adds to the AML program requirement a new fifth pillar that would require covered financial institutions, including FCMs and IB-Cs, to maintain risk-based procedures for conducting ongoing customer due diligence including, but not limited to: (1) understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and (2) conducting ongoing monitoring to maintain and update customer information and to identify and report suspicious transactions. In the Preamble, FinCEN asserts that it does not intend for this AML program rule amendment to necessarily require modifications to existing practices or procedures with respect to customer onboarding, ongoing monitoring or suspicious activity reporting and that it intends for this AML program rule amendment to clarify existing supervisory and regulatory expectations. FinCEN bases its position that the fifth pillar is not a new AML program requirement for FCMs and IB-Cs on two points: (1) the CFTC's and NFA's rules require FCMs to obtain certain know-your-customer ("KYC") information relating to customers; and (2) the suspicious activity report ("SAR") reporting requirement currently causes financial institutions to understand the nature and purpose of customer relationships for purposes of identifying transactions in which the customer would not normally be expected to engage.[45] However, consistent with our position in the ANPRM Comment Letter,[46] FIA continues to view this fifth pillar as a new requirement for the futures industry insofar as it relates to the AML program.

As set forth below, and in response to FinCEN's specific request for comment,[47] FIA believes that: (1) the fifth pillar is not incorporated into the existing AML program requirements; (2) it is not necessary for successful implementation of an AML program; and (3)

[44] In the Preamble, FinCEN recognizes that such lower percentages may be used. *See* NPRM, 79 Fed. Reg. at 45158 ("FinCEN has learned through its outreach that some financial institutions may already identify beneficial owners using a lower ownership threshold, such as 10 percent.").

[45] *See generally* NPRM, 79 Fed. Reg. at 45163.

[46] *See* ANPRM Comment Letter at pp. 2-3, 7-8.

[47] NPRM, 79 Fed. Reg. at 45167 ("FinCEN also seeks comment from industry as to whether there are any covered financial institutions that have been able to meet the existing AML program requirements and SAR requirements without understanding the nature and purpose of customer relationships and conducting ongoing monitoring.")

it is beyond FinCEN's authority to incorporate non-AML-program CFTC and NFA rules by reference into FinCEN's AML program requirements.[48] Accordingly, FIA urges FinCEN to exclude this pillar from the Final Rule.

A. There is no Current AML Program Requirement Applicable to the Futures Industry That an FCM or IB-C Understand the Nature and Purpose of a Customer Relationship in Order to Develop a Customer Risk Profile.

As discussed extensively in the ANPRM Comment Letter, FCMs and IB-Cs are not presently subject to general CDD requirements. Indeed, aside from Section 312 of the PATRIOT Act (*i.e.*, special due diligence for correspondent and private banking accounts), there is no specific obligation under the futures industry's AML program requirements to collect information relating to understanding the nature and purpose of customer relationships (*i.e.*, to collect the purpose and intended nature for the customer's account or customer's expected activity).[49] Nor are FCMs or IB-Cs subject to any AML program rule—including any CFTC or NFA AML program rules—requiring them to gather information relating to the nature and purpose of customer relationships. Further, as discussed below, they are not presently required (unless they are part of a bank holding company) to gather information relating to a "customer risk profile."

The Preamble makes clear that FinCEN appreciates that the AML program rules themselves do not require this prong. Indeed FinCEN points out the confusion created in the industry with respect to CDD by the March 2010 beneficial ownership guidance.[50] Recognizing that the manner in which different industries determine the nature and purpose of customer relationships varies across industry lines, FinCEN notes in the Preamble that FCMs and IB-Cs are subject to certain KYC and other requirements by the CFTC and NFA, citing CFTC Rule 1.37(a)(1) and NFA Compliance Rule 2-30, which require FCMs and IB-Cs to obtain certain information from individuals and other unsophisticated customers during the onboarding process. Relying on these non-AML rules to which FCMs and IB-Cs are subject, FinCEN states that these existing practices will meet the newly proposed CDD Rule. However, its stated

[48] By way of example, FinCEN cites CFTC Rule 1.37(a)(1) and NFA Compliance Rule 2-30. *See* NPRM, 79 Fed. Reg. at 45163 n.51.

[49] *See generally* NPRM, 79 Fed. Reg. at 45163 n.48. FIA has previously expressed its concern in writing about the application of the concept of expected or anticipated activity, even in the context of Section 312. *See* Letter from Alan Sorcher, Securities Industry Association, and Barbara Wierzynski, Futures Industry Association to William Langford, FinCEN (Mar. 3, 2006) (on file with FinCEN), *available at* http://www.futuresindustry.org/downloads/regulatory/2006/Rule312_CommentLetter030306.pdf

[50] On March 5, 2010, FinCEN, the SEC, and the federal banking regulators issued joint guidance on obtaining and retaining beneficial ownership information. *See* FinCEN, "Guidance on Obtaining and Retaining Beneficial Ownership Information" (Mar. 5, 2010), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/fin-2010-g001.pdf. (hereinafter, the "March 2010 Beneficial Ownership Guidance"). As FinCEN notes in the Preamble, "[i]ndustry reaction to this guidance has been one reason for pursuit of the clarity entailed in making requirements with respect to CDD and beneficial ownership explicit within FinCEN's regulations." NPRM, 79 Fed. Reg. at 45154 n.16. FinCEN does not take a definitive position in the NPRM on the guidance, advising instead that "[t]he future status of previous guidance … such as" this one "will be addressed at the time of the issuance of a final rule." NPRM, 79 Fed. Reg. at 45156 n.27.

expectation that these existing practices will meet the requirements of the proposed rule continues to create confusion and, we submit, goes beyond FinCEN's authority.

The rules to which FinCEN refers are not AML-related requirements. Instead, as FinCEN recognizes, these requirements are intended to address risks inherent to trading futures and the need for adequate risk disclosure.[51] While these regulatory requirements can supplement an AML program and reduce some of the concerns FinCEN has about an FCM's knowledge of its clients, the maintenance of such information is not part of the FCM's AML program. In fact, the implementation of these procedures is generally assigned to operations, onboarding, sales, and general compliance groups—not the AML group—and is therefore not fully tied into an FCM's or IB-C's AML program or its monitoring procedures.

B. The Current SAR Rule Does Not Require FCMs and IB-Cs to Monitor for Expected Activity Through Its Automated Monitoring Process; nor Is It Industry Practice To Do So.

FinCEN states that this element of the amendment to the AML program rule is simply intended to clarify the existing expectations for financial institutions to understand the nature and purpose of customer relationships in order to develop a customer risk profile. FinCEN states that this understanding is necessary for purposes of complying with the existing requirement to (1) report suspicious activity and (2) maintain an effective AML program.

Currently, under the SAR Rule, FCMs and IB-Cs understand that if they detect something suspicious involving a transaction of at least $5,000, the activity should be reported on a SAR. There are four prongs to the SAR filing requirement that would trigger a requirement to file a SAR with FinCEN.[52] Under one of those four prongs, a SAR filing is required if the activity "has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the FCM or IB-C knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction."[53]

Based on this single prong, FinCEN assumes that firms are required to implement automated monitoring of the nature and purpose of a customer's account. However, it is

[51] *See* NPRM, 79 Fed. Reg. at 45163 n.51 (citing CFTC Rule 1.37(a)(1) and NFA Compliance Rule 2-30).

[52] *See* 31 C.F.R. § 1026.320(a)(2) ("A transaction requires reporting under the terms of this section if it is conducted or attempted by, at, or through an FCM or IB-C, it involves or aggregates funds or other assets of at least $5,000, and the FCM or IB-C knows, suspects, or has reason to suspect that the transaction (or pattern of transactions of which the transaction is a part): (i) Involves funds derived from illegal activity or is intended or conducted in order to hide or disguise funds or assets derived from illegal activity (including, without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any Federal law or regulation or to avoid any transaction reporting requirement under Federal law or regulation; (ii) Is designed, whether through structuring or other means, to evade any requirements of this chapter or of any other regulations promulgated under the [BSA]; (iii) Has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the FCM or IB-C knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction; or (iv) Involves use of the FCM or IB-C to facilitate criminal activity.").

[53] 31 C.F.R. § 1026.320(a)(2)(iii).

important to note that not every prong or every aspect of the SAR Rule is built into a firm's automated monitoring system. The Proposal assumes that because a covered financial institution obtains information, this information will be, or should be, incorporated into the institution's AML automated monitoring system and may be used to determine whether a SAR should be filed. This is not current practice at firms in the futures industry.

Moreover, FinCEN's understanding of a firm's implementation of its monitoring system fails to recognize how firms build their automated monitoring systems and incorrectly assumes that these monitoring systems are built around this prong. In fact, automated monitoring systems are built in various ways. For example, some firms focus on scenarios in their monitoring systems, while others use deviation in activity. We are not aware of any requirement that the nature or purpose of an account must be tied into a firm's automated monitoring system.

That does not mean that the four prongs of the SAR Rule are not taken into account when an FCM or IB-C determines whether to file a SAR. While FinCEN's statement that "it is industry practice to gain an understanding of a customer in order to assess the risk associated with that customer to help inform when the customer's activity might be considered 'suspicious'"[54] is generally correct, it overstates actual industry monitoring practices. In fact, when firms are reviewing suspicious activity, depending on the nature of the suspicious activity, they may review the information they have on hand about the customer to determine if that activity is consistent with what they know about the client. That process could be initiated in numerous areas at the firm outside of the AML group, with the understanding that those parts of the firm are expected to escalate any suspicious activity to the AML group for an assessment of whether a SAR should be filed. It is not, however, necessarily part of a firm's automated monitoring processes. Accordingly, it is FIA's position that FinCEN is not accurately depicting existing industry monitoring practices in the Preamble, and requests that it take FIA's comments into account in drafting and interpreting the Final Rule.

C. FinCEN's Interpretation of the CDD Rule to Incorporate All Regulatory Rules Into the AML Program is Inconsistent With the Language of the Proposed Rule Itself and Would be an Overly Broad Extension of its Authority. In any Event, This Expansion of its Authority is not Necessary.

As presently written, proposed section 1026.210(c) states that an FCM and IB-C shall be deemed to satisfy the AML program requirements of the BSA if the FCM or IB-C "implements and maintains a written [AML] program approved by senior management that: . . . [c]omplies with the rules, regulations, or requirements of its self-regulatory organization governing such programs; provided that the rules, regulations, or requirements of the self-regulatory organization governing such programs have been made effective under the Commodity Exchange Act by the appropriate Federal functional regulator *in consultation with FinCEN*."[55] In the Preamble, however, FinCEN describes certain rules and regulations meeting this "so-called" standard which do not meet this description and are not part of the AML program rules. Moreover, FIA questions whether the approach taken in the NPRM—incorporating by

[54] NPRM, 79 Fed. Reg. at 45163.

[55] *See id.* at 45174 (emphasis added) (citing proposed 31 C.F.R. § 1026.210(c)).

reference various non-AML requirements and non-BSA regulatory schemes—would withstand scrutiny under the Administrative Procedure Act ("APA").[56] First, incorporating an entire other regulatory scheme into FinCEN's regulatory scheme presents a significant risk of overbreadth, as not all rules applicable to a financial institution can be AML program requirements or mapped onto an AML framework. Second, FinCEN's approach fails to provide regulated entities with fair notice of the specific non-BSA rules that would be applicable under this Proposal. In fact, at the time of their adoption, none of the rules FinCEN cites were designed to meet any AML purpose and therefore the industry did not have the ability to effectively comment on that purpose.[57] Third, it is not clear how this aspect of the Proposal would be implemented going forward. For example, will the AML compliance staff of a covered financial institution have an independent obligation to stay abreast of *all* non-BSA rules that relate to customer or account monitoring, regardless of the intended regulatory purpose for such monitoring? Will covered financial institutions be required to amend existing AML policies and programs to reflect the addition of non-BSA requirements?

Thus, while the language of this section appears to be limited to AML requirements made effective under the CEA and subject to consultation with FinCEN, FinCEN's expectations as described in the Preamble appear to be far more extensive and to incorporate by reference all of the CFTC and NFA rules. If that is what FinCEN intends to do, FIA believes it is unwarranted and likely an extension of its authority.

Under delegated authority from the U.S. Secretary of the Treasury, FinCEN's statutory authority is limited to administering the requirements of the BSA, which includes the authority to require the establishment of an AML program and the filing of reports that have been determined to have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings, and certain intelligence and counter-terrorism matters.[58] Incorporating non-AML rules into the AML program requirement, when these rules were not promulgated in furtherance of the administration of the BSA, appears to be outside of FinCEN's statutory authority. Further, incorporating existing non-AML procedures into a firm's AML program raises a concern about future enforcement actions in which regulators penalize covered financial institutions for violations of past practices without having clearly indicated that such rules were part of AML program requirements.

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[56] *See* 5 U.S.C. §§ 706(2)(A), (C) (Under the APA, "[t]he reviewing court shall—hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]").

[57] In accordance with the provisions of section 553(b) of the APA, a notice of proposed rulemaking must include, *inter alia*, a "reference to the legal authority under which the rule is proposed," and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The CFTC and NFA rules to which FinCEN refers—CFTC Rule 1.37 and NFA Compliance Rule 2-30—were adopted pursuant to the CEA for the purpose of implementing the relevant provisions of the CEA. The public had no notice that these rules were also intended to form a part of an FCM's or IB-C's AML program. Similarly, neither NFA nor the CFTC indicated that NFA Compliance Rule 2-30 was intended to be an integral part of a member firm's AML program. Incorporating these rules into a firm's AML program without providing the public additional opportunity to comment would deny the public the opportunity to comment required under the APA.

[58] *See* Treasury Order 108-01 (Sept. 26, 2002), *available at* http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to180-01.aspx.

The discussion of the fifth pillar in the Preamble is also inconsistent with the language in the CDD Proposal itself, which purports to incorporate AML rules already approved by FinCEN.[59] Indeed, many of the non-AML rules, regulations, or requirements that FinCEN cites in the Preamble were not developed in consultation with FinCEN.[60] Accordingly, there is confusion regarding whether these non-AML rules will be deemed to be part of the AML program requirements. In fact, the rule text is not reflective of FinCEN's stated intent and this ambiguity is concerning. FIA does not take issue with the language of the rule itself, but requests FinCEN reference in the Preamble to the Final Rule only those rules which have been developed in consultation with FinCEN (as the proposed rule requires). FIA disagrees with the incorporation of non-AML rules into the AML program requirements.

Further, to suggest that codifying this prong is necessary for the successful implementation of an AML program is an overstatement. As FinCEN recognizes, firms have utilized this KYC information, as appropriate, for years and have not needed a separate KYC provision in their AML program to do so effectively. Moreover, the fact that firms obtain this information to fulfill non-AML requirements, yet still have robust AML programs, indicates that this fifth pillar is not necessary.

In the event that FinCEN still considers it necessary for FCMs and IB-Cs to obtain information about the purpose and intended nature of an account, FinCEN should specifically define its expectations in the context of the futures industry, specify the type of information that is required and provide time for the futures industry to implement these rules. As presently configured, it is difficult for a financial institution to know which rules to incorporate into its AML program.

1. FinCEN Should Clarify What is Meant by the Term "Customer Risk Profile."

In the Preamble FinCEN asks for comment on whether the term "customer risk profile" is commonly understood. Although FinCEN uses the term throughout the Preamble and within the amended AML program rule itself, the term is not defined or explained. Instead, FinCEN states that the AML program rule that incorporates this element (including the customer risk profile) "is intended to clarify *existing expectations* for financial institutions to understand the relationship for purposes of identifying transactions in which the customer would not normally be expected to engage" and that doing so is "a critical and necessary aspect of complying with the existing requirement to report suspicious activity and maintain an effective AML program."[61] It is not clear from this statement whether FinCEN is suggesting that covered financial institutions already maintain a customer risk profile,[62] but at a minimum

[59] *See* NPRM, 79 Fed. Reg. at 45174 (emphasis added) (citing proposed 31 C.F.R. § 1026.210(c)).

[60] In accordance with the plain terms of the proposed rule, FinCEN may not simply incorporate by reference self-regulatory organization rules governing AML programs. Such rules must be approved by the CFTC under the CEA for this purpose. As discussed above, the CFTC and NFA rules to which FinCEN refers were not adopted or approved as elements of an FCM's or IB-C's AML program.

[61] NPRM, 79 Fed. Reg. at 45163 (emphasis added).

[62] We are aware of only one reference to the development of a "customer risk profile" in the context of an AML program, but it is outside the context of the futures industry and only in the context of private banking. *See* FFIEC

in asking for comment, it appears to recognize that there is some doubt as to whether it is commonly understood. Although some FCMs (generally those that are part of bank holding companies) may develop something akin to a "customer risk profile," the term is not commonly used in the AML context in the futures industry.

Moreover, because we do not understand what FinCEN means by this term, or how it is to be applied to the futures industry, FIA's ability to comment on the fifth pillar is limited. Accordingly, we ask FinCEN to eliminate this term from the fifth pillar at this time. At a minimum, FIA urges FinCEN to define its expectations relating to this term as it applies to the futures industry if it opts to include it in the fifth pillar and provide industry with an opportunity to effectively comment.

2. FinCEN Should Clarify the Significance of its Distinction Between the Terms "Account" and "Customer" and how the Fifth Pillar Applies to Account Relationships.

In the context of both elements of the fifth pillar, FinCEN notes that the scope of the fifth pillar should not be limited to "customers" for purposes of the CIP rules, but rather should extend more broadly to encompass all account relationships maintained by a covered financial institution. Specifically, FinCEN states:

> In addition, because [complying with the requirement to report suspicious activity] is a necessary step to identifying and reporting suspicious activities, which obligation applies to all 'transactions . . .conducted or attempted by, at or through' the covered financial institution, its scope should not be limited to 'customers' for purposes of the CIP rules, but rather should extend more broadly to encompass *all accounts* established by the institution. [63]

It is not clear what FinCEN means by this distinction nor is it clear how this fifth pillar applies to account relationships. Moreover, FIA is concerned that by using the term "account" (instead of the term "customer"), the CDD Rule might inadvertently supersede previous guidance stating that CIP obligations do not apply to executing brokers in give-up arrangements and omnibus relationships. For example, the Give-Up Arrangement Guidance excludes certain customer relationships from being "accounts" under the CIP Rule (because they

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Bank Secrecy Act/Anti-Money Laundering Examination Manual at 281 (2010), *available at* http://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2010.pdf (hereinafter "FFIEC Examination Manual") which provides "[m]anagement should establish a risk profile for each customer to be used in prioritizing oversight resources and for ongoing monitoring of relationship activities" and the following factors that should be considered when identifying risk characteristics of private banking customers: nature of the customer's wealth and the customer's business; purpose and anticipated activity; relationship with the private banking customer; customer's corporate structure; geographic location and jurisdiction of the private banking customer's domicile or business; and public information.

[63] *See* NPRM, 79 Fed. Reg. at 45163 (emphasis added). Also confusing is the language in the NPRM which states "[w]ithin the context of CDD, 'customer relationship' is a broader term, not subject to the exemptions referenced in the definitions used for CIP." *Id.* at 45163 n.53.

are not considered "formal relationships"). Accordingly, executing brokers of give-up arrangements do not have CIP obligations.

FIA requests that the Final Rule clarify the language relating to "account" and ensure that previous guidance is not superseded by the new CDD Rule. Additionally, if the reason for FinCEN's use of these two terms interchangeably is to address the concept that both customer and account activity should be reviewed for suspicious transactions, *i.e.*, to satisfy the SAR requirement, FinCEN should make this point clear in the Final Rule. However, if that is the case, it is not clear why this language is discussed in the context of the CDD Rule, which focuses on customers and not accounts. Therefore FIA requests deletion of this language from the Final Rule or at a minimum, clarification of the language in the context of the Rule.

3. FinCEN Should Provide FCMs and IB-Cs Sufficient Time to Implement the Fifth Pillar of the Amended AML Program Rule.

Furthermore, as discussed in more detail below, if FinCEN continues to believe that this fifth pillar is necessary, it should provide covered financial institutions, particularly FCMs and IB-Cs, the same amount of time to implement this new element of the AML program rule as it is providing firms to modify their existing customer onboarding processes for purposes of obtaining beneficial ownership information. As we have noted, this is a new AML program requirement for the futures industry, and therefore the industry will need sufficient time to modify its procedures to be in compliance with its terms.

D. The Obligation to Conduct Ongoing Monitoring to Maintain and Update Customer Information and to Identify and Report Suspicious Transactions Needs to be Clarified.

Under the Proposal, when in the course of monitoring, a financial institution becomes aware of information relevant to assessing the risk posed by a customer, the financial institution is expected to update the customer's relevant information accordingly. FinCEN states that this element of the amendment to the AML program rule is consistent with a financial institution's current requirements to conduct ongoing monitoring for the purpose of maintaining and updating customer information and identifying and reporting suspicious activity.

Although throughout the Preamble, FinCEN states that it is not proposing a new categorical requirement to periodically update beneficial ownership information,[64] other language in the NPRM suggests otherwise. For example, in discussing "whether or not a financial institution would be required to update or refresh periodically the beneficial ownership information obtained under this rule," FinCEN states that it "is not proposing such a requirement but notes that, as a general matter, a financial institution should keep CDD information, including beneficial ownership information, as current as possible and update as appropriate on a risk-basis."[65] FinCEN goes on to identify various factors which may be relevant in considering whether and when to update beneficial ownership information.

[64] *See, e.g.*, NPRM, 79 Fed. Reg. at 45162, 45164.

[65] *Id*. at 45162.

Separately, FinCEN also adds that "financial institutions should update beneficial ownership information in connection with ongoing monitoring."[66] While FCMs have procedures in place to identify suspicious activity, there is no requirement that they have procedures in place to conduct ongoing monitoring of customer information or to update customer information as a result of such monitoring. Moreover, it is not the practice in the industry to adopt such procedures.

FIA urges FinCEN to clarify whether the term "ongoing monitoring": (1) is addressing monitoring for suspicious activity pursuant to the existing and independent suspicious activity reporting requirement of Section 356 of the PATRIOT Act; or (2) pertains to an expectation that FCMs will periodically update CDD, such as through the maintenance of a "customer risk assessment" or "customer risk profile." If the first interpretation is the correct view, any Final Rule should explicitly state that this element of the fifth pillar of the amended AML program rule is satisfied by compliance with the SAR Rule. If the second view is correct, this would be an extremely burdensome process and inconsistent with current industry practice. Therefore, the requirement, if adopted, should be limited to specific, event-driven situations, and be implemented on a risk-based basis. That is because not all SARs should require this type of updating. In fact, many routine SARs based on suspicious activity do not implicate customer identification. As covered financial institutions do not presently update customer information when a SAR is filed, FIA urges FinCEN to provide additional clarification regarding when such data would need to be updated. If FinCEN continues to believe that this aspect of the fifth pillar is necessary, FIA asks that it provide additional clarification regarding whether all suspicious activity or SAR filings trigger the requirement to review and update customer identification and account information.

Further, because we do not know what FinCEN's expectations are with regard to the monitoring requirement in the "ongoing due diligence" prong (*i.e.*, whether it pertains to suspicious activity monitoring or the expectation that FCMs will periodically update CDD, such as through the maintenance of a "customer risk assessment" or "customer risk profile"), and because, as discussed above, we do not understand what FinCEN means by the term "customer risk profile," our ability to comment on the fifth pillar is limited. Accordingly, we ask that FinCEN eliminate the fifth pillar at this time, and re-issue this aspect of the AML program requirement in a separate rulemaking.

VI. Response to FinCEN's Specific Request for Comments

In addition to seeking comment from the industry on the entirety of the Proposal, FinCEN seeks comments on specific parts of the rule. Below we address certain of these discrete issues which we have not already addressed above.

[66] *Id.* To add to the confusion, FinCEN also states in the Preamble that the requirement means that "when in the course of monitoring the financial institution becomes aware of information relevant to assessing the risk posed by a customer, it is expected to update the customer's relevant information accordingly" and "the proposed requirement to update a customer's profile as a result of ongoing monitoring (including obtaining beneficial ownership information for existing customers on a risk basis), is different and distinct from a categorical requirement to update or refresh the information received from the customer at the outset of the account relationship at prescribed periods[.]" *Id.* at 45164.

A. The CDD Rule Should Not be Universally Applied Retroactively.

FinCEN seeks comment as to whether the proposed requirement to collect beneficial ownership information should apply retroactively with respect to legal entity accounts established before the implementation date of the Final Rule. As set forth in the ANPRM Comment Letter,[67] we continue to believe that the CDD Rule should not be applied retroactively. The application of any Final Rule to existing accounts is costly, and in our view, is not a particularly efficient use of limited resources. Similar to the CIP Rule, which explicitly excludes from the definition of "customer" any person that has an existing account with an FCM or IB-C, existing accounts and, accordingly, existing customers, should be exempt from the Final Rule. If deemed absolutely necessary, the application of these procedures to existing accounts should be adopted on an event-driven basis, as appropriate. Although still requiring additional expenditure of time and resources, which FIA believes to be unnecessary, FinCEN's approach of having the CDD Rule apply to existing customers that open new accounts is a reasonable compromise. However, in the intermediary context, it is important that FinCEN clarify that the establishment of a new sub-account opened under an existing intermediary's master account does not trigger any obligation by the covered financial institution to conduct CDD on the sub-account holders or otherwise identify or verify the intermediary's underlying customers, or conduct additional CDD on the intermediary's master account. We ask FinCEN to incorporate these points in its guidance. (*See* Section B, *infra.*)

B. FIA Endorses the Treatment of Intermediated Accounts But Requests Additional Clarification.

FinCEN seeks comments as to whether the proposed treatment of intermediated accounts in general is sufficiently clear to address any issues that may be expected to arise. To the extent that the Proposal does not require covered financial institutions to identify the beneficial owners of an intermediary's underlying customers if the covered financial institution has no customer relationship with respect to those underlying customers, FIA agrees with this proposed treatment. However, as noted above, FIA requests that FinCEN clarify in the Final Rule that this proposed treatment takes into account the existing Omnibus Guidance discussed above.

FIA is, however, concerned that the language in the Preamble appears to limit this reliance on intermediaries exclusively to the terms of the Omnibus Guidance. The CIP Rule permits a firm who opens an account for an intermediary, such as in the case of an omnibus account, to view the intermediary as the firm's customer. An FCM or IB-C will not, in such a situation, be required to look through the intermediary to identify the beneficial owners of the underlying sub-account holders.[68] FIA requests that FinCEN clarify that the Omnibus Guidance is not the exclusive avenue for this relief. Indeed, in the securities context, the SEC, has recognized that this guidance is non-exclusive.[69] This clarification is necessary because, since

[67] ANPRM Comment Letter at p. 8.

[68] *See* Preamble to FCM CIP Rule, 68 Fed. Reg. at 25151 n.25.

[69] *See* SEC, National Exam Risk Alert, Volume I, Issue 1, at 4 n.18 (Sept. 29, 2011), *available at* http://www.sec.gov/about/offices/ocie/riskalert-mastersubaccounts.pdf (citing Question and Answer Regarding the Broker-Dealer Customer Identification Program Rule (31 CFR 103.122) (Oct. 1, 2003), *available at*

the issuance of the 2003 Omnibus Guidance, as a result of many new rules introduced in the futures industry requiring FCMs to obtain more information on these sub-accounts, FCMs know a significant amount more about these sub-accounts than was previously the case. However, FIA firmly believes that this knowledge obtained for credit and other administrative regulatory purposes (*e.g.*, Tag50 Registration) should not change the fact that its customer is the intermediary and not the sub-accountholder.

Additionally, as noted above, it is important that FinCEN clarify that the establishment of a new sub-account opened under an existing intermediary's master account does not trigger any obligation by the covered financial institution to conduct CDD on the new or existing sub-account under a master relationship opened before the CDD Rule was adopted. This clarification is essential to the efficient processing of omnibus accounts.

C. The Effective Date of the Final Rule Should be Extended to 24 Months After Issuance of the Final Rule So That Covered Financial Institutions Can Incorporate the New Beneficial Ownership Requirement and the Fifth Pillar of the Amended AML Program Rule Into Their AML Policies and Procedures.

Although the Proposal provides covered financial institutions a period of one year from the date the Final Rule is issued to modify existing customer onboarding processes to incorporate the new beneficial ownership requirement, FIA believes that at least 24 months is necessary to implement these new regulations given the extensive work involved in implementing these procedures. Moreover, because FinCEN is of the view that these procedures already exist, FinCEN does not appear to be giving covered financial institutions any time to adopt the AML program requirements contained in NPRM section 1026.210(b)(5)—the fifth pillar of the amended AML program rule. As discussed above, FinCEN is incorrect in this assumption, and if the fifth pillar is adopted, FinCEN should provide financial institutions with the same amount of time to implement these elements of the AML program as well. Otherwise firms will not be able to achieve timely compliance.

VII. Additional Considerations

A. FinCEN Should Permit Reliance on the Foreign Affiliate of a Covered Financial Institution And Incorporate Existing Guidance Relating to the Application of the Reliance Provision Into the Final Rule.

Under current FinCEN regulations, one financial institution may rely on another to conduct CIP with respect to shared customers, provided that: (1) such reliance is reasonable; (2) the other financial institution is subject to an AML program rule and is regulated by a federal functional regulator; and (3) the other financial institution enters into a contract and provides

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http://www.fincen.gov/statutes_regs/guidance/pdf/20031001.pdf which address the *non-exclusive* circumstances under which a broker-dealer could treat an omnibus account holder as the only customer for the purposes of the CIP rule and would not also be required to treat the underlying beneficial owner as a customer) (emphasis added); *In the Matter of Pinnacle Capital Markets and Michael A. Paciorek*, Exchange Act Release No. 62811 at 6 n.7 (Sept. 1, 2010), *available at* http://www.sec.gov/litigation/admin/2010/34-62811.pdf.

annual certifications regarding its AML program and CIP requirements.[70] The Proposal also provides for such reliance for purposes of complying with the CDD requirement, if those same three conditions are met. Further, a covered financial institution would not be responsible for the failure of the relied-upon financial institution to adequately fulfill the covered financial institution's beneficial ownership responsibilities, provided it can establish that its reliance was reasonable and that it obtained the requisite contracts and certifications.

FIA appreciates and supports FinCEN's proposal to extend the reliance provisions in the CIP Rule to the beneficial ownership requirement of the CDD Rule. FIA also requests that FinCEN incorporate existing guidance relating to the application of the reliance provision into the text of the Final Rule.

Additionally, FIA urges FinCEN to expand the concept of reliance beyond its present limitations, so as to permit reliance on the foreign affiliate of a covered financial institution subject to a global standard that is at least as rigorous as U.S. CIP and CDD standards.

B. FinCEN Should Require all Federal Regulatory Authorities and SROs to Release Their Examination Manuals.

FinCEN recognizes that the federal banking regulators (*i.e.*, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency) set forth their regulatory expectations through a bank examination manual (*i.e.*, the FFIEC Examination Manual).[71] FinCEN speaks frequently in the Preamble of the importance of regulatory supervisory expectations and cites to the FFIEC Examination Manual several times. However, not all regulators release their examination manuals; instead, the regulatory expectations are often identified during the examination process. This practice needs to change, particularly if FinCEN expects financial institutions to meet supervisory expectations. FIA does not believe that the FFIEC Examination Manual is an appropriate vehicle to provide guidance about BSA expectations for futures firms not subject to examinations under the FFIEC Examination Manual. Accordingly, FIA urges FinCEN to require that all federal regulatory authorities and SROs that examine financial institutions for compliance with the BSA provide those financial institutions with a copy of their examination manual so that covered financial institutions may be fully aware of supervisory expectations.

C. The March 2010 Beneficial Ownership Guidance Should be Withdrawn.

FinCEN notes in the Preamble that the future status of the March 2010 Beneficial Ownership Guidance will be addressed at the time of the issuance of the Final Rule.[72] We note that this guidance was issued in consultation with, but not in conjunction with, the CFTC, the futures industry's primary regulator. Because of its stated expectations and the examples it

[70] *See* 31 C.F.R. § 1020.220(a)(6).

[71] *See generally* FFIEC Examination Manual.

[72] *See* NPRM, 79 Fed. Reg. at 45156 n.27.

provided, this Guidance has created, and continues to create, great confusion in the futures industry.[73] Therefore, we ask that this guidance be withdrawn upon issuance of a Final Rule.

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We again express our appreciation that FinCEN has incorporated many of our comments to the ANPRM in this Proposal. For the reasons set forth above, FIA believes that the Proposal requires further refinement and modification before it is implemented. Moreover, because we do not sufficiently understand the requirements of the fifth pillar, we, therefore, request that FinCEN re-propose it in a separate rulemaking or provide additional clarification so firms can adequately comment. To that end, we are available to meet with FinCEN staff to discuss these complicated issues, as well as other ways to improve AML compliance.

Thank you for giving FIA the opportunity to comment on the Proposal. We look forward to the continued dialogue between government and industry to strengthen the regulatory structure surrounding futures firms and other U.S. financial institutions. If you have any questions regarding this comment or any related issues, please contact Barbara Wierzynski, FIA's General Counsel at (202) 466-5460 and bwierzynski@futuresindustry.org.

Respectfully yours,

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[73] *See id.* at 45154 n.16.