



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Matthew B. Kulkin
Director

Re: Interpretive Guidance Regarding Voice Broker Customer Identification Program and Beneficial Ownership Rule Requirements

Ladies and Gentlemen:

The Division of Swap Dealer and Intermediary Oversight (**DSIO**) of the U.S. Commodity Futures Trading Commission (**Commission** or **CFTC**) is issuing this interpretive guidance to clarify the obligations of a certain subset of entities operating as Introducing Brokers (**IBs**) in commodities under the Customer Identification Program (**CIP**)¹ and Beneficial Ownership (**BO**) regulations issued under the Bank Secrecy Act (**BSA**).² The Financial Crimes Enforcement Network (**FinCEN**), a bureau of the U.S. Department of Treasury, exercises delegated authority to implement, administer and enforce compliance with the Bank Secrecy Act and its associated regulations. The CFTC exercises examination authority under the Bank Secrecy Act and joint authority with respect to the promulgation of the CIP Rule. In consultation with FinCEN, DSIO issues this guidance to clarify the applicability of CIP and BO requirements to voice brokers, which became subject to IB registration under the Dodd-Frank Wall Street Reform and Consumer Protection Act.³ Specifically, an IB that is registered with the CFTC and is a member of NFA that does not introduce an account to a Futures Commission Merchant (**FCM**), does not have customers or accounts for the purposes of the CIP Rule. An IB that has neither customers nor accounts as defined under the CIP Rule has no obligations under the CIP Rule, and it likewise has no obligations under the BO Rule. This guidance does not establish any new regulatory requirements;

¹ 31 CFR § 1026.220 (hereinafter CIP Rule).

² 31 CFR § 1010.230 (hereinafter BO Rule).

³ Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”). The Dodd-Frank Act regulatory framework revised the IB definition in the CEA to include persons engaged in soliciting or accepting orders for the purchase or sale of swaps. This revision resulted in the registration as IBs of persons that broker swap transactions in the over-the-counter markets that previously did not have to register.

rather, it clarifies a particular set of circumstances under which CIP and BO requirements do not apply.

I. Regulatory Background

The BSA⁴ authorizes the Secretary of the Treasury (the **Secretary**) to issue regulations requiring financial institutions (**FIs**) to keep records and file reports.⁵ The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.⁶ Section 5318(h) of the BSA requires FIs to establish anti-money laundering (**AML**) programs and specifies that these programs must contain certain minimum requirements.⁷ Section 1010.100 of FinCEN's regulations defines IBs as FIs.⁸ Therefore, IBs are required to establish AML programs under section 5318(h) of the BSA. FinCEN regulations also require that IBs, among other obligations, establish AML programs that address the CIP Rule and BO Rule.⁹

Commission regulation 42.2, which was issued under the authority of the CFTC to jointly issue the CIP Rule, sets forth the obligation of IBs to comply with the CIP Rule. Specifically, every IB is required to comply with the applicable provisions of the BSA, the FinCEN regulations promulgated thereunder, and the requirements of 31 U.S.C. 5318(l) and 31 CFR 1026.220, which require that CIP be adopted as part of the firm's BSA compliance program.¹⁰

An *Introducing Broker* in commodities is defined in both the CIP Rule¹¹ and BO Rule¹² as "any person registered or required to be registered as an introducing broker with the CFTC under the Commodity Exchange Act [**CEA**] (7 U.S.C. 1 *et seq.*), except persons who register pursuant to Section 4f(a)(2) of the Commodity

⁴ The BSA is codified at 12 U.S.C. § 1892b, 12 U.S.C. § 1951 *et seq.* 31 U.S.C. § 5311 *et seq.*

⁵ 31 U.S.C. § 5311.

⁶ See Treasury Order 180-01 (Sept. 26, 2002).

⁷ Section 5318(h)(1) identifies these minimum requirements as follows: In order to guard against money laundering through financial institutions, each financial institution shall establish AML programs, including, at a minimum—(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs.

⁸ 31 CFR § 1010.100(t)(9).

⁹ 31 CFR § 1026.210.

¹⁰ 17 CFR § 42.2.

¹¹ 31 CFR § 1026.100(g).

¹² 31 CFR § 1010.100(bb).

Exchange Act (7 U.S.C. 6f(a)(2)).” The Dodd-Frank Act revised the IB definition in the CEA to include persons engaged in soliciting or accepting orders for the purchase or sale of swaps. This revision has resulted in the registration as IBs of persons that historically brokered swap transactions without having to register.¹³

Traditional IBs “introduce” their customers to FCMs that carry their customers’ accounts. Such IBs solicit or accept orders for commodity futures contracts, options on futures contracts, and commodity options as well as solicit customers for referral to an FCM for the institution of a trading relationship.

DSIO understands that there are registered IBs that operate differently from traditional IBs, in that they do not “introduce” customers to the FCMs that carry their customers’ accounts. Rather, transacting parties, often through their independent efforts, establish or have already established accounts with the carrying FCMs. An IB that works with such a transacting party may not have a direct and formal relationship with any FCM that carries the transacting party’s accounts. Where such a relationship does not exist, the IB will obtain a license enabling it to directly enter orders into the electronic order system of a designated contract market (DCM) on behalf of the transacting party. The transacting party then gives permission to the IB to electronically enter orders on its behalf. In such an instance, the IB does not receive or have access to the transacting party’s records or account statements, and invoices the transacting party directly for payment of commissions owed regarding the order.¹⁴

II. Application of CIP Rule

The CIP Rule applicable to FCMs and IBs requires the implementation of a written CIP that “must include risk-based procedures for verifying the identity of each customer” and “must include procedures for opening an account that specify identifying information that will be obtained from each customer.”¹⁵ For purposes of the CIP Rule, *account* is defined as a formal relationship with an FCM. This definition is silent as to IBs.¹⁶ *Customer* is defined as one opening an account with

¹³ An IB is defined under the CEA (7 U.S.C. § 1a(31)) as any person (except an individual who elects to be and is registered as an associated person of an FCM) who is registered with the CFTC as an IB, or any person who is engaged in soliciting or in accepting orders for: (1) the purchase or sale of any commodity for future delivery, security futures product, or swap; (2) any agreement, contract, or transaction described in § 2(c)(2)(C)(i) or § 2(c)(2)(D)(i) of the CEA; (3) any commodity option authorized under section 4c of the CEA; or (4) any leverage transaction authorized under section 19 of the CEA; and, does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

¹⁴ IBs operating in this manner are often referred to as “voice brokers.”

¹⁵ 31 CFR § 1026.220(a)(1)-(2).

¹⁶ 31 CFR § 1026.100(a)(1).

an FCM for itself or another (if an individual lacking legal capacity or an entity that is not a legal person).¹⁷ This definition further states that “[w]hen an account is introduced to a futures commission merchant by an introducing broker, the person or individual opening the account shall be deemed to be a *customer* of both” the FCM and IB.¹⁸ Based on the application of the regulatory text to these circumstances, an IB only has a customer for the purpose of the CIP Rule if the IB introduces the account in question, as opposed to the account having been established directly at the FCM through the transacting party’s independent efforts. If this condition is not met, *i.e.*, if an IB operates solely in a manner such that it does not introduce an account to an FCM, that IB has neither customers nor accounts for the purposes of the CIP Rule.

The CIP Rule sets forth the minimum elements required to be contained in a CIP. These elements address the application of CIP explicitly to customers and/or accounts.¹⁹ Based on the application of these provisions of the CIP Rule to these circumstances, an IB that does not introduce an account to an FCM does not have customers or accounts for the purposes of the CIP Rule, therefore does not have obligations under these provisions of the CIP Rule.

An IB that does not introduce an account to an FCM would have no occasion to implement a CIP, given that it lacks both customers and accounts under the CIP Rule. Therefore, DSIO hereby clarifies, in consultation with FinCEN, that if an IB has neither customers nor accounts as defined under the CIP Rule, it is not required to maintain a written CIP under § 1026.220(a)(1). To interpret the CIP Rule otherwise would produce a result inconsistent with the purpose of the CIP Rule by requiring an entity to maintain written procedures that are inapplicable to its current activities and that it has no expectation of ever having to apply.

III. Application of BO Rule

In consultation with FinCEN, and based upon the rationale of FinCEN, set forth below, DSIO hereby clarifies that if an IB has neither customers nor accounts as defined under the CIP Rule, it therefore has no obligations under the CIP Rule, and it likewise has no obligations under the BO Rule (footnotes omitted):

¹⁷ 31 CFR § 1026.100(d).

¹⁸ 31 CFR § 1026.100(d)(3).

¹⁹ See, e.g., 31 CFR § 1026.220(a)(2) [“CIP must include risk-based procedures for verifying the identity of each customer...”]; 31 CFR § 1026.220(a)(3)(i)(A) [CIP recordkeeping must include “All identifying information about a customer...”]; 31 CFR § 1026.220(a)(4) [“The CIP must include procedures for determining whether a customer appears on any list of known or suspected terrorists or terrorist organizations...”]; 31 CFR § 1026.220(a)(5) [CIP must provide customers adequate notice].

The BO Rule clarified and strengthened due diligence requirements for certain financial institutions (including IBs) by imposing requirements for these financial institutions to identify and verify the identity of beneficial owners of *legal entity customers*. In the BO Rule a *legal entity customer* is defined as “a corporation, limited liability company, or other entity that is created by the filing of a public document with a Secretary of State or similar office, a general partnership, and any similar entity formed under the laws of a foreign jurisdiction that opens an account,.” Although most of the provisions of this definition focus on the “legal entity” portion of the defined term, the definition explicitly states that a *legal entity customer* is a legal entity “that opens an account.”

The definition of account in the BO Rule incorporates by reference the definitions of account used in the CIP Rule for all covered financial institutions, which for FCMs and IBs is 31 CFR § 1026.100(a). Although the policies and procedures for identification and verification under the BO Rule need not be identical to those adopted under the CIP Rule, they “must contain all the elements of the applicable CIP Rule.” FinCEN developed the BO Rule framework in this manner in order to, among other things, “facilitate financial institutions’ implementation of the requirement through leveraging existing [CIP] procedures and systems.”

As described above, the specific condition under which an IB has CIP Rule obligations (*i.e.*, the introduction of an account) is contained in the definition of *customer*. This same language does not appear in the BO Rule's definition of *legal entity customer*. However, the BO Rule defines *legal entity customer* as one who opens an account, and explicitly ties the definition of *account* to that which applies to the CIP Rule. Reading the CIP Rule and BO Rule together requires that only those IBs subject to obligations under the CIP Rule be subject to obligations under the BO Rule. To interpret otherwise in the circumstances addressed in this guidance would put an IB which does not introduce accounts in the impossible situation where it was required to identify the beneficial owner of a purported customer, but not to identify the purported customer itself.

IV. DSIO Interpretative Guidance

In arriving at the conclusions in this guidance, DSIO has relied upon its understanding of how the IBs described herein operate. Nothing precludes DSIO from arriving at a different conclusion regarding how the CIP Rule or BO Rule apply to an entity operating in a manner different from that specifically described herein.

This guidance represents the views of DSIO only, and does not necessarily represent the position or view of the Commission or of any other office or division of the Commission. Persons may rely upon this guidance strictly for the purposes of compliance with the CIP Rule and BO Rule. Further, this guidance is based upon the representations made to DSIO. Any different, changed, or omitted material facts or circumstances might render this guidance void.

Questions concerning the relief in this letter may be directed to Andrew Chapin, Associate Chief Counsel, DSIO at (202) 418-5465 or achapin@cftc.gov; Helene Schroeder, Special Counsel, DSIO at (202) 418-5424 or hschroeder@cftc.gov; or Scott Lee, Special Counsel, DSIO at (202) 418-5090 or slee@cftc.gov.

Very truly yours,

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