



FinCEN GUIDANCE

FIN-2019-G002

Issued: July 22, 2019

Subject: Guidance on the Application of the Customer Identification Program Rule and the Beneficial Ownership Rule to Certain Introducing Brokers

The Financial Crimes Enforcement Network (FinCEN) is issuing this interpretive guidance to clarify the obligations under the Customer Identification Program (CIP) Rule¹ and the Beneficial Ownership (BO) Rule² of a certain subset of entities operating as Introducing Brokers in commodities (IBs). Specifically, an IB 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 expectations or requirements. Rather, it clarifies a particular set of circumstances under which CIP and BO requirements do not apply.

Background

An *Introducing Broker* in commodities is defined in both the CIP Rule³ and BO Rule⁴ as “any person registered or required to be registered as an introducing broker with the [Commodity Futures Trading Commission (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 [CEA] (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.⁵

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1. 31 CFR § 1026.220
 2. 31 CFR § 1010.230
 3. 31 CFR § 1026.100(g)
 4. 31 CFR § 1010.100(bb)
 5. 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.

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, and solicit customers for referral to an FCM to establish a trading relationship.

Based on consultation with the CFTC, FinCEN understands that there are some 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 obtains 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 commission on the order.⁶

Application of CIP Rule

The CIP Rule applicable to FCMs and IBs requires the implementation of a written CIP which “must include risk-based procedures for verifying the identity of each customer” and which “must include procedures for opening an account that specify identifying information that will be obtained from each customer.”⁷ For purposes of the CIP Rule, *account* is defined as a formal relationship with an FCM. This definition is silent as to IBs.⁸ *Customer* is defined as “(i) A person that opens a new account with a futures commission merchant; and (ii) An individual who opens a new account with a futures commission merchant for: (A) An individual who lacks legal capacity; or (B) An entity that is not a legal person.”⁹ This definition further states that “When 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.¹⁰ 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.

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

7. 31 CFR § 1026.220(a)(1)-(2)

8. 31 CFR § 1026.100(a)(1)

9. 31 CFR § 1026.100(d)(1)

10. 31 CFR § 1026.100(d)(3)

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 accounts.¹¹ 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, and accordingly, does not have obligations under these provisions of the CIP Rule. If an IB has no obligations under these provisions of 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.

Application of BO Rule

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.”¹²

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.”¹³ 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.”¹⁴

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,

11. 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].

12. 31 CFR § 1010.230(e)

13. 81 FR 29398, 29406 (May 11, 2016)

14. 81 FR 29398, 29407 (May 11, 2016)

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.

Accordingly, 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. Nothing precludes FinCEN 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.

Financial institutions with questions about this guidance may contact FinCEN's Resource Center Helpline at (800) 949-2732 or FRC@fincen.gov.