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DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA58

Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels

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

ACTION: Interim final rule; request for comments.

SUMMARY: FinCEN is issuing this interim final rule to prescribe minimum standards applicable to dealers in jewels, precious metals, or precious stones, pursuant to the provisions in the USA PATRIOT Act of 2001 that require financial institutions to establish anti-money laundering programs. This rule is being issued as an interim final rule because FinCEN is seeking additional public comment on several aspects of the interim final rule. These issues are addressed in the "SUPPLEMENTARY INFORMATION" section under the heading "Request for Comments." We also are providing questions and answers to assist businesses in understanding how the interim final rule operates, and in determining whether and when a business's operations are covered by the interim final rule. These questions and answers appear in the "SUPPLEMENTARY INFORMATION" section under the heading "Frequently Asked Questions."

DATES: Effective Date: This interim final rule is effective [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION].

Applicability Date: The requirement that dealers develop and implement an anti-money laundering program applies as provided in 31 CFR 103.140(d).

Submission of Comments: Comments on the issues raised in the “Request for Comments” portion of this document must be received before [INSERT DATE THAT IS 45 DAYS AFTER DATE OF PUBLICATION]

ADDRESSES: You may submit comments, identified by RIN 1506-AA58, by any of the following methods:

- Federal e-rulemaking portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- E-mail: regcomments@fincen.treas.gov. Include RIN 1506-AA58 in the subject line of the message.
- Mail: FinCEN, P.O. Box 39, Vienna, VA 22183. Include RIN 1506-AA58 in the body of the text.

Instructions: It is preferable for comments to be submitted by electronic mail because paper mail in the Washington, DC, area may be delayed. Please submit comments by one method only. All submissions received must include the agency name and the Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to http://www.fincen.gov, including any personal information provided. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354-6400 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division (FinCEN), (800) 949-2732 (toll-free).

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Provisions

The Bank Secrecy Act (BSA), Public Law 91-508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314, 5316-5332, authorizes the Secretary of the Treasury to issue regulations requiring financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities to protect against international terrorism, and to implement counter-money laundering programs and compliance procedures.[1] Regulations implementing Title II of the BSA (codified at 31 U.S.C. 5311 et seq.) appear at 31 CFR Part 103. The authority of the Secretary to administer the BSA has been delegated to the Director of FinCEN.

The provisions of 31 U.S.C. 5318(h), added to the BSA in 1992 by section 1517 of the Annunzio-Wylie Anti-Money Laundering Act, authorize the Secretary of the Treasury "[i]n order to guard against money laundering through financial institutions . . . [to] require financial institutions to carry out anti-money laundering programs." 31 U.S.C. 5318(h)(1). Those programs may include "the development of internal policies, procedures, and controls;" "the designation of a compliance officer;" "an ongoing employee training program;" and "an independent audit function to test programs." 31 U.S.C. 5318(h)(1)(A-D).

[1] Language expanding the scope of the BSA to intelligence or counter-intelligence activities to protect against international terrorism was added by section 358 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (the USA Patriot Act), Public Law 107-56.

On October 26, 2001, the President signed into law the USA Patriot Act. Section 352 of the USA Patriot Act, which became effective April 24, 2002, amended 31 U.S.C. 5318(h) of the BSA to require, and not merely authorize, anti-money laundering programs for all financial institutions defined in the BSA. Section 352(c) of the USA Patriot Act directs the Secretary to prescribe regulations for anti-money laundering programs that are "commensurate with the size, location, and activities" of the financial institutions to which such regulations apply.

Although a dealer in "precious metals, stones, or jewels" ("dealer") has long been listed as a financial institution under the BSA, 31 U.S.C. 5312(a)(2)(N), FinCEN has not previously defined the term or issued regulations regarding dealers. On April 29, 2002, FinCEN deferred the anti-money laundering program requirement contained in 31 U.S.C. 5318(h) that would have applied to a number of new industries, including dealers. The purpose of the deferral was to provide FinCEN with time to study the industries and to consider how anti-money laundering controls could best be applied to them.[2] This rule defines the term dealer and describes the required elements of a dealer's anti-money laundering program.

B. Money Laundering Cases Involving Dealers

The statutory mandate that financial institutions establish an anti-money laundering program is a key element in the national effort to prevent and detect money laundering and the financing of terrorism, and recognizes that financial institutions other than depository institutions (which have long been subject to BSA requirements) are vulnerable to money laundering. Precious metals, precious stones, and jewels are easily

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[2] See 31 CFR 103.170, as codified by interim final rule published at 67 FR 21110 (April 29, 2002), as amended at 67 FR 67547 (November 6, 2002) and corrected at 67 FR 68935 (November 14, 2002).

transportable, highly concentrated forms of wealth and can be highly attractive to money launderers and other criminals, including those involved in the financing of terrorism. Recent cases demonstrate various ways in which precious metals, precious stones, and jewels can be used for illicit purposes. In particular, these cases demonstrate the risks involved in accepting third-party payments, and the importance of conducting reasonable inquiries when a customer's requests seem unusual.

Although the following two examples involve dealers who were acting in complicity with the illegal activity of their customers, they demonstrate money laundering methodologies that also could be conducted through unwary dealers. First, a federal grand jury indictment illustrates the money laundering risks associated with the use of third-party payments.[3] A jewelry wholesaler pled guilty to laundering money by accepting third-party payments in drug proceeds for merchandise purchased by its retailer clients. A review of the wholesaler's records revealed several unusual patterns, including:

- many instances in which the wholesaler received payment for merchandise from a party other than the purchaser (third-party payments); and
- numerous examples of unusual check activity including payment in the form of sequentially numbered checks, multiple checks from the same account drawn on the same date, checks with no identified payor, payments drawn on a bank located in a county different from the country in which the purchaser lived, and checks paid through foreign countries.

Second, the results of the recently conducted Operation Meltdown demonstrate the importance of conducting reasonable inquiries when a customer's requests seem

[3] U.S. v. Speed Joyeros, S.A., 204 F.Supp.2d 412 (E.D.N.Y. 2002).

unusual. This money laundering scheme involved the use of couriers to deliver cash to gold dealers. The dealers exchanged the cash for gold and other precious commodities, which were then smuggled out of the United States. To make the gold less easily detected by inspectors, the gold dealers sometimes molded the gold into common items, such as tools, belt buckles, or light switches, or painted it.[4]

A review of suspicious activity reports filed with FinCEN by depository institutions also reveals instances in which banks and others suspected the involvement of dealers in unusual transactions. Several suspicious activity reports describe the use of bulk amounts of sequentially numbered U.S. money orders and traveler's checks deposited abroad. The money orders and traveler's checks were purchased for the maximum face value, and then were used to purchase diamonds and gems at dealers located in foreign countries. One suspicious activity report was filed by a U.S. bank that became suspicious about a series of checks payable to U.S. suppliers and issued on behalf of a foreign gold and gem company from a correspondent account at the bank. The bank contacted the correspondent for additional details about the transactions, and found that the invoice amounts did not correspond with the check amounts. Although there can be legitimate reasons for both making payments that do not match invoices and using sequentially numbered money orders or traveler's checks (such as limitations on the maximum face amount of these instruments), their use can be indicia of money laundering.

The Guidance for Financial Institutions in Detecting Terrorist Financing issued

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[4] U.S v. Ramerez, 313 F.Supp.2d 276 (S.D.N.Y. 2004).

by the Financial Action Task Force on Money Laundering (the "FATF")[5] identifying vulnerabilities in financial industries on the financing of terrorism, includes an example involving a dealer. In this case, suspicious activity reports filed by several banks on two individuals and a diamond trading company identified high-volume unusual funds transfer activity to and from foreign countries, and the deposit of several large-value checks denominated in U.S. dollars. The financial intelligence unit of the country in which the filing banks are located learned from the police that, through these transactions, funds had been wired to a person suspected of buying diamonds on behalf of a terrorist organization.[6]

The vulnerabilities described above help demonstrate the need for an anti-money laundering program requirement for dealers to minimize the opportunity for abuse in this industry.

II. Notice of Proposed Rulemaking.

This interim final rule is based on the notice of proposed rulemaking published February 21, 2003 (the "NPRM") (68 FR 8480). The NPRM sought to require dealers in jewels, precious metals, and precious stones to develop and implement written anti-money laundering programs appropriately tailored to the risk of money laundering or terrorism financing presented by their businesses. The NPRM focused on dealers, that is, businesses that both buy and sell these items, given FinCEN's conclusion that the most significant risks of money laundering or the financing of terrorism lie within those

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[5] The FATF is an inter-governmental body whose purpose is the development and promotion of policies to combat money laundering. Originally created by the G-7 nations, its membership now includes Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Kingdom of the Netherlands, New Zealand, Norway, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States, as well as the European Commission and the Gulf Cooperation Council.

[6] Financial Action Task Force on Money Laundering, Guidance for Financial Institutions in Detecting Terrorist Financing, April 24, 2002, at page 4 (see www.faft-gafi.org/pdf/GuidFITFOI_en.pdf).

businesses that do both. Furthermore, the NPRM excluded most retailers from the scope of the regulation, based on the conclusion that retailers simply do not face the same level of risk. The elements of the anti-money laundering program outlined in the NPRM mirror those found in FinCEN's regulations for other types of financial institutions. The NPRM contained proposed definitions for the terms "dealer," "jewel," "precious metal," and "precious stone."

The comment period for the NPRM ended on April 22, 2003. FinCEN received a total of 29 comment letters. Of these, 16 were submitted by dealer and pawnbroker trade associations, five by law firms, four by individuals, three by pawnbrokers, and one by a manufacturer.

III. Summary of Comments and Revisions.

A. Introduction.

The format of this interim final rule is generally consistent with the format of the rule proposed in the NPRM. The terms of the rule, however, differ from the terms of the NPRM in the following significant respects:

- The definitional threshold for a dealer has been revised from persons engaged in the purchase *or* sale, to persons engaged in the purchase *and* sale, of more than $50,000 in covered goods.
- The interim final rule contains a new defined term, "covered goods," which includes jewels, precious metals, and precious stones, and finished goods (including jewelry, numismatic items, and antiques), that derive 50 percent or more of their value from jewels, precious metals, or precious stones contained in or attached to such finished goods. The references to "jewelry containing

jewels, precious metals, or precious stones" have been removed because such items are more specifically addressed within the new "covered goods" definition.

- Language has been added to clarify that the interim final rule only applies to U.S. dealers, *i.e.*, dealers with a physical presence in the U.S..
- An explicit exception for pawnbrokers has been added to the interim final rule.
- An exception from the meaning of the terms "purchase" and "sale" for purposes of the definition of "dealer" has been created for certain trade-in transactions, as a result of which such transactions would not count toward the $50,000 definitional thresholds.
- The exception relating to the fabrication of finished goods containing minor amounts of jewels, precious metals, or precious stones is no longer necessary (and therefore has been removed) as a result of (1) the new "covered goods" definition, and (2) a new exception from the definition of "dealer" and the anti-money laundering program requirement for the purchase of jewels, precious metals, and precious stones that are incorporated into equipment and machinery to be used for industrial purposes, and the purchase and sale of such equipment and machinery.
- The definition of "retailer" appears as a separate definition, and clarifies that the term applies only to a U.S. person who sells covered goods primarily to the public.

- The $50,000 thresholds in the rule to determine whether a person is a dealer and whether a retailer is eligible for the retailer exemption have been clarified to provide that, with respect to finished goods, only the value of the jewels, precious metals, or precious stones contained in or attached to such finished goods needs to be taken into account.
- The rule has been revised to provide that the anti-money laundering program of a retailer that does not qualify for the retailer exception due to purchases from persons other than dealers or other retailers need only cover such purchases.
- Language has been added to require a dealer, when making the risk assessment required by the rule, to take into account the extent to which it engages in transactions with persons other than dealers subject to the rule.
- The definition of "precious stone" has been revised to include tanzanite.
- A risk factor has been revised to apply to attempts by a customer to maintain an "unusual," rather then a "high," degree of secrecy with respect to a transaction.
- The applicability date of the interim final rule has been extended to January 1, 2006, or not later than six months after the date a person becomes a dealer for purposes of the interim final rule.

B. Public Comments on the NPRM -- Overview and General Issues.

Comments on the NPRM concentrated on three matters: (1) application of the retail exception to retailers that buy from foreign-located sources; (2) application of the rule to pawnbrokers; and (3) application of the definition of "purchase" to trade-in transactions.

1. Application of Retailer Exception to Retailers that Purchase from Foreign-Located Sources.

The focus of a dealer's anti-money laundering program must be twofold: prevention and detection of money laundering and terrorist financing through the dealer by its customers, and prevention and detection of money laundering and terrorist financing through the dealer by its sources of supply. As explained in the NPRM, however, FinCEN has concluded that the risks of money laundering or terrorist financing are less significant in those businesses that engage primarily in retail sales of such products. As a result, the NPRM proposed to exclude certain retailers from the rule. To qualify for the proposed exception under the NPRM, a retailer would have had to purchase its products predominantly from other dealers subject to the NPRM. Specifically, under proposed section 103.140(a)(1)(ii)(A), the anti-money laundering program requirement would not apply to a retailer unless that retailer purchased annually more than $50,000 in jewels, precious metals, precious stones, or jewelry from persons that are not dealers. Persons that are not dealers subject to the rule would include members of the public, other U.S. persons not subject to the rule, and – for reasons of jurisdiction – foreign (non-U.S.) dealers in precious metals, precious stones, or jewels.

Several commenters asserted that FinCEN did not provide proper notice required under the Administrative Procedure Act with respect to whether purchases by a retailer from non-U.S. sources would be included within the $50,000 threshold which, if exceeded, would disqualify a dealer from utilizing the retailer exception. FinCEN disagrees. The preamble to the NPRM stated that "there is substantially less risk that a retailer who purchases goods exclusively or almost exclusively from dealers subject to the proposed rule will be abused by money launderers." See 68 FR 8482 (emphasis supplied). Although the NPRM did not explicitly state that the rule would only apply to dealers located in the United States, such dealers are the only persons that could have been the subject of the NPRM.

Several commenters urged FinCEN to revise the retailer exception so that it would apply to retailers that purchase jewels, precious metals, precious stones, or jewelry, predominately from foreign-located sources. However, this approach would ignore the risk of money laundering and terrorist financing through a dealer's international source of supply.[7] One commenter suggested extending the exception to retailers that purchase from foreign sources that are located in countries that are members of the FATF. The application of anti-money laundering measures to dealers has been emphasized by the international community as a key element in combating money laundering and terrorist financing.[8] However, the fact that a country is a member of the FATF does not mean that the country requires dealers located within its borders to implement an anti-money laundering program, much less an anti-money laundering program that is similar to that contained in this interim final rule.[9] Thus, to extend the

[7] See discussion of money laundering cases involving dealers, supra part I.B.

[8] In June 2003, FATF revised its Forty Recommendations to extend counter-money laundering and terrorist financing principles to dealers in precious metals and stones. Among the recommendations now applicable to dealers in precious metals and stones to the extent of transactions equal to or above $15,000 are those requiring customer due diligence, suspicious activity reporting, and record-keeping requirements. In addition, Recommendation 16 extends the development of anti-money laundering and terrorist financing programs to dealers in precious metals and stones.

[9] Although several FATF member countries have enacted anti-money laundering legislation that applies to dealers, the applicable requirements operate differently than those contained in this interim final rule. Directive 2001/97/EC of the European Parliament and of the Council Amending Council Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering

exception in the manner suggested would be contrary to the rationale underlying the exception. Finally, several commenters suggested permitting retailers that buy from foreign sources to be excepted from the anti-money laundering requirement to the extent that they receive written assurances that their foreign sources of supply have taken steps to prevent and detect money laundering. Given the importance of the anti-money laundering requirement, FinCEN has determined that written assurances from a source of supply that is not subject to the requirements of this rule does not justify a complete exception from the rule. Such assurances, however, could be a factor in assessing the degree of risk inherent in a particular relationship and the degree of scrutiny that accordingly should be brought to bear on it.

For all of the foregoing reasons, the interim final rule continues to provide that a retailer that sold more than $50,000 in covered goods during the prior year is not required to implement an anti-money laundering program unless it purchased during the prior year more than $50,000 in covered goods from persons other than dealers as defined in the interim final rule. In addition, language has been added to the retailer exception to ensure that a retailer's purchases from other retailers as defined in the interim final rule will not prohibit a retailer from taking advantage of the retailer exception. This change is intended to recognize the fact that retailers often purchase covered goods from other retailers, and that such purchases should not result in requiring a retailer to be covered by the rule. However, FinCEN recognizes that a retailer that would otherwise be completely

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(December 4, 2001) requires dealers in high-value goods such as precious stones or metals (when transactions involve cash payments of 15,000 euro or more) to establish internal control and communication procedures for the purposes of detecting and preventing money laundering, including employee training. Many European Union members have enacted legislation consistent with this Directive. See, e.g., United Kingdom Statutory Instrument 2003 No. 3075 Financial Services, Money Laundering Regulations 2003 (November 28, 2003).

exempt from the rule because of its lack of significant purchases from persons other than dealers or retailers should not have to implement a program directed at customer risk merely because it exceeds the $50,000 threshold in purchases from persons other than dealers and/or other retailers. Rather, an appropriate program for such a retailer would be limited to guarding against the risks presented by its sources of supply other than dealers and other retailers. FinCEN believes that this targeted approach presents the right balance between the money laundering risks of such businesses and the intent of the statute. Therefore, language has been added to section 103.140(b) of the interim final rule to provide that, to the extent that a retailer's purchases from persons other than dealers subject to the rule and other retailers exceeds the $50,000 threshold contained in the retailer exception, the anti-money laundering compliance program required of the dealer need address only such purchases; such a program would not be required to address sales, or other types of purchases.

2. Application of the Rule to Pawnbrokers.

Several commenters requested clarification on whether the rule is intended to apply to pawnbrokers. Although pawnbrokers take in covered goods from the public in return for funds, they do so in the context of extending short-term, non-recourse collateralized loans. Most often, such loans are repaid and the collateral is returned to the borrower. However, if the borrower fails to repay the loan, the pawnbroker forecloses on the collateral, subsequently selling the collateral to the general public. FinCEN has determined not to treat this type of transaction as the purchase and sale of covered goods for purposes of this rule.

Pawnbrokers are defined as financial institutions for BSA purposes (see 31 U.S.C. 5312(a)(2)(O)), and are therefore subject to the statutory requirement to implement an anti-money laundering program requirement. As noted above, FinCEN deferred the anti-money laundering program requirement contained in 31 U.S.C. 5318(h) that would have applied to many entities that are financial institutions in 31 U.S.C. 5312, including pawnbrokers. FinCEN intends to address at a later time the applicability of the anti-money laundering program requirements of 31 U.S.C. 5318(h) to pawnbrokers, but at this time, such a requirement for pawnbrokers remains deferred. For this reason, the interim final rule contains an explicit exception, found at new section 103.140(a)(2)(ii)(B), providing that the term dealer does not include a person licensed or authorized under the laws of any State (or local government) to do business as a pawnbroker, but only to the extent such person is engaged in pawn transactions, including the sale of pawn loan collateral.

3. Trade-in Transactions.

As explained above, section 103.140(a)(1)(ii)(A) of the NPRM provided an exception from the anti-money laundering program requirement for retailers that do not purchase from persons other than dealers more than $50,000 in jewels, precious metals, precious stones, or jewelry during the prior year. Commenters indicated that many retailers, rather than purchasing jewels, precious metals, precious stones, or jewelry containing such items from retail customers for cash or cash equivalents, often accept such an item from the customer, a “trade-in,” and credit the value of the trade-in toward a new purchase by the customer at the retailer. Several commenters asserted that a trade-in transaction should not be deemed a “purchase” for purposes of the retailer exception because the money laundering risks involved in trade-in transactions are low. According to commenters, the average value of a trade-in is under $1,000. Many retailers limit the use of trade-ins to transactions in which the price of the item to be purchased is at least twice the value of the trade-in item, and do not permit a customer to obtain cash or cash equivalents in the course of a trade-in transaction. Moreover, some retailers will only accept a trade-in that was originally purchased from the retailer itself. Even if trade-ins were to be considered a "purchase" in the context of the retailer exception, commenters argued that certain types of trade-ins, for example trade-ins of low value (under $10,000), or trade-ins of jewelry worth 50 percent or less of the total purchase, should be exempted. According to commenters, if the rule were to treat all trade-in transactions as purchases, a large percentage of retailers would be unable to take advantage of the retailer exception.

In response to comments, and in order to balance the risks posed by trade-in transactions against the burdens imposed by the requirement to implement an anti-money laundering program, the interim final rule has been revised to specifically exempt certain trade-in transactions for purposes of the definition of "dealer," including the retailer exception that appears in that definition. New section 103.140(a)(2)(iii) provides that for purposes of meeting the definition of a "dealer," the "purchase" and "sale" of covered goods does not include retail transactions in which a dealer or retailer accepts from a customer covered goods, the value of which the dealer or retailer credits to the account of the customer, or to another purchase by the customer, and the retailer or dealer does not provide funds to the customer in exchange for such covered goods (the "trade-in exception"). As a result of this exception, a person is not required to count a trade-in transaction toward the $50,000 threshold for the purchase and sale of covered goods for purposes of determining that person's status as a dealer under the rule.[10] It should be noted that the trade-in exception is only an exception from the "dealer" definition, and not an exception to the scope of the anti-money laundering program required of a person other than a retailer who otherwise meets the definition of "dealer."

IV. Section-by-Section Analysis.

A. 103.140(a) – Definitions[11]

1. 31 CFR 103.140(a)(1) - Definition of "Covered Goods."

Section 103.140(a) continues to define the key terms used in the rule. Section 103.140(a)(1) contains a new defined term, "covered goods," which includes jewels, precious metals, and precious stones (as each is defined in paragraphs (3), (4), and (5), respectively, of subsection (a)), and finished goods that derive 50 percent or more of their value from jewels, precious metals, and precious stones contained in or attached to such finished goods. Such finished goods include, but are not limited to, jewelry, numismatic items, and antiques. The new defined term was added to replace the undefined term "jewelry" that was used in the NPRM and to clarify and broaden the scope of an exception in the NPRM for transactions in jewels, precious metals, and precious stones for purposes of fabricating finished goods, to the extent that the finished goods contain "minor amounts of," or the value of the goods is "not significantly attributable to," jewels, precious metals, or precious stones.[12] Commenters suggested that the rule provide more specificity on what is meant by the phrases "minor amounts" and

[10] Similarly, a person is not required to count a trade-in transaction toward the $50,000 threshold for the purchase of covered goods from persons other than dealers and other retailers, for purposes of excluding a "retailer" from the "dealer" definition.

[11] FinCEN notes that these definitions apply only with respect to the interim final rule and not with respect to any other law or regulation.

[12] See also the discussion in the following part of the preamble regarding a new exception in section 103.140(a)(2)(iii)(B) of the interim final rule for purchases and sales of jewels, precious metals, and precious stones used in industrial products.

“not significantly attributable to.” One commenter suggested that the exception apply to the extent that finished goods contain gems, precious metals, or precious stones worth not more than 10 percent of the product value, and two commenters suggested using a threshold of 50 percent of the product value. FinCEN believes that 50 percent constitutes a threshold that is consistent with the rule’s definition of “precious metal,” which adopts a minimum purity level of at least 500 parts per 1000. Thus, the defined term “covered goods” adopts the 50 percent threshold for determining whether finished goods containing jewels, precious metals, or precious stones are products subject to the interim final rule.

2. 31 CFR 103.140(a)(2) – Definition of “Dealer.”

Section 103.140(a)(2)(i) defines “dealer” as any person who is engaged “as a business in the purchase and sale of covered goods” in excess of the dollar thresholds. This language differs slightly from the language contained in the NPRM, which had defined a dealer as a person engaged “in the business of purchasing and selling” jewels, precious metals, precious stones, or jewelry composed of jewels, precious metals, or precious stones. The change was made for purposes of consistency of terms and, except for the use of the new term “covered goods,” is not a substantive change. The terms “purchase” and “sale” are used throughout the rule, and as discussed below, new sections have been added to the rule excepting certain transactions from the meaning of “purchase” or “sale.”

The rule applies only to persons that *both* purchase items that meet the definition of covered goods, *and* sell items that meet the same definition, in sufficient quantity to meet the $50,000 definitional thresholds. Therefore, a person that engages only in the sale of such products, for example a mining company that only sells precious metals that it mines, would not be covered by the definition. Similarly, a person who only engages in the purchase of such products, for example a person who purchases gold coins for gifts to family members, would not be covered by the rule.[13] Additionally, a manufacturer of jewelry that in one year purchases over $50,000 worth of gold of sufficient purity (for example, 14 carat gold) to meet the definition of "precious metal," but that does not sell jewelry composed of gold of sufficient purity (for example, 10 carat gold after manufacturing) to be deemed "covered goods," would not be a dealer for purposes of this rule. Finally, the rule would not generally apply to persons who merely facilitate the purchase and sale of covered goods. For example, persons who facilitate estate sales or conduct auctions, bankruptcy trustees, school districts that sponsor class ring sales, and persons who host in-home sales of a company's jewelry would not be "dealers" for purposes of the rule based on such activity.

The interim final rule contains language clarifying that the anti-money laundering program requirement applies only to a person engaged within the United States as a business in the purchase and sale of covered goods. This would include, for example, a person with a U.S. office, a person who comes to the United States to make purchases and sales of covered goods above the threshold amount at U.S. trade shows, and a foreign-located person who maintains sales staff engaged in such purchases and sales within the United States. However, it would not include, for example, a foreign dealer who ships products into the United States without conducting further business activity within the United States, or a foreign dealer that merely advertises in the United States or attends a trade-show in the United States at which it does not purchase and sell covered goods above the threshold amounts. This is consistent with the general applicability of BSA regulatory

[13] In contrast, a person who buys and sells coins containing metals of a sufficient purity to meet the definition of "precious metal" would be treated as a dealer for purposes of this rule assuming the $50,000 purchase and sale thresholds were met and the person is not a retailer as defined in the rule.

requirements to U.S. persons.[14] It should be noted that, under FinCEN's regulations, the status of a person's corporate parent, subsidiary, or affiliate does not affect the determination whether the person is itself a financial institution for BSA purposes. Thus, a person that does not engage in the business of dealing in covered goods would not be deemed a dealer solely by virtue of the fact that it is the parent, subsidiary, or affiliate of a dealer.

The interim final rule retains the minimum dollar threshold that was proposed in the NPRM, but has been modified to apply the threshold to both purchases and sales. Thus, sections 103.140(a)(2)(i)(A) and (B) provide that a person is a "dealer" only if, during the prior calendar or tax year, the person *both* (1) purchased more than $50,000 in covered goods, *and* (2) received more than $50,000 in gross proceeds from the sale of covered goods.[15] This change reflects FinCEN's determination that a person that does not reach the $50,000 threshold for both purchases and sales is not of sufficient size or risk to be required to implement an anti-money laundering program. A few commenters suggested that, instead of a yearly dollar volume threshold, the rule should contain a threshold based on a single transaction amount. These commenters argued in favor of a $10,000 transaction level, in light of the requirement that dealers, as non-financial trades or businesses, must report transactions involving currency in excess of $10,000 pursuant to Section 26 U.S.C. 6050I and 31 CFR 103.30.

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[14] See, *e.g.*, the definition of financial institution in 31 CFR 103.11(n), which includes "each agent, agency, branch or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern . . . ."

[15] The reference to "calendar or tax year" is intended to provide flexibility for dealers in determining whether they have reached the $50,000 thresholds. In the case of a dealer whose tax year is not the calendar year, this language is intended to avoid causing such dealer to keep two sets of records in order to determine if the threshold has been met. However, a dealer must continue to use whatever basis it initially chooses for determining whether it has reached the $50,000 thresholds, whether calendar year or tax year, unless it experiences a change in its taxable year.

This suggestion is not adopted in the interim final rule because it is not consistent with the risk-based approach that is taken in the rule. Imposition of a high-dollar transaction threshold would exempt dealers that conduct large volumes of business on an annual basis, even dealers engaging in numerous transactions at the $5,000 to $10,000 level, while covering a dealer that conducts a far lower annual volume of business that engages in as little as one transaction over $10,000. Although ensuring compliance with the currency reporting requirement found at 31 CFR 103.30 is an important part of a dealer's anti-money laundering program, the requirement to implement an anti-money laundering program is intended to accomplish the broader purpose of requiring a dealer to assess money laundering risks posed by its business model, and to take reasonable steps to lessen such risks. For these reasons, FinCEN believes that the $50,000 annual volume threshold for both sales and purchases best ensures that those dealers whose businesses pose the most significant risk of abuse for money laundering and terrorist financing (whether through transaction size or volume) are covered by the rule.

The NPRM contained two exceptions from the definition of dealer. The first exception applied to retailers, other than retailers that during the prior calendar or tax year, purchased more than $50,000 in jewels, precious metals, precious stones, or jewelry from persons other than dealers. The second exception applied to a person who engages in transactions in jewels, precious metals, or precious stones for purposes of fabricating finished goods that contain minor amounts of, or the value of which is not significantly attributable to, such precious metals, precious stones, or jewels. The substance of these exceptions has been retained in the interim final rule, but the exceptions have been re-structured and additional exceptions have been added. The interim final rule contains four exceptions, two relating to the definition of "dealer," and two relating to the meaning of the terms "purchase" and "sale."

Section 103.140(a)(2)(ii) provides two exceptions from the definition of "dealer." As described in Part III.B.1, above, the first exception provides that a retailer is a dealer only if it purchased more than $50,000 in covered goods from persons other than dealers or other retailers (*e.g.*, from the general public or from foreign persons not subject to the interim final rule) during the prior calendar or tax year. A retailer that is a dealer pursuant to this provision, however, would only have to address in its anti-money laundering program purchases from persons other than dealers and other retailers. As discussed further below, the definition of "retailer" has been taken out of the exception itself, and a separate definition of "retailer" has been added to the interim final rule.

The second exception from the definition of "dealer," found at section 103.140(a)(2)(ii)(B) has been added to the rule to clarify that a person licensed or authorized under the laws of any State (or local government) to do business as a pawnbroker is not a dealer for purposes of the rule with respect to pawn transactions, including the sale of pawn loan collateral.

As discussed in part III.B.3. above, section 103.140(a)(2)(iii) provides an exception from the meaning of the terms "purchase" and "sale" as used in section 103.140(a)(2)(i) of the interim final rule for trade-in transactions.

Section 103.140(a)(2)(iv) provides an exception from the definitions of "purchase" and "sale" for purposes of both the definition of "dealer" in section 103.140(a)(2)(i) and the anti-money laundering program requirement in section 103.140(b), for transactions relating to industrial equipment containing covered goods. As discussed in Part IV.A.1. above, section 103.140(a)(1)(ii)(B) of the NPRM provided that a person engaged in transactions in jewels, precious metals, or precious stones for purposes of fabricating finished goods containing minor amounts of, or the value of which is not significantly attributable to, the precious metals, precious stones, or jewels, was not a "dealer." The exception was intended to exempt the purchase and sale of precious metals, precious stones, or jewels in the context of buying, selling, and fabricating finished goods, including industrial products, that contain small amounts of jewels, precious metals, or precious stones, in order to ensure that the anti-money laundering program requirement is imposed on those sectors of the industry that pose the most significant risk of money laundering and terrorist financing.

FinCEN has concluded that the purchase of jewels, precious metals, and precious stones for use in industrial products, and the purchase or sale of such products, appears to be less susceptible to money laundering and terrorist financing risks, due to the fact that precious metals, precious stones, and jewels typically do not constitute a significant component of the value of an industrial product. Accordingly, the interim final rule contains a new exception from the terms "purchase" and "sale" (section 103.140(a)(2)(iv)) for the purchase of precious metals, precious stones, or jewels that are incorporated into machinery or equipment used for industrial purposes, and the purchase or sale of such machinery or equipment.

Commenters requested clarification as to whether "toll-refining" constitutes the purchase and sale of precious metals for purposes of the definition. As described by commenters, toll-refining is a transaction in which a company that uses precious metal in a process that results in scrap metal sends the scrap metal to a refiner that, for a fee, extracts the precious metal from the scrap and returns the precious metal to the company.

Commenters argued that because this type of transaction is not the exchange of metal for cash or other monetary consideration, but rather the payment of a fee in exchange for the performance of the process of extracting precious metal from scrap metal, it should not be deemed the purchase and sale" of precious metals. FinCEN agrees. Although we believe it is unnecessary for the interim final rule to include a specific exemption for toll-refining, we clarify that toll-refining, as described above, does not constitute a purchase or sale of precious metals for purposes of this interim final rule.

Finally, a few commenters requested exemptive or other relief for specific types of businesses that fall within the definition of dealer, arguing that these businesses pose a low risk of money laundering and terrorist financing. Although it is not appropriate to resolve such fact-specific individualized situations in the context of a general rulemaking, persons wishing to obtain an administrative ruling relating to their specific situation may submit a request pursuant to 31 CFR 103.81. In addition, FinCEN has the authority to make exceptions to, or grant exemptions from, the requirements of 31 CFR Part 103 pursuant to 31 U.S.C. 5318(a)(6) and 31 CFR 103.55.

Section 103.140(a)(2)(v) provides that, for purposes of applying the $50,000 definitional thresholds contained in the rule to the purchase and sale of finished goods, only the value of the jewels, precious metals, or precious stones contained in, or attached to, such goods must be taken into account.

3. <u>31 CFR 103.140(a)(3) – Definition of "Jewel.</u>"

Section 103.140(a)(3) defines the term "jewel" to include organic substances that have a market-recognized gem level of quality, beauty, and rarity. FinCEN did not receive comments on the definition of "jewel" contained in the NPRM, and has retained the definition in the interim final rule.

4. <u>31 CFR 103.140(a)(4) – Definition of "Precious metal.</u>"

Section 103.140 (a)(4) defines "precious metal" to include gold, silver, and the platinum group of metals, at a level of purity of 500 parts per 1000 (50 percent) or greater, singly or in any combination. The definition is unchanged from the NPRM. Although one commenter suggested that the purity threshold should be lowered so that the rule would apply to dealers in 10 carat gold, another commented favorably on the purity threshold because it provides an approach that is tailored to cover higher-risk products. In order to balance the burdens associated with the rule against the lower risk of money laundering and terrorist financing with products of a lower purity threshold, the interim final rule retains the 50 percent purity threshold. However, FinCEN will continue to review whether it is appropriate to extend the anti-money laundering program to dealers that purchase and sell lower grade metals.

5. <u>31 CFR 103.140(a)(5) – Definition of "Precious stone.</u>"

The term "precious stone" is defined in section 103.140(a)(5) to include substances that have a market-recognized gem level of quality, beauty, and rarity. Therefore, precious stones of industrial quality are not included in the definition of precious stones. In response to a comment, the word "inorganic" has been removed from the definition. However, this change is not intended to alter the substantive effect of the definition. In addition, tanzanite has been added to the list of substances that will be treated as precious stones. Because it shares the characteristics of market-recognized, gem level quality, beauty, and rarity with other minerals in that category, and because of its significant market vale, tanzanite can be used for money laundering and terrorist financing. Therefore, a person engaged as a business in the purchase and sale of tanzanite is covered by the anti-money laundering program requirement, to the extent that all of the other thresholds of the rule are met.

6. 31 CFR 103.140(a)(6) – Definition of "Person."

Section 103.140(a)(6) provides that for purposes of the interim final rule, the term "person" has the same meaning as provided in 31 CFR 103.11(z).

7. 31 CFR 103.140(a)(7) – Definition of "Retailer."

The retailer exception proposed in section 103.140(a)(1)(ii)(A) of the NPRM defined a retailer as "a person engaged in the business of sales to the public of jewels, precious metals, or precious stones, or jewelry composed thereof." In the interim final rule, a separate section containing the definition of "retailer" has been created, and language has been added to the definition to clarify the scope of the definition. New section 103.140(a)(7) provides that a retailer is a U.S. person engaged in the business of sales *primarily* to the public of covered goods. The purpose of this revision is to clarify that the retailer exception found at section 103.140(a)(1)(ii)(A) of the interim final rule applies to those dealers whose sales are made primarily to the public, so that the rule does not apply to a dealer whose sales to persons other than members of the public constitute a minimal portion of the dealer's overall sales. Thus, a dealer whose business is primarily with the public would not be disqualified from the retailer exception solely because of occasional sales to a dealer or retailer. However, a dealer whose business is not primarily with the public, but with other persons such as dealers, would not be treated as a retailer under the interim final rule.

B. 103.140(b) – Anti-Money Laundering Program Requirement

Section 103.140(b) of the interim final rule continues to require that each dealer develop and implement an anti-money laundering program reasonably designed to prevent the dealer from being used to facilitate money laundering or the financing of terrorist activities, and clarifies that the program is to apply to the dealer's purchases and sales of covered goods. The program must be in writing and should set forth clearly the details of the program, including the responsibilities of the individuals and/or departments involved. In addition, a dealer's program must be approved by its senior management. A dealer must make its anti-money laundering program available to the Treasury or its designee upon request. While it is permissible for a dealer to delegate certain functions relating to its anti-money laundering program to a third party, the dealer remains responsible for ensuring compliance with these requirements. To the extent that a retailer's purchases from persons other than dealers and other retailers exceeds the $50,000 threshold contained in paragraph (a)(2)(ii)(A), the anti-money laundering compliance program required of the retailer need only address such purchases.

Although ensuring compliance with the requirement to report transactions involving currency in excess of $10,000 pursuant to Section 26 U.S.C. 6050I and 31 CFR 103.30 should be an element of a dealer's anti-money laundering program, it should not be the sole focus. Rather, as noted above, a dealer's program must be reasonably designed to prevent the dealer from being used to facilitate money laundering or the financing of terrorist activities. Several commenters expressed concern about the standard to which they would be held under the “reasonably designed” language. These commenters argued that there is little information available to dealers to consult when evaluating whether a transaction may involve money laundering or terrorist financing, and suggested that FinCEN provide specific sources of reference for dealers to use when determining whether a particular transaction may potentially involve money laundering or the financing of terrorism. Dealers able to demonstrate that they have checked these sources of information, commenters asserted, should be deemed in compliance with the anti-money laundering program requirement. In addition, commenters expressed concern that, while money laundering is a concept that can be understood in terms of objective criteria, terrorist financing is more subjective, making it more difficult for dealers to implement a program designed to prevent it. Commenters suggested that FinCEN provide more information on the methods by which people attempt to finance terrorism through transactions with dealers. Finally, some commenters suggested that FinCEN develop a written program that could be used by dealers.

The use of the phrase “reasonably designed” in paragraph (b) is intended to provide dealers with the flexibility to tailor their programs to their specific circumstances so long as the minimum requirements are met. The interim final rule applies to many different types of dealers that engage in purchase and sale transactions involving a variety of products and different types of customers and sources of supply. Dealers must use the expertise that they possess about their industry, their particular business, and their particular customers and suppliers to develop a program that meets the requirements of the rule. However, FinCEN recognizes the importance of providing guidance to assist dealers in assessing the risks related to their businesses, and in identifying transactions that may be indicative of money laundering or terrorist financing. The examples of transactional behavior that may indicate money laundering or terrorist financing contained in the text of the rule, as well as the information about recent cases contained in this preamble, are intended to be the starting point. Going forward, FinCEN is committed to providing dealers with additional guidance, including analysis of relevant trends and patterns of money laundering and terrorist financing, whenever possible.

The interim final rule requires that each dealer develop and implement a program reasonably designed to prevent money laundering. Accordingly, when evaluating a dealer's compliance with the requirements of this rule, the focus will be on the design and implementation of the program. The Treasury and FinCEN recognize that even the best of anti-money laundering programs cannot guarantee that a dealer will not be used by a money launderer.

Finally, in response to comments, FinCEN wishes to clarify that a dealer's anti-money laundering program need not be made available for inspection at each of the dealer's locations. It is sufficient that a dealer maintain a copy of its written program at one location within the United States, for example the dealer's headquarters or the location of the person designated as the dealer's compliance officer.

C. 103.140(c) – Minimum Requirements

Section 103.140(c) continues to set forth the minimum requirements of a dealer's anti-money laundering program.

1. 31 CFR 103.41(c)(1) – Policies, Procedures and Internal Controls.

Section 103.140(c)(1) provides that a dealer's anti-money laundering program must incorporate policies, procedures, and internal controls based upon the dealer's assessment of the money laundering and terrorist financing risks associated with its line(s) of business. Policies, procedures, and internal controls must also include provisions for complying with applicable BSA requirements. Thus, a dealer's program must address its obligation to report on Form 8300 the receipt of cash or certain non-cash instruments totaling more than $10,000 in one transaction or in two or more related transactions. If dealers become subject to additional BSA requirements, their anti-money laundering programs will need to be updated accordingly.

Section 103.140(c)(1)(i) provides that, for purposes of making the risk assessment required under section 103.140(c)(1), a dealer must consider all relevant factors, including the specific factors contained in the rule. The specific risk factors listed in the rule require a dealer to (1) assess the money laundering and terrorist financing risks associated with its products, customers, suppliers, distribution channels, and geographic locations, (2) take into consideration the extent to which the dealer engages in transactions other than with established customers, or sources of supply, or other dealers subject to this rule, and (3) analyze the extent to which it engages in transactions for which payment or account reconciliation is routed to or from accounts located in jurisdictions that have been identified as vulnerable to terrorism or money laundering.[16] The rule is intended to give a dealer the flexibility to design its program to meet the specific money laundering and terrorist financing risks presented by the dealer's business, based on the dealer's assessment of those risks. Language has been added to the second

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[16] Examples of designations to this effect include the Department of State's designation of a jurisdiction as a sponsor of international terrorism under 22 U.S.C. 2371 (see www.state.gov/s/ct/rls/pgtrpt/), the FATF's designation of jurisdictions that are non-cooperative with international anti-money laundering principles (see http://www.fatf-gafi.org/NCCT_en.htm), or the Secretary of the Treasury's designation, pursuant to 31 U.S.C. 5318A of jurisdictions warranting special measures due to money laundering concerns (www.fincen.gov).

risk assessment factor to require dealers to take into account the potential risks involved in engaging in transactions with persons who are not subject to this rule.

Section 103.140(c)(1)(ii) provides that a dealer's policies, procedures, and internal controls must be reasonably designed to detect transactions that may involve use of the dealer to facilitate money laundering or terrorist financing. In addition, a dealer's program must incorporate procedures for making reasonable inquiries to determine whether a transaction may involve money laundering or terrorist financing. A dealer that identifies indicators that a transaction may involve money laundering or terrorist financing should take reasonable steps to determine whether its suspicions are justified and respond accordingly, including refusing to enter into, or complete, a transaction that appears designed to further illegal activity.[17] The interim final rule continues to list several examples of factors that may indicate that a transaction is designed to involve use of the dealer to facilitate money laundering or terrorist financing.

The rule provides flexibility to dealers in developing procedures for making reasonable inquiries under section 103.140(c)(1)(ii). For example, a dealer may appropriately determine that reasonable inquiry with respect to a transaction conducted by a new customer or supplier involves considerable scrutiny, including verification of customer identity, or the purpose of a transaction. In contrast, reasonable inquiry with respect to an established customer may not involve additional steps beyond those normally required to complete the transaction, unless the transaction appears suspicious

[17] 18 U.S.C. 1956 and 1957 make it a crime for any person, including an individual or company, to engage knowingly in a financial transaction with the proceeds from any of a long list of crimes or types of "specific unlawful activity." Although the standard of knowledge required is "actual knowledge," actual knowledge includes "willful blindness." Thus, a person could be deemed to have knowledge that proceeds were derived from illegal activity if he or she demonstrated "willful blindness" to "red flags" that indicated illegality. See, e.g., U.S. v. Finkelstein, 229 F.3d 90 (2nd Cir. 2000) (owner of jewelry/precious metals business convicted for participation in money laundering scheme; sentence enhancement based on willful blindness regarding receipt of funds derived from narcotics trafficking).

or unusual to the dealer. As explained further below, the determination whether to refuse to enter into, or to terminate, a transaction lies with the dealer. In addition, dealers are encouraged to adopt procedures for voluntarily filing Suspicious Activity Reports with FinCEN and for reporting suspected terrorist activities to FinCEN using its Financial Institutions Hotline (1-866-556-3974).

FinCEN has not at this time proposed a suspicious activity reporting rule for dealers. However, given the importance of ensuring that information relevant to the use of covered products for financial crime or the financing of terrorism is provided to law enforcement, we are considering proposing a suspicious activity reporting rule in the future. We will work closely with law enforcement and the industry as we consider whether such a rule is appropriate.

The list of factors contained in the rule is intended to provide examples of what may indicate illegal activity, and is by no means exhaustive. Determinations as to whether a transaction should be refused or terminated must be based on the facts and circumstances relating to the transaction and the dealer's knowledge of the customer or supplier in question. It is not intended that dealers automatically refuse to engage in or terminate transactions simply because such transactions involve one or more of the factors listed in the rule. Rather, it is intended that dealers will develop procedures for identifying transactions involving potentially illegal activity, and procedures setting forth the actions that a dealer will take in response to such transactions.

The factors in the interim final rule are identical to those contained in the proposed rule, with one exception. One commenter suggested that the factor contained in section 103.140(c)(1)(ii)(C), relating to an attempt by a customer to maintain a high degree of secrecy with respect to a transaction, should be eliminated because in an industry with security concerns stemming from the high dollar value of jewels, precious metals, and precious stones, transactions are typically characterized by secrecy. FinCEN wishes to clarify that this factor is not intended to apply to the level of concern for personal security or the security of valuable merchandise that is customary in the normal course of business for this industry. Rather, it is intended to apply to transactions in which a customer attempts to maintain a level of secrecy that is unusual in light of the level of secrecy that is normal and customary for the industry, or the business of the particular dealer, or the type of transaction. In response to this comment, section 103.140(c)(1)(ii)(C) has been revised to apply to attempts by a customer or supplier to maintain "an unusual degree of secrecy" with respect to the transaction.

2. 31 CFR 103.41(c)(2) – Compliance Officer.

Section 103.140(c)(2) continues to require that a dealer designate a compliance officer to be responsible for administering the anti-money laundering program. The person (or group of persons) should be competent and knowledgeable regarding BSA requirements and money laundering issues and risks, and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures throughout the dealer's business. The role of the compliance officer is to ensure that (1) the program is being implemented effectively, (2) the program is updated as necessary, and (3) appropriate persons are trained in accordance with the rule. The compliance officer also provides an available resource for employees with questions regarding BSA requirements. Whether the compliance officer is dedicated full time to BSA compliance would depend upon the size and complexity of the dealer's business and the risks posed.

In all cases, the person responsible for the supervision of the overall program must be an officer or employee of the dealer.

3. <u>31 CFR 103.41(c)(3) – Education and Training.</u>

Section 103.140(c)(3) continues to require that a dealer provide for training of appropriate persons. Employees of the dealer must be trained in BSA requirements relevant to their functions, including recognizing possible signs of money laundering and terrorist financing. The level, frequency, and focus of the training should be determined by the responsibilities of the employees, and any factors the dealer has identified in its risk assessment.[18] Employees should receive periodic updates and refreshers regarding the anti-money laundering program.

4. <u>31 CFR 103.41(c)(4) – Independent Testing.</u>

Section 103.140(c)(4) continues to require that a dealer conduct periodic testing of its program, to ensure that the program is functioning as designed. Such testing should be accomplished by personnel knowledgeable regarding BSA requirements. The frequency of such a review will vary by dealer, depending upon factors such as the size and complexity of the dealer, the nature of its business, and any relevant factors identified by the dealer in the course of conducting its risk assessment.

Testing may be accomplished either by dealer employees or unaffiliated service providers so long as those same individuals are not involved in the operation or oversight of the program. One commenter expressed concern that the independent testing requirement would place an unfair burden on smaller businesses, requiring them to bear

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[18] Appropriate topics for an anti-money laundering program include, but are not limited to: BSA requirements, a description of money laundering, how money laundering is carried out, what types of activities and transactions should raise concerns, what steps should be followed when suspicions arise, and the need to review OFAC and other government lists.

the cost of hiring an outside auditor because their entire staff would be directly involved in the operation or oversight of the program. Under the terms of the rule, however, the required independent review may be performed by an employee of the dealer (or a co-owner), so long as the reviewer is not the designated compliance officer or involved in the operation of the program.

D. 103.41(d) – Effective Date

The NPRM proposed that a dealer must develop and implement an anti-money laundering program within 90 days after publication of the interim final rule, or not later than 90 days after the date a person becomes a dealer for purposes of the rule. Several commenters requested an extension of the effective date to at least 180 days after issuance of the final rule. In view of the diversity of the businesses that constitute dealers in covered goods, coupled with the fact that dealers are not currently regulated as financial institutions, FinCEN agrees that a longer delayed applicability date is warranted. The interim final rule (section 103.140(d)) provides that the a dealer is required to develop and implement an anti-money laundering program not later than January 1, 2006, or six months after the date a dealer becomes subject to the provisions of the interim final rule.

V. Frequently Asked Questions

FinCEN is providing the following questions and answers to assist dealers in precious metals, precious stones, and jewels in understanding the scope of this interim final rule.

1. Why is FinCEN issuing a regulation requiring dealers in precious metals, stones, and jewels to establish an anti-money laundering program?

As with all of FinCEN's regulations requiring the establishment of an anti-money laundering program, FinCEN is issuing this regulation to better protect those who deal in jewels, precious metals, and precious stones from potential abuse by criminals and terrorists, thereby enhancing the protection of the U.S. financial system generally, and the precious metals, jewels and precious stones industry in particular. The characteristics of jewels, precious metals, and precious stones that make them valuable also make them potentially vulnerable to those seeking to launder money. This regulation is a key step in ensuring that the Bank Secrecy Act (BSA) is applied appropriately to these businesses.

Recognizing the need for a more comprehensive anti-money laundering regime, Congress passed, and the President signed into the law, the USA Patriot Act, which, among other things, requires that all persons defined as financial institutions for BSA purposes establish anti-money laundering programs. The Act further directs the Secretary of the Treasury to prescribe through regulation minimum standards for such programs. A dealer in jewels, precious metals, or precious stones is defined as a "financial institution" under the BSA, and this regulation fulfills that mandate of the USA Patriot Act.

2. Why is this being issued as an "Interim Final" rule? Will it change?

FinCEN is issuing this rule as an interim final rule to give us the flexibility to more narrowly tailor certain aspects of the rule in response to our request within this rule for additional public comment on four discrete issues, while still ensuring that dealers immediately begin to develop anti-money laundering programs.

Through the course of the rulemaking process and in developing a final rule, FinCEN has identified several important issues that would affect the scope of the regulation but on which it received little or no public comment. Thus, to ensure an effective and appropriately focused regulation, FinCEN seeks public comment regarding the following issues (which are discussed more fully under the heading "Request for Comments"):

(1) Should silver be removed from the definition of a "precious metal?"

(2) Should "precious stones" and "jewels" be defined more specifically, for example, by reference to a minimum price per carat, and if so, how?

(3) Is 50 percent the appropriate value threshold for determining whether finished goods (including jewelry) containing jewels, precious metals, or precious stones should be subject to the rule?

(4) In addition, FinCEN is again requesting comments on the potential impact of the rule on small businesses (including manufacturers, dealers, wholesalers, distributors, and retailers) that may be "dealers" subject to the provisions of the rule.

FinCEN is soliciting comments until [INSERT DATE THAT IS 45 DAYS AFTER DATE OF PUBLICATION]. After the end of the comment period, FinCEN will review all comments received and determine whether any further changes should be made in the final rule. At this time, FinCEN will only consider comments addressing the issues outlined above, and FinCEN anticipates that changes, if any, will be made before January 1, 2006, the date that dealers are required to implement their anti-money laundering programs.

Dealers covered by the interim final rule are expected to begin developing anti-money laundering programs in accordance with the terms of this interim final rule. Any changes that FinCEN makes to the rule would likely reduce compliance burdens on dealers.

3. Who is covered by this regulation?

The interim final rule applies to “dealers” in “covered goods.” “Covered goods” include jewels, precious metals, and precious stones, and finished goods (including but not limited to, jewelry, numismatic items, and antiques) that derive 50 percent or more of their value from jewels, precious metals, or precious stones contained in or attached to such finished goods.

FinCEN has defined the term “dealer” as it is commonly understood: A person who both purchases and sells covered goods. Additionally, FinCEN has included dollar thresholds in the definition of dealer: A person must have purchased at least $50,000, ***and*** sold at least $50,000, worth of covered goods during the preceding year. The dollar threshold is intended to ensure that the rule only applies to persons engaged in the business of buying and selling a significant amount of these items, rather than to small businesses, occasional “dealers,” and persons dealing in such items for hobby purposes.

Significantly, the interim rule distinguishes between a dealer and “retailer” of covered goods. FinCEN has defined the term retailer as a person engaged within the U.S. in sales of covered goods, ***primarily*** to the public. FinCEN believes that retailers, as defined, do not pose the same level of risk for money laundering as do dealers. Thus, most retailers will **not** be required to establish anti-money laundering programs.

So long as retailers generally purchase their covered goods from U.S.-based dealers and other retailers, the retailers will not be required to establish anti-money laundering programs. Thus, retailers that, for example, purchase excess inventory from other retailers from time to time would still be covered by the retailer exemption.

Under the interim final rule, a retailer that purchases up to $50,000 of covered goods from persons other than U.S.-based dealers or retailers is covered by the retailer exemption. However, if during the prior tax or calendar year a retailer both purchased more than $50,000 of covered goods from persons other than U.S. dealers or retailers (such as non-U.S. dealers and members of the general public), **and** sold more than $50,000 of covered goods, then the retailer would be deemed to be a "dealer" and would have to develop and implement an anti-money laundering program. Under such circumstances, the anti-money laundering program would only be required to address purchases from non-U.S. dealers (including members of the general public) for the following year; the program would not be required to address sales.

Finally, businesses licensed or registered as pawnbrokers under State or municipal law are specifically exempted from the definition of "dealer" for purposes of the interim final rule. Thus, a pawnbroker is not required to establish an anti-money laundering program under this rule as long as the pawnbroker is properly licensed or registered with the appropriate State or local government and is engaged in pawn transactions.

3(a) Is the purchase and sale of jewelry and other finished goods containing jewels, precious metals, or precious stones subject to the rule as well?

The purchase and sale of jewelry and other finished goods containing jewels, precious metals or precious stones would subject a person to the rule, only if such jewelry or other finished goods derive at least 50 percent of their value from the jewels, precious metals or precious stones they contain. The purpose of this distinction is to ensure that

FinCEN does not regulate a wide variety of goods whose value is not primarily derived from the jewels, precious metals or precious stones they contain.

3(b) How do I determine whether I have purchased and sold $50,000 worth of jewels, precious metals or precious stones?

The $50,000 threshold is based solely on the value of jewels, precious metals, and precious stones that were purchased and sold during the prior year. For example, if a business purchases and sells jewelry, at least 50 percent of the value of which is derived from jewels, precious metals, or precious stones, the $50,000 threshold is calculated based on the value of the jewels, precious metals, and precious stones contained in such jewelry, not on the overall value of the jewelry. This distinction ensures that the focus of the rule remains on jewels, precious metals, and precious stones, not on value due to other reasons.

3(c) How do I determine whether the businesses from which I purchase my covered goods are "dealers" or other "retailers" for purposes of the interim final rule?

FinCEN expects persons engaged in the business of buying and selling covered goods to take reasonable steps to determine whether a supplier is covered by this interim final rule or whether the supplier is eligible for the retailer exemption. Reasonable steps will depend on the nature of the relationship between the supplier and the person purchasing the items. FinCEN understands that the jewel, precious metal, and precious stone industry is one often characterized by personal relationships. Accordingly, in most cases, FinCEN anticipates that the verbal or written representations of the supplier will be sufficient. However, in other cases, additional due diligence will be required.

3(d) In 2005, I will purchase more than $50,000 in jewels, precious metals, and precious stones that I use to manufacture inexpensive jewelry that I sell to retail stores. Will I be required to have an anti-money laundering program in 2006?

If the jewels, precious metals, and precious stones in your jewelry account for 50 percent or more of the selling price of the jewelry, and the value of the jewels, precious metals and precious stones contained in the jewelry you sell exceeds $50,000, you will be required to have an anti-money laundering program.

If only some of your jewelry derives 50 percent or more of its selling price (the price at which you sell it to the retail stores, not the price that the retail stores will charge their customers) from jewels, precious metals, or precious stones, you only need to count the value of the jewels, precious metals, or precious stones in that jewelry towards your $50,000 “sales” threshold.

The focus of this rule is on the jewels, precious metals, and precious stones – not on the jewelry or other finished items. Therefore, only jewelry (and other finished goods) that derive at least 50 percent of their value from the jewels, precious metals, and precious stones are subject to this rule.

The anti-money laundering program should focus on realistic money-laundering risks, based on the experience of the industry and government. FinCEN believes that these thresholds help to better focus the rule on those risks, and will be periodically issuing information to the industry regarding its knowledge and experience with money laundering risks to this industry.

3(e) I sell precious stones primarily to the public, but my supplier is a foreign company. Am I required to establish an anti-money laundering program?

If, during 2005, you purchase more than $50,000 in precious stones from your foreign supplier, and sell more than $50,000 in precious stones, you must develop and implement an anti-money laundering program by January 1, 2006. But, because you are a retailer, your anti-money laundering program would only need to address the money laundering risks associated with the purchases from your foreign supplier.

3(f) Are trade-in transactions "purchases" under this rule?

Not for the purpose of defining who is a dealer subject to the rule.[19] FinCEN has learned that it is quite common for dealers and retailers in covered goods to allow retail customers to trade-in existing items for credit against the purchase of a new item. Therefore, so long as the value of the trade-in is credited to the account of the customer, and so long as a dealer or a retailer does not provide funds to the customer in exchange for the trade-in, these transactions need not be taken into account in determining the dollar value of covered goods purchased.

The trade-in exception only applies for purposes of determining who is a "dealer," and not to the scope of the anti-money laundering program required of a dealer. Therefore, a dealer that is not a retailer would be required to evaluate the risks posed by trade-in transactions in determining the appropriate program requirements, as it would with other transactions in covered goods.

3(g) I am a retail jeweler who sometimes buys jewelry from the general public, which I re-sell in my store. Am I required to have an anti-money laundering program?

You would be required to establish an anti-money laundering program only if, during the prior calendar or tax year:

[19] Trade-in transactions also are not considered "purchases" for purposes of determining whether a retailer qualifies for the retailer exception to the definition of "dealer."

(1) You sold jewelry containing more than $50,000 in jewels, precious metals, and precious stones, and the value of the jewels, precious metals, and precious stones comprised 50 percent or more of the selling price of the jewelry; **and**

(2) You purchased from the general public jewelry containing more than $50,000 in jewels, precious metals, and precious stones, and the value of the jewels, precious metals, and precious stones comprised 50 percent or more of the purchase price of the jewelry.

If you are required to have an anti-money laundering program, it would only need to address the risks associated with purchases from the public of jewelry that derives 50 percent or more of its value from jewels, precious stones, or precious metals. It would not need to address your sale of covered goods.

3(h) I purchase jewels, precious stones, and precious metals for the purpose of making and selling decorative consumer goods. Do I have to establish an anti-money laundering program?

If you sell your goods primarily to the public, you are a retailer and do not have to establish an anti-money laundering program, unless during the prior tax or calendar year:

(1) The value of the jewels, precious stones and precious metals contained in the goods you sold was more than $50,000, and the value of the jewels, precious stones, and precious metals comprised 50 percent or more of the selling price of those goods; and

(2) You purchased more than $50,000 in jewels, precious stones, and precious metals from either foreign sources or the general public, in which case your program need address only those sources of supply.

If you are not a retailer, you must establish an anti-money laundering program if, during the prior tax or calendar year:

(1) You purchased more than $50,000 in jewels, precious stones, and precious metals from any source of supply; and

(2) The value of the jewels, precious stones and precious metals contained in the goods you sold was more than $50,000, and the value of the jewels, precious stones, and precious metals comprised 50 percent or more of the selling price of those goods.

3(i) I am an antiques dealer who purchases and sells items that contain jewels, precious metals or precious stones. Am I required to have an anti-money laundering program?

If you sell your antiques primarily to the public, you are a retailer and do not have to establish an anti-money laundering program, unless during 2005:

(1) The value of the jewels, precious stones and precious metals contained in the antiques you sold was more than $50,000, and the value of the jewels, precious stones, and precious metals comprised 50 percent or more of the selling price of those antiques; and

(2) You purchased antiques from foreign sources or the general public that contained more than $50,000 in jewels, precious stones, and precious metals, and the value of the jewels, precious stones, and precious metals comprised 50 percent or more of the purchase price of those antiques; in which case your program need address only those sources of supply.

If you are not a retailer because, for example, you sell your antiques equally to other antiques dealers as well as the general public, you must establish an anti-money laundering program if, during 2005:

(1) The value of the jewels, precious stones and precious metals contained in the antiques you purchased was more than $50,000, and the value of the jewels, precious stones, and precious metals accounted for 50 percent or more of the purchase price of those antiques; and

(2) You sold antiques that contained more than $50,000 in jewels, precious stones, or precious metals, and the value of the jewels, precious stones, and precious metals comprised 50 percent or more of the selling price of those antiques.

In all cases, it is only the value of the jewels, precious metals, and precious stones in the antiques that matters, not the value of the antiques themselves.

Because of price "mark-ups" it is possible that the precious metals in an antique you purchased accounted for more than 50 percent of its purchase price, but less than 50 percent of its selling price when you sold it. If this is the case, you would need to count the purchase toward your $50,000 "purchases" threshold, but the sale would not count toward your "sales" threshold.

3(j) What about the purchase of jewels, precious stones, or precious metals for use in machinery or equipment to be used for industrial purposes? If a business manufactures such equipment and sells it, is that business subject to this rule?

No. The purchase of jewels, precious metals, and precious stones for use in industrial products, and the purchase or sale of such products, appears to be less susceptible to money laundering and terrorist financing risks, due to the fact that precious metals, precious stones, and jewels typically do not constitute a significant component of the value of an industrial product. Therefore, persons who engage in these activities are not dealers to the extent of such activities for purposes of the interim final rule.

4(a) What are the requirements for the anti-money laundering program?

At a minimum, dealers must establish an anti-money laundering program that comprises the four elements set forth below. FinCEN offers the following guidance to assist dealers in the development of their program. However, this guidance does not supplant the terms of the interim final rule, and the steps required in any one particular case will depend on the unique circumstances of each business:

(1) Policies, procedures, and internal controls, based on the dealer's assessment of the money laundering and terrorist financing risk associated with its business, that are reasonably designed to enable the dealer to comply with the applicable requirements of the Bank Secrecy Act and to prevent the dealer from being used for money laundering or terrorist financing.

You should learn what the BSA requirements are for your business. For most dealers, the requirements are (1) to establish an anti-money laundering program, (2) to file IRS/FinCEN Form 8300,[20] (3) to file FinCEN Form TD F 90-22.1[21], and (4) to file FinCEN Form 105.[22] All of these forms and their instructions are available at www.fincen.gov.

As the preamble to the rule describes, you should assess the extent to which your particular business is susceptible to money laundering and terrorist financing. For

[20] Reports relating to currency in excess of $10,000 received in a trade or business, *see* 31 CFR 103.30.
[21] Report of Foreign Bank and Financial Accounts, *see* 31 CFR 103.24.
[22] Report of International Transportation of Currency or Monetary Instruments, *see* 31 CFR 103.23.

example, business you conduct with other U.S. dealers subject to the rule, and established customers or suppliers, presents a relatively low level of risk. On the other hand, business conducted with parties located in, or transactions for which payment or account reconciliation is routed through accounts located in, jurisdictions that have been identified as particularly vulnerable to money laundering or terrorist financing, present a significantly higher risk, and therefore require greater diligence for detecting transactions that may involve money laundering or terrorist financing.

You should look at the FinCEN website for information and updates on money laundering and terrorist financing risks, as they apply to your industry.

You should talk with colleagues in your industry and consult industry trade associations to learn what the best practices are among dealers.

Finally, you should consider all of the things that you learn in the context of your own business. FinCEN does not expect that this program can prevent all potential money laundering. What ***is*** expected is that your business will take prudent steps, with the same kind of thought and care that you take to guard against other crimes, such as theft or fraud.

(2) A compliance officer who is responsible for ensuring that the program is implemented effectively.

The compliance officer is an employee or group of employees who will be responsible for the day-to-day operation of your anti-money laundering and counter-terrorist financing program. This person will be responsible on a day-to-day basis for ensuring that the steps within your own program are fully implemented. As such, this person should be someone with enough authority to achieve this important task. The amount of time devoted to these duties will depend on the level of risk. A dealer is not required to designate a person to serve on a full-time basis as a compliance officer for purposes of the interim final rule, unless the level of risk or volume of transactions warrants that. If your business faces very high level of risk for money laundering or terrorist financing, then much will be required of this person. If your exposure to these risks is more moderate, then the level of effort will be commensurate with that risk.

In all cases, however, the compliance officer should be thoroughly familiar with the operations of the business itself and with all aspects of your anti-money laundering program, as well as with the requirements of the BSA and applicable FinCEN forms, and should have read carefully all applicable documents issued by FinCEN or on FinCEN's webpage.

(3) Ongoing training of appropriate persons concerning their responsibilities under the program.

You should first consider what training is appropriate for each individual employee. Some employees may require no training on the program, because of their duties. Others may require a great deal of training. The training should be clearly understood by your employees, and the compliance officer should be available to answer all questions posed by employees. Remember that you should periodically retrain your employees on your program as may be necessary to ensure that they understand and can fully implement your program.

(4) Independent testing to monitor and maintain an adequate program.

Some person or group of people who are not working specifically for the compliance officer on the anti-money laundering program should be selected to determine whether the program has been appropriately implemented and is working. For example, if the program requires that a particular employee be trained once every six months, then the independent testing should determine whether the training occurred and whether the training was adequate. Independent testing does <u>not</u> mean that an outside party must be hired, although outside parties may be utilized to conduct the independent review. It does mean, though, that the testing should be a fair and unbiased appraisal of the success in implementing the anti-money laundering program, and the results of the independent testing should be put into writing, including any recommendations for improvement.

Independent testers should carefully consider all the decisions made by the compliance officer, such as the level of risk faced by the dealer for money laundering and terrorist financing, the frequency of training, etc. However, the decision as to how best to establish and operate the program is not a task for the independent tester. The independent testing is intended to confirm that the program operates properly.

4(b) What resources are available to help me establish an adequate program?

The preamble to the interim final rule, including these FAQs, provides the foundation for dealers to begin the process of establishing their own anti-money laundering program. Going forward, FinCEN will be issuing additional guidance to this industry. All such guidance will be posted in FinCEN's website, www.fincen.gov. Additionally, FinCEN operates a regulatory helpline, 1-800-949-2732, to provide answers to specific compliance questions. Finally, FinCEN will continue to work with the IRS, which has been delegated the authority to examine dealers for compliance with the interim final rule, to provide outreach and training about anti-money laundering issues.

5(a) When do I have to implement my anti-money laundering program?

As explained above, you first need to determine whether, based on your business activities during calendar year 2005, you are required to have an anti-money laundering program for 2006. (If the calendar year is not the same as your tax year, you may use your tax year instead.) If you are required to have an anti-money laundering program for 2006, it has to be implemented by January 1, 2006, or six months after that date you become subject to the anti-money laundering program requirement. You should start developing your program as soon as you can to be sure you have it in place by that date.

5(b) I am not required to have an anti-money laundering program for 2006. Will I need to have one in 2007?

If you are not required to establish an anti-money laundering program based on your 2005 business activities, you will need to assess your 2006 business activities to see if you have to establish an anti-money laundering program in 2007, which would have to be in place beginning six months after the date you become subject to the anti-money laundering program requirement. The same assessment needs to be made every year to determine if you will be required to have an anti-money laundering program the following year.

5(c) I am required to have an anti-money laundering program for 2006. How long must it continue?

If you are required to establish an anti-money laundering program for 2006, you must maintain it as long as you continue to be a "dealer" under the rule. If, based on your business activities for 2006, you no longer satisfy the criteria for being a dealer, you do not need to continue your anti-money laundering program in 2007. But you will need to assess your business activities in 2007 to see if you need to re-implement your program in 2008.

6. Am I required to file Suspicious Activity Reports as part of my anti-money laundering program?

This interim final rule requires dealers to establish anti-money laundering programs but does not require a dealer to file reports of suspicious activity with FinCEN. However, dealers are strongly encouraged to file suspicious activity reports when they suspect the transaction or the funds involved has/have an illegal source or purpose or when the transaction has no apparent business or lawful purpose. Where appropriate, dealers should immediately contact law enforcement or FinCEN through its hotline.

An integral part of the dealer's anti-money laundering program is to assess the risks and vulnerabilities of the business and to develop policies, procedures and internal controls to address those risks. This should include procedures and controls for identifying "suspicious" activities and dealing with them accordingly. Procedures for dealing with suspicious activities may include guidance for when it is appropriate in the context of the business and the activity to (1) contact local or federal law enforcement authorities, (2) file a suspicious activity report with FinCEN (FinCEN recommends using the Money Services Business SAR Form TD F 90-22.56, available at http://www.fincen.gov/reg_bsaforms.html), (3) check the "suspicious activity" box on a Form 8300 filed on a particular transaction, or (4) report suspected terrorist activities to FinCEN using its Financial Institutions Hotline (1-866-556-3974). Any dealer, or any of its officers, directors, employees or agents, that makes a voluntary SAR filing shall not be liable to any person under federal, state or local law, or under an arbitration contract, for such a filing or for failing to provide notice of the filing to the subject of the filing.[23] We also caution, however, that a dealer, or any of its officers, directors, employees, or agents, that makes a voluntary SAR filing ***may not*** notify any person involved in the reported transaction that a SAR has been filed.[24]

7. Do I still need to report cash receipts of in excess of $10,000 on Form 8300?

Yes. Nothing in this interim final rule affects the existing obligation of a business to report cash receipts in excess of $10,000 in one transaction, or two or more related transactions, on Form 8300. 31 C.F.R. 103.30. In particular, businesses excluded from this interim final rule are ***not*** relieved of their existing obligation to file Form 8300. To the contrary, FinCEN regards the filing of Form 8300 as an essential reporting component of the Bank Secrecy Act, especially for this industry that does not presently have a suspicious activity reporting obligation.

VI. Request for Comments

FinCEN is issuing this rule as an interim final rule in order to obtain further public comment on the specific issues addressed below. FinCEN encourages comments on any or all of these issues from all interested persons, and particularly persons engaged in commerce in finished goods containing jewels, precious metals or precious stones. Comments received on or before [INSERT DATE THAT IS 45 DAYS AFTER DATE OF PUBLICATION], will be carefully considered in the development of the final rule that will supercede this interim final rule. The final rule will be identical to the interim

[23] 31 U.S.C. 5318(g)(3).
[24] 31 U.S.C. 5318(g)(2)(A).

final rule, except for any changes made in response to comments received on the following issues. Please refer to the instructions under "ADDRESSES" for information on how to submit comments.

A. Silver.

Section 103.140(a)(4) of the interim final rule defines the term "precious metal" to include silver as proposed in the NPRM. FinCEN did not receive any comments on the inclusion of silver within this definition. Nonetheless, we are soliciting comments on whether the proposed provision should be included in a final rule. Although silver has historically been considered to be a precious metal, silver recently has been trading at approximately $7.00 per ounce. In contrast, platinum recently has been trading at approximately $860.00 per ounce, gold at approximately $420.00 per ounce, and palladium at approximately $185.00 per ounce. Comments are specifically requested on the following issues:

1. Should silver continue to be defined as a "precious metal" for purposes of the final rule?

2. The inclusion of silver in the interim final rule, taken together with the applicability of the interim final rule to dealers in finished goods that derive 50 percent or more of their value from silver (see below), requires dealers in silver to develop and implement anti-money laundering programs (assuming that the applicable purchase and sale thresholds are satisfied). Should finished goods containing silver be covered by the final rule? What types of finished goods containing silver are likely to be covered by the final rule in light of the definitional thresholds for precious metal and finished goods contained in the interim final rule? What types of finished goods (for example, brazing

alloys and medical products) should not be covered by a final rule? What percentage of the sales price of various types of finished goods containing silver is attributable to the silver contained in the good? Commenters are specifically requested to consider the potential impact of the interim final rule on persons and businesses that manufacture "inexpensive" jewelry and other items containing silver intended for retail sale to the public, as well as the impact on wholesalers and distributors of such goods that purchase and sell them in the course of commerce, and on dealers in silver alloys used for medical purposes. Comments are also specifically requested on the extent to which wholesalers, distributors, and retailers of such goods will know, in the ordinary course of business, whether they are dealing in goods that derive 50 percent or more of their value from silver.

3. Should a final rule include an overall minimum price-per-ounce level at which silver (or any other metal) would be deemed a "precious metal" for purposes of the rule? Commenters answering in the affirmative are requested to recommend an appropriate minimum price-per-ounce level and a basis for that recommendation.

B. Jewels and Precious Stones

The definition of "precious metal" contains a finite list of metals and incorporates an objective purity threshold of 500 parts per 1000. In contrast, the definitions of "jewel" (section 103.140(a)(2)) and "precious stone" (section 103.140(a)(4)), while listing commonly recognized jewels and precious stones, also extend to any substance that is of "gem quality market-recognized beauty, rarity, and value." Would it be appropriate to add to these definitions an overall minimum price-per-carat or other objective threshold indicating at which point the jewel or stone would be deemed a "jewel" or "precious stone" for purposes of a final rule? If so, what would be an appropriate threshold and why?

C. Finished Goods

Section 103.140(a)(1)(iv) of the interim final rule includes within the definition of "covered goods," finished goods including, but not limited to, jewelry, numismatic items, and antiques, that derive 50 percent or more of their value from the jewels, precious metals, or precious stones contained or attached to such finished goods. The 50 percent value threshold for finished goods in these provisions is, in principle, consistent with the 500 parts per 1000 purity threshold for precious metals in section 103.140(a)(4).

1. Is the 50 percent value threshold described above an appropriate threshold for finished goods containing jewels, precious metals, or precious stones, or to which jewels, precious metals, or precious stones are attached? If not, what would be an appropriate threshold and why? Should jewelry be subject to a threshold different from that of other finished goods? If so, why, and what would constitute an appropriate definition of "jewelry"?

2. Comments are also specifically requested on whether, in the ordinary course of business, wholesalers, distributors, and retailers of finished goods (including persons such as antique dealers) will know, and if so how (*e.g.*, pursuant to Federal Trade Commission requirements[25]), whether the goods they are dealing in derive 50 percent or more of their value from jewels, precious metals, or precious stones, and thereby cause them to be a "dealer" required to have an anti-money laundering program under the terms of the interim final rule.

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[25] *See* "Guides for the Jewelry, Precious Metals, and Pewter Industries" http://www.ftc.gov/bcp/guides/jewel-gd.htm, effective April 10, 2001.

D. Effects on Small Businesses

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), FinCEN certified that the preceding notice of proposed rulemaking would not have a significant economic impact on a substantial number of small businesses or other small entitites. Although FinCEN specifically requested public comments on the impact of the rule on small dealers, no such comments were received, and this interim rule repeats that certification.

In view of the issues raised above, FinCEN again solicits comments on the potential impacts of the rule on small businesses (including manufacturers, dealers, wholesalers, distributors, and retailers) that may be "dealers" subject to the provisions of the rule.

VII. Regulatory Flexibility Act

FinCEN certifies pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), that this interim final rule will not have a significant economic impact on a substantial number of small entities. Because the requirements of the rule closely parallel the requirements for anti-money laundering programs for all financial institutions mandated by section 352 of the USA Patriot Act, the costs associated with the establishment and implementation of anti-money laundering programs are attributable to the statute and not the rule. Moreover, FinCEN believes that the definition of "dealer" in section 103.140(a)(2), which excludes dealers who have less than $50,000 in gross proceeds derived from covered goods in a year, will exclude most small dealers from the requirements of the rule.

Furthermore, the rule provides for substantial flexibility in how each dealer may meet its requirements. This flexibility is designed to account for differences among dealers, including size. In this regard, the costs associated with developing and implementing an anti-money laundering program will be commensurate with the size of a dealer. If a dealer is small, the burden to comply with section 352 and the rule should be similarly small.

In the NPRM, FinCEN requested comments on the impact of the proposed rule on small dealers. No comments on this issue were received.

VIII.   Paperwork Reduction Act

The collection of information contained in the interim final rule has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), and assigned OMB Control Number 1506-0030. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information is the recordkeeping requirement in section 103.140(b). The information will be used by federal agencies to verify compliance by dealers with the provisions of sections 103.140. The collection of information is mandatory.

Estimated Number of Recordkeepers: 20,000.

Estimated Average Annual Burden Per Recordkeeper: The estimated average burden associated with the recordkeeping requirement in section 103.140(b) rule is 1 hour per recordkeeper.

Estimated Total Annual Recordkeeping Burden: 20,000 hours.

Comments concerning the accuracy of this burden estimate should be directed to the Financial Crimes Enforcement Network, Department of the Treasury, Post Office Box 39, Vienna, VA 22183, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

IX. Executive Order 12866

It has been determined that this rule is not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Banks and banking, Currency, Investigations, Law enforcement, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, part 103 of title 31 of the Code of Federal Regulations is amended as follows:

PART 103 – FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FINANCIAL TRANSACTIONS

1. The authority citation for part 103 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5314 and 5316-5332; title III, secs. 311, 312, 313, 314, 326, 352, Pub. L. 107-56, 115 Stat. 307.

2. Subpart I of part 103 is amended by adding new §103.140 to read as follows:

§ 103.140 Anti-money laundering programs for dealers in precious metals, precious stones, or jewels.

(a) Definitions. For purposes of this section:

(1) Covered goods means:

(i) Jewels (as defined in paragraph (a)(3) of this section);

(ii) Precious metals (as defined in paragraph (a)(4) of this section);

(iii) Precious stones (as defined in paragraph (a)(5) of this section); and

(iv) Finished goods (including, but not limited to, jewelry, numismatic items, and antiques), that derive 50 percent or more of their value from jewels, precious metals, or precious stones contained in or attached to such finished goods;

(2) Dealer. (i) Except as provided in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section, the term “dealer” means a person engaged within the United States as a business in the purchase and sale of covered goods and who, during the prior calendar or tax year:

(A) Purchased more than $50,000 in covered goods; and

(B) Received more than $50,000 in gross proceeds from the sale of covered goods.

(ii) For purposes of this section, the term “dealer” does not include:

(A) A retailer (as defined in paragraph (a)(7) of this section), unless the retailer, during the prior calendar or tax year, purchased more than $50,000 in covered goods from persons other than dealers or other retailers (such as members of the general public or foreign sources of supply); or

(B) A person licensed or authorized under the laws of any State (or political subdivision thereof) to conduct business as a pawnbroker, but only to the extent such person is engaged in pawn transactions (including the sale of pawn loan collateral).

(iii) For purposes of paragraph (a)(2) of this section, the terms “purchase” and “sale” do not include a retail transaction in which a retailer or a dealer accepts from a customer covered goods, the value of which the retailer or dealer credits to the account of the customer, and the retailer or dealer does not provide funds to the customer in exchange for such covered goods.

(iv) For purposes of paragraphs (a)(2) and (b) of this section, the terms “purchase” and “sale” do not include the purchase of jewels, precious metals, or precious stones that are incorporated into machinery or equipment to be used for industrial purposes, and the purchase and sale of such machinery or equipment.

(v) For purposes of applying the $50,000 thresholds in paragraphs (a)(2)(i) and (a)(2)(ii)(A) of this section to finished goods defined in paragraph (a)(1)(iv) of this section, only the value of jewels, precious metals, or precious stones contained in, or attached to, such goods shall be taken into account.

(3) <u>Jewel</u> means an organic substance with gem quality market-recognized beauty, rarity, and value, and includes pearl, amber, and coral.

(4) <u>Precious metal</u> means:

(i) Gold, iridium, osmium, palladium, platinum, rhodium, ruthenium, or silver, having a level of purity of 500 or more parts per thousand; and

(ii) An alloy containing 500 or more parts per thousand, in the aggregate, of two or more of the metals listed in paragraph (a)(3)(i) of this section.

(5) Precious stone means a substance with gem quality market-recognized beauty, rarity, and value, and includes diamond, corundum (including rubies and sapphires), beryl (including emeralds and aquamarines), chrysoberyl, spinel, topaz, zircon, tourmaline, garnet, crystalline and cryptocrystalline quartz, olivine peridot, tanzanite, jadeite jade, nephrite jade, spodumene, feldspar, turquoise, lapis lazuli, and opal.

(6) Person shall have the same meaning as provided in § 103.11(z).

(7) Retailer means a person engaged within the United States in the business of sales primarily to the public of covered goods.

(b) Anti-money laundering program requirement. (1) Each dealer shall develop and implement a written anti-money laundering program reasonably designed to prevent the dealer from being used to facilitate money laundering and the financing of terrorist activities through the purchase and sale of covered goods. The program must be approved by senior management. A dealer shall make its anti-money laundering program available to the Department of Treasury through FinCEN or its designee upon request.

(2) To the extent that a retailer's purchases from persons other than dealers and other retailers exceeds the $50,000 threshold contained in paragraph (a)(2)(ii)(A), the anti-money laundering compliance program required of the retailer under this paragraph need only address such purchases.

(c) Minimum requirements. At a minimum, the anti-money laundering program shall:

(1) Incorporate policies, procedures, and internal controls based upon the dealer's assessment of the money laundering and terrorist financing risks associated with its line(s) of business. Policies, procedures, and internal controls developed and

implemented by a dealer under this section shall include provisions for complying with the applicable requirements of the Bank Secrecy Act (31 U.S.C. 5311 et seq.), and this part.

(i) For purposes of making the risk assessment required by paragraph (c)(1) of this section, a dealer shall take into account all relevant factors including, but not limited to:

(A) The type(s) of products the dealer buys and sells, as well as the nature of the dealer's customers, suppliers, distribution channels, and geographic locations;

(B) The extent to which the dealer engages in transactions other than with established customers or sources of supply, or other dealers subject to this rule; and

(C) Whether the dealer engages in transactions for which payment or account reconciliation is routed to or from accounts located in jurisdictions that have been identified by the Department of State as a sponsor of international terrorism under 22 U.S.C. 2371; designated as non-cooperative with international anti-money laundering principles or procedures by an intergovernmental group or organization of which the United States is a member and with which designation the United States representative or organization concurs; or designated by the Secretary of the Treasury pursuant to 31 U.S.C. 5318A as warranting special measures due to money laundering concerns.

(ii) A dealer's program shall incorporate policies, procedures, and internal controls to assist the dealer in identifying transactions that may involve use of the dealer to facilitate money laundering or terrorist financing, including provisions for making reasonable inquiries to determine whether a transaction involves money laundering or terrorist financing, and for refusing to consummate, withdrawing from, or terminating such transactions. Factors that may indicate a transaction is designed to involve use of the dealer to facilitate money laundering or terrorist financing include, but are not limited to:

(A) Unusual payment methods, such as the use of large amounts of cash, multiple or sequentially numbered money orders, traveler's checks, or cashier's checks, or payment from third parties;

(B) Unwillingness by a customer or supplier to provide complete or accurate contact information, financial references, or business affiliations;

(C) Attempts by a customer or supplier to maintain an unusual degree of secrecy with respect to the transaction, such as a request that normal business records not be kept;

(D) Purchases or sales that are unusual for the particular customer or supplier, or type of customer or supplier; and

(E) Purchases or sales that are not in conformity with standard industry practice.

(2) Designate a compliance officer who will be responsible for ensuring that:

(i) The anti-money laundering program is implemented effectively;

(ii) The anti-money laundering program is updated as necessary to reflect changes in the risk assessment, requirements of this part, and further guidance issued by the Department of the Treasury; and

(iii) Appropriate personnel are trained in accordance with paragraph (c)(3) of this section.

(3) Provide for on-going education and training of appropriate persons concerning their responsibilities under the program.

(4) Provide for independent testing to monitor and maintain an adequate program. The scope and frequency of the testing shall be commensurate with the risk assessment conducted by the dealer in accordance with paragraph (c)(1) of this section. Such testing may be conducted by an officer or employee of the dealer, so long as the tester is not the person designated in paragraph (c)(2) of this section or a person involved in the operation of the program.

(d) Effective date. A dealer must develop and implement an anti-money laundering program that complies with the requirements of this section on or before the later of January 1, 2006, or six months after the date a dealer becomes subject to the requirements of this section.

DATED: 3-JUNE-2005

William J. Fox
Director,
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