



Department of the Treasury Financial Crimes Enforcement Network

Guidance

FIN-2008-G008

Issued: September 10, 2008

Subject: Application of the Definition of Money Transmitter to Brokers and Dealers in Currency and Other Commodities

The Financial Crimes Enforcement Network (“FinCEN”) is issuing this interpretive guidance to clarify whether a person who conducts transactions in currency or other commodities is a money services business for purposes of complying with the Bank Secrecy Act and its implementing regulations. Specifically, this guidance addresses whether a broker or dealer in currency or other commodities¹ is a money transmitter when, in the ordinary course of business, the broker or dealer accepts and transmits funds² in order to effect transactions in currency or other commodities for or with a customer.³

Whether a person is a money transmitter is a matter of facts and circumstances.⁴ Our regulations define the term “money transmitter” to include “[a]ny person... who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution... or... [a]ny other person engaged as a business in the transfer of funds,”⁵ and to exclude any person, such as a futures commission merchant, that is “registered with, and regulated or examined by... the Commodity Futures Trading Commission.”⁶ The regulations also provide that “the acceptance and transmission of funds as an integral part of the execution and settlement of a transaction other than the funds transmission itself... will not cause a person to be a money transmitter.”⁷

¹ These other commodities would include, for example, agricultural commodities, energy, and metals. See 31 C.F.R. § 103.11(xx) (defining the term “commodity” as “any good, article, service, right, or interest described in section 1a(4) of the Commodity Exchange Act”).

² In this guidance, the term “funds” means currency, funds, or the value of currency or funds, as those terms are used in 31 C.F.R. § 103.11(uu)(5).

³ See, e.g., 7 U.S.C. § 2.

⁴ 31 C.F.R. § 103.11(uu)(5)(ii).

⁵ 31 C.F.R. § 103.11(uu)(5)(i)(A) and (B).

⁶ 31 C.F.R. § 103.11(uu).

⁷ 31 C.F.R. § 103.11(uu)(5)(ii).

When a broker or dealer in currency or other commodities accepts and transmits funds solely for the purpose of effecting a bona fide purchase or sale of currency or other commodities for or with a customer, such person is not engaged as a business in the transfer of funds, and is not acting as a money transmitter as that term is defined in our regulations.⁸ In such circumstances, the transmission of funds is a fundamental element of the actual transaction necessary to execute the contract for the purchase or sale of the currency or the other commodity. The transmission of funds is not a separate and discrete service provided in addition to the underlying transaction. It is a necessary and integral part of the transaction.

We caution that the conclusions in this interpretive guidance are limited to circumstances in which a broker or dealer in currency or other commodities accepts and transmits funds as an integral part of the execution and settlement of a transaction other than the funds transmission itself. A broker or dealer in currency or other commodities is not solely engaged in the execution and settlement of a purchase or sale of currency or other commodities when the broker or dealer transfers funds between a customer and a third party that is not party to the currency or commodity transaction. For example, the broker or dealer could transfer funds between a customer and a third party by permitting a third party to fund a customer's account, by transferring a customer's currency or commodity position to a third party, or by closing out a customer's currency or commodity position with a transfer by the broker or dealer of proceeds from the position to a third party. If the broker or dealer, by providing such additional services, is engaged as a business in the transfer of funds, then the broker or dealer is acting as a money transmitter as that term is defined in our regulations. Of course the facts and circumstances surrounding the services provided by the broker or dealer will be determinative of whether the dealer is acting as a money transmitter.

Facts and circumstances also will determine whether a broker or dealer that is a money transmitter is required to register with FinCEN. If a broker or dealer is engaged in the business of a money transmitter in its own right, then it is subject to money services business regulations that include the requirement to register with FinCEN.⁹ If the broker or dealer is acting as a money transmitter solely because it is acting as the agent of another money transmitter, then it is subject to

⁸ See 31 C.F.R. § 103.11(uu)(5)(ii) (providing, for example, that a dealer in securities or other property would not be a money transmitter when it transmits funds in connection with the bona fide sale of such securities or other property). We reach the same conclusions regardless of whether positions are closed-out by the physical delivery of currency or commodities or by cash settlement of a contract in the currency or commodity.

⁹ See 31 C.F.R. §§ 103.20 (reports of suspicious activities), 103.22 (reports of transactions in currency), 103.33 (record keeping), 103.41 (registration), 103.125 (anti-money laundering program).

all of the money services business regulations except the registration requirement.¹⁰

Finally, we caution that this interpretive guidance is limited to our definition of money transmitter. When effecting the bona fide purchase or sale of currency or of certain metals, stones, and jewels, a dealer may be a “currency dealer or exchanger” or a “dealer in precious metals, precious stones, or jewels” as those terms are defined in our regulations.¹¹

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Financial institutions with questions about this guidance or other matters related to compliance with the Bank Secrecy Act and its implementing regulations may contact FinCEN’s Regulatory Helpline at (800) 949-2732.

¹⁰ See 31 C.F.R. § 103.41 (requiring registration of money services businesses, except “an issuer, seller, or redeemer of stored value” or “a person that is a money services business solely because that person serves as an agent of another money services business”).

¹¹ See 31 C.F.R. § 103.11(uu)(1) (defining “currency dealer or exchanger”) and 31 C.F.R. § 103.140(a) (defining “dealer,” “precious metals,” “precious stones,” and “jewels”).