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DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA28

RIN 1506-AA41

Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Businesses Engaged in Vehicle Sales

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

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: FinCEN is in the process of implementing the requirements delegated to it under the USA PATRIOT Act of 2001, in particular the requirements pursuant to sections 352 and 326 of the Act that require financial institutions to establish anti-money laundering compliance and customer identification programs. Pursuant to 31 U.S.C. 5312(a)(2)(T), the term “financial institution” is defined to include a “business engaged in vehicle sales, including automobile, airplane, and boat sales.” FinCEN is issuing this advance notice of proposed rulemaking (ANPRM) to solicit public comments on a wide range of questions pertaining to these requirements, including the money laundering risks that are posed by these businesses, whether these businesses should be subject to these requirements, and if so, how the requirements should be structured.

DATES: Written comments may be submitted on or before [INSERT DATE THAT IS 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Because paper mail in the Washington, D.C., area may be subject to delay, commenters are encouraged to e-mail comments. Comments may be submitted by electronic mail to regcomments@fincen.treas.gov with the caption in the body of the text,

“ATTN: ANPRM - Sections 352 and 326 – Vehicle Seller Regulations.” Comments may be mailed to FinCEN, P.O. Box 39, Vienna, VA 22183, ATTN: ANPRM - Sections 352 and 326 – Vehicle Seller Regulations. Comments should be sent by one method only. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN Reading Room in Washington, D.C. 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: Office of Chief Counsel, FinCEN, (703) 905-3590; the Office of the General Counsel, (202) 622-1927; or the Office of the Assistant General Counsel (Banking and Finance), (202) 622-0480 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 (Public Law 107-56) (the Act). Title III of the Act makes a number of amendments to the anti-money laundering provisions of the Bank Secrecy Act (BSA), which are codified in subchapter II of chapter 53 of title 31, United States Code. These amendments are intended to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Section 352(a) of the Act, which became effective on April 24, 2002, amended section 5318(h) of the BSA. As amended, section 5318(h)(1) requires every financial institution to establish an anti-money laundering program that includes, at a minimum: (i) the development of internal policies, procedures, and controls; (ii) the designation of a compliance officer;

(iii) an ongoing employee training program; and (iv) an independent audit function to test programs. When prescribing minimum standards for anti-money laundering programs, section 352 directs the Treasury to consider the extent to which such standards are commensurate with the size, location, and activities of the financial institutions to which such regulations apply.

As a “business engaged in vehicle sales” (vehicle seller) is defined as a financial institution under the BSA, 31 U.S.C. 5312(a)(2)(T), it is subject to the anti-money laundering program requirement. On April 29, 2002, and again on November 6, 2002, FinCEN temporarily exempted certain financial institutions, including vehicle sellers, from the requirement to establish an anti-money laundering compliance program. The purpose of the deferral was to enable FinCEN to study the affected industries and consider the extent to which anti-money laundering program requirements should be applied to them, taking into account the specific characteristics of the various entities defined as financial institutions by the BSA.¹

In addition, section 326 of the Act added new subsection (l) to 31 U.S.C. 5318, which requires Treasury to prescribe regulations setting forth minimum standards for financial institutions to identify customers applying to open accounts. Section 326 applies to all BSA financial institutions that open accounts for their customers.

The business of vehicle sellers encompasses various segments, including sellers of: (1) new land-based vehicles, such as automobiles, trucks, RVs, and motorcycles; (2)

¹ 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) (as corrected at 67 FR 68935 (November 14, 2002)).

new aircraft, including fixed wing airplanes and helicopters; (3) new boats and ships; and (4) used vehicles (as well as those who broker the sale of used vehicles).²

Businesses engaged in the selling of vehicles comprise a significant percentage of the total gross domestic product of the United States, and the vehicles that they collectively sell account for a major portion of U.S. consumption, exports, and other important economic indicia.³ As such, because of both the economic significance of this industry, and the important and pervasive role that vehicles, and therefore vehicles sales, play in the United States, this ANPRM is intended to assist FinCEN in striking a balance between the important statutory requirements of the Act, and the important benefits that vehicle sellers provide to our country.

Some vehicle sellers are tied to the manufacturing of the vehicles, while others may not be. While some vehicle sellers are publicly traded companies, most are privately held or family owned. Some may be characterized as wholesale sellers of vehicles, while others are engaged in retail sales of the vehicles. In each segment, there is often substantial variety in function and practice.

Vehicle sellers range in size from very large entities that sell vehicles with a total value that is measured in billions of dollars annually, to very small entities (such as a neighborhood used car dealer) that may only sell a few vehicles each year. Vehicle sellers may sell either new or used vehicles, and may sell to customers domestic or foreign, or both. Moreover, the characteristics of vehicle sellers often vary based on the

² FinCEN does not intend to impose anti-money laundering program obligations on individuals in connection with the sale of their own personal vehicle to others, whether as a “trade-in” with a retail vehicle dealer or by private sale with another party, unless an individual is engaged in the business of selling vehicles.

³ According to the Department of Transportation, in the year 2000 there were 8,847,000 new automobiles, 578,700 boats, and 3,285 civilian aircraft sold at retail. U.S. Dept. of Transportation Bureau of Transportation Statistics, National Transportation Statistics 2002 (GPO July 2002).

type of vehicles sold. For example, retail sellers of large, multi-engine commercial aircraft are generally much larger businesses than sellers of small, general aviation aircraft, reflecting the capital and business risks needed to maintain inventory. In a like manner, sales of large marine ships in excess of 100,000 deadweight tons are conducted very differently than sales of pleasure watercraft, such as sail boats. Similarly, sellers of used vehicles often have different characteristics than sellers of new vehicles, reflecting the different relationships with vehicle manufacturers and the differences in these markets.

II. Issues for Comment

1. What is the potential money laundering risk posed by vehicle sellers? Do money laundering risks vary by (1) vehicle type (e.g., boat, airplane, automobile); (2) market (wholesale vs. retail); or (3) business line (international sales, sales to governments)?

The threshold issue being addressed by this ANPRM is the extent to which vehicle sellers pose a significant risk of money laundering.⁴ For example, a money laundering risk is presented where a vehicle is purchased with cash.⁵ This is particularly true for the placement stage of money laundering; that is, where the money launderer seeks to cleanse illegal proceeds by introducing them into the financial system. A large cash purchase of an expensive vehicle could form the placement stage for a money

⁴ For the purpose of this ANPRM, FinCEN is focusing on the money laundering risks associated with the sale of the vehicles themselves, and not with the financing of such sales. Although some vehicle sellers that provide financing for their products (generally through a finance subsidiary) perform a function similar to that of traditional financial institutions such as banks and loan companies, that function will be addressed separately by a proposed rule to be issued that will require loan and finance companies to have anti-money laundering programs.

⁵ Recently, in Operation Lightning Strike, manufacturers of illegal liquor were convicted of laundering the illegal proceeds of untaxed liquor sales by using cash transactions and purchasing a number of vehicles in the names of other family members.

laundering scheme.⁶ While the risk of money laundering is minimized, to some extent, by the existing obligation on all vehicle sellers to report, pursuant to 26 U.S.C. 6050I, 31 U.S.C. 5331, and 31 CFR 103.30, the receipt of cash or monetary instruments in excess of \$10,000,⁷ a rule that requires an anti-money laundering compliance or customer identification program may alleviate further the money laundering risk associated with large cash purchases. In response to documented instances of abuse, industry associations representing new car dealers have already taken steps to guard against the laundering of illicit proceeds through the purchase of automobiles with cash, providing their members with educational materials concerning their legal obligations and cash-related money laundering red flags.

The next stage of money laundering, the layering stage, involves the distancing of illegal funds from their criminal source through the creation of complex layers of financial transactions. Examples of layering through the vehicle sellers industry might include trading in vehicles for other vehicles and engaging in successive transactions of buying and selling both new and used vehicles.

Vehicle sales businesses also could be used for integrating illicit income into assets that appear legitimate. Integration occurs when illegal funds appear to have been derived from a legitimate source. This could occur, for instance, when the funds or vehicles received from the vehicle seller in the aftermath of the layering transactions are held out as coming from a legitimate source.

⁶ See, e.g., U.S. v. Cruz, 993 F.2d 164 (8th Cir. 1993) (narcotics dealer laundered proceeds by purchasing three automobiles for cash in amount that greatly exceeded his stated income).

⁷ Sellers of vehicles for personal consumption (as opposed to commercial sales) fall within the type of retail business required to report receipts of monetary instruments (cashier's checks, traveler's checks, money orders) that have face amounts of less than \$10,000 and which are used to make a purchase of greater than \$10,000. See 31 CFR 103.30.

Vehicle sellers may need to have an understanding of the identity of customers who participate in transactions with money laundering risk. For purchases of vehicles involving large sums of cash, knowing the customer's identity may be an essential part of an effective anti-money laundering program. Customers may request complex invoicing arrangements or payment arrangements or may structure their cash payments to avoid BSA reports. While vehicle sellers may scrutinize non-cash transactions to manage fraud risk, they are undoubtedly less aware of possible money laundering risk with both cash and non-cash transactions.

FinCEN has received reports indicating that some vehicle sellers have engaged in structuring⁸ sequential deposits of cash near the reporting threshold of \$10,000. FinCEN also has received reports of the purchase of automobiles with structured checks and money orders. Other instances of suspicious activity reported to FinCEN concerning this industry include consumer loan fraud and check fraud. These instances all involve the placement stage of money laundering.

Accordingly, FinCEN solicits comments on the existence of the above, and other, types of risks in the vehicle sellers business. Specifically, FinCEN is interested in identifying risks in the products that vehicle sellers provide that make them uniquely susceptible to money laundering, as opposed to the risks inherent in all businesses that sell products or services to the public that may be purchased with tainted funds. Such heightened risks include, for example, the payment of funds to the seller by third parties on behalf of customers, particularly from jurisdictions with lax money laundering controls, and the ability to pay funds to the vehicle seller and, in return, receive funds

⁸ Structuring refers to the breaking up of a transaction into multiple smaller transactions to evade recordkeeping or reporting requirements.

from the seller that have the appearance of legitimacy. FinCEN further seeks comment on whether differentiation should be made for lines of business that appear to have minimal money laundering risks, such as the sale of vehicles to federal, state, and local governments. Are there other functional distinctions that should be made?

2. Should vehicle sellers be exempt from coverage under sections 352 and 326 of the Patriot Act?

Based on the determination of the extent of the risk of money laundering posed by vehicle sellers, the question arises as to whether the industry should be exempt under sections 352 and 326 of the Act. If the risk of money laundering in the vehicle sellers industry is determined to be minimal such that it does not justify the imposition of a regulatory burden, it might be reasonable to exempt the industry from coverage of these provisions. This judgment will be based on the existing risks of money laundering, the potential risks of money laundering, as well as the volume of possible illicit funds that may flow through vehicle sellers.

In light of these issues, FinCEN would like to solicit comments with regard to the issue of whether there should be an exemption from these provisions for vehicle sellers, or any category thereof. These comments should be designed to enable FinCEN to decide whether or not to propose an appropriate regulation designed to provide protection for the vehicle seller industry from the risks of money laundering.

3. If vehicle sellers, or some subset of the industry, should be subject to the anti-money laundering program requirements, how should the program be structured?

In applying section 352 of the Act to vehicle sellers, FinCEN must take into account which requirements are “commensurate with the size, location, and activities” of this industry. In undertaking this review, FinCEN recognizes that vehicle sellers likely have some programs already in place to meet existing legal obligations. For example, as a nonfinancial trade or business, vehicle sellers are required to report on Form 8300 the receipt of over \$10,000 in currency and certain monetary instruments. Vehicle sellers also may have procedures in place to protect themselves against fraud. Such procedures may be sufficient in themselves, given the money laundering risk in the industry, or they may serve as a foundation on which additional anti-money laundering program requirements could be based. FinCEN therefore seeks comment on the particular elements that should be included in any required anti-money laundering program, should it be determined that such a requirement should be imposed on this industry. In this regard, comment is requested regarding the types of programs vehicle sellers currently have in place to prevent fraud and illegal activities, and the applicability of such programs to the prevention of money laundering.

4. How should a vehicle seller be defined? Should there be a minimum threshold value in the definition? Should it include wholesale and retail sellers? Should sellers of used vehicles be included?

In the event FinCEN determines to propose requirements on vehicle sellers under sections 352 and 326 of the Act, it will be necessary to define the term vehicle seller. Although the BSA identifies a vehicle seller as a financial institution, the statute contains no definition of the term, other than to state that it includes sellers of automobiles, airplanes, and boats. The legislative history of the BSA provides no insight into how

Congress intended the term to be defined, nor has FinCEN had an occasion to define the term in a regulation.

As discussed above, vehicle sellers form an extremely large and diverse industry, accounting for a major portion of American consumption as well as exports. Given this diversity in the vehicle sellers industry, the risks of money laundering and the costs of preventive programs can vary widely. Thus, FinCEN solicits comment on whether any proposed rule should limit the definition to sellers of particular types of vehicles, to retail or wholesale vehicle sellers, or sellers of new or used vehicles. In addition, FinCEN's regulations in the past have recognized that businesses that do not transact in sufficient dollar amounts or volume, or in cash or monetary instruments, may not present sufficient money laundering risk to require the imposition of federally mandated programs. For example, under the BSA, money services businesses other than money transmitters (currency exchangers, check cashers, and issuers, sellers, and redeemers of traveler's checks and money orders) are defined as financial institutions only if they transact over \$1,000 in covered transactions for any one person in any one day.⁹ This threshold reflects the judgment that businesses that never engage in transactions above that level fail to present a money laundering risk sufficient to justify the regulatory burden. FinCEN solicits comment on whether, if vehicle sellers are required to implement anti-money laundering programs, there should be a monetary threshold of some kind in defining a vehicle seller for purposes of the BSA. Commenters should address whether any such threshold should be transaction based, as with the money services business rules, or on an annual gross income, or some other basis.

5. Do vehicle sellers maintain “accounts” for their customers?

Section 326 requires the setting of minimum standards for identification of customers “in connection with the opening of an account at a financial institution.” Section 311 of the Patriot Act provides a definition of “account” for banks, but requires the Secretary to promulgate a regulation defining “account” for non-bank financial institutions. Although such a regulation has yet to be issued, the definition for banks (“a formal banking or business relationship established to provide regular services, dealings, and other financial transactions”) is a useful starting point. This definition incorporates two key concepts: (1) formality of the business relationship, and (2) regularity of dealings. In light of these concepts, FinCEN solicits comments as to whether (and to what extent) vehicle sellers maintain accounts for their customers, in addition to fleet accounts. What kinds of services do vehicle sellers provide to any such account holders (including fleet accountholders)? Are these account relationships ongoing? Are accounts established to receive recurring payments from a customer, or are additional services provided to the accountholder?

III. Conclusion

With this ANPRM, FinCEN is seeking input to assist it in determining how to implement the requirements of sections 352 and 326 of the Act with respect to vehicle sellers. FinCEN welcomes comments on all aspects of this potential regulation and encourages all interested parties to provide their views.

IV. Executive Order 12866

Because this is an ANPRM, FinCEN does not know whether or in what form it may issue a regulation pursuant to sections 352 and 326 of the Act affecting vehicle sellers. Accordingly, FinCEN does not know whether potential regulations will

⁹ 31 CFR 103.11(uu).

constitute a significant regulatory action under the Executive Order. This ANPRM neither establishes nor proposes any regulatory requirements. FinCEN has submitted a notice of planned regulatory action to OMB for review. Because this ANPRM does not contain a specific proposal, information is not available with which to prepare an economic analysis. FinCEN will prepare a preliminary analysis if it proceeds with a proposed rule that constitutes a significant regulatory action.

Accordingly, FinCEN solicits comments, information, and data on the potential effects of any potential regulation. FinCEN will carefully consider the costs and benefits associated with this rulemaking.

DATED: _____

James F. Sloan
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