Department of the Treasury
Financial Crimes Enforcement Network

FREQUENTLY ASKED QUESTIONS

Interim Final Rule - Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels

The Financial Crimes Enforcement Network ("FinCEN") is issuing these frequently asked questions ("FAQs") regarding the application of its interim final rule implementing section 352 of the USA PATRIOT ACT and requiring dealers in precious metals, stones or jewels to establish anti-money laundering programs. FinCEN is providing these FAQs to assist dealers in precious metals, precious stones, and jewels in understanding the scope and application of the 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 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 Bank Secrecy Act 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 Bank Secrecy Act, 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:

(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 will be soliciting comments for 45 days after publication of the interim final rule in the Federal Register. 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 the 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 final 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. Therefore, pawnbrokers are not required to establish anti-money laundering programs under this rule as long as they are properly licensed or registered with the appropriate state or local government and 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.[1] 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:

(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

[1] 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."

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) <u>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</u>

Secrecy Act and to prevent the dealer from being used for money laundering or terrorist financing.

You should learn what the Bank Secrecy Act 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,[2] (3) to file FinCEN Form TD F 90-22.1[3], and (4) to file FinCEN Form 105.[4] All of these forms and their instructions are available at www.fincen.gov.

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

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

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 Bank Secrecy Act 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 not 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, and these FAQs, provide the foundation for dealers to begin the process of establishing their own anti-money laundering programs. Going forward, FinCEN will issue 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 Internal Revenue Service, which has been delegated the authority to examine dealers for compliance with the interim final rule and other Bank Secrecy Act requirements, 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?

The interim final rule requires dealers to establish anti-money laundering programs but does not require dealers 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 a dealer's anti-money laundering program is an assessment of the risks and vulnerabilities of the business and the development of 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_Bank Secrecy Actforms.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.[5] 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.[6]

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

Yes. Nothing in the 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.

[5] 31 U.S.C. 5318(g)(3).
[6] 31 U.S.C. 5318(g)(2)(A).