

dealer must make its anti-money laundering program available to 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.

Section 103.140(c) sets forth the minimum requirements of a dealer's money laundering program. Section 103.140(c)(1) requires the anti-money laundering program to 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 be reasonably designed to ensure compliance with BSA requirements. The only BSA regulatory requirement currently applicable to a dealer is the obligation to report on Form 8300 the receipt of cash or certain non-cash instruments totaling more than \$10,000 in one transaction or two or more related transactions.⁶ To assure reasonable compliance, the program should be reasonably designed to detect and report not only transactions required to be reported on Form 8300, but also activity designed to evade this reporting requirement. Such activity, commonly known as "structuring," may involve payments of more than \$10,000 with multiple money orders, travelers' checks, or cashiers' checks or other bank checks, each with a face amount of less than \$10,000. Such methods of payment may be indicative of money laundering, particularly when the payment instruments were obtained from different sources or the payments were made at different times on the same day or were made on consecutive days or close in time. Should dealers become subject to additional requirements, their compliance programs would have to be updated to include appropriate policies, procedures, training, and testing functions relating to such requirements.

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 those listed in the rule. First, the dealer must assess the money laundering and terrorist financing risks associated with its products, customers, suppliers, distribution channels, and geographic locations. In addition, a dealer must take into consideration the extent to which the dealer engages in transactions other than with established customers

or sources of supply. Finally, a dealer must 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.⁷ The proposed 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 such risks.

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 involves 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.⁸ The proposed rule provides flexibility to dealers in developing procedures for making reasonable inquiries under paragraph (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, income source, 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 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 (1-866-566-3974).

The proposed rule lists 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. Factors that may indicate a transaction is designed to involve use of the dealer to facilitate money laundering or terrorist financing include: (1) 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 unknown third parties; (2) unwillingness by a customer or supplier to provide complete or accurate contact information, financial references, or business affiliations; (3) attempts by a customer or supplier to maintain a high and unusual degree of secrecy with respect to the transaction, such as a request that normal business records not be kept; (4) purchases or sales that are unusual for the particular customer or supplier or type of customer or supplier; and (5) purchases or sales that are not in conformity with standard industry practice. For example, one money laundering scheme observed in this industry involved a customer who ordered items, paid for them in cash, cancelled the order, and then received a large refund.⁹ In one case, funds were laundered through large cash purchases of a dealer's gold at artificially inflated prices, followed by re-purchase by the dealer of the same gold at lower prices.¹⁰ A dealer should make reasonable inquiries when transactions appear to vary from standard industry practice, or from the standard practice of an established customer or supplier. Over- or under-invoicing, structured, complex, or multiple invoice requests, and high-dollar shipments that are over- or under-insured may all be indicia that a transaction involves money laundering or terrorist financing.

The list of factors contained in the proposed rule is intended to provide

⁷ 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, the FATF's designation of jurisdictions that are non-cooperative with international anti-money laundering principles, 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.

⁸ 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 ignored "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 of certain funds received derived from narcotics trafficking).

⁹ See *United States v. Huppert*, 917 F.2d 507 (11th Cir. 1990).

¹⁰ See *Finkelstein*, *supra* n. 8.

⁶ See 31 CFR 103.30.