

March 18, 2021

FinCEN Notice on Efforts Related to Trade in Antiquities and Art

FinCEN Informs Financial Institutions of New AML Measures to Combat the Illegal Trade in Antiquities and Art

SUMMARY

On March 9, 2021, the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") issued a notice ("Notice") to inform financial institutions about new provisions in the Anti-Money Laundering Act of 2020 ("AMLA") relating to the illicit trade in antiquities and art. As the Notice highlights, the AMLA amended the Bank Secrecy Act ("BSA") to apply to dealers in antiquities and directed the Secretary of the Treasury, acting through the Director of FinCEN, to issue proposed rules to carry out the amendments. The AMLA also directed the Secretary of the Treasury to perform a study of the facilitation of money laundering and the financing of terrorism through the trade in works of art. The Notice emphasizes the heightened risk of the antiquities and art markets being exploited to launder money and finance terrorism and warns financial institutions with existing BSA obligations that illicit activity associated with the trade in antiquities and art may involve their institutions. Finally, the Notice provides specific instructions to financial institutions for filing a Suspicious Activity Report ("SAR") related to trade in antiquities and art.¹

BACKGROUND

As FinCEN underscores in the Notice, financial institutions with existing BSA obligations should be aware of illegitimate investors using the antiquities and art markets as conduits for money laundering and terrorist financing. Crimes relating to antiquities and art may include the looting and smuggling of cultural artifacts, the sale of stolen or counterfeit items, money laundering and sanctions violations. Illicit activity related to antiquities and art has been linked to transnational criminal networks as well as international terrorist organizations, who have increasingly taken up trafficking in antiquities not only to generate income for their operations, but also to erase the cultural heritage of persecuted groups.² Although the scope of the problem

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is difficult to quantify, according to a March 2021 Congressional Research Service report on “Transnational Crime Issues: Arts and Antiquities Trafficking” (“CRS Report”), the estimated financial value of the illegal trade in antiquities and art ranges from several hundred million to billions of dollars annually.³

Certain characteristics inherent in the antiquities and art industries render these markets especially vulnerable to illegal financial activity. For instance, the CRS Report notes certain factors that enable bad actors to conceal their identities from other market participants and evade detection by law enforcement and regulators. These factors include: (i) the high degree of confidentiality in the art market; (ii) challenges in documenting the ownership history of cultural property and high-value artwork; (iii) inconsistent due diligence practices; and (iv) the use of shell companies and intermediaries to purchase, hold or sell antiquities and art.⁴ As the Senate Permanent Subcommittee on Investigations Art Industry Report (“PSI Report”) from July 2020 illustrates, sellers of artwork at auction are often not required to disclose their identities to buyers and, in some cases, auction houses do not even know the name of the original owner or buyer. This anonymity makes it difficult to track sales transactions and art ownership, making art an attractive instrument to hide illicit assets.⁵ The U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) also released an “Advisory and Guidance on Potential Sanctions Risks Arising from Dealings in High-Value Artwork.” The Advisory explained that the portability, concealability and subjective value of high-value artwork further contribute to the illegal trade and make the art market particularly enticing to those looking to integrate their ill-gotten proceeds into the financial system.⁶

The FinCEN Notice highlights new provisions of the AMLA aimed at addressing perceived gaps in the country’s approach to countering anti-money laundering and terrorist financing in the antiquities and art markets. With respect to antiquities regulation, Section 6110 of the AMLA amended the definition of “financial institution” under the BSA to include “a person engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities[.]”⁷ It also directed the Secretary of the Treasury, acting through the Director of FinCEN, to promulgate implementing regulations by December 2021.

As to art, FinCEN notes that Section 6110 of the AMLA directed the Secretary of the Treasury to submit to Congress a study on money laundering and the financing of terrorism through the trade in works of art. The study will include an assessment of, among other things, which markets should be subject to regulation, the degree to which the regulations—if any—should focus on the trade in high-value works of art and the need to identify the actual purchasers of such works or any other persons engaged in the trade in works of art.⁸

As part of the Notice, FinCEN issued SAR filing instructions requesting that filers detail how a suspicious activity relates to antiquities, art or both. Filers are instructed to provide any available details that may assist in the identification of items or persons connected to the financial transactions. These may include a description of the antiquities or artwork traded, the volume and dollar amount of the transactions and the

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names, identifiers, contact information and location of the purchasers or sellers of the property and their intermediaries or agents. In the case of stolen antiquities or art, FinCEN instructed filers to provide a detailed and specific description of the stolen items and to indicate whether photographs of the items are available. FinCEN stressed the importance of effective SAR reporting in identifying and combatting money laundering and other crimes related to trade in antiquities and art.

IMPLICATIONS

The Notice demonstrates FinCEN's awareness of the risks related to money laundering and terrorist financing in the antiquities and art markets and its intent to address these risks. Congress, the U.S. Department of State, the Financial Action Task Force ("FATF"), INTERPOL and the U.N. Office on Drugs and Crime have highlighted these risks in the reports discussed herein. Further guidance and rulemaking will almost certainly be forthcoming. Financial institutions and other market participants should remain attuned to illicit activity associated with trade in antiquities and art identified by FinCEN and should evaluate their due diligence and other compliance policies in light of the recent passage of the AMLA.

Traders in antiquities should be aware of the implications of the AMLA expanding the scope of the BSA to include persons engaged in the trade of antiquities. The BSA requires financial institutions to assist U.S. government agencies in detecting and preventing money laundering by monitoring and reporting suspicious activity and maintaining AML measures designed to reduce the risk of launderers exploiting legitimate investors and businesses. Once the implementing regulations under Section 6110 of the AMLA come into effect, traders in antiquities will be subject to record-keeping, reporting and other AML compliance requirements under the BSA and may face civil or criminal penalties for noncompliance. For instance, antiquities dealers will be required to file SARs on transactions they know or suspect involve funds derived from illegal activity. In addition, although some traders in antiquities have already established voluntary AML policies, the BSA may impose additional, more stringent requirements. These changes may have resounding impacts on the antiquities industry.

Although the art industry is not subject to the BSA and is not required under U.S. law to maintain AML and anti-terrorism financing controls for transactions, art market participants should expect increased scrutiny while the Secretary of the Treasury undertakes the art study mandated by Section 6110 of the AMLA and considers whether to extend BSA requirements to art dealers. Several of the issues that Congress directed the Secretary of the Treasury to address in its study of the art market mirror concerns raised in the PSI Report. The PSI Report focused on Russian oligarchs who used anonymous shell companies to purchase high-value art and evade U.S. sanctions and recommended that Congress amend the BSA to impose its AML requirements on businesses handling transactions involving high-value art.⁹ The art study also may be informed by the European Union's Fifth Anti-Money Laundering Directive, which requires art market participants to comply with more stringent AML obligations in connection with transactions in art valued at more than €10,000.¹⁰

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In light of the new AMLA provisions related to the trade in antiquities and art, participants in the antiquities and art markets, including financial institutions, art galleries, museums, private collectors, auction houses, agents and others, should consider implementing or enhancing AML processes and procedures. Participants in the antiquities market in particular should, in consultation with counsel, prepare to implement AML measures designed to address the risks of that market.

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ENDNOTES

- ¹ FinCEN, “FinCEN Informs Financial Institutions of Efforts Related to Trade in Antiquities and Art,” (March 9, 2021), *available at* <https://www.fincen.gov/index.php/news/news-releases/fincen-issues-notice-inform-financial-institutions-efforts-related-trade-0>.
- ² Department of State, “Tackling Illicit Trafficking of Antiquities and its Ties to Terrorist Financing” (June 20, 2018), *available at* <https://2017-2021.state.gov/tackling-illicit-trafficking-of-antiquities-and-its-ties-to-terrorist-financing/index.html>; U.N. Office on Drugs and Crime, “Links Between Terrorism, Crime and Trafficking in Cultural Property/Antiquities” (March 2019), *available at* <https://www.unodc.org/e4j/en/organized-crime/module-16/key-issues/links-between-terrorism--crime-and-trafficking-in-cultural-property---antiquities.html>; Financial Action Task Force, “Emerging Terrorist Financing Risks” (October 2015), *available at* <http://www.fatf-gafi.org/publications/methodsandtrends/documents/emerging-terrorist-financing-risks.html>; INTERPOL, “The Issues – Cultural Property” (Last Accessed March 16, 2021), *available at* <https://www.interpol.int/Crimes/Cultural-heritage-crime/The-issues-cultural-property>.
- ³ Congressional Research Service, “Transnational Crime Issues: Arts and Antiquities Trafficking” (March 1, 2021), *available at* <https://crsreports.congress.gov/product/pdf/IF/IF11776>.
- ⁴ *Id.*
- ⁵ Staff of S. Permanent Subcommittee on Investigations, “The Art Industry and U.S. Policies That Undermine Sanctions, Staff Report” (July 29, 2020) (“PSI Report”), *available at* <https://www.hsqac.senate.gov/imo/media/doc/2020-07-29%20PSI%20Staff%20Report%20-%20The%20Art%20Industry%20and%20U.S.%20Policies%20that%20Undermine%20Sanctions.pdf>.
- ⁶ U.S. Dep’t of Treasury, Office of Foreign Assets Control, “Advisory and Guidance on Potential Sanctions Risks Arising from Dealings in High-Value Artwork” (October 30, 2020), *available at* https://home.treasury.gov/system/files/126/ofac_art_advisory_10302020.pdf.
- ⁷ AMLA, § 6110.
- ⁸ *Id.*
- ⁹ PSI Report.
- ¹⁰ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU; *see also* Kenneth Mullen, “Tough UK anti-money laundering law comes into force tomorrow – here’s what you need to know,” *The Art Newspaper* (Jan. 9, 2019), *available at* <https://www.theartnewspaper.com/news/new-eu-law-calls-for-tough-action-on-dirty-money>.

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