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Treasury Study on Illicit Finance in the High-Value Art Market

Treasury Releases a Study on the Facilitation of Money Laundering and the Financing of Terrorism Through the Trade in Works of High-Value Art

SUMMARY

On February 4, 2022, the U.S. Department of the Treasury (“Treasury”) published a study identifying art market participants and sectors of the U.S. high-value art market that may present money laundering and terrorist finance risks to the U.S. financial system (the “Study”). The Study also examines efforts that U.S. government agencies, regulators, and market participants might explore to further mitigate these risks. The Study found that the high-value art market is susceptible to abuse by illicit financial actors due to, among other characteristics, its historical culture of anonymity, the transferability of high-value items in the art trade, and the inconsistency in due diligence practices among participants. The Study further cautions that the emerging digital art market embodies all of these qualities. Coupled with the untraditional structure of this submarket’s transactions, the risk of money laundering is heightened in this emerging submarket. Treasury’s recommendations include enhanced private sector information sharing, widespread voluntary anti-money laundering/countering the financing of terrorism (“AML/CFT”) compliance programs, and consideration of international harmonization of regulation.

BACKGROUND

[The Anti-Money Laundering Act of 2020 \(“AMLA”\)](#) was enacted on January 1, 2021 as part of the National Defense Authorization Act for fiscal year 2021. Among other things, the AMLA sought to address perceived gaps in the country’s approach to AML/CTF, including by recognizing certain previously unregulated channels that may be exploited and used as conduits for money laundering and terrorist financing. More specifically, Section 6110 of the AMLA amended the BSA’s definition of “financial institution” to include “a

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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, subject to regulations prescribed by the Secretary.” Section 6110 also tasked the Secretary of the Treasury, acting through the Director of FinCEN, with promulgating implementing regulations and 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. Specifically, the AMLA required the study to assess, among other things, which markets should be subject to regulation, the degree to which 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.¹

Published on February 4, 2022 pursuant to the AMLA directive, the Study identifies characteristics inherent in the art market that render the market especially vulnerable to exploitation by money launderers and terrorist financiers seeking access to the U.S. financial system. As to the former, the Study notes how the historically opaque nature of the high-value art market, the challenges associated with accurately documenting provenance and assessing the value of artwork, the inconsistent due diligence practices across the industry, and the use of shell companies and intermediaries to purchase, hold, or sell artwork collectively may enable malign actors to conceal their identities from other market participants and evade detection by law enforcement and regulators. The Study remarks on how common anonymity is in transactions facilitated by auction houses or galleries, achieved through identification cover of “private collection,” agents, or complex ownership structures such as the use of shell companies or third-party art dealers.”² This lack of transparency can allow art to become what the Study terms an “invisible asset” if it is not held by a financial institution and the related transactions are not recorded, consequently making it difficult to monitor the ownership or movement of the art.³

Moreover, according to the Study, the potentially small size, ease of transport, and subjective value of artwork make it easier for those looking to launder their illicit funds through the U.S. financial system to use high-value works of art to transport value across borders. Vehicles or private jets can easily transport some pieces of such art, and often law enforcement officials at the borders do not have the expertise or training to assess high-value works of art. As an illustration, the Study points to the conviction of Edemar Cid Ferreira, owner of Brazilian financial institution Banco Santos’, for bank fraud, and the subsequent search and seizure of the assets that he and others had acquired with unlawfully obtained funds from Bancos Santos. A U.S. investigation revealed that one such art work, appraised at \$8 million, had been illegally imported into the United States with an invoice valuing it at \$100.⁴

Other government publications have included similar findings. The [Senate Permanent Subcommittee on Investigations Art Industry Report from July 2020](#) illustrated how 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 the 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 also released in October 2020 an “[Advisory and Guidance on Potential Sanctions Risks Arising from Dealings in High-Value Artwork](#).” The Advisory explains 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 Study found the concerns about high-value artwork amplified by the rise of non-fungible tokens (“NFTs”) in the emerging digital art market. NFTs are digital units that codify the ownership of a unique digital asset, such as a piece of high-value digital art, and are managed through smart contracts and digital wallets. Like traditional art mediums, their valuations fluctuate subjectively and have even reached similar levels: Beeple’s NFT *Everydays: The First 5000 Days* sold at a Christie’s auction for more than \$69 million.⁷ The Study notes how NFTs enable the movement of value to be accomplished without the financial, regulatory, or investigative costs of physical shipment because some NFTs can be transferred via the internet instantaneously and geographic distance is no obstacle. Moreover, the directness of some NFT transactions—peer-to-peer and without an intermediary’s involvement—creates the added dangers of self-laundering and a lack of public record, according to the Study. Consequently, the Study found that the sheer efficiency and seamlessness of NFT transactions render this submarket vulnerable to money laundering.⁸

IMPLICATIONS

The Study demonstrates that the high-value art market is susceptible to abuse by illicit financial actors. To address this problem, the Study suggests that Treasury consider the costs and benefits of applying AML/CFT requirements to art market participants, including customer identification and suspicious activity report (“SAR”) obligations. Although obligations will ultimately hinge on any FinCEN implementing regulations, participants in the art market and other industry stakeholders should be aware of the potential implications of Treasury’s oversight. Major auction houses and some art dealers have already voluntarily established AML policies and procedures, but FinCEN’s implementing rules may impose additional, more stringent requirements. For example, the rules may require auction houses and galleries to conduct customer due diligence to authenticate and verify both the identities of their buyers and sellers and the source of their funds, and obligate them to file SARs with FinCEN.

The Study also mentions the possibility that NFT platforms such as Dapper Labs, Super Rare, and Opensea may be considered virtual asset service providers by the Financial Action Task Force if the NFTs are used for payment or investment purposes in practice. Similarly, these platforms or others transferring virtual assets during the sale of NFTs in the U.S. may face AML/CFT obligations under FinCEN’s rules for money services businesses.⁹ An art market participant would therefore benefit from maintaining a voluntary AML/CFT compliance program for NFTs.

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Indeed, the Study encourages the widespread implementation of voluntary AML/CFT compliance programs for art transactions across the board. In addition to the economic incentives of minimizing credit risk issues and maintaining the reputation of art market participants, the Study emphasizes that maintaining written procedures for conducting due diligence on potential buyers and sellers also helps reduce money laundering in the art market and is the best practice in the industry for high-value art.¹⁰ Specifically, the Study approves of programs collecting information regarding the seller's identity, credibility, and plausibility, and reviewing publicly available sources regarding the parties to the transaction and the object, and the object's provenance, including legal documents, witness declarations, expert opinions, restoration history, or other available circumstantial evidence. The Study recognizes that the ongoing rulemaking process to implement the beneficial ownership information reporting requirements set out in the Corporate Transparency Act¹¹ should help address some concerns with respect to shell companies, but it also noted that there will likely still be vulnerabilities that need to be addressed.¹²

The Study identifies the importance of private sector information sharing in the due diligence process for onboarding clients in the art market and recommended a more standardized process to facilitate communications between peers about whether a prospective client is suspicious or disreputable. It also noted the added benefit of increased visibility into a customer's past interactions with facets of the art market through such an information-sharing mechanism. Accordingly, art market participants should consider creating an information-sharing program to enable transparency about the identities of buyers and sellers. Any information-sharing mechanism would need to account for privacy requirements and address liability concerns if there is no safe-harbor provision to protect information sharing between participants.¹³ The Study further notes that there is currently no formal process for market participants to make information available to law enforcement when they encounter irregular or potentially suspicious activity. The Study suggests that a broader public-private information-sharing mechanism including art market participants, federal regulators, and law enforcement agencies could provide a robust solution to this issue.

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ENDNOTES

- 1 AMLA § 6110.
- 2 U.S. Dep't of Treasury, "Study of the Facilitation of Money Laundering and Terror Finance Through the Trade in Works of Art" (February 4, 2022), *available at* https://home.treasury.gov/system/files/136/Treasury_Study_WoA.pdf ("Study").
- 3 Study at 19-20.
- 4 Study at 3-4.
- 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.hsgac.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 Study at 26.
- 8 *Id.* at 27.
- 9 *Id.* at 26.
- 10 *Id.* at 1.
- 11 31 U.S.C. § 5336.
- 12 *Id.* at 6.
- 13 *Id.* at 30.

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