



**Response by ArtAML Limited to FinCEN's
Advanced Notice of Proposed Rulemaking:
Anti-Money Laundering Regulations for Dealers in Antiquities**

86 FR 53021
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Docket Number FINCEN-2021-0006

1. Please identify and describe the roles, responsibilities, and activities of persons engaged in the trade in antiquities, including, but not limited to, advisors, consultants, dealers, agents, intermediaries, or any other person who engages as a business in the solicitation or the sale of antiquities. Are there commonly understood definitions of particular roles within the industry? Who would be considered within or outside such definitions?

From the roles mentioned above:

Advisors:

These professionals act in the interests of collectors selling and/or buying. Transactions are structured in many ways and advisors take an active role acting on behalf of their clients. Advisors are typically at one end of the transaction, representing either a buyer or seller. One aspect of their role can be to keep the identity of their client (buyer or seller) unknown - associated with the culture of privacy in the sector, however this is open to abuse by nefarious actors. Some advisors provide the identity of their client and represent them in negotiations with galleries, auction houses or other parties, as the advisor knows what is reasonable and will work to get the best deal for their client. While it's possible for funds to go via an advisor's business, it is routine for them to work on a commission basis, being paid by either their client or another professional involved in the transaction.

Consultants:

This is another term for advisor and can be associated with transactions of a lower value than advisors.

Agents: These individuals are either representing a seller (as a seller's agent) or a buyer (as a buyer's agent).

Intermediaries: These individuals are positioned in a transaction somewhere between the seller and buyer. There can be one or multiple intermediaries. One challenge faced is when parties are located in varying jurisdictions, with one or several parties having none or differing AML requirements.

Dealers: These professionals buy and sell objects and are often subject specialists, able to spot opportunities with acquisitions and know who might be interested in acquiring an item. While they can operate from a physical gallery premises, many will work independently without a dedicated space.

Other roles to consider in addition to the above:

Auction houses (offline and online):

These businesses receive objects on consignment from collectors, collectors' agents / advisors, dealers, estates, institutions and others, and in turn sell objects to collectors (often via collectors' agents / advisors), dealers, institutions and others. Note that in recent years, larger auction houses have also been involved with private sales of objects that are not auctioned.

Galleries: Like auction houses, they're in the middle of transactions. They both receive objects on consignment and buy for stock. They sell to private collectors, advisors / consultants / agents, dealers, agents, institutions and others.

Online transactional marketplaces: These technology-based platforms present objects for sale (by private sale and/or auction) on behalf of dealers, galleries and artists, which are in turn purchased by dealers, galleries, collectors, agents, advisors, consultants, institutions and others. Such platforms provide a service and might or might not be actively involved intermediaries - for example, some marketplaces get actively involved in brokering some but not all sales, while others only operate as a technology solution. In consideration of jurisdictions already regulated for AML in the art market, it's noteworthy that some platforms, whether or not acting (or even registered) as art market participants, conduct AML checks upon which their users presenting objects 'rely' to satisfy their compliance requirements. Between the uptick in online sales during the Covid-19 pandemic and the variety of options available with online transactional marketplaces, this is an area in need of consideration.

For the art market, interior designers are sometimes actively involved in high value transactions and therefore can be operating as 'art market participants'. How much they're involved in sales of antiquities is not known.

2. How are transactions related to the trade in antiquities typically financed and facilitated? What are the typical sources and types of funds used to facilitate the purchase of items in the antiquities market? How common are leveraged or financed purchases in the antiquities market? How common are cash transactions in the trade in antiquities?

On cash transactions:

Based on experience with the art market, the lack of compliance experience results in some professionals not being aware of potentially 'suspicious activity'. Collectors might occasionally state that they have a preference to pay in cash - and we are aware of this in some UK transactions of 10,000+ Euros. It's feasible that an unknowing 'art market participant' views such a request as personal preference and not think anything of it. While such high- value cash transactions are already caught under AML legislation in the UK, there is a lack of awareness of existing compliance requirements and, in turn, associated education in the art market, and a like-for-like knowledge gap could exist in the antiquities sector in the USA.

3. Can the antiquities market be broken down to show the percentage of transactions that fall in a given monetary range (e.g., 50% of all transactions fall below \$X-value)? If so, please provide a breakdown of those ranges.

As with the art market, auction sales and major exhibitions are likely the only places where information about sale prices are readily available. Any other information about sale volumes and prices will be held as a closely guarded secret.

4. What, if any, information does a buyer typically learn about the seller, cosigner, or intermediary involved in the sale of antiquities? When a seller, cosigner, or intermediary offers an item for sale, why might a person involved in the antiquities trade withhold the name of the seller, cosigner, or intermediary from the buyer? What, if any, business purpose does this serve? Should the buyer have the right to learn this information to determine whether the provenance of an item is legitimate? Why or why not?

The amount of information known is dictated by how many parties are involved in a transaction. For example, a dealer might have acquired an object from an auction house that supplied provenance paperwork, with the dealer directly selling the item with associated provenance and authenticity paperwork provided. On the other hand, there could be multiple agents and only the one representing the seller / buyer knows the identity of the seller / buyer and where the object is coming from / going to.

Based on the art market, privacy is the culture for many transactions in the sector. While this can be for good reason such as collectors not wanting it to be known that they hold expensive items in a personal collection (potentially attracting robbery), this culture can open opportunities to criminals who wish to not be detected. There is also (potentially unknown) danger with “the way business is done” mentality in the sector, which normalizes behaviour that should in fact be questioned.

As for the buyer having the right to find out who is involved in a prospective transaction to determine if the provenance is legitimate, there is a careful balance to strike between privacy and transparency.

5. How do foreign-based participants in the antiquities market operate in the United States? Do they operate directly as advisors, consultants, dealers, agents, intermediaries, or others? Or do they work with domestic advisors, consultants, dealers, agents, intermediaries, or others?

Our experience of regulation in the UK is that cross-jurisdictional issues are extremely difficult to deal with. Here’s a simple example - a UK dealer might be selling work to a US interior designer, who is purchasing it for their client (a private individual). The US interior designer has a contract with their client promising to keep their identity private, while the UK dealer has a legal obligation to know the identity of the ultimate beneficial owner of the piece.

More commercial settings also have issues. A UK art dealer at an art fair in the US is still required to abide by requirements of the UK legislation. Non-UK dealers exhibiting at art fairs in the UK are also expected to comply with UK legislation. The latter is made particularly difficult because the existing UK government procedures (and relevant gov.uk websites) currently only cater for UK registered entities. As of October 2021, non-UK dealers are expected to make best efforts to comply.

6. When advisors, consultants, dealers, agents, intermediaries, or others receive payment from overseas accounts, what steps do they take, if any, to determine whether the payment comes from a legitimate source?

As there is no current legal requirement to do this, this will only be done on an as-is-necessary basis. The necessity being defined by - the amount of money involved, the reputational risk of getting something wrong, and the resources available. Large institutions such as auction houses will have their own in-house compliance departments. Many involved in the trade (as in the art world) will be very small businesses, and their checks - if any, will necessarily be less rigorous.

We have spoken to art dealers who are, in effect, being regulated by their banking provider, who have asked for more details relating to a payment. Some dealers make the assumption that if money is coming from a bank they recognise, then surely the bank (who has far more resources) will already have validated the ultimate source.

7. What are the money laundering, terrorist financing, sanctions, or other illicit financial activities risks associated with the trade in antiquities? What is the industry experience with money laundering, terrorist financing, and other illicit financial activity? Which parts of the market are most vulnerable to these risks? In which geographical locations do those vulnerabilities tend to take place? Are there certain types of persons engaged in the trade in antiquities whose activities present lower money laundering, terrorist financing, and other illicit financing risks and for whom the application of BSA requirements is less critical? Are there certain types of persons engaged in the trade in antiquities whose activities present greater money laundering, terrorist financing, and other illicit financing risks and for whom the application of BSA requirements is more critical?

Based on the art market:

- Risk is high when an AMP does not know the identity of customer or where the work is going.

In general terms:

- Provenance is paramount for antiquities. A related risk is the reliance on others' provenance - such as a dealer buying from an auction house that provides ownership history and a condition report. The quality of provenance varies from business to business and it's possible that a seller has a conflict of interest in the quality of information provided. One way to address this is to take a risk-based approach for provenance provided, for example with very high value items and/or types of objects associated with money laundering, terrorist financing and other illicit activities, it would make sense to have one's own provenance conducted prior to bidding on an object.

8. Which participants involved in the trade in antiquities are in positions in which they can effectively identify and guard against money laundering, the financing of terrorism, and other illicit financing risks in connection with the transactions they conduct? For example, do these participants have access to information regarding the nature and purpose of the transactions at issue and the participants' involvement in completion of the transactions?

The individuals directly representing and/or transacting with sellers (for origin of the object) or buyers (for origin of the money, as source of funds and, when deemed necessary, source of wealth) are in a position to identify and guard against money laundering, the financing of terrorism and other illicit financing risks.

9. What, if any, safeguards does the industry currently have in place to protect against business loss and fraud? For example, how, if at all, do market participants currently identify and verify the identity of the buyer, seller, or ultimate beneficial owner of an antiquity to guard against money laundering, terrorist financing, or other illicit financial activity? To what extent do market participants conduct due diligence on agents and other intermediaries involved in purchases and sales of antiquities? To what extent do safeguards vary depending on the size, nature of the transactions, and whether the transaction involves foreign jurisdictions? To what extent are the safeguards voluntary or required by contractual arrangements, trade associations, or other forms of industry self-regulation? Could these safeguards be leveraged and modified to detect and prevent

money laundering, terrorist financing, and other illicit financial activities, or to better detect and prevent such activities?

As previously covered, there is a general lack of awareness of possible suspicious activity owing to the sector not having been directly regulated under AML, TF and related areas of illicit activity. In our experience, with the exception of large auction houses that have voluntarily introduced compliance measures, the vast majority of industry players will not introduce such compliance measures until legally required to do so.

B. Regulation of the Industry

10. How should “antiquities” be defined for the purposes of FinCEN's regulations? Should jurisdictional or territorial considerations be taken into account when determining how antiquities should be defined (e.g., foreign cultural heritage laws)?

11. How is an antiquity distinct from a work of art?

An antiquity may be a work of art (The Mona Lisa) or may not be (a Roman sword). Attempting to make a distinction between the two on anything other than date of creation will be extremely difficult.

The answer to this question depends upon what the intent of the distinction is supposed to be - would an object falling into one category or other be subject to different regulations? Given the difficulty of defining ‘antiquity’ and ‘art’, regulations need to be a) simple enough for the market to understand; b) clear enough for enforcement officials to understand; and c) flexible enough to allow for changes needed as implementation challenges arise.

For some context, the UK ML regulations define a work of art based on the 1994 VAT regulation Section 21(6). As will be seen from the definition here:

<https://www.legislation.gov.uk/ukpga/1994/23/section/21>

... the primary focus of the definition concerns limited edition works of art. The use of this in relation to ML has recently been the subject of an HM treasury consultation asking about digital art, amongst other considerations.

12. How should “trade of antiquities” be defined for the purposes of FinCEN's regulations? Should FinCEN distinguish between the commercial, for-profit trade of antiquities and noncommercial, not-for-profit activity? If so, how?

There should not be any difference between for-profit and not-forprofit as legal structures of a business or institution when it comes to the “trade of antiquities”. We know of not-for-profit art businesses in both the US and UK that operate very much like forprofit businesses, except with the reinvestment of profit into the cause. Not being obligated could open up such an entity as a target of criminal activity.

13. Are there any other terms that FinCEN should consider addressing and defining as part of a rulemaking on the trade in antiquities? If so, what are those terms, why should they be addressed, and how should they be defined?

14. Should FinCEN establish a monetary threshold for activities involving trade in antiquities that would subject persons involved in such activities above that threshold to FinCEN's regulations, but exempt persons whose activities fall below that threshold? What is an appropriate dollar value for such a threshold and should it be set as an annual or pertransaction threshold? Should there be a different threshold—including potentially a zerodollar threshold—for legal entities as opposed to natural persons?

From our experience of helping the UK art market, having a threshold per-transaction is very helpful, as it allows dealers to easily assess if they fall under the regulations or not.

It seems likely that the majority of trades would be carried out by some legal entity - private individuals trading in ways that might be used for ML/TF are not likely to register. Transactions of this type are more likely to be caught by financial institutions or legal authorities.

15. Should there be any other exemptions for categories or types of persons engaged in the trade of antiquities beyond the consideration of a monetary threshold?

16. Which aspects of the current regulatory framework applicable to financial institutions should apply to persons engaged in the trade in antiquities?

a. Should FinCEN consider extending all or only some elements of AML/CFT program requirements now applicable to financial institutions to the trade in antiquities, including: (i) A system of internal controls to ensure ongoing compliance, (ii) independent testing for compliance to be conducted by internal financial institution personnel or by an outside party, (iii) designation of an individual or individuals responsible for coordinating and monitoring day-to-day compliance, or (iv) training for appropriate personnel?

Some element of proportionality should be built into the regulations - a business run by a single individual has much less resources than an international auction house. The risk-based approach recommended by the FATF has much merit, since it means that a small business selling an item for \$1mm is expected to put in significantly more effort than for a sale of \$20K.

b. How could know-your-customer requirements, such as customer due diligence or customer identification programs, apply in the transaction process in the trade in antiquities? What would be the effect on industry of imposing customer verification and identification requirements on sellers, purchasers, and others involved in the trade in antiquities? How would the application of know-your-customer requirements to this industry assist in preventing money laundering, terrorist financing, and other illicit financial activity?

We see that the main purpose of AML/CTF regulations is two-fold: 1) to prevent legitimate business unknowingly being subject to predation by bad actors; and 2) if there is an attempt to move objects or money associated with illicit activity, that associated suspicious activity is detected.

As with the art market, antiquities dealers are likely to be concerned about the effect upon their sales of asking “embarrassing questions” of their customers. It’s worth remembering that once regulations are imposed, then there is a task to educate buyers as well as dealers.

On a related note, one challenge for the art (and antiquities) market in the UK, as compared to many other regulated sectors, is that there is no overarching professional body for the sector. Lawyers, accountants, bookkeepers and so on, are required to have professional qualifications,

and those are regulated and administered by official bodies. Although art market trade bodies exist, membership is voluntary. This has led to smaller provincial dealers often being unaware of the new regulations. The same will apply to the US.

c. What, if any, difficulties are associated with requiring the disclosure of or otherwise obtaining beneficial ownership information for legal entities engaged in the trade of antiquities, including foreign legal entities that may be outside the scope of current or future U.S. beneficial ownership reporting requirements?

International UBO information can be extremely onerous to uncover. 5MLD in the EU requires member states to make owner information available, but the amount of information that can be accessed varies greatly. See:

<http://registries.opencorporates.com/>

... for a comprehensive list of what is available where.

Large financial institutions can struggle with this discovery process when making international transactions. Many deal with the difficulty and risks by 'de-risking' and refusing to operate in certain jurisdictions. Small dealers don't have this luxury, and if they are to comply, then guidance will be needed. We have been asked questions such as "what is considered valid proof of address for a Chinese national?". No official guidance on this is available, which places dealers in a difficult position.

d. What should be the requirements for filing SARs related to antiquities? What should FinCEN consider in implementing any requirements for filing SARs related to antiquities?

e. How many natural persons and legal entities might be affected by FinCEN's application of BSA requirements to persons engaged in the trade in antiquities, and what is the estimated hourly and annual burden, if any, for each such person, for each of the obligations described above? How could FinCEN minimize the burdens associated with these obligations, if any, through its decisions about the form or content of the rule while still ensuring the appropriate management and mitigation of AML/CFT risk?