

Congress Votes on Federal Oversight for Antiquities and Heightened Scrutiny of the Art Market

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On January 1, 2021, the Senate and the House of Representatives voted to override President Trump's veto of the National Defense Authorization Act (NDAA) of 2021. The NDAA introduces legislation that allows federal oversight for transactions involving antiquities and contains other provisions affecting the art market at large. It was passed following a damning July 2020 report by the Senate Permanent Subcommittee on Investigations, *The Art Industry and U.S. Policies that Undermine Sanctions* ("Senate Report"), which called for tighter anti-money laundering (AML) regulation of the U.S. art market. The new bill extends the Bank Secrecy Act (BSA) to cover the antiquities market, requires disclosure of beneficial ownership information for entities formed or operating in the U.S., and directs the Treasury Department's Financial Crimes Enforcement Network (FinCEN) – in coordination with the Federal Bureau of Investigation (FBI), the Attorney General, and the Secretary of Homeland Security – to conduct a new study of money laundering and terror financing in the art market in order to recommend potential AML regulation to Congress. In light of the increased attention, art and antiquities businesses should review existing AML policies with an eye towards BSA compliance. Art and antiquities businesses without an AML policy should work with counsel to adopt one.

Who Are "Dealers in Antiquities"?

As we reported [previously](#), the Senate Report's first recommendation was for Congress to "amend the BSA to add businesses handling transactions involving high-value art."¹ Although the NDAA did not extend the BSA to cover the broader art market (for now), section 6110 of the NDAA amends section 5312(a) of the BSA to include "Dealers in Antiquities." Notably, the term "Dealers in Antiquities," which is in the title of section 6110, is not defined in the text of the statute. At the very least, the statute covers persons "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."²

Those meeting the criteria under section 6110 must fulfill some of the same AML compliance requirements that the BSA requires of financial institutions, such as reporting cash transactions exceeding \$10k and filing "suspicious activity reports" (SARs) with FinCEN to ensure that parties to an antiquities transaction are not among those under sanction by the Office of Foreign Assets Control (OFAC). As art and antiquities sales are often conducted through intermediaries such as advisors who represent

¹ *The Art Industry and U.S. Policies That Undermine Sanctions*, Staff Report, Permanent Subcommittee on Investigations, U.S. Senate (July 29, 2020),

https://www.hsgac.senate.gov/subcommittees/investigations/hearings/majority-and-minority-staff-report_the-art-industry-and-us-policies-that-undermine-sanctions

² 2021 NDAA, Section 6110, <https://www.govinfo.gov/content/pkg/BILLS-116hr6395enr/pdf/BILLS-116hr6395enr.pdf>

anonymous buyers and sellers, the new AML compliance requirements will prove costly and complicated for “Dealers in Antiquities.” Any pre-existing compliance policies will need to be broadened and enhanced to implement effective AML protocols that satisfy the BSA requirements.

New Beneficial Ownership Reporting Requirements

The Senate Report’s second recommendation was for Congress “to collect beneficial ownership information for companies formed or registered to do business in the United States.”³ This recommendation followed a detailed account of one sanctioned Russian family’s use of shell companies to operate under-the-radar in high-value art transactions. Section 6403 of the NDAA cracks down on shell companies and other opaque capital structures often behind high-value art transactions.

The NDAA incorporates into the BSA the Corporate Transparency Act of 2020,⁴ codified at section 5336, which will subject such entities to beneficial ownership reporting requirements. Subject to certain exceptions, a reporting company must report to FinCEN identifying information for each applicant and each beneficial owner. This raises the question: who is a “beneficial owner”? According to Section 5336(a)(3), a “beneficial owner” is an individual who owns or controls not less than 25% of the equity interest of the entity or exercises “substantial control” over the entity – another undefined term. Section 5336(a)(3) then lists a number of exceptions.

In practice, the new beneficial ownership reporting requirement may not achieve much of its intended effect on transparency in the art and antiquities markets. FinCEN will maintain beneficial ownership information of reporting companies in a confidential registry, which will not be made public. Though accessible by law enforcement authorities, art dealers themselves will not have access to this information as a general matter. Even financial institutions processing art and antiquities transactions will only be able to obtain beneficial ownership information upon the consent of the reporting company whose information is sought. Practically speaking, this may make it difficult for “Dealers in Antiquities” – and near impossible for broader art market participants – to use the registry for AML due diligence.

Increased Scrutiny of the Art Market

While the NDAA declined to follow the Senate Report’s recommendation to extend the BSA to the broader art market, NDAA Section 6110 directs FinCEN – in coordination with the FBI, the Attorney General, and the Secretary of Homeland Security – to conduct an assessment of the ways in which the art trade facilitates money laundering and terror financing and to recommend to Congress the degree to which the art market should be subject to AML regulations. This report must be submitted to the Senate Committee on Banking, Housing, and Urban Affairs and the House of Representatives Committee on Financial Services within 360 days of the NDAA’s enactment on January 1, 2021.⁵

³ *The Art Industry and U.S. Policies That Undermine Sanctions*, Staff Report, Permanent Subcommittee on Investigations, U.S. Senate (July 29, 2020), https://www.hsgac.senate.gov/subcommittees/investigations/hearings/majority-and-minority-staff-report_the-art-industry-and-us-policies-that-undermine-sanctions

⁴ *Id.* at Section 6403.

⁵ *Id.* at Section 6110.

As recommended by the Senate Report, OFAC also issued an advisory in October⁶ regarding the extent to which artwork may fall under presidential sanction authority under both the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA). Until the recent OFAC guidance, the “Berman Amendment” to the IEEPA and TWEA had been interpreted to exempt artwork from presidential sanction authority under its “informational materials” exception. The October advisory clarifies that OFAC will indeed apply IEEPA- and TWEA-based sanctions to transactions involving artworks in which a blocked person, including a person on the Specially Designated National (SDN) List, has an interest, “to the extent the artwork functions primarily as an investment asset or medium of exchange” – in other words, pretty much every art transaction.

What’s Next?

In order for the NDAA sections amending the BSA to have the force of law, FinCEN, which administers the BSA, will need to promulgate implementing regulations by the end of 2021. The implementing regulations must include details about which transactions are covered and what is required. Once FinCEN proposes these regulations, which will be published in the federal register and on the FinCEN website, interested parties will be afforded an opportunity to comment during an official comment period.

With the art market falling under increasing scrutiny, attention from regulators and law enforcement is also likely to increase. Entities involved in high-value art transactions would be well advised to consider adopting AML policies if they do not already have them or updating their existing policies.

⁶“Advisory and Guidance on Potential Sanctions Risks Arising from Dealings in High-Value Artwork,” https://home.treasury.gov/system/files/126/ofac_art_advisory_10302020.pdf.

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