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Comments on FinCEN Advance Notice of Proposed Rulemaking

Anti-Money Laundering Regulations for Dealers in Antiquities

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Global Heritage Alliance (GHA) advocates for policies that will foster appreciation of ancient and indigenous cultures and the preservation of their artifacts for the education and enjoyment of the American public. GHA supports policies that facilitate lawful trade in cultural artifacts and promotes responsible collecting and stewardship of archaeological and ethnological objects.

GHA is pleased to comment on FinCEN’s Advance Notice of Proposed Rulemaking (ANPRM). When this matter was before Congress, GHA supported a Senate Banking Committee alternative that would have studied the extent to which antiquities were utilized to fund terrorist and other criminal activity *before authorizing FinCEN to regulate the industry*. Such caution was warranted given the shifting nature of the justifications for anti-money laundering (AML) regulations being imposed on the antiquities industry. First, the legislation’s proponents, a coalition of archaeological advocacy groups and AML compliance contractors, claimed that the legislation was necessary to help keep items looted by Islamic State terrorists off the market. Next, after those claims were debunked,¹ proponents of the regulations cited reports that

¹ See “RAND Corp Report Demolishes Assumptions on Antiquities and Terror,” Cultural Property News (July 30, 2020) available at <https://culturalpropertynews.org/rand-corp-report-demolishes-assumptions-on-antiquities-and-terror/> (last visited October 9, 2021); “RAND Corporation Report Debunks Facebook & Dark Web Ties to Illegal Antiquities,” Cultural Property News (July 19, 2020) available at <https://culturalpropertynews.org/rand-corporation-report-debunks-facebook-dark-web-ties-to-illegal-antiquities/> (last visited October 9, 2021); Michael Press, “How Antiquities Have Been Weaponized in the Struggle to Preserve Culture,” *Hyperallergic* (Dec. 7, 2017)

criminals were exploiting the art market to launder money. Specifically, they latched onto a Senate report detailing a highly unusual set of facts involving Russian oligarchs evading sanctions with the purchase of valuable paintings through shell companies and a Moscow based art intermediary as the reason to regulate an entire industry.² Even more recently, they have cited reports that the family of Douglas Latchford, a deceased Thai antiquities dealer, used offshore trust accounts to hide profits from the looting of Cambodian archaeological sites dating back to the immediate aftermath of the Vietnam War as further justification for clamping down on American antiquities dealers.³ In fact, Global Financial Integrity’s report on transnational crime indicates that cultural goods account for no more than 0.1% of illegal activity.⁴ Given the variety of industries where money laundering is thought to be a far more serious problem, GHA believes caution is in order before FinCEN issues regulations which may harm legitimate trade in the United States.

Efforts to justify regulations based on jewelers and bullion dealers already complying with similar rules, or arguments that the art trade in Europe is covered, should also fail. Jewelry

available at <https://hyperallergic.com/415471/how-antiquities-have-been-weaponized-in-the-struggle-to-preserve-culture/> (last visited October 9, 2021); Katharine Brennan and Kate FitzGibbon, “Bearing False Witness: The Media, ISIS and Antiquities,” *Cultural Property News* (Dec. 1, 2017) available at <https://culturalpropertynews.org/bearing-false-witness-the-media-isis-and-antiquities/> (last visited October 9, 2021); Kate FitzGibbon, “Facts on Terrorism and the Art Trade: Important Study by Dutch National Police Contradicts Media Hoax,” *Cultural Property News* (Aug. 24, 2017) available at <https://culturalpropertynews.org/facts-about-the-art-trade-terrorism-and-the-size-of-the-illicit-market/> (last visited October 9, 2021); “Iraqi and Syrian Cultural Property: U.S. Government Committee Should Incorporate Additional Collaboration Practices,” GAO (September 2017) (only verifiable number of Islamic State looting less than a million a year) (available at <https://www.gao.gov/assets/690/687232.pdf>) (last visited October 9, 2021).

² United States Senate Permanent Subcommittee on Investigations, *The Art Industry and U.S. Policies that Undermine Sanctions*, Staff Report, 2020 at 10.

³ Peter Whoriskey, Malia Politzer, Delphine Reuter and Spencer Woodman, *Global Hunt for Looted Treasures Leads to Offshore Trusts*, *The Washington Post* (October 5, 2021), available at <https://www.washingtonpost.com/world/interactive/2021/met-museum-cambodian-antiquities-latchford/> (last visited October 13, 2021).

⁴ Channing May, *Transnational Crime and the Developing World* at xi (Global Financial Integrity March 2017).

and bullion are liquid commodities easy to launder. Antiquities take time to buy and sell, making them a poor vehicle for money laundering. Just because European regulators acted precipitously, based on questionable information about the Islamic State being financed by stolen antiquities, does not mean that US regulators should do so as well.

The costs also should not be underestimated. Proponents avoid speaking about such costs because they know how devastating they would be to businesses already operating in a very difficult business climate. House Financial Services staff have indicated that any regulation of antiquities dealers under the Bank Secrecy Act (BSA) would most likely be similar to that covering jewelers and bullion dealers. Virtually all such viable businesses are covered given the \$50,000 gross per year regulatory threshold. Once covered, jewelers and bullion dealers must spend thousands of dollars per year in compliance costs for an AML plan, and an independent audit, and considerable time on red tape. Such money, time and effort could very well drive marginal businesses under, particularly those operating part time.

Moreover, regulations already applicable to industries that deal in high value, liquid assets like bullion have been heavily criticized because the costs to micro and small business are grossly disproportionate to any successes in stemming money laundering. (*See* Frank Holmes, “The Five Costliest Financial Regulations of the Past Twenty Years: A Timeline,” *Forbes* (May 18, 2017) available at <https://www.forbes.com/sites/greatspeculations/2017/05/18/the-5-costliest-financial-regulations-of-the-past-20-years-a-timeline/#793df1ea72ba> (last visited October 7, 2021) (“Although I think most of us would agree that catching terrorists is an admirable mission, the AML rules come at a very high cost to financial institutions. According to a 2016 study conducted by the Heritage Foundation, the current rules cost the U.S. economy between \$4.8 billion and \$8 billion annually. And with so few money laundering cases opened and

investigated every year, each conviction since the law went into effect carries an estimated \$7 million price tag.”). Such concerns will be magnified for the micro and small businesses of the antiquities trade which has just begun the process of recovery from Covid-19 business disruptions.

FinCEN should also be aware that some proponents of these regulations may see their primary benefit as a cudgel to force guilty pleas and repatriations of artifacts. GHA’s Executive Director attended a conference sponsored by the State Department where a Homeland Security Investigations officer bragged that the threat of bringing money laundering charges had led to the repatriation of an important paleontological object. GHA’s Executive Director was familiar with that case because he represented the Defendant as a “Claimant” in the original civil forfeiture case. The government alleged in that case that the object was “stolen” under a national patrimony law and that it had been imported based on falsified documentation. The Claimant argued the national patrimony law did not apply and that there were no material misrepresentations in the import documentation. After the Claimant filed a motion to dismiss that civil case, the government filed a criminal case predicated on the same facts, which allowed the government to freeze his bank accounts as potential proceeds of the alleged crime. The civil case was then stayed pending resolution of the criminal case, where the Claimant ultimately pled guilty, thereby losing his ownership rights to the paleontological object, which was then repatriated with great fanfare to its country of origin. The government’s actions raise ethical issues, most significantly whether the government punished the Claimant for asserting his constitutional rights to contest a civil forfeiture. The fact that money laundering charges were leveraged to force a guilty plea also raises important issues that FinCEN should consider. This episode suggests that FinCEN should focus on promulgating regulations solely designed to counter

serious money laundering issues, and not be influenced by those with an axe to grind against the antiquities trade to issue overly complicated and draconian rules that can be exploited to repatriate artifacts in questionable cases.

Finally, there also is a related concern that the government could misuse any data that is collected to build profiles of significant collectors and dealers. As James McAndrew, a global customs consultant who previously directed Homeland Security's art and antiquity program, mentioned at a meeting GHA also attended with House Financial Service Committee Staff, New York Assistant District Attorney Matthew Bogdanos (who is a major proponent of regulating the antiquities trade along with the Antiquities Coalition, a well-funded archaeological advocacy group with ties with authoritarian Middle Eastern Governments and UNESCO's repatriationist cultural heritage bureaucracy⁵) has already misused investigative subpoenas for fishing expeditions directed against prominent New York City collectors.⁶ Without strict controls and

⁵ See Antiquities Coalition Website, Search Term "Bogdanos," available at <https://theantiquitiescoalition.org/?s=Bogdanos> (last visited October 13, 2021). The Antiquities Coalition's "Partner's Page" has now been disabled but it previously identified its partnerships with UNESCO, and the Egyptian and Jordanian governments. See <https://theantiquitiescoalition.org/about/our-partners/> (last visited October 13, 2021). The Antiquities Coalition's website does detail its collaboration with UNESCO and various Middle Eastern and North African ("MENA") governments. See e.g., *Landmark Agreement Continues to Protect Priceless Antiquities*, Antiquities Coalition Website (September 25, 2019) available at <https://theantiquitiescoalition.org/landmark-agreement-between-united-states-and-egypt-continues-to-protect-priceless-antiquities/> (last visited October 13, 2021; *Antiquities Coalition Partners with UNESCO, Jordan and Italy on New Initiative*, Antiquities Coalition Website (September 29, 2015), available at <https://theantiquitiescoalition.org/antiquities-coalition-partners-with-unesco-italy-and-jordan-on-important-initiative/> (last visited October 13, 2021).

⁶ Ironically, at the exact same time Mr. Bogdanos and the Antiquities Coalition were lobbying for legislation to make dealers comply with specific AML controls as an anti-terrorism measure, Mr. Bogdanos repatriated an artifact long on public display in a Canadian Museum to Iran, a state sponsor of terrorism. Christina Ruiz, "Return Persian Antiquity to Iran, New York District Attorney Says," *The Art Newspaper* (May 28, 2018) available at <https://www.theartnewspaper.com/news/return-persian-antiquity-to-iran-new-york-district-attorney-says> (last visited October 7, 2021). GHA is concerned that information gathered for AML purposes may be misused to pursue additional similar claims in the future. More recently, the Antiquities Coalition and other archaeological advocacy groups have argued for "emergency import restrictions" on Afghan cultural goods which will repatriate them to Taliban held Afghanistan sooner or later. See Antiquities Coalition, Comment on DOS-2021-0032-0001 (September 25, 2021), available at <https://www.regulations.gov/comment/DOS-2021-0032-0082> (last visited October 14, 2021). In that same document, the Antiquities Coalition also looks forward to the United States entering a Memorandum of Understanding with Taliban Afghanistan, which would presumably also reopen the country to American archaeologists.

adequate sanctions for misuse of information that is collected, there is a real danger information originally gathered to fight terrorism will instead be used to harass collectors and dealers in the hopes of forcing repatriations of objects to authoritarian countries that have broad cultural patrimony laws treating almost everything old as “state property.”

GHA requests that FinCEN especially consider submissions made on behalf of trade associations engaged in the trade of cultural goods. GHA is aware that Authentic Tribal Arts Dealers Association, the Confédération Internationale des Négociants en Œuvres d’Art, the International Association of Professional Numismatists, and the Professional Numismatists Guild all plan to comment on this consultation. GHA defers to these organizations which know the most about their industries but will respond to certain of the questions FinCEN put out for comment as set forth below.

A. The Antiquities Market

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?

Response:

GHA defers to industry trade groups to respond to this question; however, GHA believes that these risks are negligible. Claims that the antiquities are a major source for terrorist financing have been debunked by RAND and other. See Footnote 1, *supra*. There is looting of archaeological sites and some smuggling of looted material into the United States, but much of what is seized appears to be either low value material or material that was imported from legitimate markets in the Europe that lacks proper documentation for entry.⁷ The idea that this material is typically looted is predicated on the falsehood that artifacts without a detailed provenance history must be the products of recent, illicit digs. This is simply untrue. Many artifacts have lost their provenance history over time, particularly because provenance information was not thought important until recently. GHA believes there is a low risk of money laundering and other illicit activities for items

⁷ It is probable that proponents of AML regulations will argue that recent INTERPOL data about seizures of cultural property supports the need for AML regulations. *Cultural Property Crime Thrives Throughout the Pandemic Says New INTERPOL Survey*, INTERPOL (Oct. 18, 2021), available at <https://www.interpol.int/News-and-Events/News/2021/Cultural-property-crime-thrives-throughout-pandemic-says-new-INTERPOL-survey> (last visited October 21, 2021). However, it is just as easy to conclude that such data demonstrates that police forces already have sufficient tools necessary to investigate and prosecute crimes against cultural property. Moreover, one cannot assume that all or even most of seized material is stolen or the product of recent, illicit archaeological digs. In fact, due to the costs of hiring an attorney, much cultural property that is seized in the US and Europe is abandoned, even in cases where there is a valid defense to forfeiture. In the MENA region, such assumptions are even more questionable, given the lack of rule of law in such countries.

A few other points should be noted. First, although INTERPOL claims trafficking is linked to terrorism, there is no hard evidence provided establishing that link. Second, the numerical data raises more questions than it answers. While the report lists the number of arrests no data about convictions or the nature of the offense is provided. The Stolen Objects section also lacks clarity. In total, INTERPOL indicated that in 2020, 854,742 items were seized globally. Dividing the seizures into continents, the overwhelming majority are listed as library materials (472,933 or 55% of all seizures globally) seized in Europe. What about antiquities, the chief focus of the report? These are not even listed as a distinct category. Instead, INTERPOL lists archaeological items, sculpture, religious items and others as categories, which may all include antiquities. So, once again the report raises more questions than are answered. Finally, the report actually undercuts any claim that that looting of archaeological sites is the primary concern. Instead, the report provides a far more nuanced picture. While in Africa the majority of crimes were committed against antique shops (18%) and private homes (16%), and in America and Europe against private homes (both 22%), in Asia it was against archaeological sites (26%) as well as private homes and shops (each 17%).

imported from the developed economies of Australia, Europe, Japan, New Zealand and Singapore. To the extent FinCEN regulates in this area, FinCEN should concentrate on transactions directly from the Middle East and other conflict zones.

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)?

Response:

Antiquities should be defined simply as artifacts made for public or private use dating before 500 AD, the end of the Roman Empire. If FinCEN thinks a more recent date is more appropriate, 1500 AD makes sense because it roughly corresponds to the Renaissance, the Fall of Constantinople, the Discovery of the Americas, the end of Pre-Columbian civilizations, and the highpoint of Empires in China and India. The term should not be determined based on definitions in foreign laws as that could add considerable confusion.

The term should explicitly exclude coins and ethnological objects. These items are traded separately from antiquities, are serviced by different trade associations, are the subject of separate academic treatment, and typically are of limited monetary value.

Exempting these objects would harmonize US law with that of the United Kingdom, which also excludes coins and ethnographic art from the purview of its own AML regulations.

See Guidance on Anti Money Laundering for UK Art Market Participants, Approved by HM Treasury at 5 (What is a Work of Art?) (January 4, 2020) available at

<https://www.gov.uk/government/publications/art-market-participants-guidance-on-anti-money-laundering-supervision> (last visited October 13, 2021).

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 non-commercial, not-for-profit activity? If so, how?

Response:

The “trade of antiquities” should relate to commercial activity as opposed to charitable donations to museums and other institutions. GHA does not believe non-commercial, not-for-profit activity should be targeted. However, to the extent it is covered, it should include activities of US archaeologists excavating in countries with high risks of corruption, money laundering and terrorist activities. There is a danger that archaeologists working in these areas will inadvertently fund corrupt practices. Moreover, most archaeologists are associated with Universities with large compliance departments that should be able to track the issue and provide guidance. The “trade in antiquities” should also cover not only antiquity sales, but the exploitation of antiquities for commercial gain, particularly where there is a nexus to countries where there are high risks of corruption, money laundering and terrorist activities. For example, some years ago the National Geographic Society was investigated for possible bribery of Zahi Hawass, who at the time was overseeing Egypt’s antiquities service. See Julie DeMauro, *Report: DOJ Investigating National Geographic for Egypt Payments*, The FCPA Blog (October 29, 2013) available at <https://fcpublog.com/2013/10/29/report-doj-investigating-national-geographic-society-for-egy/> (last visited October 15, 2021).