

# Locke Lord QuickStudy: FinCEN Issues Advance Notice of Proposed Rulemaking on Anti-Money Laundering Regulations Relating to Dealing in Antiquities

Locke Lord LLP

## WRITTEN BY

Barry J. Bendes

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On September 23, 2021, the Financial Crimes Enforcement Network (FinCEN) issued an advance notice of proposed rulemaking (ANPRM)<sup>[1]</sup> soliciting public comment on possible rules implementing Section 6110 of the Anti-Money Laundering Act of 2020 (the AMLA).<sup>[2]</sup> The ANPRM specifically asked for comment on a number of issues affecting the antiquities market and possible new rules implementing the AMLA. Comments are due to FinCEN on or before October 25, 2021.

Under the AMLA dealers in antiquities are included in the definition of regulated financial institutions under the Bank Secrecy Act (BSA)<sup>[3]</sup> effective when FinCEN issues implementing rules and regulations.<sup>[4]</sup> The rules are required to be promulgated by the end of 2021. The ANPRM seeks comments concerning possible rule making defining what is an antiquity as well as who should be treated as participants in the antiquities market.

The ANPRM also seeks input as to what should be treated as an antiquity (as opposed to a work of art), as well as “the roles, responsibilities, and activities of persons engaged in the trade in antiquities”. It particularly requests input concerning “advisors, consultants, dealers, agents, intermediaries, or any other person who engages as a business in the solicitation or the sale of antiquities.”

Based upon the long and detailed list of “Issues for Comment” set forth in the ANPRM, it appears that FinCEN may be using a very broad brush when dealing with who should be treated as a “participant” in the antiquities market and how they should be regulated.

By using phrases like “engages as a business in the solicitation or the sale of antiquities” and “financed and facilitated”, it appears that FinCEN may be considering rules that would apply broadly to persons as well as many classes and types of businesses and institutions. By using words such as seller, buyer, cosigner, intermediary, advisors consultants, dealers and agents plus the catchall “and others”, FinCEN seems to be signaling just how broadly it believes the scope of its regulatory authority may be.

The ANPRM also focuses upon and solicits comments concerning matters that financial institutions already subject to the BSA and its Suspicious Activity Reporting (SAR) requirements generally deal with in their “know-your-customer” processes and SAR processing. Similarly, when it requests comment on steps participants in the

antiquities market already take to determine sources of funds, FinCEN may be foreshadowing rules that would require efforts in this regard.

The issues list in the ANPRM also suggests that FinCEN may be willing to consider minimum monetary thresholds for the application of the new rules to trading in antiquities, and that it may be willing to address industry specific issues where participants in the market in antiquities can be demonstrated to differ from banks and other financial institutions subject to the BSA. In this regard, the ANPRM specifically asks commenters to address any “difficulties” that might arise in making disclosures concerning beneficial ownership of antiquities, and how FinCEN might “minimize the burdens associated” with BSA compliance and SAR reporting with respect to trading in antiquities.

The issuance of the ANPRM should be seen as a call to action by all participants in the art and antiquities markets. It highlights areas where participants in the art and antiquities markets might find guidance, even before the rules are issued by FinCEN.

Even if a participant in the antiquities market does not choose to submit comments to FinCEN at this time, the participant might consider taking steps to be ready for the adoption of rules under AMLA and further amendments to the BSA to bring the art market generally under FinCEN’s regulatory authority. These steps could include, among other things, the creation, review, testing and improvement of internal systems, internal controls and programs to permit timely compliance with the BSA and new AMLA/BSA rules applicable to the antiquities market, and eventually to the art market generally.

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[1] [Anti-Money Laundering Regulations for Dealers in Antiquities](#)

[2] Public Law 116-283, 134 Stat 3388 (2021).

[3] 12 U.S.C. §1829b, 12 U.S.C. §§1951-1959 and 31 U.S.C. §§5311-5314, 5316-5336. See implementing regulations codified at 31 CFR Chapter X. Section 6110(a)(1) of the AML Act amends BSA §5312(a)(2).

[4] AMLA §6110