

OFAC Issues Advisory on Sanctions Risks Arising from High-Value Artwork Transactions

In many ways, the market for valuable art remains one that depends on long-standing relationships and a high degree of familiarity between market participants. The importance of relationships in the art business makes sense. One is more comfortable selling to or buying from a known quantity—someone whose values and ethics can be trusted, and someone with whom successful business has been transacted before.

As the market has globalized and as business has shifted first to art fairs and now online, however, the circle of relationships has widened and relationships have become less personal. As a business matter, these developments have resulted in different kind of risks. As a legal matter, these changes have brought about greater regulation and enhanced scrutiny on the art market.

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") maintains lists of individuals and entities subject to U.S. sanctions and with whom U.S. persons may not conduct business. These lists of "sanctioned" persons include those who are alleged to have engaged in or who have supported terrorism, narcotics trafficking, or weapons proliferation, or whose actions otherwise do not comport with U.S. foreign policy objectives in places like Iran, Cuba, North Korea, and Venezuela. Doing business with a sanctioned party can be punishable by substantial fines and, in some cases, even imprisonment. And the lists of these individuals and entities are not static—individuals and entities are added and removed frequently.

On October 30, 2020, OFAC issued an advisory and guidance addressing sanctions that may be imposed in connection with high-value artwork transactions.¹ The advisory makes clear that OFAC sees the art market as particularly susceptible to abuse by sanctioned parties,² and therefore that OFAC sees the art market as ripe for sanctions enforcement actions. The advisory recommends that art galleries, museums, private art collectors, auction companies, agents, brokers, and other participants in the art market develop and implement safeguards that will help to avoid transactions with illicit actors.

Recent Events Leading to OFAC's Advisory and Guidance

On December 13, 2019, OFAC announced an enforcement action against Nazem Said Ahmad.³ Ahmad was alleged to have evaded U.S. counterterrorism sanctions using his multi-million-dollar art collection and an art gallery he opened in Beirut that was in fact a front to launder substantial amounts of money for the Hizballah, an organization designated as a Specially Designated Global Terrorist terrorist group. OFAC warned in its press release that art and luxury goods dealers are among those who must be particularly wary of facilitating money-laundering schemes. OFAC also added to its website three "frequently asked questions," and corresponding answers, regarding the art community's compliance obligations with respect to counterterrorism sanctions.⁴ These FAQ's, which include guidance on what to do if a violation occurs, can be accessed at: <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/2396>

Other governmental bodies have observed that the absence of regulation in the art industry, coupled with the high degree of anonymity and confidentiality afforded to both buyers and sellers, makes the market for high-value artworks particularly attractive to those engaged in sanctions evasion. For example, a July 2020 report by the Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs detailed

how Russian oligarchs who had been designated by OFAC and listed on the SDN List used shell companies to engage in numerous high-value art transactions.⁵ In OFAC's view, this type of exploitation demands a response.

Implications of OFAC's Advisory and Guidance

The advisory sounds a clear warning of OFAC's intent, moving forward, to investigate high-value artwork transactions and to initiate enforcement actions where those transactions involved, either directly or indirectly (*i.e.*, through a shell company or another kind of front), with blocked persons. In the advisory, OFAC reminds the reader that U.S. organizations and individuals can be held *strictly liable* for violative transactions—in other words, civil monetary penalties may be imposed on violators even if the individual or organization did not know, or have reason to know, that it was engaging in prohibited conduct.⁶

OFAC thus strongly encourages participants in the art market to prepare accordingly, including by implementing more robust sanctions compliance programs, as discussed below.

Develop a Compliance Program

While civil penalties for violating OFAC sanctions can be imposed even if the person is not aware that they are doing business with a sanctioned person, OFAC has some discretion to vary the fines based on whether or not a violation is voluntarily disclosed and whether it is "egregious." Certainly, if one knowingly does business with a sanctioned person, it is more likely that the violation will be deemed to be egregious, and the fine will be higher. On the other hand, if one implements a sensible compliance program to identify sanctioned persons, that effort will not only help to avoid a violation, but, in the event of an apparent violation, OFAC may give more favorable treatment because such a program was in effect, including by mitigating civil monetary penalties and designating the violation as non-egregious. Willful ignorance will not be rewarded.

To assist in sanctions compliance, OFAC recently promulgated a framework for a risk-based sanctions compliance program—not specifically for art businesses, but for all persons and entities.⁷ That framework specifies five essential components:

- **Senior Management Commitment:** OFAC recommends that Senior Management be heavily involved in the development and implementation of the sanctions compliance programs, including by reviewing and approving them; designating compliance personnel and ensuring they have sufficient authority, autonomy, and resources to effectively deploy the program; and promoting a culture of compliance through strong messaging and showcasing Senior Management's own commitment to the programs.
- **Risk Assessment:** Organizations should conduct ongoing assessments designed to identify potential circumstances in which it will engage (or has already engaged), either directly or indirectly, with OFAC-prohibited persons, parties, countries, or regions. For example, an organization may monitor the geographic locations and affiliations of clients, relevant supply chains, intermediaries, and counter-parties. Remember that the sanctions list is not static.
- **Internal Controls:** To be effective, sanctions compliance programs must include policies and procedures pursuant to which employees can identify, interdict, escalate and report (as appropriate), and keep records pertaining to, activity that may be prohibited by OFAC. Organizations should endeavor to implement mechanisms that are capable of detecting and quickly adjusting to the frequent changes that OFAC publishes.

- Testing and Auditing: Organizations should regularly audit the effectiveness of their sanctions compliance programs.
- Training: Formal sanctions compliance training should be provided to all employees, and it should be provided on a periodic basis. Such training should include job- and location-specific information, as relevant.

The precise contours of any compliance program can and should be calibrated to the risk presented by a firm's size, clientele and sales by the work that it sells. A small art gallery that sells only to local clients may need different procedures than an art gallery with a global footprint.⁸ What is reasonable for a large gallery with a bigger infrastructure will be different than what is reasonable for a small gallery with three employees. But any gallery of any size should consider and implement a program.

An effective sanctions compliance program will allow organizations to identify persons with whom transacting business may be prohibited. But if in doubt, the organization may apply to OFAC for guidance on, or a license for, a specific proposed transaction.

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Endnotes

¹ OFAC, U.S. Dep't of the Treasury, *Advisory and Guidance on Potential Sanctions Risks Arising from Dealings in High-Value Artwork* (Oct. 30, 2020), https://home.treasury.gov/system/files/126/ofac_art_advisory_10302020.pdf.

² For example, persons OFAC has placed on its Specially Designated Nationals and Blocked Persons ("SDN") List.

³ Press Release, OFAC, U.S. Dep't of the Treasury, *Treasury Designates Prominent Lebanon and DRC-Based Hizballah Money Launderers* (Dec. 13, 2019), <https://home.treasury.gov/news/press-releases/sm856>.

⁴ OFAC, U.S. Dep't of the Treasury, *Frequently Asked Questions Nos. 812-814: Counter Terrorism Sanctions*, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/2396> (last visited Nov. 3, 2020).

⁵ Staff of Permanent Subcomm. on Investigations, S. Comm. on Homeland Sec. & Governmental Affairs, 116th Cong., *The Art Industry and U.S. Policies that Undermine Sanctions* (Comm. Print. 2020), <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 In addition, in the advisory, OFAC addresses a statutory exemption from the International Emergency Economic Powers Act and the Trading with the Enemy Act that some commentators and practitioners have invoked in the context of the sale of artworks. The Berman Amendment, by its terms, exempts from regulation "the importation from any country, or the exportation to any country . . . of any information or informational materials, including but not limited to . . . artworks." 50 U.S.C. § 1702(b)(3); 50 U.S.C. § 4305(b)(4). On its face, the Berman Amendment would broadly exempt the sale of artworks from OFAC sanctions. But OFAC stated in the advisory that it viewed the Berman Amendment more narrowly, as not authorizing the sale of artworks "to the extent the artwork functions primarily as an investment asset or medium of exchange."

⁷ OFAC, Dep't of the Treasury, *A Framework for OFAC Compliance Commitments*, https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf (last visited Nov. 3, 2020).

⁸ Other jurisdictions, such as the European Union and the United Kingdom, also have sanctions programs that are similar to OFAC's programs, and so businesses that operate in multiple jurisdictions may need to comply with several different programs.