

OFAC Art Transaction Advisory Signals Increased Scrutiny

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(November 10, 2020, 4:46 PM EST)

On Oct. 30, the U.S. Department of the Treasury's Office of Foreign Assets Control issued an advisory and guidance addressing sanctions that may be imposed in connection with high-value artwork transactions.[1] The advisory expresses OFAC's view that the market for artwork valued above \$100,000 is particularly susceptible to abuse by sanctions targets seeking to mitigate or evade applicable sanctions,[2] and is ripe for OFAC enforcement actions.

Accordingly, the advisory urges art galleries, museums, private art collectors, auction companies, agents, brokers, and other participants in the artwork market to develop and implement safeguards that will help them avoid transactions with illicit actors.

This article provides an overview of the advisory and summarizes OFAC's recommendations for sanctions compliance programs.

Recent Events Leading to OFAC's Advisory and Guidance

On Dec. 13, 2019, OFAC announced an enforcement action against Nazem Said Ahmad,[3] who had evaded U.S. counterterrorism sanctions by using his multimillion-dollar art collection and an art gallery he opened in Beirut. The art gallery was, in fact, a front to launder substantial amounts of money for Hezbollah, a specially designated global terrorist organization.

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]

OFAC's concerns extend beyond the counterterrorism context, however. In recent months, 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



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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 its specially designated nationals 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 variety of front — blocked persons.

In the advisory, OFAC reminds the reader that organizations and individuals can be held strictly liable for violative transactions — meaning civil monetary penalties may be imposed even if the individual or organization did not know, or have reason to know, that it was engaging in prohibited conduct.

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." [6]

On its face, the Berman Amendment would broadly exempt the sale of artworks from OFAC sanctions. However, 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."

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

OFAC's Recommended Framework for Sanctions Compliance Programs

To assist in sanctions compliance, OFAC recently promulgated a framework for risk-based sanctions compliance programs.[7] That framework specifies five essential components:

Senior Management Commitment

OFAC recommends that senior management be heavily involved in the development and implementation of 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 programs; 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 counterparties.

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 announces.

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 clientele and by the works that it sells. A small art gallery that sells only to local customers may need different procedures than an art gallery with a global footprint. 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.

Conclusion

Ultimately, OFAC's advisory is less instructive for its recommendations — which are consistent with prior guidance — than for its audience: the art community. In issuing this advisory, OFAC is signaling that, going forward, members of that community may be subject to heightened scrutiny in connection with sanctions compliance efforts. It will therefore be important for those individuals and organizations to act quickly in implementing sanctions compliance programs.

Not only will doing so help to avoid running afoul of OFAC sanctions but, in the event of an apparent sanctions violation, OFAC may give more favorable treatment to those that have such programs in effect, including by mitigating civil monetary penalties and designating violations as nonegregious.

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[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 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] 50 U.S.C. § 1702(b)(3); 50 U.S.C. § 4305(b)(4).

[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).