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ATTN: RIN 1506-AB50 Docket Number FINCEN-2021-0006

Sir or Madam:

This is a response to the September 23, 2021 Advanced Notice of Proposed Rulemaking (ANPRM 1506-AB50) by the Financial Crimes Enforcement Network (FinCEN), which is seeking to implement Section 6110 of the Anti-Money Laundering Act of 2020 (AML Act), which became law on January 1, 2021. Section 6110 of the AML Act amended the Bank Secrecy Act (BSA) by including as a type of financial institution a person 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. Section 6110 requires the Secretary of the Treasury to issue proposed rules to carry out the amendment. This work affirms FinCEN's support of The Department of the Treasury's "Strategic Plan for Fiscal Years 2018-2022" to fulfill its mission to enhance the integrity of financial systems by facilitating the detection and deterrence of financial crime. Specifically, FinCEN supports Treasury Goal 3: Enhance National Security, including Strategic Objective 3.1 (Strategic Threat Disruption) and Strategic Objective 3.2 (Anti-Money Laundering and Combating Financing of Terrorism Framework).<sup>1</sup>

This letter commenting on the range of questions related to the implementation of amendments to the Bank Secrecy Act (BSA) regarding the trade in antiquities presented in ANPRM 1506-AB50 is submitted on behalf of the co-chairs of the Antiquities Coalition's Financial Crimes Task Force, building on the report from the Task Force (attached for your information) submitted by members with extensive experience in the AML/Sanctions/Counter Terror Finance (CFT) fields.

The Antiquities Coalition's nonpartisan think tank convened the Financial Crimes Task Force to work together to bar criminals and terror organizations from exploiting the \$21.3 billion American art and antiquities market, and serve as an ongoing resource to policymakers.<sup>2</sup> The Task Force, the first of its kind, unites allies from the cultural heritage, financial, and legal communities, as well as former law enforcement and government officials. This diverse group of experts has worked together to develop comprehensive recommendations for protecting the

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<sup>1</sup> U.S. Treasury, FinCEN's Strategic Plan, FinCEN (2020), <https://www.fincen.gov/index.php/about/fincens-strategic-plan>.

<sup>2</sup> The Art Market 2021 presents the results of research on the global art and antiques market in 2020. Clare McAndrew, The Art Market 2021, Art Basel & UBS Report, 2020 at 17.

American art and antiquities market from money laundering, terrorist financing, sanctions violations, tax evasion, fraud, forgery, and related crimes.

The \$21.3 billion American art and antiquities market is the largest unregulated market in the world, making it vulnerable to a wide range of financial crimes. This ongoing exemption from standard laws and oversight, which now cover all industries of comparable risk and size, is a documented and growing threat to our national security and integrity, as well as the vast majority of legitimate collectors, dealers, auction houses, and museums. Meanwhile, the United Kingdom and European Union have already begun applying anti-money laundering and counter terrorist financing measures to their respective art and antiquities markets.<sup>3</sup> With the actions to be taken under the AML Act the U.S. public and private sectors will together be able to close these loopholes and then be consistent with international AML and CFT laws and regulations. Thus they will begin to mitigate these major vulnerabilities in the world's biggest economy that are now open to money launderers, artifact traffickers, drug smugglers, kleptocrats, oligarchs, terrorists, and the many other criminals proven to have exploited the art and antiquities market's weaknesses.

Ever since the passage of the USAPATRIOT Act, and the debate regarding its coverage, the broad-based AML community have believed it is important for those with financial footprints to have obligations to assist law enforcement in tracking and countering money laundering and other financial crimes. In the absence of these obligations, it is simply impossible to know the size of the problem. Without reporting requirements such as Suspicious Activity Reports (SARs), and required Customer Identification Program (CIP) protocols, the relevant data is not being collected. Since the passage of the USAPATRIOT Act and subsequent application of the Bank Secrecy Act to additional markets, Congress has made clear that it recognizes that an incomplete AML regime is, by definition, simply not effective. Section 6110 of the AML Act fills in some of the clear gaps of the U.S.'s AML infrastructure, which will improve the ability of all stakeholders to be more diligent, effective and actually proactive.

On September 24, 2020, the Task Force published their first joint report, "Reframing U.S. Policy on the Art Market: Recommendations for Combatting Financial Crimes." It details the documented risks facing the American art and antiquities market from money laundering, terrorist financing, sanctions violations, tax evasion, fraud, forgery, and other related crimes. More importantly, it puts forward 44 recommendations to improve the existing AML environment, including new policies, practices, and priorities that can be implemented by the U.S. government, art and antiquities market, financial industry, and international community. As we indicated above, we have included this report in our submission, which assisted Congress in

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<sup>3</sup>The United Kingdom's Money laundering and terrorist financing (amendment) regulations 2019 and EU Directive 2018/843 ("Fifth Anti-Money Laundering Directive" or AMLD5), respectively.

their deliberations regarding coverage and it provides additional information that we hope will be useful in future deliberations on managing the documented abuse of this sector.

In the over twenty years since the attacks on the United States on 9/11, it has become eminently clear that misuse of the financial system or the general economy enables terrorism, money laundering and a whole host of other financial crimes. During this time policymakers both here and abroad have collaborated on creating laws, regulations and guidance impacting BOTH the private and public sectors, increasing or enhancing requirements to detect, report, investigate and prevent the misuse of anything of value exploited to enable illegal activity.

Thus, the Antiquities Coalition's Financial Crimes Task Force strongly believes that there is a need for reasoned regulation for any entity that has a financial footprint in the global economy. It is no longer acceptable to decline to support efforts to report suspicious activity if you are benefitting from engaging in financial activity, and your products or services can be — and are — used to aid terrorists, organized criminals or fraudsters.

As career AML professionals, we believe that the time has come to more formalize the relationship with the antiquities community, build the structures to work together, and become partners to improve both the actions of private and public sectors in combating financial crime and terror finance. We are confident that FinCEN, in their ANPRM and eventual final rulemaking, will be able to close the clear gap in security and law enforcement information gathering that exists without dealers, advisors and traders of antiquities doing their part to prevent terrorism, money laundering and various aspects of financial crime.

We appreciate the opportunity afforded by FinCEN to submit these comments, which includes recommendations on several additional questions that will help the Bureau in the crafting of the final regulations. We are committed to work with the Treasury Department and other law enforcement agencies to ensure that the American art and antiquities market is no longer vulnerable to a wide range of financial crimes. The goal of implementing programs to detect and prevent such efforts is one in which we have before and are eager to continue to assist.

The challenge of implementation to achieve the goals of the regulations is substantial, and must propose a system that is generally applicable to a wide array of business models. We applaud FinCEN for their ongoing work to find solutions to these operational challenges, utilizing an open and transparent process. This is an essential step in crafting rules that are reasonable and adaptable by market participants.

### **Regulation of the Art Market**

**Question 7.** The risks of money laundering and terror finance, avoidance of sanctions, and other illicit financial crimes are very high with antiquities due to the historical lack of regulatory

oversight in the trade. Because of the lack of oversight, the antiquities sector provides a target rich environment for illicit actors, with issues such as built-in anonymity and masking of beneficial ownership, ineffective protection of artifacts at archeological sites in high-risk countries, counterfeits and forgeries, fraudulent provenance and use of social media in suspect transactions. The new law is a significant step forward to protection of this sector by enhancing knowledge and understanding to the business and financial sectors that are impacted by the new law and providing capabilities to law enforcement that will help identify, investigate, disrupt and deter illicit markets.

In the 2019 final report based on the work the Research and Training on Illicit Markets for Iraqi and Syrian Art and Antiquities: Understanding networks and markets, and developing tools to interdict and prevent the trafficking of cultural property that could finance terrorism written by Dr. Neil Brodie (EAMENA, School of Archaeology, University of Oxford), from the CLASI project (of which Task Force Chair Mike Loughnane was a member) under the Terrorism, Transnational Crime and Corruption Center, located at George Mason University (2019). In the report Dr. Brodie wrote, “Traditionally, antiquities trafficking centered on low-volume trade of large, expensive objects, sold by experts to experts. But the current looting out of Syria and Iraq targets coins and smaller objects such as cuneiform-inscribed objects, jewelry glass, etc. – a shift enabled by the widespread availability of metal detectors, the Internet and cellular communications.

The report noted that among other profit-making efforts, “intermediaries, during the transport and early-stage marketing of the antiquities, profiting directly from sales.” It is the sales element the new law will address.

There have been numerous instances of ancient cultural property taken from the ground to be sold around the world in support of insurgents and terror organizations (such as the past activities of ISIS and the more current activities in Iraq and Syria). The International Council of Museums has described various types of criminal activity, impacting museums, monuments, religious sites and other public or privately held places of conservation. They cite such activities as illicit excavations of archaeological objects from various sites, including underwater excavations; the theft of cultural property during armed conflicts or military occupation; the illicit import and export of cultural property in trade based money laundering schemes; the illegal transfer of ownership of cultural property (sale, purchase, assumption of mortgage debt, exchange, donation or legacy), through the use of forged documentation and false provenance; and the counterfeit antiquities market as well.

While there has been a lot of media coverage about the risk of antiquities in the MENA and Asian regions, the vulnerabilities of antiquities are worldwide. The same risks that present in cultural property coming out of the ground in Iraq and Syria, as referenced in the CLASI report

the same risk of exploitation from Mayan and Aztec ruins, as from the ancient lands of indigenous peoples of North America.

Therefore, it is not as relevant from where the antiquity is geographically sourced, whether it came out of the ground in Syria or Mexico or was stolen from a museum. Rather, it is the financial and business processes that engage in the movement, sale, and payment processes. Without these processes the antiquities sector simply would be less effective, less profitable, and possibly not exist.

The cultural property market has been estimated by Global Financial Integrity as generating between \$1.2 billion to \$1.6 billion annually in revenues. More important, however, is that this market operates with a business model inherent with risk, including the ability to acquire and sell products with little to no proof of ownership, the use of anonymity in sales and auctions, and, of course, the ability to transact businesses in cash.

The new law places responsibility and accountability within this process. It provides the opportunity to improve understanding, awareness within the cultural property sector as well as processes to identify and report suspicious actions.

This is also consistent with other sectors with similar challenges. Antiquities are items of value, commodities, capable of being used as a means of value transfer (as they are bought and sold) or storage (held until they are sold). This is very consistent with the value transfer systems such as precious stones and jewels and precious metals, where regulatory controls are in place to monitor how these items are sourced and acquired, marketed and sold. This has created a clearer picture of the illicit activities within the sector and improved the capability of these markets to identify and report suspicious activity.

The business process in the antiquities sector needs effective compliance. Obviously, investigations of crime and terrorism issues are best left to law enforcement. However, with the diverse nature of crime and illicit finance the resources in law enforcement are limited. Their ability to identify potential areas of investigation relies upon a strong regulatory program. As with other regulated business sectors, there is an expertise and business knowledge that is not possessed by law enforcement. That knowledge, that often forms the predication for investigation, is present within the industry. Therefore, just as in compliance requirements placed on banks and other financial institutions, the requirements placed on money exchangers and money transfer businesses, there needs to be the ability to see transactions, then a process to identify and report suspicious actions.

As with other businesses that operate as money services businesses, the antiquities sector needs to act as the “tip of the spear.” They need to have a clear understanding to identify activities that

can be provided through this connection to law enforcement and become more alert to activities of money laundering and terror finance, and have clear processes for reporting and coordination with law enforcement.

### Additional Comments

In addition to the questions raised in the September 23, 2021 ANPRM, we would like to highlight additional questions we hope will help in the crafting in the final regulations.

#### **Regulation of the Art Market**

- I. How often are Offshore Vehicles utilized to trade in antiquities? If the entity is registered under a Nominating Officer, what steps are taken to identify the beneficial owner?
- II. When the buyer is purchasing an antiquity outside the country in which it was sourced, should the buyer have the right to ask for export/import documentation to determine if it was properly declared?

#### **Regulation of the Industry**

- III. How does the seller authenticate country of origin? Should we require an authentication from the stated country of origin to protect against potential sanctions violations?

We thank you for your attention to this comment, and look forward to assisting the Treasury Department and FinCEN in its well-founded mission to improve the AML infrastructure – created over 35 years ago with a patchwork of laws and regulations and until the PATRIOT Act, with no real comprehensive attempt to consider necessary modifications. We hope that the accompanying resource, developed by industry leaders, will help to cement America’s standing as a leader in the fight against financial crimes.

Signed:

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