

MONEY LAUNDERING AND THE ART MARKET: CLOSING THE REGULATORY GAP

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I. Introduction

In 2017, an “outlandish” conspiracy theory exploded across the Internet following the sale of the supposed last painting by Leonardo Da Vinci held in a private collection.¹ The painting, the *Salvator Mundi*, sold at auction for a mind-boggling \$450 million, three times its estimated worth.² It was the most expensive painting ever sold.³ According to conspiracy theorists, the sale of the painting was part of a complex international money laundering scheme involving: Donald Trump’s 2016 campaign staff, the royal families of Saudi Arabia and Abu Dhabi, the Israeli intelligence firm Psy-Group, and Russian magnate Dmitry Rybolovlev.⁴ Despite the fact that scholars studying crime in the art world consider the theory to be “bonkers,” the rumors have persisted.⁵ Only further fueling these rumors is the fact that the painting disappeared after the sale, its whereabouts are now completely unknown.⁶

While it is certainly true that the spread of conspiracy theories across the Internet reflects the anxieties of the current political climate and the “opacity of the notoriously unregulated art market,” the public is only seeing the tip of the massive money laundering and terrorism financing iceberg.⁷ Based on the increasingly urgent legislative

¹ Gaby Del Valle, *How a long-lost Leonardo da Vinci Painting Got dragged into a Trump-Russia Conspiracy Theory*, VOX MAGAZINE (Jan. 22, 2019, 2:35 PM), <https://www.vox.com/the-goods/2019/1/22/18192927/salvator-mundi-trump-conspiracy-theory>.

² *Id.*

³ *Id.*; Kevin Shau, *On Leonardo da Vinci’s Salvator Mundi—Is It Authentic?*, MEDIUM (Apr. 15, 2019), <https://medium.com/art-direct/on-leonardo-da-vincis-salvator-mundi-is-it-authentic-c4b15a42c8de>.

⁴ Del Valle, *supra* note 1.

⁵ Del Valle, *supra* note 1.

⁶ Del Valle, *supra* note 1.

⁷ Del Valle, *supra* note 1; *Money Laundering in the Art World*, CE NOTICIAS FINANCIERAS (Mar. 17, 2020), [hereinafter *Art World*].

measures that have been taken in the last two years in Europe and measures that are currently under consideration in the U.S. and elsewhere, lawmakers, law enforcement and international intergovernmental bodies, including the United Nations, have concluded that a response is overdue.⁸

Since the beginning of anti-money laundering efforts in the 1970s and 1980s, laws criminalizing money laundering have progressively, if slowly, expanded.⁹ Over time, increased oversight has made the international financial system increasingly difficult to access by persons attempting to introduce illicit funds into licit markets.¹⁰ Simultaneously, the predicate crimes to money laundering have increased.¹¹ Regulations were significantly strengthened following 9/11; in the U.S., the Patriot Act contained a number of new anti-money laundering measures that built on the Bank Secrecy Act (BSA).¹² Recently, regulation has reached the real estate market (one of the spheres that had been most exploited after 2001), and dealers in precious metals and gems.¹³ At this point, the only market in ultra-high value goods that remains utterly unregulated is the market for art and antiquities.¹⁴ Despite significant

⁸ Brad Gershel, *Lawmakers Renew Effort to Overhaul AML Laws, Including Greater Beneficial Ownership Transparency*, NAT'L L. REV. (June 20, 2019), <https://www.natlawreview.com/article/lawmakers-renew-effort-to-overhaul-aml-laws-including-greater-beneficial-ownership>; Rahim Kanani, *F&D: Money Laundering via Picasso*, WESTERN WORLD NEWS (Oct. 1, 2019), <https://regional.blogspot.com/2019/10/f-money-laundering-via-picasso.html>; Deborah Lehr, *Art and Antiquities: Conduits for Money Laundering and Terrorist Financing*, ACAMS TODAY (Dec. 20, 2018), <https://www.acamstoday.org/art-and-antiquities-conduits-for-money-laundering-and-terrorist-financing/>.

⁹ *History of Anti-Money Laundering Laws*, FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/history-anti-money-laundering-laws> (last visited Jan. 31, 2021).

¹⁰ See generally JOHN A. CASSARA, *TRADE-BASED MONEY LAUNDERING: THE NEXT FRONTIER IN INTERNATIONAL MONEY LAUNDERING ENFORCEMENT, 195-206* (2015).

¹¹ *Id.*

¹² See 18 U.S.C. § 1956 *et seq.* (2016); USA PATRIOT ACT, Pub. L. No. 107-56, § 301 *et. seq.*, 115 Stat. 272, 296-342 (2001).

¹³ EUROPEAN PARLIAMENT, *UNDERSTANDING MONEY LAUNDERING THROUGH REAL ESTATE TRANSACTIONS 1, 2, 4* (2019); *Dealers in Precious Metals, Stones or Jewels Required to Establish Anti-Money Laundering Programs*, FIN. CRIMES ENF'T NETWORK (June 3, 2005) <https://www.fincen.gov/news/news-releases/dealers-precious-metals-stones-or-jewels-required-establish-anti-money-0>; Peter D. Hardy, *Art and Money Laundering*, NAT'L L. REV. (Mar. 20, 2019), <https://www.natlawreview.com/article/art-and-money-laundering>.

¹⁴ Davina Given & Eleanor Wilson-Holt, *Anti-Money Laundering Legislation Meets the Art Market*, REYNOLDS PORTER CHAMBERLAIN LLP (Nov. 16, 2018), <https://www.rpc.co.uk/-/media/rpc/files/perspectives/financial-services-regulatory-and-risk/rpc-antimoney-laundering-legislation-meets-the-art-market.pdf>; DELOITTE DEVELOPMENT LLC, *FIVE INSIGHTS INTO THE ART MARKET AND MONEY LAUNDERING 3* (2018).

pushback from the art world, this gaping regulatory hole is likely to close within the next few years.¹⁵

This Comment will examine the issue of money laundering in the international trade of fine art and antiquities, then emphasize why it is so important that regulatory steps be taken. In the process of doing so, this Comment will outline the history and parameters of the problem, as well as the measures legislative bodies and law enforcement organizations are taking. While there has been increasing treatment of this topic in the media and in broader academic circles, it has only occasionally been addressed in legal journals.¹⁶ Given that legislation in this area has the potential to seriously affect numerous areas of the law, both civil and criminal, it is a topic that warrants the attention it is receiving.¹⁷ It is also impossible to look at this question without a global perspective, given that money laundering via the art market relies to a great extent on exploiting international tax havens and international trade, so this Comment will provide an international perspective. Modern and contemporary art are major facilitators of tax evasion, and the trade in illicit antiquities has developed into a major source of financing for terrorist organizations, so the issue also implicates national and international security concerns.

Money laundering in the art and antiquities markets, no matter its scale, is a problem whose solution requires binding legislative and regulatory response, especially in the two largest markets: the U.S. and the European Union (more specifically the U.K., now that the country is slated to leave the EU). Part II of this Comment will outline general characteristics of the art market including some unique features of the art markets that make it particularly vulnerable, estimates of the scope of the problem, and profiles of the actors taking advantage of the art market for criminal gain. Part II also includes a survey of a few of the most notable and highest value money laundering schemes that have been uncovered to date. Part III examines the mechanisms by which money laundering is accomplished in the art market. The analysis includes both how art is used for traditional types of money laundering,

¹⁵ *Art World*, *supra* note 7; Hardy, *supra* note 13.

¹⁶ See generally GEORGINA ADAM, DARK SIDE OF THE BOOM: THE EXCESSES OF THE ART MARKET IN THE 21ST CENTURY (2017); ART AND CRIME: EXPLORING THE DARK SIDE OF THE ART WORLD (Noah Charney ed., 2009); Timothy E. Burroughs, *NOTE: US and EU Efforts to Combat International Money Laundering in the Art Market are no Masterpiece*, 52 VAND. J. TRANSNAT'L L. 1061 (2019); Alessandra Dagirmanjian, *Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 687 (2019) (providing examples of the few available law journal articles).

¹⁷ See Lehr, *supra* note 8.

as well as the regulatory gaps that facilitate tax evasion using art. Part III further argues that the most important target of new regulations is the hindrance of financial crimes. Part IV examines the legislation that took effect in the EU in January 2020, the legislation passed by the British Parliament in December 2019, and H.R. 2514, which was passed by the House of Representatives and sent to the Senate in October, 2019. Part IV also discusses how other existing laws and regulations are being used in anti-money laundering initiatives, and it demonstrates that these measures are not sufficient, arguing for support of further legislative action.

II. Background

Over the last decade or so, there have been some news articles and academic studies outside of legal scholarship attempting to bring this issue into focus.¹⁸ A survey of these sources leaves the reader with the unfortunate, but accurate, impression that no one quite knows the scale of the problem and that confronting the problem is going to be complicated, expensive, and aggressively protested by a variety of interested parties. To introduce the issue, it is first important to furnish a few definitions, and establish which predicate crimes to money laundering are at play. Clarity on these points is necessary to understand the mechanisms for laundering money through the art and antiquities market; meanwhile, profiling the parties most likely to be affected by art market regulation will establish grounds on which to explore the implications that changed regulatory schemes may have on the art market.

A. DEFINITIONS

This section serves two purposes: 1) to define the scope and parameters of the art market and its money laundering problem, and 2) to establish a framework for the arguments this Comment proposes. This is particularly important, given that some of the major hurdles to confronting this issue are due to a limited understanding of the art market, arising from limited understandings of art in general.

1. *Art and Antiquities*

Black's Law Dictionary defines "art" as "[c]reative expression, or the product of creative expression," and dates the term to the 13th

¹⁸ See e.g., Hardy, *supra* note 13; see generally ADAM, *supra* note 16; Charney, *supra* note 16.

century.¹⁹ Merriam-Webster, meanwhile, defines “art” as “the conscious use of a skill and creative imagination especially in the production of aesthetic objects[, or] . . . works so produced.”²⁰ Practically speaking, this refers to paintings, drawings, sculptures, photographs, and other such objects. “Antiquities” meanwhile are “relics or monuments (such as coins, statues, or buildings) of ancient times[,]” and an “antique” is “a work of art, piece of furniture, or decorative object made at an earlier period and according to various customs laws at least 100 years ago.”²¹ The antiquities category includes items such as religious objects, pottery, other everyday objects, manuscripts, and carvings.²²

2. A Working Definition of Money Laundering

The question of what money laundering *is* and *entails* is far broader than the pop-culture conception of drug lords or mafia dons in need of ways to make bags full of cash appear legitimate.²³ Today, money laundering actually encompasses both the above (sometimes termed “criminal money management”), and nearly any financial activity involving criminally tainted money; furthermore, it implicates all parties to a transaction, if the party knows or should have known that that any aspect of the transaction is criminal.²⁴ Broadly speaking, an individual is guilty of money laundering if:

. . . he or she hides or conceals the true nature, origins, place [the money] can be found, or its disposition; or if he or she relocates an illegally obtained object, uses it, or possesses it while knowing that such object has been obtained—directly or indirectly—by means of a criminal offense.²⁵

¹⁹ *Art*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²⁰ *Art*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/art> (last visited Jan. 30, 2021).

²¹ *Antiquity*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/antiquity> (last visited Jan. 30, 2021); *Antique*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/antique> (last visited Apr. 9, 2021).

²² None of these lists are intended to be exhaustive, but merely to be illustrative.

²³ See generally CASSARA, *supra* note 10. The main thesis of Cassara’s book is that trade-based money laundering—which is a concept he developed in the 1990s while working at the FBI—must be the next major front for law enforcement to police, and that it remains one of the means frequently employed by the cartels and organized crime groups. Cassara also outlines a number of basic money laundering concepts.

²⁴ See Petrus C. van Duyne, Lena Louwe, & Melvin Soudijn, *Money, Art, and Laundering: Coming to Grips with the Risks*, in CULTURAL PROPERTY CRIME: AN OVERVIEW AND ANALYSIS ON CONTEMPORARY PERSPECTIVES AND TRENDS 82-85 (Joris Kila & Marc Balcells eds., 2015).

²⁵ Van Duyne, *supra* note 24, at 83.

In other words, any transaction that involves ill-gotten objects or funds could qualify as money laundering.²⁶ One motivating factor in favor of increased regulation derives from the fact that U.S. law, and the laws of many other countries, considers profits derived from tax crimes to be laundered money, whether or not the money itself is derived from otherwise legal activities or transactions.²⁷ That means any unreported financial assets, including capital gains on personal property over certain thresholds, that go unreported in an effort to evade taxation, is a predicate crime to money laundering. The Financial Action Task Force (FATF)—the international anti-money laundering task force—has included tax evasion as a predicate crime to money laundering since 2012.²⁸ The EU definitions of money laundering follow FATF guidelines.²⁹ As will be addressed below, the reduction in financial crimes could be the most important result of art market regulation.

B. GENERAL CHARACTERISTICS OF THE ART AND ANTIQUITIES MARKETS

Before turning to money laundering in the art market specifically and explaining which techniques of money laundering techniques are common to it, several observations about the art market need to be made. To begin with, this question is both an ideological one, and practical one. To understand the contours of the problem, one must first understand the ways in which the art market is unique from other financial and commodities markets.

1. *Art Is A Commodity*

For many people, treating art as a “commodity” is a wildly controversial position that causes a gut reaction to its inherent *wrongness*.³⁰ Whatever one’s philosophical position on the question, or

²⁶ Van Duyne, *supra* note 24, at 83.

²⁷ See generally 18 U.S.C. § 1956 *et seq.* (2016); USA PATRIOT ACT, Pub. L. No. 107-56, § 301 *et seq.*, 115 Stat. 272, 296-342 (2001); *Designated Categories of Offenses, D-I*, Financial Action Task Force, <https://www.fatf-gafi.org/glossary/d-i/>, (last visited Jan. 30, 2021); Council Directive 2018/843, 2018 O.J (L156) 43, 46 (EU) *amending* Council Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Directives 2009/138/EC, and 2013/36/EU (Text with EEA relevance); Council Directive 2015/849, §§ (A)(3)-(4), 2015 O.J. (L141) 73 (EU).

²⁸ INTERNATIONAL MONETARY FUND, REVISIONS TO THE FINANCIAL ACTION TASK FORCE (FATF) STANDARD—INFORMATION NOTE TO THE EXECUTIVE BOARD 9-10 (2012).

²⁹ Compare INTERNATIONAL MONETARY FUND, *supra* note 28 with Council Directive 2018/843, *supra* note 27.

³⁰ ADAM, *supra* note 16, at 133-34; Van Duyne, *supra* note 24, at 79; Dagirmanjian, *supra* note 16, at 716, 727; *Cash in on Your Picasso: Borrowing Against Art is Growing at a Stunning Rate*, ECONOMIST (July 6, 2019), <https://www.economist.com/finance-and->

the advisability of art as an investment tool it is inarguable that art has been *commodified* and that it is being treated as a financial asset, and has been for a very long time.³¹ Even if art was not widely considered a financial commodity in the past, it has become financialized; it *is* now treated as a commodity, and it *is* traded as such.³² Even though metaphysical definitions of art suggest that art is *more than* a commodity, current practice indicates that many newer market participants regard art and antiquities as nothing more than assets to be bought, sold, and traded. In fact, the use of art as a commodity is not unique to the late twentieth and early twenty-first centuries.³³ For example, commissioning works of art for churches in order to buy salvation, a practice commonly known as buying indulgences, was widespread in the Middle Ages through the modern era.³⁴ In Renaissance Italy, artworks also served as a means of power brokering, and of establishing financial status, or advancing political ambitions.³⁵

Another related complication—one of the features that makes art such an attractive vehicle for money laundering—is the inherent difficulty in assigning monetary valuations to artworks and antiquities.³⁶ Unlike most commodities, which usually have relatively narrow and predictable ranges in value, the value of a work of art can vary widely for almost no reason.³⁷ Price fluidity combined with the

economics/2019/07/06/borrowing-against-art-is-growing-at-a-stunning-rate; Henry Glitz, *Artwork Is a Public Good, not a Commodity*, PITT NEWS (Nov. 18, 2015), <https://pittnews.com/article/65627/opinions/artwork-is-a-public-good-not-a-commodity/>.

³¹ Georgina Adam, *Secrets of the Auction Room*, FIN. TIMES (Jan. 2, 2009), <https://www.ft.com/content/cb1e2906-d6c7-11dd-9bf7-000077b07658>; NOAH CHARNEY, *Introduction and Art Crime in Context* in ART AND CRIME: EXPLORING THE DARK SIDE OF THE ART WORLD xiii, xviii (Noah Charney ed., 2009); *Cash in Your Picasso*, *supra* note 30.

³² ADAM, *supra* note 16, at 133; *Cash in Your Picasso*, *supra* note 30, at 64-65; *The Art of Money Laundering*, DAILY TRIB. (Dec. 29, 2019), <https://tribune.net.ph/index.php/2019/12/29/the-art-of-money-laundering/>; *see also*, NOAH HOROWITZ, *THE ART OF THE DEAL: CONTEMPORARY ART IN A GLOBAL FINANCIAL MARKET* 143-187 (2011)

³³ ADAM, *supra* note 16, at 132-34.

³⁴ THOMAS DACOSTA KAUFMANN, *COURT, CLOISTER AND CITY, 1450-1800*, 125-26 (1997).

³⁵ Alina Cohen, *In the Italian Renaissance, Wealthy Patrons Used Art for Power*, ARTSY (Aug. 20, 2018, 12:22 PM), <https://www.artsy.net/article/artsy-editorial-italian-renaissance-wealthy-patrons-art-power>.

³⁶ ADAM, *supra* note 16, at 88; Harvey Bezozi, *The Basics of Art Valuation*, WEALTH MGMT. (Dec. 8, 2017), <https://www.wealthmanagement.com/high-net-worth/basics-art-valuation>.

³⁷ Bezozi, *supra* note 36; Edward Ellis, *The Art of Money Laundering: How to Fight the Perfect Crime*, AML RIGHTSOURCE (Dec. 26, 2018), <https://www.amlrightsource.com/news/posts/money-laundering-artwork>.

universal lack of a regulatory body anywhere in the world that is authorized to oversee the valuation of artworks effectively makes pricing completely arbitrary.³⁸ The *Salvator Mundi*, discussed at the outset of this article, provides one of the more extreme but not at all unusual illustrations of this problem. In that work, we have a work that was purchased for an already astronomical \$127.5 million in 2015, then sold for almost four times that amount two years later.³⁹ Why the bidding on that work climbed so high remains unclear and exceeds justification even on the basis of heat-of-the-moment bidding.⁴⁰ In a frequently discussed case, known to have been attempted money-laundering-by-artwork, Brazilian banker Edegar Cid Ferreira was caught trying to ship an \$8 million painting by Jean-Michel Basquiat marked as worth just \$100 on its shipping manifest from Brazil to the U.S.⁴¹ The pertinent fact for the moment, though, is that in the 1990s, not long after Basquiat's death, the painting had sold for only \$79,500, a one-hundredth of its current value.⁴²

Over the last few decades, the art market has shifted and expanded dramatically.⁴³ For example, sales at auction of Impressionist and Modern works lost a significant part of their market share and in favor of Postwar and Contemporary works.⁴⁴ Nevertheless, even artists whose popularity is less subject to vagaries of taste can be subject to extreme variation in demand and price due to market forces extrinsic to the works themselves. For example, the upsurge in nationalistic

³⁸ Ellis, *supra* note 37.

³⁹ Scott Reyburn, *How This Leonardo's Mind-Blowing Price Will Change the Art Market*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/arts/design/salvator-mundi-leonardo.html>.

⁴⁰ Hannah Ellis-Petersen & Mark Brown, *How Salvator Mundi Became the Most Expensive Painting Ever Sold at Auction*, GUARDIAN (Nov. 16, 2017, 2:04 PM), <https://www.theguardian.com/artanddesign/2017/nov/16/salvator-mundi-leonardo-da-vinci-most-expensive-painting-ever-sold-auction>.

⁴¹ Eileen Kinsella, *Bad Banker's \$8 Million Basquiat Smuggled With Shipping Invoice for \$100 Returns Home*, ARTNET NEWS (June 19, 2015), <https://news.artnet.com/market/smuggled-basquiat-returned-brazil-309813>.

⁴² *Id.*

⁴³ See Sam Ro, *Wine, Stamps, and Art Values Have Smoked Bonds Since 1900*, BUSINESS INSIDER (Nov. 12, 2015, 6:14 PM), <https://www.businessinsider.com/values-of-wine-stamps-and-art-since-1900-2015-11>; Tim Schneider, *Goodbye Art World, Hello Art Industry: How the Art Market Has Transformed—Radically—Over the Past 30 Years*, ARTNET NEWS (Nov. 25, 2019), <https://news.artnet.com/market/how-the-art-world-became-the-art-industry-1710228>; *Artprice traces the Art Market's recent history via Sotheby's*, CISION PR NEWSWIRE (Dec. 1, 2020), <https://www.prnewswire.com/it/comunicati-stampa/artprice-traces-the-art-market-s-recent-history-via-sotheby-s-835562150.html>.

⁴⁴ See Schneider, *supra* note 43; *Artprice*, *supra* note 43 (discussing a variety of trend shifts in the art market).

sentiment in the U.S. following 9/11 caused the popularity of Norman Rockwell's paintings of Americana to soar, and consequently the price of his paintings at auction climbed steeply alongside.⁴⁵ The market for antiquities, such as a cuneiform tablet from the Assyrian Empire or statues from a Cambodian temple, would have been relatively stable in the past, but that market has also seen prices soar in the last decade.⁴⁶ Whether those antiquities were legally brought to market is a different question that also bears on money laundering.

The sale prices of more recent works—especially works by living artists—are much less predictable, and are particularly vulnerable to extrinsic manipulation.⁴⁷ This is partly because works by living artists do not exist in finite quantities, unlike the works of dead artists, and the sheer number of works by living or recently deceased artists vastly outnumber older works.⁴⁸ Today, living artists are mass producing art, partly due to technology, current tastes, and the trend toward financialization in the art market.⁴⁹ The rise of process art, digital art, and simple means of mechanical reproduction have been major contributors to financialization.⁵⁰ This combination of factors makes it very simple to manipulate the prices of works, and to influence buyers; in essence it allows galleries, dealers, and auction houses to “print[] money.”⁵¹ At any rate, for the time being, the art market seems capable of generating massive gains in wealth by its very volatility.⁵²

2. *The Financialization of Art*

What does the “financialization of art” mean? It means that art, instead of being purchased solely for its aesthetic, historical, and cultural significance, is being purchased as an investment tool.⁵³ To put

⁴⁵ Christopher Lopez, *In Plain Sight: Hiding Illicit Funds in Artwork*, BANKING EXCH. (Mar. 9, 2018, 11:45 PM), <https://www.bankingexchange.com/bsa-aml/item/7418-in-plain-sight-hiding-illicit-funds-in-artwork>.

⁴⁶ Van Duyne, *supra* note 24, at 79-80; Tara Loader Wilkinson, *Pricing the Priceless*, WALL ST. J. (Mar. 14, 2011, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748703373404576148002256713880>.

⁴⁷ See e.g., ADAM, *supra* note 16, at 37-38.

⁴⁸ See ADAM, *supra* note 16, at 37-40; Schneider, *supra* note 43.

⁴⁹ ADAM, *supra* note 16, at 37-40; Schneider, *supra* note 43.

⁵⁰ ADAM, *supra* note 16, at 40-47.

⁵¹ ADAM, *supra* note 16, at 37-40; cf. Tom Mashberg, *The Art of Money Laundering*, 56 FIN. & DEV. 30 (2019).

⁵² See ADAM, *supra* note 16, at 37-40. Cf. Mashberg, *supra* note 51 at 32 (noting the subjectiveness of pricing).

⁵³ *Financialization*, LEXICO, <https://www.lexico.com/en/definition/financialization> <https://www.lexico.com/en/definition/financialization> (last visited Mar. 12, 2021). Cf. *For Collectors Only*, LEBANON

the art market into context, this section outlines similarities and differences to other already regulated markets—specifically the real estate market, and the market in gems and precious metals. Like real estate or precious metals, art is an asset that holds and stores value reliably.⁵⁴ Whether this is an accurate statement is highly debatable.

The real estate market is the latest to come under the purview of anti-money laundering regulations because of extensive evidence that high value real estate, especially in Manhattan and in Miami, is being used by foreign officials and foreign criminals to launder money.⁵⁵ In the U.S., roughly seventy-eight percent of real estate transactions were already indirectly subject to BSA oversight, because the purchases are tied to mortgages from financial institutions.⁵⁶ The remaining twenty-two percent of real estate transactions are cash purchases by shell corporations, most of which are for properties costing millions of dollars.⁵⁷ In response, starting in 2016, and most recently, from March through August of 2019, FinCEN (the Financial Crimes Enforcement Network, the enforcement arm of the Department of the Treasury) has run pilot programs requiring title insurance companies to identify the beneficial owners of any property purchased by a limited liability company (LLC) or other shell company and whose value exceeds \$300,000.⁵⁸ The program was renewed and will continue through at

OPPORTUNITIES (Jan. 1, 2020) (quoting art dealers discussing the practice of purchasing art as an investment).

⁵⁴ See Ellis, *supra* note 37.

⁵⁵ 31 U.S.C. § 5312(a)(2)(U); BUSINESS LAW TODAY, *FinCEN Continues Emphasis on “Know Your Customer” Money Sources—This Time, Secret Real Estate Buyers*, AM. BAR ASSOC. (June 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/06/06_schar/; *US Regulators Tackle Money Laundering in the Luxury Home Market*, THOMSON REUTERS (Sept. 14, 2019), <https://legal.thomsonreuters.com/en/insights/articles/u-s-regulators-tackle-money-laundering-luxury-home-market>.

⁵⁶ THOMSON REUTERS, *supra* note 55; OFF OF THE HIGH COMM’R., *Financialization of Housing*, U.N. OFF. OF HUM. RTS., <https://www.ohchr.org/EN/Issues/Housing/Pages/FinancializationHousing.aspx> (last visited May 13, 2021).

⁵⁷ THOMSON REUTERS, *supra* note 55; Juliana B. Carter & Peter D. Hardy, *More on AML Reform: Artificial Intelligence, Beneficial Ownership, and Real Estate*, NAT’L L. REV. (Dec. 5, 2018), <https://www.natlawreview.com/article/more-aml-reform-artificial-intelligence-beneficial-ownership-and-real-estate>.

⁵⁸ THOMPSON REUTERS, *supra* note 55; Hardy, *supra* note 13.

least May 2021.⁵⁹ Legislation has been introduced to make the requirements permanent.⁶⁰

Another similar market, also subject to anti-money laundering regulation, is the precious metals, gemstone, and jewelry market; however, this extension of anti-money laundering regulations only applies to certain types of dealers, and enforcement has been limited.⁶¹ Vintage cars, wines (sometimes counterfeits of rare vintages) and liquor, and other luxury good and trade commodities are also used as money laundering vehicles.⁶² For example, wine estates in France are being purchased by foreign interests, especially by the Chinese (at least fifty-some to date) in what appears, at least in part, to be an attempt to move money out of China.⁶³ Wine, like art, is also a highly valued, fluid commodity.⁶⁴ The price stability of more common trade commodities, like fossil fuels, livestock, and other agricultural products, is due in part to these commodities' vastly larger market shares, rendering these commodities more difficult to manipulate and less useful as money

⁵⁹ *FinCEN Reissues Real Estate Geographic Targeting Orders for 12 Metropolitan Areas*, FinCEN: News (Nov. 5, 2020), <https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-2>.

⁶⁰ THOMPSON REUTERS, *supra* note 55; *see generally* Hardy, *supra* note 13; *FinCEN Again Extends Its Geographic Targeting Order to Address Money Laundering Through Real Estate*, GIBSON DUNN (May 18, 2020), <https://www.gibsondunn.com/fincen-again-extends-its-geographic-targeting-order-to-address-money-laundering-through-real-estate/>.

⁶¹ *Dealers in Precious Metals*, *supra* note 13. *See also* CASSARA, *supra* note 10, at 198-99; Kinsella, *Bad Banker*, *supra* note 41; *but see* Mühlemann, *supra* note **Error! Bookmark not defined.**, at 6 (noting that some stakeholders do not believe money laundering via gems and precious metals is a significant problem).

⁶² Melita Kiely, *Fourteen Arrested Over Suspected £40m Alcohol Fraud*, THE SPIRITS BUSINESS (Oct. 8, 2014), <https://www.thespiritsbusiness.com/2014/10/fourteen-arrested-over-suspected-40m-alcohol-fraud/>; Joseph V. Micallef, *What's in Your Cellar? Counterfeit Wines are a Multi-Billion Dollar Problem*, FORBES (Dec. 1, 2018), <https://www.forbes.com/sites/joemicallef/2018/12/01/whats-in-your-cellar-counterfeit-wines-are-a-multi-billion-dollar-problem/?sh=7470b4171c83>. *See also* CASSARA, *supra* note 10, at 198-99; David Mühlemann and Stefan Mbiyavanga, *Natural Resources and Money Laundering: Commodity and Precious Metals Deals from the Perspective of Swiss Money Laundering Law*, 2018 OECD GLOBAL ANTI-CORRUPTION AND INTEGRITY FORUM 6-7 (2018); Andrew Taylor, *Experts Warn 'Inconsistent' Laws Make luxury goods an easy target for money laundering*, SYDNEY MORNING HERALD (Dec. 29, 2019), <https://www.smh.com.au/national/experts-warn-inconsistent-laws-make-luxury-goods-an-easy-target-for-moneylaundering-20191218-p5317q.html>; MAX HEYWOOD, *Tainted Treasures, Money Laundering Risks in Luxury Markets* 5-6 (2017).

⁶³ Avi Jorisch, *Money Laundering Taints Wine Trade*, SOUTH CHINA MORNING POST (Oct. 28, 2013 9:30 PM), <https://www.scmp.com/comment/insight-opinion/article/1342072/money-laundering-taints-wine-trade>.

⁶⁴ *Id.*

laundering vehicles.⁶⁵ But, common money laundering techniques such as over- or under-valuing shipments, phantom shipments, and carousel transactions can still be used for trade-based money laundering.⁶⁶ The Basquiat scheme discussed above is a case of massive under-invoicing.⁶⁷

3. Peculiarities of the Art Market

Compared to the markets discussed above, the art market has a number of peculiar features that make it an attractive target for money launderers. First and foremost, the art market involves levels of secrecy and layers of obfuscation not found in any other licit commercial market.⁶⁸ There are no other circumstances in which the parties on both sides of a legitimate transaction for high value assets may remain anonymous.⁶⁹ And yet, the art market regularly conducts business in this manner.⁷⁰ Research has shown that from the end of World War II until 2000, almost ninety percent of the artworks that passed through London, under the auspices of the two largest auction houses in the world, listed no historical information at all.⁷¹

The extreme secrecy pervading the art market originates in the late 19th century, with the decline of the landed nobility in Europe.⁷² This coincided with the rise of the barons of industry and of the middle class during the Industrial Revolution.⁷³ Prior to the surge in overall societal wealth, art purchasing had been the domain of only the wealthiest and highest status individuals and institutions, including the Catholic Church, many of whose commissions were semi-public or public works meant to grace the interiors of churches and public spaces in the estates of the wealthy.⁷⁴ As the landed nobility's fortunes declined, they quietly started liquidating valuable assets, particularly artworks, but did so

⁶⁵ Frank H. Easterbrook, *Monopoly, Manipulation, and the Regulation of Futures Markets*, 59 J. OF BUS. S103 (1986); Joshua Kennon, *What Is a Commodity*, THE BALANCE, <https://www.thebalance.com/what-are-commodities-356089> (last updated June 24, 2020).

⁶⁶ Claudia Huesman, *TBML: What Is Trade-Based Money Laundering?* FICO: BLOG (Mar. 17, 2021), <https://www.fico.com/blogs/tbml-what-trade-based-money-laundering>; Jorsich, *supra* note 63.

⁶⁷ Kinsella, *Bad Banker*, *supra* note 41.

⁶⁸ FAUSTO MARTIN DESANCTIS, *MONEY LAUNDERING THROUGH ART: A CRIMINAL JUSTICE PERSPECTIVE* 2-3 (2013); Mashberg, *supra* note 51.

⁶⁹ Ellis, *supra* note 37.

⁷⁰ Daniel Grant, *Secrets of the (High-End) Art Market*, HUFFINGTON POST (Dec. 14, 2010 11:12 AM), https://www.huffpost.com/entry/secrets-of-the-highend-ar_b_796356.

⁷¹ DESANCTIS, *supra* note 68, at 60.

⁷² *The Banker's Guide to Art* (BBC Four television broadcast July 14, 2016).

⁷³ *Id.*

⁷⁴ *Id.*

through dealers who kept the sellers' identities hidden, in order to keep the sellers' financial straits hidden from their peers.⁷⁵

Over the next several decades, this coalesced into a system in need of standards higher than the "handshake."⁷⁶ Because the art market also permits dealers to completely control information between the parties to a sale, it is easy for unfair or shady dealings to run rampant. For example, someone could be transacting with him- or herself with no one else the wiser.⁷⁷ Past considerations of this issue have stopped short of calling out this practice for the problem that it is.⁷⁸ But, from a legal standpoint, this is a huge problem reaching far beyond the question of money laundering.⁷⁹

One of the biggest scandals that has broken in the last few years involves Russian billionaire Dmitri Rybolovlev (seller of the *Salvator Mundi*, discussed above) and the art dealer Yves Bouvier. Bouvier also figures prominently into the discussion of freeports later in this Comment. In 2015, Bouvier was arrested in Monaco on accusations of fraud and money laundering relating to the sale of a number of artworks, including some \$2 billion worth of artworks that Bouvier sold to Rybolovlev.⁸⁰ Besides the criminal charges brought in Monaco, Rybolovlev has also brought suit against Bouvier, alleging that Bouvier misled Rybolovlev as to Bouvier's financial interest in the art collection he built for Rybolovlev, to the tune of \$1 billion in losses.⁸¹

Over the course of about ten years, Bouvier helped Rybolovlev build a collection of masterworks by Gauguin, Picasso, Magritte, and many others, including the *Salvator Mundi*.⁸² Rybolovlev claims that Bouvier inflated the value of the artworks by purchasing the works from the sellers himself, then reselling them to Rybolovlev for a higher price, acting as the seller instead of as the agent of Rybolovlev, as Bouvier

⁷⁵ *Id.*

⁷⁶ DELOITTE, *supra* note 13, at 2-3; Georgina Adam, *How Transparent Is the Art Market?*, FIN. TIMES (Apr. 28, 2017), <https://www.ft.com/content/77cba886-251b-11e7-a34a-538b4cb30025>.

⁷⁷ *See infra*, section III(B)(1).

⁷⁸ DELOITTE, *supra* note 13, at 2-3; Adam, *supra* note 76.

⁷⁹ Discussions of further legal implications of the art dealer and gallery system, especially with respect to agency law governing the relationship between principles and agents are beyond the scope of this Comment.

⁸⁰ ADAM, *supra* note 16, at 21-22.

⁸¹ Eileen Kinsella, *Swiss Authorities Investigate Charges That 'Freeport King' Yves Bouvier Owes More Than \$100 Million in Back Taxes*, ARTNET NEWS (Sept. 6, 2017), <https://news.artnet.com/art-world/yves-bouvier-swiss-tax-charges-1072205>; ADAM, *supra* note 16, at 170-71.

⁸² ADAM, *supra* note 16, at 22, 167.

presented himself.⁸³ Rybolovlev alleges that Bouvier hid the profits he made for himself by obscuring the parties to the transactions.⁸⁴ Rybolovlev apparently discovered the deceit unintentionally.⁸⁵ After a messy transaction, Rybolovlev contacted the former owner of the painting and learned that Bouvier had not acted as Rybolovlev's agent; instead Bouvier had bought the painting himself and sold it to Rybolovlev in a separate transaction and at a substantial markup.⁸⁶ Bouvier had done the same, when he purchased the *Salvator Mundi* from Sotheby's in 2016 for \$80 million, then immediately resold it to Rybolovlev for \$127.5 million.⁸⁷

Rybolovlev is also suing Sotheby's, alleging that the auction house was complicit in the fraud; Sotheby's denies they had any knowledge that Bouvier intended to resell the painting to Rybolovlev.⁸⁸ Of the paintings that Rybolovlev bought from Bouvier, all except the *Salvator Mundi* were later resold at a phenomenal loss to Rybolovlev.⁸⁹ The disparity between the purchase and subsequent, lower resale prices on the rest of Rybolovlev's collection is likely helping to fuel the rumors that the astronomical sale price of the *Salvator Mundi* was the result of a money laundering conspiracy.⁹⁰ The fact that on top of the sales figures, Rybolovlev himself has been accused of money laundering is also likely fueling the *Salvator Mundi* conspiracy theory.⁹¹ The accusations against Rybolovlev arise from Rybolovlev's purchase of a large property in Palm Beach, Florida, from Donald Trump.⁹² That \$95 million purchase and the profit Rybolovlev made on resale were, like the

⁸³ Kinsella, *Swiss Authorities*, *supra* note 81; Sam Knight, *The Art-World Insider Who Went Too Far*, NEW YORKER (Jan. 31, 2016), <https://www.newyorker.com/magazine/2016/02/08/the-bouvier-affair>.

⁸⁴ Kinsella, *Swiss Authorities*, *supra* note 81; Knight, *supra* note 83.

⁸⁵ Knight, *supra* note 83.

⁸⁶ Kinsella, *Swiss Authorities*, *supra* note 81; Knight, *supra* note 83.

⁸⁷ ADAM, *supra* note 16, at 173; Knight, *supra* note 83.

⁸⁸ Margaret Carrigan, *Sotheby's Denied Dismissal of Rybolovlev's \$380m Lawsuit by New York Judge*, ART NEWSPAPER (June 26, 2019), <https://www.theartnewspaper.com/news/sotheby-s-denied-dismissal-of-rybolovlev-s-usd380m-lawsuit-by-new-york-judge>.

⁸⁹ See ADAM, *supra* note 16, 174-75.

⁹⁰ See Del Valle, *supra* note 1.

⁹¹ See Keith Larsen, *Russian Oligarch Sells Last Piece of former Trump Estate in Palm Beach for \$37M*, THEREALDEAL.COM (July 8, 2019), <https://therealdeal.com/miami/2019/07/08/russian-oligarch-sells-last-piece-of-former-trump-estate-in-palm-beach-for-37m>; Doreen Carvajal, *The Billionaire Who Bought Trump's Mansion Faces Scrutiny in Monaco*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/arts/design/dmitry-rybolovlev-monaco-investigation.html>.

⁹² Larsen, *supra* note 91; Carvajal, *supra* note 91.

Salvator Mundi, surprisingly profitable transactions on a property that had repeatedly failed to sell at a lower price.⁹³

C. THE EXTENT OF THE PROBLEM

In short, no one has a good grasp on the extent of the problem, in part because of the extreme market opacity. As such, it is important to acknowledge the fact that there is no agreement as to the frequency of tainted transactions, nor how much money is involved.⁹⁴ On top of the problems inherent in assigning accurate prices to works, the fact is that art crime continues to be difficult to define and categorize, and it is hardly ever separated out from data on other types of crimes.⁹⁵ Some scholars maintain that the use of art market to launder money is not a substantial enough problem to warrant further government action.⁹⁶ But estimates from sources like Interpol, FinCEN, and the FATF suggest that the amount of money laundered through the art market is likely around \$6 billion a year, with half of that amount relating back to financial crimes.⁹⁷ According to these agencies, by 2009, art-related crime had risen to the third-highest-grossing criminal trade annually.⁹⁸

Given the difficulty in estimating the extent of something that cannot be measured effectively, this remains conjecture, but all indications suggest that the problem is accelerating and expanding.⁹⁹ It may be tempting to let the art market remain out of the view of general public; however, arguments that the problem is too small to matter are not tenable. While arguing against regulation, as many stakeholders continue to do, may have been a reasonable position to take before about 2014 or 2015 (pre-Panama Papers), these arguments are no longer convincing.¹⁰⁰ One of the main arguments against art market regulation is that art is just too inconvenient to exploit because it is usually considered an illiquid asset; however, the same objection has

⁹³ Larsen, *supra* note 91; Carvajal, *supra* note 91.

⁹⁴ See CHARNEY, *supra* note 16, at xvii-xviii; See MARC BALCELLS, *Art Crime as White-Collar Crime*, in CULTURAL PROPERTY CRIME: AN OVERVIEW AND ANALYSIS OF CONTEMPORARY PERSPECTIVES AND TRENDS 96-110 (Joris Kila & Marc Balcells eds., 2015).

⁹⁵ BALCELLS, *White-Collar Crime*, *supra* note 94, at 101-04.

⁹⁶ See van Duyne, *supra* note 24, at 88.

⁹⁷ CHARNEY, *supra* note 16, at xvii-xviii; see also Mashberg, *supra* note 51.

⁹⁸ Mashberg, *supra supra* note 51; Kris Hollington, *After Drugs and Guns, Art Theft Is the Biggest Criminal Enterprise in the World*, NEWSWEEK (July 22, 2014), <https://www.newsweek.com/2014/07/18/after-drugs-and-guns-art-theft-biggest-criminal-enterprise-world-260386.html>.

⁹⁹ ADAM, *supra* note 16, at 190-92.

¹⁰⁰ See van Duyne, *supra* note 24, at 79-81. Admittedly, many of the anti-regulatory arguments were, in fact, written prior to 2014-15, but there have not been many retractions. For a discussion of the Panama Papers, see *infra* section III(A)(1).

been disproved for real estate.¹⁰¹ This also fuels the objections that the threshold value used to determine covered transactions in the 5th Anti-Money Laundering Directive (“5AMLD”) is too low.¹⁰² Yet, countries like Italy offer numerous examples of the heads of organized crime amassing huge, valuable collections of art for purposes of money laundering.¹⁰³

This argument at a minimum ignores the fact that the massive market for looted and smuggled antiquities is: (1) the source of many of these “low value” transactions, i.e. they are for the sale of items costing under \$10,000 (the standard dollar amount that triggers anti-money laundering reporting); and (2) providing funding to drug cartels and terrorist organizations.¹⁰⁴ As one commentator pointed out when rejecting this argument, the terrorist attacks on Paris in November 2015, cost less than \$90,000, and that the proceeds from the sale of just a few looted antiquities, even for only a few thousand dollars each, rapidly adds up to enough money to fund similar attacks.¹⁰⁵ In fact, the 2016 Brussels bombings were linked to a member of Al-Qaeda, Khalid El Bakraoui, who is known to have trafficked in looted antiquities before he was arrested in Belgium in 2016.¹⁰⁶

Another less-discussed issue has to do with the location of market growth. Some would argue that the huge uptick in transactions coming out of certain countries (China for example) merely reflects new access to and interest in the art market, following massive new wealth creation.¹⁰⁷ The idea that these purchases uniformly reflect an interest in art for its own sake is a difficult proposition to accept given evidence

¹⁰¹ See Dagirmanjian, *supra* note 16, at 701–04; Jake Reiter, *Think Real Estate Is Illiquid? Think Again*, GLOBEST.COM (Feb. 21, 2020), <https://www.globest.com/2020/02/21/think-real-estate-is-illiquid-think-again/>; Money Laundering Through Real Estate, SANCTION SCANNER, <https://sanctionscanner.com/blog/money-laundering-through-real-estate-318> (last visited Apr. 17, 2021).

¹⁰² See *infra*, Part IV.

¹⁰³ Maria Berlinguer, *L'arte è la criptoaluta delle mafie: così i clan ripuliscono il denaro sporco alle aste di tutto il mondo*, LA STAMPA (Feb. 10, 2020), <https://www.lastampa.it/topnews/primo-piano/2020/02/10/news/l-arte-e-la-criptovaluta-delle-mafie-cosi-i-clan-ripuliscono-denaro-sporco-alle-aste-di-tutto-il-mondo-1.38447447>.

¹⁰⁴ Lehr, *supra* note 8; Bojan Dobovšek, *Art, Terrorism, and Organized Crime*, in ART AND CRIME: EXPLORING THE DARK SIDE OF THE ART WORLD 64–69 (Noah Charney ed. 2009).

¹⁰⁵ Lehr, *supra* note 8.

¹⁰⁶ Lehr, *supra* note 8; *Brussels Linked to Illicit Antiquities Trade Which Funds Terrorism*, ANTIQUITIES COALITION (Nov. 1, 2016), <https://theantiquitiescoalition.org/brussels-linked-to-illicit-antiquities-trade-which-funds-terrorism/>.

¹⁰⁷ ADAM, *supra* note 16, at 63–64; David Keohane, *So You Want to Get Your Money Out of China?*, FIN. TIMES (Mar. 3, 2016), <https://www.ft.com/content/5426ecd0-87d2-3e15-bdc0-4719257f718b>.

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to the contrary.¹⁰⁸ Because art can be bought and sold through intermediaries using foreign accounts, high value purchases are a convenient method for the ultra-wealthy in China to conceal transactions whose actual purpose is to funnel cash out of the country, in order to avoid the risk of seizure by the government on real or falsified criminal charges.¹⁰⁹ Big-ticket purchases, like art and other luxury goods, provide a way to circumvent laws restricting cash flow out of China, which is otherwise limited to \$50,000 per year, per person.¹¹⁰

Even where there is no suspicion of criminal money laundering, there is plenty of evidence of *reputation* laundering, which feeds back into price manipulation in the market.¹¹¹ That, in turn, facilitates the overall exploitation of the art market. Reputation laundering is the use of status symbols, such as art, to give someone the appearance of being a cultured member of high society.¹¹² Cultivating appearances can grant access to previously closed elite social and business circles, which in turn can help to build the social and legal protections granted by wealth and high status.¹¹³ Reputation laundering is pursued by the newly ultra-wealthy and by the heads of cartels and organized crime alike.¹¹⁴ The newly ultra-wealthy in China are also rapidly opening private museums to showcase their collections in order to exploit the various tax advantages available to cultural and not-for-profit institutions and to exploit their art collections to help build reputations for themselves akin to their European and American counterparts.¹¹⁵

A final, common argument against regulation concerns the burden regulation would place on the market.¹¹⁶ Many stakeholders argue that

¹⁰⁸ See, e.g., Lopez, *supra* note 45.

¹⁰⁹ ADAM, *supra* note 16, at 57–59, 63–64; Keohane, *supra* note 107. See also, Jane Cai, *Revealed: the sneaky ways Chinese are moving money across the border*, S. CHINA MORNING POST (May 29, 2017), <https://www.scmp.com/news/china/economy/article/2096032/chinas-watchdog-tracks-underground-cash-trail>; *China's Money Exodus*, Bloomberg News (Nov. 2, 2015), <https://www.bloomberg.com/news/features/2015-11-02/china-s-money-exodus>.

¹¹⁰ See ADAM, *supra* note 16, at 63–64; Keohane, *supra* note 107.

¹¹¹ ADAM, *supra* note 16, at 57–59, 63–64; Ryan Casey, *Analyzing Criminality in the Market for Ancient Near Eastern Art*, 13 J. ART CRIME 39, 45 (2015).

¹¹² ADAM, *supra* note 16, at 57–59, 63–64; Casey, *supra* note 111, at 45; Alexander Cooley, et al., *The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations*, 29 J. DEMOCRACY 39, 39–40 (2018).

¹¹³ See Casey, *supra* note 111, at 45.

¹¹⁴ See Casey, *supra* note 111, at 40, 45.

¹¹⁵ ADAM, *supra* note 16, at 56–57, 60, 62–63.

¹¹⁶ DELOITTE, *supra* note 13, at 5; Mashberg, *supra* note 51; Lauren Bursey & Dean Nicyper, *Art Market May Be Asked to Reveal What's Behind the Curtain With Proposed Legislation*, N.Y. L. J. (Mar. 29, 2019),

the cost of implementing regulatory frameworks would be too high, especially for smaller-scale dealers and auction houses, which would make the cost outweigh the benefit.¹¹⁷ At least one highly partisan think tank estimates the cost of implementing regulations would be over \$1 billion annually, and that the regulations would have, at best, “limited” effectiveness.¹¹⁸ And yet, every other financial institution of any size already complies with anti-money laundering regulations and has implemented the procedures required by law.¹¹⁹ Another related, but ultimately trivial, objection that has been made a number of times by art dealers is that the amount of time it would take to comply with regulations would wipe out impulse purchases at art fairs.¹²⁰ Holding the inconvenience to buyers who possess the financial resources to impulse purchase artworks costing more than \$10,000 above the benefits to society at large that would result from market regulation—including reduced terrorism threats to political stability and infrastructure development made possible by increased tax revenue—is ethically indefensible.

III. Who, Why, and How

Next, it is necessary to establish who is laundering money in the art market, why they are doing so, and how the purchase and sale of artworks and antiquities is being exploited. There are a number of ways that money can be laundered using art.¹²¹ Some of the main reasons for laundering money include: making “dirty” money appear “clean;” tax evasion; terrorism financing; and the illicit transfer of money out of countries with unstable currencies or other governmental restrictions

<https://www.law.com/newyorklawjournal/2019/03/29/art-market-may-be-asked-to-reveal-whats-behind-the-curtain-with-proposed-legislation/>.

¹¹⁷ DELOITTE, *supra* note 13, at 5; Mashberg, *supra* note 51; Liz Palmer & John Martyn, *Attempt to Combat Dirty Money Has Shackled the Art Market*, TIMES (Feb. 13, 2020), <https://www.thetimes.co.uk/article/attempt-to-combat-dirty-money-has-shackled-the-art-market-h9vsnpt8n>.

¹¹⁸ David R. Burton, *Beneficial Ownership Reporting in the United States?*, HERITAGE FOUND. (Apr. 24, 2018), <https://www.heritage.org/economic-and-property-rights/commentary/beneficial-ownership-reporting-the-united-states>.

¹¹⁹ DELOITTE, *supra* note 13, at 3, 5.

¹²⁰ Scott Reyburn, *Britain Moves to Regulate Its Art Trade. Bring your ID.*, N.Y. TIMES (Jan. 10, 2020.) <https://www.nytimes.com/2020/01/10/arts/design/uk-art-money-laundering.html#:~:text=Its%20Art%20Trade,-Bring%20Your%20ID.,identity%20of%20buyers%20and%20sellers>.

¹²¹ See *e.g.*, CASSARA *supra* note 10, at 204-06; Mashberg, *supra* note 51.

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on wealth and cash flow.¹²² Shell corporations and freeports (a type of tax-free trade zone discussed below) plays a big role in many of these transactions.¹²³

A. WHO'S LAUNDERING MONEY THROUGH ART?

There are a few broad categories of persons involved in money laundering via the art market: (1) the ultra-wealthy; (2) terrorist organizations; and (3) traditional organized crime operations, such as the mafia and drug cartels.¹²⁴ While terrorism and organized crime are flashier problems that typically attract wider public attention, preventing tax evasion is equally, if not more important, because tax evasion facilitates funds terrorism and organized crime.¹²⁵ Furthermore, the techniques used to launder the proceeds of both are substantially similar.¹²⁶

1. *Financial Crimes of the Rich and Famous*

One of the challenges in confronting money laundering in the art market is that much of it is related to white-collar crime, which is hard to detect and assess.¹²⁷ In the U.S., most art crime (80-90 percent) is likely committed from within the art market, some of it by museums and academia.¹²⁸ Even when most parties are acting in good faith, given that \$6 billion or more worth of art market transactions (roughly 10 percent of the overall value of a \$64 billion market in 2019) are estimated to be criminally motivated, it seems very possible that many market participants are unwittingly made party to criminal transactions each

¹²² CASSARA *supra* note 10, at 204-06; Mashberg, *supra* note 51; LAURA GOLDZUNG, ANTI-MONEY LAUNDERING, DEALERS IN PRECIOUS METALS, STONES, OR JEWELS, ELEMETAL DIRECT 18 (Mar. 27, 2015).

¹²³ See Matt Egan, *The Art World Has a Money Laundering Problem*, CNN BUSINESS (July 29, 2020) <https://www.cnn.com/2020/07/29/business/art-money-laundering-sanctions-senate/index.html>; Scott Reyburn, *What the Panama Papers Reveal About the Art Market*, N.Y. TIMES (Apr. 11, 2016), <https://www.nytimes.com/2016/04/12/arts/design/what-the-panama-papers-reveal-about-the-art-market.html>.

¹²⁴ See CHARNEY, *supra* note 31, at xvii-xviii; Dobovšek, *supra* note 104, at 64-69; Mashberg, *supra* note 51.

¹²⁵ See *The IMF and the Fight Against Illicit and Tax Avoidance Related Financial Flows*, INT'L MONETARY FUND Factsheet (Mar. 8, 2021), <https://www.imf.org/en/About/Factsheets/Sheets/2018/10/07/imf-and-the-fight-against-illicit-financial-flows>; Rui Tavares, *Thematic Paper on Money Laundering: Relationship between Money Laundering, Tax Evasion and Tax Havens.*, SPECIAL COMM. ON ORGANISED CRIME, CORRUPTION AND MONEY LAUNDERING (CRIM) 2012- 2013, 1, 5-7 (2013).

¹²⁶ Tavares, *supra* note 125, at 6.

¹²⁷ BALCELLS, *White-Collar Crime*, *supra* note 94, at 101.

¹²⁸ DESANCTIS, *supra* note 68, at 53.

year.¹²⁹ And because the U.S. criminalizes willful blindness, even market participants otherwise acting within the law could incur criminal liability if they choose not to verify the other parties to the transaction; as public awareness of money laundering in the art market grows, plausibly deniability cover seems likely to diminish.¹³⁰ A culture of “don’t ask, don’t tell” is especially prevalent in the antiquities trade.¹³¹ Notably, willful blindness liability is already imposed on parties to fraudulent real estate transactions, so it should be no greater hurdle to introduce willful blindness liability into the art market.¹³²

Tax evasion is one crime to which money laundering in the art market is tied.¹³³ Laws against tax evasion are underenforced and the negative effects are underestimated, probably in part because tax evasion is often considered a “victimless” crime, despite the fact that its perpetrators may have tremendous social, economic, and political influence.¹³⁴ The fact that white-collar financial crimes are treated as crimes of impunity and are criminally inconspicuous has obscured both the extent of the problem and the nature of the criminal actions.¹³⁵ But financial crimes, including criminal tax evasion are *not* victimless crimes.¹³⁶ Tax evasion undermines social stability at all levels by depriving governments of tax revenues they cannot afford to lose.¹³⁷

The difficulty in estimating the financial cost of tax evasion via the art market is compounded by the fact that there is very little data on tax evasion broken down by income bracket, and by the fact that there is little data on how art purchasing habits correlate to income bracket;

¹²⁹ See Casey, *supra* note 111, at 41-42; CHARNEY, *supra* note 16, at xvii-xviii; Egan, *supra* note 123; Christopher Bradley, *Artworks As Business Entities: Sculpting Property Rights by Private Agreement*, 94 TUL. L. REV. 247, 297 (2020); Jane Zimmerman, *Don't Let the Beauty of Art Disguise Money Laundering*, FINEXTRA, (Dec. 17, 2020) <https://www.finextra.com/blogposting/19678/dont-let-the-beauty-of-art-disguise-money-laundering>.

¹³⁰ DESANCTIS, *supra* note 68, at 57.

¹³¹ Casey, *supra* note 111, at 41-42.

¹³² Hannah Purkey, Note, *The Art of Money Laundering*, 22 FLA. INT'L L. 111, 132-33 (2010).

¹³³ See Zachary Small, *Does the Art World Have a Money Laundering Problem*, HYPERALLERGIC: NEWS (Oct. 8, 2018), <https://hyperallergic.com/465736/does-the-art-world-have-a-money-laundering-problem/>.

¹³⁴ Casey, *supra* note 111, at 40; DESANCTIS, *supra* note 68, at 7; Sarah K. Mazurek, Note, *The Invisible Crime: Exploring How Perceptions of Victimhood and the Art Market May Influence Art Fraud Reporting*, 26 INT'L J. OF CULTURAL PROP. 413, 417 (2019).

¹³⁵ Casey, *supra* note 111, at 40-41.

¹³⁶ Jo Ann Barefoot, *The Fight Against Financial Crime Has Just Begun*, AMERICAN BANKER (Oct. 28, 2019, 9:00 AM EDT), <https://www.americanbanker.com/opinion/the-fight-against-financial-crime-has-just-begun>.

¹³⁷ Cf. Lehr, *supra* note 8 (demonstrating that the problem of tax evasion exists in the U.S.); Tavares, *supra* note 125, at 2.

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however, one source suggests that at least one in five high net worth individuals collects art.¹³⁸ To give some perspective, in 2018, adults with more than \$1 million in assets represented the wealthiest 0.8 percent of the world's population, or about 42 million people, and held 44.8 percent of global wealth.¹³⁹ If, as has been suggested, one in five of these individuals collects art, that would be approximately 8.4 million people.¹⁴⁰ In a self-reported survey, a little over 67 percent of the art buyers who made purchases online as a financial investment, had a net worth of at least \$100,000, and over a third of them were high to ultra-high net worth individuals; these individuals have \$1 million plus in assets.¹⁴¹

Data from 2001 also indicates that the top 10 percent of earners were responsible for 61 percent of tax evasion in the U.S., and that the top 1 percent of earners were responsible for 28 percent of tax evasion, meaning overall rates of tax evasion are likely much higher for higher income individuals.¹⁴² A newly published study by the I.R.S. found that the top one percent of earners accounted for more than a third of unpaid federal taxes, and that the top five percent of earners are hiding over 20 percent of their incomes. In the most recent official data available from the IRS (fiscal years 2011-2013), 14.2 percent, or about \$381 billion of the federal income taxes that U.S. taxpayers owed went unpaid, which would have covered over 50 percent of the 2013 federal budget deficit; these numbers were similar for 2008-2010.¹⁴³ The United Nations estimates the worldwide cost of revenue lost to financial crimes exceeds \$1.6 trillion annually.¹⁴⁴

¹³⁸ *Who is Buying Art Right Now?*, ARTWORK ARCHIVE, <https://www.artworkarchive.com/blog/who-is-buying-art-right-now> (last visited Jan. 22, 2021).

¹³⁹ Dylan Matthews, *Are 26 Billionaires Worth More than Half the Planet? The debate, explained*, VOX (June 22, 2019 3:00 PM), <https://www.vox.com/future-perfect/2019/1/22/18192774/oxfam-inequality-report-2019-davos-wealth>.

¹⁴⁰ See ARTWORK ARCHIVE, *supra* note 156.

¹⁴¹ ARTSY, *8 Key Facts About Online Art Collectors* (Nov. 5, 2019 10:20 AM), THE ONLINE ART COLLECTOR REPORT 2019, <https://www.artsy.net/article/artsy-editorial-overview-online-art-collectors>.

¹⁴² William G. Gale & Aaron Krupkin, *How Big Is the Problem of Tax Evasion?*, BROOKINGS INSTITUTE (Apr. 9, 2019), <https://www.brookings.edu/blog/up-front/2019/04/09/how-big-is-the-problem-of-tax-evasion/>; Andrew Johns & Joel Slemrod, *The Distribution of Income Tax Noncompliance*, 63 NAT'L TAX J. 397-418, 404 (2010) (reporting 2001 data).

¹⁴³ R.S., FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP ESTIMATES FOR TAX YEARS 2011-2013 1, 8 (2019); Erin Duffin, *Surplus of Deficit of the U.S. Government's Budget in Fiscal Years 2000-2025*, STATISTA (Apr. 12, 2021), <https://www.statista.com/statistics/200410/surplus-or-deficit-of-the-us-governments-budget-since-2000/>.

¹⁴⁴ Barefoot, *supra* note 136.

Tax evasion also fosters or widens economic and social inequality, and “produces a *de facto* division” between the privileged and non-privileged.¹⁴⁵ Prosecuting money laundering in the art market could result in substantial progress in the dismantling tax evasion schemes. In order to avoid confusion and to clarify terms: tax *avoidance* (legally reducing one’s tax burden) is not criminal, but tax *evasion* is.¹⁴⁶ Tax evasion is defined as “an illegal activity in which a person or entity deliberately avoids paying a true tax liability;” so because the FATF considers self-laundering money to be possible and it is additive to the predicate crime (here, tax evasion), a person could be guilty of both crimes simultaneously.¹⁴⁷ The same is true in the U.S.: according to the IRS Code, both illegal non-payment and illegal under-payment of taxes are crimes (usually the failure to pay must be intentional), and tax evasion is a predicate crime to money laundering.¹⁴⁸ Under 18 U.S.C § 1956, tax evasion is a predicate crime to money laundering in the U.S., meaning that the proceeds of tax crimes are within the scope of money laundering enforcement.¹⁴⁹ Furthermore, according to both the U.S. Code and FATF, smuggling (which would include the illegal importation of artworks and looted antiquities) is also a predicate crime to money laundering.¹⁵⁰ Tax evasion laws, like 26 U.S.C. § 7201 should therefore cover: undeclared capital gains from the sale of artworks; any monies that are owed for taxes, such as a luxury tax on the purchase of the artworks; and any money hidden from other legal proceedings.¹⁵¹

¹⁴⁵ Tavares, *supra* note 125, at 3.

¹⁴⁶ Julia Kagan, *Tax Avoidance*, INVESTOPEDIA, https://www.investopedia.com/terms/t/tax_avoidance.asp, (last updated Mar. 13, 2021); Julia Kagan, *Tax Evasion*, INVESTOPEDIA, <https://www.investopedia.com/terms/t/taxevasion.asp>, (last updated May 29, 2020); Federal Taxes, *Tax Avoidance Is Legal; Tax Evasion Is Criminal*, WALTERSKLUWER BIZFILLINGS, <https://www.bizfilings.com/toolkit/research-topics/managing-your-taxes/federal-taxes/tax-avoidance-is-legal-tax-evasion-is-criminal> (last visited Apr. 18, 2021).

¹⁴⁷ Kagan, *Tax Evasion*, *supra* note 146; Muhlemann, *supra* note **Error! Bookmark not defined.**, at 8.

¹⁴⁸ Kagan, *Tax Evasion*, *supra* note 146; 18 U.S.C. § 1956 (2016); 26 U.S.C § 7201 (1982).

¹⁴⁹ 18 U.S.C. § 1956; 26 U.S.C § 7201.

¹⁵⁰ 18 U.S.C. § 1956; 26 U.S.C § 7201. *See* 18 U.S.C. § 545 (2020); Tavares, *supra* note 125, at 7; USLEGAL.COM, *Smuggling Law and Legal Definition*, <https://definitions.uslegal.com/s/smuggling/> (last visited Jan. 22, 2021).

¹⁵¹ 26 U.S.C § 7201. *Cf.* Jason Fernando, *Capital Gains Tax*, INVESTOPEDIA, https://www.investopedia.com/terms/c/capital_gains_tax.asp (last updated Apr. 22, 2021); Julia Kagan, *What Is a Luxury Tax*, INVESTOPEDIA, https://www.investopedia.com/terms/l/luxury_tax.asp (last updated July 19, 2020); Dan Moskowitz, *How Collectibles Are Taxed*, INVESTOPEDIA, <https://www.investopedia.com/articles/personal-finance/061715/how-are->

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In other words, the money that was not paid by avoiding customs duties or by hiding the true ownership of an artwork via tax havens or other vehicles (both would be considered smuggling) is a form of tax evasion, and the minute the funds derived from the sale of an artwork are reintroduced into global financial networks as part of a new transaction, the transaction becomes an act of money laundering.¹⁵² Returning yet again to Dmitri Rybolovlev, according to the International Consortium of Investigative Journalists, Rybolovlev transferred ownership of his art collection to one of his shell corporations in 2014, in order to move it out of the reach of divorce proceedings.¹⁵³ Rybolovlev claimed that his intentions were only related to asset protection and estate planning.¹⁵⁴ However, if it turns out he did move the collection out of reach of the divorce proceedings, that could be subject to legal action.

In April 2016, a massive number of documents were leaked from Panamanian law firm, Mossack Fonseca, exposing terabytes worth of financial and other information that demonstrated exploitation of tax havens dating back to the 1970s.¹⁵⁵ The “Panama Papers”, as they are now called, provided a massive trove of financial information about dozens of wealthy and politically powerful individuals and exposed a variety of kinds of criminal exploitation of these off-shore accounts.¹⁵⁶ Indications as to the extent to which off-shore accounts and international tax havens were being used for tax evasion and money laundering was among the revelations.¹⁵⁷ The Panama Papers also exposed a number of off-shore holdings that directly implicated the art

collectibles-taxed.asp (last updated Feb. 1, 2021) (providing examples of the types of taxes that would be due on luxury goods such as art).

¹⁵² Cf. Anthony Verni, *Money Laundering is Tax Evasion*, VERNI TAX LAW (Feb. 25, 2016), <https://www.vernitaxlaw.com/money-laundering-is-tax-evasion/>; Muhlemann, *supra* note **Error! Bookmark not defined.**, at 9.

¹⁵³ Reyburn, *Panama Papers*, *supra* note 123.

¹⁵⁴ Reyburn, *Panama Papers*, *supra* note 123.

¹⁵⁵ Juliette Garside, Holly Watt, & David Pegg, *The Panama Papers: How the World's Rich and Famous Hide Their Money Offshore*, *GUARDIAN* (Apr. 3, 2016), <https://www.theguardian.com/news/2016/apr/03/the-panama-papers-how-the-worlds-rich-and-famous-hide-their-money-offshore>. The Panama Papers exposed a network of over 214,000 tax havens whose users included world leaders, celebrities, and other wealthy individuals from 200 different nations. Will Kenton, *The Panama Papers: What You Should Know*, *INVESTOPEDIA*, <https://www.investopedia.com/terms/p/panama-papers.asp> (last updated Jun. 25, 2020).

¹⁵⁶ Garside, *supra* note 152; Kenton, *supra* note 152.

¹⁵⁷ Kenton, *supra* note 152.

market. The leak exposed the extent to which art market transactions were being abused to advance illicit financial activities.¹⁵⁸

While not all of the leaked information concerning art collections and transactions revealed criminal activity, the Panama Papers shined a negative light onto some of the inner workings of the art market and illustrated exactly how murky and prone to secretive dealings and double-dealings the art market is.¹⁵⁹ For example, the Panama Papers revealed that much of the highly respected Ganz Collection was not actually sold by noted collectors Victor and Sally Ganz, when it was auctioned off in 1997, but by British financier Joseph Lewis, who had purchased the collection several months before.¹⁶⁰ There is no evidence to suggest that this particular sale was illegal or illegitimate, but at the time of sale the buyers falsely believed they were purchasing works directly from widely respected collectors.¹⁶¹ This is important for two reasons: first, it demonstrates the absurd level of secrecy the art market maintains; and second, it demonstrates how much the image and stature of the perceived buyers and sellers matter. The fact that the sale was a “flip” (a quick resale, like in real estate) also displays the extent to which art market participants are treating artworks as financial assets.¹⁶² The truth of these transactions exposes ways in which art sales and ownership, even when not strictly illegal, are at least unethical.¹⁶³ The Ganz Collection sale also set a record at the time for private auctions, and is one of the events that set the stage for the massive, high value sales that have occurred subsequently, including the \$450 million sale of the *Salvator Mundi*.¹⁶⁴ A number of other ultra-high value sales are now known to have been money laundering schemes.¹⁶⁵

On the shadier to illegal end of the spectrum, the Panama Papers exposed a prominent family, widely involved in the international art trade, the Nahmads, and a number of other prominent art collectors as

¹⁵⁸ See generally JAKE BERNSTEIN, *SECRECY WORLD: INSIDE THE PANAMA PAPERS INVESTIGATION OF ILLICIT MONEY NETWORKS AND THE GLOBAL ELITE* (2017).

¹⁵⁹ Bursey, *supra* note 116; Noah Charney, *Notes on the Art Market and the Panama Papers*, 15 J. ART CRIME 105, 106 (2016); Sarah Cascone, *Panama Papers Reveal Secret Behind Billionaire's Involvement in Ganz Collection*, ARTNET NEWS (Apr. 8, 2016), <https://news.artnet.com/market/picasso-panama-papers-ganz-collection-469646>.

¹⁶⁰ Bursey, *supra* note 116; CHARNEY, *Notes on the Art Market*, *supra* note 117.

¹⁶¹ Bursey, *supra* note 116; CHARNEY, *Notes on the Art Market*, *supra* note 117.

¹⁶² Reyburn, *Panama Papers*, *supra* note 123.

¹⁶³ See, ADAM, *supra* note 16, at 178-82.

¹⁶⁴ Cascone, *supra* note 159; Egan, *supra* note 123; Reyburn, *Panama Papers*, *supra* note 123.

¹⁶⁵ See ADAM, *supra* note 16, at 178-82; Egan, *supra* note 123.

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complicit in a number of suspicious and misleading transactions.¹⁶⁶ One of the controversies that was exposed concerns a restitution claim for a painting by Amedei Modigliani stolen by the Nazis during World War II.¹⁶⁷ The International Art Center (“IAC”), a Panama-based entity, purchased the painting in 1996.¹⁶⁸ Despite long-standing rumors and assumptions of their association, the Nahmad family claimed to hold no financial interests in the IAC, and therefore argued they could not be sued by the claimants for the return of the painting.¹⁶⁹ However, the Panama Papers revealed that the Nahmad family has controlled the IAC since the 1990s; since 2014, the IAC’s sole owner had been the family patriarch, David Nahmad.¹⁷⁰ Meanwhile, Hillel (Helly) Nahmad, one of David Nahmad’s sons and owner of the Helly Nahmad Gallery in New York City, was convicted of running an illegal gambling ring, and narrowly escaped racketeering, money laundering, and conspiracy charges stemming from his art gallery dealings.¹⁷¹ Nahmad also stated before the court both that his father’s art world dealings were unethical, and in a wiretapped phone call from 2014 implied that cheating and lying for the purposes of creating wealth was rampant in the art trade.¹⁷²

2. Financing Terrorism and Aiding Organized Crime

Financing terrorism and organized crime, including arms and drug trafficking, is another serious issue that contributes to the urgent need for money laundering reform. While many stakeholders are dubious that either terrorist organizations or heads of organized crime are purchasing art to launder criminal proceeds at a particularly high rate, there is evidence that both terrorist organizations and organized crime syndicates are using looted artworks and antiquities as a source of

¹⁶⁶ See ADAM, *supra* note 16, at 177-78; Reyburn, *Panama Papers*, *supra* note ; Jake Bernstein, *The Art of Secrecy*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 7, 2016), <https://www.icij.org/investigations/panama-papers/20160407-art-secrecy-offshore/>.

¹⁶⁷ Reyburn, *Panama Papers*, *supra* note 123.

¹⁶⁸ ADAM, *supra* note 16, at 177-78; Reyburn, *Panama Papers*, *supra* note 123.

¹⁶⁹ ADAM, *supra* note 16, at 177-78; Reyburn, *Panama Papers*, *supra* note 123.

¹⁷⁰ ADAM, *supra* note 16, at 177-78; Laura Gilbert, *Legal Battle Over Modigliani Painting Rumbles On*, ART NEWSPAPER (Apr. 20, 2018, 9:26 AM), <https://www.theartnewspaper.com/news/legal-battle-over-modigliani-painting-rumbles-on>; Reyburn, *supra* note 123.

¹⁷¹ Ross Barkan, *Art Crime Pays: Trump Pardons Helly Nahmad, the Art World’s Cartoon Villain*, VILLAGE VOICE (Feb. 2, 2021), <https://www.villagevoice.com/2021/02/02/art-crime-pays-trump-pardons-helly-nahmad-the-art-worlds-cartoon-villain/>.

¹⁷² *Id.*

funding.¹⁷³ Since artworks and antiquities are usually highly portable, terrorist groups and organized crime organizations are moving these objects using the same techniques and along the same channels traditionally used to move drugs, weapons, and other contraband, strengthening their networks in the process.¹⁷⁴ Even when there are signs that an item was looted, these objects are being introduced into the licit market.¹⁷⁵ Once the object is introduced into the art market, licit funds transferred from the buyers to the looters become available for use within the global financial system.¹⁷⁶

Evidence comes from several sources, including the United Nations Security Council. The Security Council has been monitoring the looting activities of Al-Qaeda, the Islamic State in Iraq and the Levant (“ISIL”), and the Taliban via satellite for several years.¹⁷⁷ Starting at least as far back as 2014 or 2015, the UN began collecting copious evidence of the large scale looting of archeological sites in insurgent-held territories across the Middle East.¹⁷⁸ From 2015 onward, there is also evidence that suggests ISIL has put in place specific bureaucratic structures to manage the looting and the proceeds generated once the antiquities are brought up for sale.¹⁷⁹

Evidence has also been collected by the U.S. Attorney’s Office for the District of Columbia, as demonstrated by a lawsuit filed in 2016.¹⁸⁰ The lawsuit sought forfeiture of antiquities associated with ISIL, and also demonstrated that ISIL had set up a specific bureaucratic structures to extract financial gains from systematic looting and smuggling.¹⁸¹ Court documents also revealed that many of the looted antiquities had been professionally prepared for the market.¹⁸² One of the usual giveaways that an item was looted is evidence of dirt on the object,

¹⁷³ Berlinguer, *supra* note 103; Lehr, *supra* note 8; Roy G. Dixon III, *The New York Department of Financial Service’s New Anti-Money Laundering Regulation: A Model for Improvement*, 21 N.C. BANKING INST. 383, 383-384 (2017).

¹⁷⁴ Lehr, *supra* note 8; Mashberg, *supra* note 51; Bo Leung, *After 50 Years, Battle to Protect Culture Continues*, CHINA DAILY (Aug. 26, 2019), http://www.chinadaily.com.cn/cndy/2019-08/26/content_37505408.htm.

¹⁷⁵ Lehr, *supra* note 8; Leung, *supra* note 174; Mashberg, *supra* note 51.

¹⁷⁶ See Casey, *supra* note 111, at 40-42; Lehr, *supra* note 8; Leung, *supra* note 174; Mashberg, *supra* note 51.

¹⁷⁷ Hans-Jakob Schindler & Frederique Gautier, *Looting and Smuggling of Artifacts as a Strategy to Finance Terrorism Global Sanctions as a Disruptive and Preventive Tool*, 26 INT’L J. OF CULTURAL PROP. CRIME 332-333 (2019).

¹⁷⁸ *Id.* at 332

¹⁷⁹ *Id.* at 332

¹⁸⁰ *Id.* at 333.

¹⁸¹ *Id.* at 333.

¹⁸² *Id.* at 333.

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indicating that it only recently came out of the ground.¹⁸³ If the object is not listed on a stolen artworks register yet, an inventory code painted on the bottom of the object is usually evidence that the object was stolen from a museum or another location, such as a church or shrine.¹⁸⁴

In another case currently underway in Switzerland, the Swiss Federal Customs Administration (FCA) and Federal Office of Culture (FOC) seized over 1,200 items from antiquities dealer Hicham Aboutaam and his clients Lynda and William Beierwaltes.¹⁸⁵ The seizure was part of a larger operation in which Swiss authorities confiscated more than 12,000 objects of suspicious provenance from a Geneva warehouse.¹⁸⁶ Aboutaam and the Beierwaltes, residents of New York and Colorado respectively, sued for a declaratory judgment against the Swiss authorities for the return of the objects.¹⁸⁷ The suit was dismissed by the U.S. District Court for the Southern District of New York on a number of grounds.¹⁸⁸ This is also not the first time that Aboutaam was implicated in the sale of looted antiquities.¹⁸⁹ As recently as 2014, Aboutaam had a sarcophagus on display in his gallery, which was connected to a massive archive of looted antiquities seized in Switzerland in 2002; Aboutaam refused to identify the buyer of the sarcophagus on confidentiality grounds.¹⁹⁰ Aboutaam also pled guilty to federal charges of falsifying customs documents in 2004.¹⁹¹

B. METHODS FOR LAUNDERING MONEY USING ART

There are multiple methods for using art to launder money, ranging from the usual, widespread methods to some methods unique to the art market. The techniques range from traditional placement, layering, and integration using financial assets, to securities fraud, and to financial arrangements that do not exist outside the art market.

¹⁸³ Lehr, *supra* note 8.

¹⁸⁴ Lehr, *supra* note 8.

¹⁸⁵ *Aboutaam v. L'office Federale de la Culture de la Confederation Suisse*, 18-CV-11167, 2019 U.S. Dist. LEXIS 163427, at *3-5 (S.D.N.Y. Sept. 24, 2019).

¹⁸⁶ *Aboutaam*, 2019 U.S. Dist. LEXIS 163427, at *3-4.

¹⁸⁷ *Aboutaam*, 2019 U.S. Dist. LEXIS 163427, at *3-6.

¹⁸⁸ *Aboutaam*, 2019 U.S. Dist. LEXIS 163427, at *13-16.

¹⁸⁹ Casey, *supra* note 111, at 46-47.

¹⁹⁰ Casey, *supra* note 111, at 47.

¹⁹¹ Casey, *supra* note 111, at 47.

1. *Cleaning “Dirty” Money By Combining Art with Traditional Techniques*

“Cleaning” the proceeds of criminal activities, such as smuggling, and drugs or arms sales, is often accomplished through high-value cash transactions, of which there are many in the art market, just like in markets for other high value goods.¹⁹² So for example, the person looking to insert their illicit funds into licit financial markets would make a high-value purchase such as a \$10 million painting (or piece of real property, a diamond necklace, or a rare Swiss watch), and turn around and sell it as quickly as possible, even at or purposefully at a loss in order to give the money a legitimate source when the sale proceeds are transferred to the launderer by a bank.¹⁹³ Indeed the secrecy of the art market has likely become a major facilitator of this kind of transaction. As noted above, a person could transact with himself, thereby cleaning funds just by using an art dealer or auction house as a conduit to transfer money from one account to another.

2. *Market Manipulation*

Another recent high profile case illustrating the use of market manipulation to launder money, involves UK art dealer Matthew Green and the Mauritius based investment firm Beaufort Securities.¹⁹⁴ Matthew Green is the son of Richard Green, a famed art dealer in the Mayfair district of London, who was expected to take over the gallery from his father until he became entangled in securities fraud.¹⁹⁵ By the time Green fell in with Beaufort in 2017, the company had been selling worthless securities for quite some time. Beaufort had been laundering their profits from the securities in two main ways: by layering money into the financial markets little by little to prevent regulators from noticing (a technique commonly referred to as “smurfing”), and via the

¹⁹² See van Duyne, *supra* note 24, at 80-81.

¹⁹³ Cf. CASSARA, *supra* note 10 at 205 (explaining traditional money “cleansing” techniques).

¹⁹⁴ Melanie Gerlis, *Laundering Picasso: British Dealer Among Accused in \$50m case*, FIN. TIMES (Mar. 9, 2018), <https://www.ft.com/content/03b9a598-2136-11e8-8d6c-a1920d9e946f>; Anny Shaw, *London Dealer Matthew Green accused of selling art used to secure more than £2m in loans*, ART NEWSPAPER (Nov. 19, 2018), <https://www.theartnewspaper.com/news/london-dealer-matthew-green-accused-of-selling-art-used-to-secure-more-than-gbp2m-in-loans>; Phoebe Southworth, *Fine Art Dealer Ran Up £10m in Debts Then Fled to Rehabilitation Clinic in Spain to Evade Furious Creditors*, TELEGRAPH (Jan. 11, 2020), <https://www.telegraph.co.uk/news/2020/01/11/fine-art-dealer-ran-10m-debts-fled-rehabilitation-clinic-spain/>.

¹⁹⁵ Shaw, *Matthew Green*, *supra* note 194; Mashberg, *supra* note 51.

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rapid turnover of real estate, which they purposefully sold at a loss.¹⁹⁶ Green allegedly agreed to accept £6.7 million (about \$9 million USD at the time) to forge sales documents for a painting by Picasso, store it for a while, then “buy it back” from Beaufort for a lower price.¹⁹⁷ For his trouble, Green was going to retain between 5 and 10 percent of the laundered cash as payment.¹⁹⁸ Green was caught when he sold the works that had been used as loan collateral without first repaying the loans as part of the U.S. investigation into Beaufort Securities that had been ongoing before even Green became involved in the scheme.¹⁹⁹ Indictments brought by U.S. prosecutors quote Green as allegedly saying, during a tape-recorded conversation, “the art trade is the only market that is this unregulated,” and that a client “could even buy the art under a false name with no repercussions.”²⁰⁰

The Green case is a useful illustration of the price manipulation possible in the art market. The painting that was exploited in this scheme, Picasso’s *Personnages* (1965), was last offered for public sale, in 2010, by Christie’s London, but failed to sell.²⁰¹ At the time, it was valued between £3 million and £5 million (\$4 million to \$7 million USD).²⁰² The ownership records indicate only such provenance as: “a Paris gallery, a private collection in Switzerland, a private collection in Sweden, a Berlin Gallery,” and that an unknown buyer had acquired the painting in 2000.²⁰³ Because the art market is so opaque, it is not clear whether Green acquired the painting for himself, (as Yves Bouvier did with the paintings he sold to Dmitri Rybolovlev) or whether he was acting on behalf of a consignor.²⁰⁴ Green is also alleged by UK authorities to have borrowed over £2 million from Fundingsecure (a peer-to-peer

¹⁹⁶ Mashberg, *supra* note 51; Adam Hayes, *Smurf*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/smurf.asp> (last updated Apr. 1, 2021).

¹⁹⁷ Mashberg, *supra* note 51.

¹⁹⁸ Mashberg, *supra* note 51.

¹⁹⁹ Mashberg, *supra* note 51; Shaw, *Matthew Green*, *supra* note 194; Anny Shaw, *Funding Secure Goes into Administration After Borrowers Including London Art Dealer Fail to Pay Back Loans*, ART NEWSPAPER (Oct. 25, 2019), <https://www.theartnewspaper.com/news/funding-secure-goes-into-administration-after-borrowers-including-london-art-dealer-fail-to-pay-back-loans>.

²⁰⁰ Mashberg, *supra* note 51.

²⁰¹ Eileen Kinsella, *UK Art Dealer Matthew Green Charged in a \$9 Million Picasso Money-Laundering Scheme*, ARTNET NEWS (Mar. 6, 2018), <https://news.artnet.com/art-world/matthew-green-charged-money-laundering-us-1236929>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*; Kinsella, *UK Art Dealer*, *supra* note 201; Knight, *supra* note 83.

lending service that will lend against luxury goods) against works that he later sold without repaying the loans.²⁰⁵

3. Freeports

Another major loophole through which art can be used to facilitate money laundering for purposes of tax evasion is the freeport. Freeports are a type of special economic zone or foreign trade zone that is legally outside of customs territory, meaning that economic activities inside these zones are not subject to taxation, or are subject to very limited taxation.²⁰⁶ Luxury goods freeports are essentially high security, high tech warehouses meant to anonymously and safely store high value items.²⁰⁷ Many freeports are located in or adjacent to ports of entry, such as airports.²⁰⁸ In general, modern special economic zones first appeared in 1959, and various subtypes, including the freeport, have sprung up since, although the very first freeport, the Geneva Freeport, was founded in 1888.²⁰⁹ The Geneva freeport has been a known repository of illegally trafficked cultural property since at least the early 1990s.²¹⁰

The first of the freeports specifically intended to house luxury goods was opened by Yves Bouvier in Singapore in 2010; Bouvier opened his second luxury goods freeport in Luxembourg in 2014, and went on to manage several more freeport locations around the world after that.²¹¹ Bouvier has also been implicated in investigations into the money laundering activities of a museum that had (now closed) locations in Paris and Singapore.²¹² Another company, ARCIS, has even

²⁰⁵ Shaw, *Fundingsecure*, *supra* note 199.

²⁰⁶ SUSAN TIEFENBRUN, *TAX FREE TRADE ZONES OF THE WORLD AND IN THE UNITED STATES* 24, 36 (Susan Tiefenbrun ed., 2012).

²⁰⁷ Jennifer Rankin, *Inside the Luxembourg Freeport Storing Riches for the Super-Wealthy*, *Guardian* (July 6, 2019), <https://www.theguardian.com/business/2019/jul/06/inside-the-luxembourg-free-port-storing-riches-for-the-super-rich>.

²⁰⁸ ADAM, *supra* note 16, at 20-22.

²⁰⁹ Knight, *supra* note 83; *THE FACILITY FOR INVESTMENT CLIMATE ADVISORY SERVICES (FIAS), SPECIAL ECONOMIC ZONES: PERFORMANCE, LESSONS LEARNED, AND IMPLICATIONS FOR ZONE DEVELOPMENT*, THE WORLD BANK GROUP 3 (2008).

²¹⁰ Intergovernmental Comm. For Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation (ICPRCP), Rep. on the Work of Its Twentieth Session, U.N. Doc. ICPRCP/16/20.COM/2 (2016), at 3.

²¹¹ ADAM, *supra* note 16, at 20-22; Knight, *supra* note 83; *The King of Freeports: Yves Bouvier*, ART RIGHTS (Apr. 9, 2021), <https://www.artrights.me/en/the-king-of-the-freeports-yves-bouvier/>.

²¹² Gary Buswell, *Past Scandals Come Into Focus at Modigliani's Centenary in Livorno*, FAIR OBSERVER (Feb. 14, 2020).

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opened one such storage facility in Harlem, New York.²¹³ The tax advantages of these warehouses derive from the fact that the items stored in them are considered “in transit” and as such are not subject to tariffs and other taxes, because they have not “arrived” in a sovereign territory, and become subject to customs enforcement.²¹⁴ In recent years, there have been a number of allegations of abuse of the art market system, and Swiss authorities have made a number of high value property seizures over the last two decades.²¹⁵ The FATF explicitly considers the threat of abuse of the freeports for money laundering and terrorist financing purposes to be high, due to characteristic features of the system including inadequate safeguards, relaxed oversight, and weak inspections.²¹⁶ Because of the secrecy surrounding both the art market and the freeports, it is possible that artworks and antiquities are being bought and sold at tremendous profit, and the proceeds are being hidden from any taxing authority, especially where an offshore account or shell corporation is used to facilitate the transaction.²¹⁷

According to a 2016 U.N. report, “recent embarrassments” confirm the close involvement of art dealers in the illegal trafficking of cultural property via freeports.²¹⁸ The report cites among its examples: cases tied to the Getty Museum in Los Angeles; hundreds of looted Egyptian antiquities discovered in 2003, which were later repatriated; and a priceless trove of 45 crates of Roman and Etruscan antiquities that had been hidden for more than a decade.²¹⁹ The perpetrator responsible for the theft of the Italian antiquities claimed to have spread his antiquities in freeport warehouses all over the world, implying that there were many more objects that the authorities would not be able to locate and seize.²²⁰

²¹³ Eileen Kinsella, *Inside the Uber-High-Tech Art Warehouse That Doubles as New York's First-Ever Freeport*, ARTNET NEWS (May 2, 2018), <https://news.artnet.com/market/the-first-ever-freeport-in-new-york-is-a-super-high-tech-art-warehouse-1275194>.

²¹⁴ TIEFENBRUN, *supra* note 206, at 17.

²¹⁵ See e.g. ICPRCP, *supra* note 210, at 3.

²¹⁶ ICPRCP, *supra* note 210, at 3-4.

²¹⁷ ICPRCP, *supra* note 210, at 3-4; Hardy, *supra* note 13.

²¹⁸ ICPRCP, *supra* note 210, at 3.

²¹⁹ ICPRCP, *supra* note 210, at 3.

²²⁰ ICPRCP, *supra* note 210, at 3.

4. Guarantees and “Securities”

When an item goes up for sale on the art market, especially at auction, a “guarantee” is often placed on it.²²¹ These guarantees (also called the “reserve price”) are agreements made by the auction house to pay a seller a certain amount for a work, if it does not sell at all or for less than the guaranteed amount.²²² The guarantees could be placed on the object by the auction house or dealer, but they could also be made by any other party, including the ultimate purchaser.²²³ The existence of guarantees on a sale is often secret, and even if potential buyers know there is a guarantee on the sale, its likely to be unclear who the guarantor is.²²⁴ Sometimes not even the auction house knows who the guarantor is.²²⁵ Increasingly, these guarantees and ownership shares are traded like financial futures, creating a financial market hybrid that combines risk hedges and speculative gambling.²²⁶ Furthermore, guarantees can be used to artificially manipulate prices and could easily be transacted between two clients of the same auction house.²²⁷

Stakeholders in the market have also made number of attempts to develop a market in financial interests in artwork, similar to other financial securities.²²⁸ These stakeholders have also explored other complex investment tools, including the purchase and sale of risks, hedges and reinsurance, but with little success thus far.²²⁹ Some such attempts have even relied on Blockchain as a way of apportioning ownership.²³⁰ These transactions are incredibly risky, given the highly unstable value of art, and there have been a number of high profile failed schemes in the recent past, but that is not the only concern.²³¹

Even beyond its features that make the art market similar to the real estate and precious metals and gemstone markets (whose usefulness for money laundering, as touched on above, is well-documented), the art market performs a number of further functions for

²²¹ Anna Brady, *Guarantees: the Next Big Art Market Scandal?*, ART NEWSPAPER (Nov. 12, 2018), <https://www.theartnewspaper.com/news/guarantees-the-next-big-art-market-scandal>.

²²² *Id.*; Grant, *supra* note 70.

²²³ Brady, *supra* note 221; Grant, *supra* note 70.

²²⁴ Brady, *supra* note 221; Grant, *supra* note 70.

²²⁵ Brady, *supra* note 221; Grant, *supra* note 70.

²²⁶ Brady, *supra* note 221; Grant, *supra* note 70.

²²⁷ Brady, *supra* note 221; Grant, *supra* note 70.

²²⁸ John Zarobell, *How the Wealthy Sell Treasures Tax-Free*, YALEGLOBAL ONLINE (Feb. 6, 2020), <https://yaleglobal.yale.edu/content/how-wealthy-sell-treasures-tax-free>.

²²⁹ Zarobell, *supra* note 228.

²³⁰ Zarobell, *supra* note 228.

²³¹ See ADAM, *supra* note 16 at 192; Brady, *supra* note 221.

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its customers that overlap with financial institutions, and add to its utility for money laundering. For example, even transactions for huge sums of money are often done in cash (enough on its own to justify treating art dealers and auction houses as financial institutions); and the auction houses will front loans for millions of dollars to their biggest customers; and the system of guarantees ensure that some amount of funds are transferred at a sale.²³² While, banks and auction houses have been lending against art for decades, there has also been a boom in lending against art by banks and specialized investing firms over roughly the last decade.²³³

One such high profile failed attempt to build an investment scheme using a non-traditional asset class turned out to be a Ponzi scheme, involving a very famous, and salacious work.²³⁴ In what may turn out to be the largest Ponzi scheme in French history, almost 18,000 investors were duped out of \$1 billion USD tied to investments in rare manuscripts.²³⁵ In 2014, French authorities raided the company headquarters of Aristophil and its associated Museum of Letters and Manuscripts.²³⁶ Authorities allege that Gérard Lhéritier orchestrated a Ponzi scheme through Aristophil, based around selling shares in the ownership of rare books and manuscripts, including the Dead Sea Scrolls, love letters from Napoleon to his mistress, André Breton's original *Surrealist Manifesto*, and most scandalously, the original copy of the Marquis de Sade's *The 120 Days of Sodom*.²³⁷ Lhéritier paid €7 million (\$10 million) for the book in March 2014, making it one of the most valuable manuscripts in the world.²³⁸ French authorities have accused Lhéritier of vastly overvaluing Aristophil's holdings, and of using new investments to pay off old ones.²³⁹

²³² Brady, *supra* note 221; Tobias Bumm, *The Art of Money Laundering*, Trust Your Compliance (July 26, 2020), <https://trustyourcompliance.com/the-art-of-money-laundering>.

²³³ See ADAM, *supra* note 16 at 143; Monique Sofo, *How to Monetize an Art Collection*, CHRISTIE'S INTERNATIONAL REAL ESTATE (May 10, 2017), <https://www.christiesrealestate.com/blog/how-to-monetize-an-art-collection/>.

²³⁴ Joel Warner, *The Sadist's Revenge*, ESQUIRE (Mar. 27, 2018), <https://www.esquire.com/lifestyle/a19181308/marquis-de-sade-120-days-of-sodom/>.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

5. *Conflicts of Interest*

When evaluating the problem of money laundering in the art market, it is also important to consider the possible extent to which conflicts of interests affect the market and facilitate money laundering. Because transactions can be so opaque, there is no way of verifying the parties to the transaction, and this is part of what facilitates the mechanisms, loopholes, and known scandals discussed above. Art dealers argue that losing their control over the amount of information shared between parties would deprive them of their commissions, and possibly cut them out of the system entirely.²⁴⁰ This objection may be disposed of quickly.

Bouvier's machinations demonstrate how ripe the system is for scamming. If Rybolovlev had not spoken to the right third-party by chance, he may never have discovered that he had been cheated. Bouvier's bait-and-switch would have been impossible if even minimal transparency between the parties to an art market transaction were required. Furthermore, this is not a difficult problem to solve. While there was nothing criminal or even inappropriate about the Ganz Collection sale, it was deceptive, perhaps purposefully so.

Contracts between real estate agents, and the buyers and sellers of real property prevent the transacting parties from cutting the agent out of the transaction and depriving him of his commission. Similar contractual arrangements could be developed for use in the art market, that would also be responsive to the differences between art and real estate.

IV. The Legislative Landscape and Some Further Proposed Solutions

To summarize: there are two principal justifications for taking legislative and regulatory action. One, the art market is using financial sector tools and investment structures (i.e., that the market is fully financialized), while not subject to any of the same regulations that protect investors and the public in other regulatory fields. Two, the peculiarities of the art market, and its culture of extreme secrecy allow for the exploitation of regulatory loopholes in ways that would be difficult or even impossible in other high value transactions. While there will be challenges to rooting out the problem of money laundering

²⁴⁰ Naomi Rea, *UK Art Dealers Are Misusing the Law to Avoid New Money-Laundering Regulations. Compliance Experts Say It Will Backfire*, ARTNET NEWS (Mar. 9, 2021) <https://news.artnet.com/art-world/uk-aml-reliance-1950213>.

in the art market from both practical and cultural standpoints, regulation is the appropriate response. Having seen how odd the art market is, and the specific mechanics by which it is exploited for money laundering, the fact that lawmakers and regulators have not yet fully brought the art market into alignment with the rules governing banks and other financial institutions is a miscalculation.

Prescriptive, and hard legal solutions must be employed to close the regulatory gaps that enable money laundering in the art and antiquities market. Others have argued that addressing this problem should be left to soft controls, such as by the creation of a flexible legal framework defined by the FATF; however, that proposal cannot realistically succeed.²⁴¹ Soft law approaches, such as international trade agreements, would only create easily bent rules, and the market manipulation would continue unabated. Furthermore, the purpose of the European Economic Area (EEA) is to harmonize laws across Member States, so there is already a binding agreement on Member States. Arguing that non-binding measures should be implemented is moot; binding soft law measures already exist, and the hard law measures now do, too. Given that the U.S. and the U.K. constituted 62 percent of the global market in 2018, closing the gap through domestic legislation, in just those two countries, even without international agreements in place, could substantially reduce financial crimes in the art market.²⁴²

Some, though not enough, steps have been taken to regulate the art market.²⁴³ In the EU and U.K. concrete legislative action was taken when the Fifth Anti-Money Laundering Directive (5AMLD) was brought into force.²⁴⁴ In the U.S., a number have proposals have been presented.²⁴⁵ The proposed U.S. legislation, and 5AMLD are attempts to impose legal regimes on the art market that are similar to the established regulatory and reporting requirements that are already imposed on other financial and financialized markets.

²⁴¹ Burroughs, *supra* note 16, at 1086-89.

²⁴² *Global Art Market Share 2020, By Country*, STATISTA (Mar. 24, 2021), <https://www.statista.com/statistics/885531/global-art-market-share-by-country/>.

²⁴³ See e.g., Christian R. Everdell and Barbara K. Luse, *Senate Report Exposes the U.S. Art Market as a Hotbed for Money-Laundering and U.S. Sanctions Evasion*, COHEN & GRESSER (Sept. 24, 2020), <https://www.jdsupra.com/legalnews/senate-report-exposes-the-u-s-art-91889/>.

²⁴⁴ Alma Angotti and Courtland Hillman, *The Art Market and the EU's Fifth Anti-Money Laundering Directive*, GUIDEHOUSE, (Mar. 6, 2020), <https://guidehouse.com/insights/financial-crimes/2020/art-european-union-5th-money-laundering-directive>.

²⁴⁵ See *infra*, section IV(B).

A. THE FIFTH ANTI-MONEY LAUNDERING DIRECTIVE, AND THE U.K. MONEY LAUNDERING AND TERRORIST FINANCE AMENDMENTS REGULATIONS 2019

As of the beginning of 2020, the EU and U.K. (pre-Brexit) had taken concrete action, whereas the U.S. Congress had continued to debate the matter, then finally took action in December 2020.²⁴⁶ The European Parliament passed 5AMLD in 2018, and it took effect on January 10, 2020.²⁴⁷ 5AMLD requires EU member states to enact domestic legislation that conforms to the 5AMLD's minimum requirements.²⁴⁸ In response, the U.K. pushed legislation through on December 24, 2019 in order to meet the January 2020 5AMLD deadline.²⁴⁹ The U.K. taxing authorities published guidelines on February 7, 2020.²⁵⁰ As of March, 2021, there have been some analyses of the requirements, and guidance has been published, but it is still too early to see the effects of 5AMLD on the art market, especially given the across-the-board disruptions caused by COVID-19.²⁵¹ Because the U.K. legislation was adopted as domestic law, the country's withdrawal from the EU at the end of 2020 (Brexit) is unlikely to affect the law.

The Fourth Anti-Money Laundering Directive (4AMLD), now updated as 5AMLD, was a sweeping revision to prior anti-money laundering legislation, and it introduced numerous controls for the first time, including requirements to file beneficial owner information on banking transactions above a certain value, similar to those found in the

²⁴⁶ Mashberg, *supra* note 51; Directive (EU) 2018/843, *supra* note 27. *See infra*, section IV(B).

²⁴⁷ Alan Ward, *The Fifth EU Money Laundering Directive and the Art Market*, STEPHENSON HARWOOD (May 28, 2019), <https://www.shlegal.com/news/the-fifth-eu-money-laundering-directive-and-the-art-market>. The EU has now also ratified the Sixth Anti-Money Laundering Directive (6AMDL), but its changes do not affect the provisions that are of concern for this discussion. Samuel McIlhagga, *How New Anti-Money Laundering Laws Will Affect Art Collectors*, Artsy (Mar. 12, 2021 2:49 PM), <https://www.artsy.net/article/artsy-editorial-new-anti-money-laundering-laws-will-affect-art-collectors>.

²⁴⁸ *Id.*

²⁴⁹ *Fifth Anti-Money Laundering Directive (5AMLD)*, Pershing (Feb. 25, 2021), <https://www.pershing.com/uk/en/news/what-is-big-in-our-world/regulation/fifth-anti-money-laundering-directive>.

²⁵⁰ Simon Stokes, *Anti Money Laundering Guidance is Now Available for the UK Art Market*, TAGLAW (Feb. 10, 2020), <https://www.taglaw.com/intl-trade-a-customs/7224-anti-money-laundering-guidance-is-now-available-for-the-uk-art-market.html>.

²⁵¹ *See, e.g. Money Laundering: Buyer Secrecy in the London Art Market*, WILMERHALE (Mar. 19, 2020); Robert Kim & Patty Tehrani, *Measuring the Impact of Covid-19 on AML Compliance*, BLOOMBERG LAW: ANALYSIS (July 27, 2020, 4:24 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-measuring-the-impact-of-covid-19-on-aml-compliance>.

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BSA and Title III of the Patriot Act in the U.S.²⁵² Following the prior several years of major scandals and revelations about the art market, the updated legislation, 5AMLD, added art dealers and other related art market professionals to the list of “high value dealers” who must comply with anti-money laundering measures.²⁵³ These measures include filing transaction reports on any cash transaction over €10,000, and mandatory implementation of Know Your Client/Customer (KYC) protocols to monitor for suspicious transactions.²⁵⁴ 5AMLD further stipulates the disclosure of ultimate beneficial ownership for artworks stored in freeports.²⁵⁵ The hope is that 5AMLD requirements will also stop or slow the use of financial investment structures and tools, thereby also potentially reducing the use of the art market as a financial asset in the first place.²⁵⁶

KYC and Customer Due Diligence (CDD) a procedures that the agent of a financial institution, when the financial institution is is party to a covered transaction, uses to verify the identity of the Ultimate Beneficial Owner (UBO) of the transaction.²⁵⁷ In the case of artworks and antiquities, the UBO would usually be the individual natural persons who are actually exchanging ownership of the object, in place of the holding companies, shell corporations, and offshore legal entities that currently legally own the artworks.²⁵⁸ After the beneficial owners have been identified, they should be checked for a presence on watch lists, have their status as a politically exposed person (PEP) verified for monitoring, and any other characteristics that would raise red flags should be checked.²⁵⁹ For example, a red flag should be raised if a seller brings an object to market from a country in which there is extensive

²⁵² Directive (EU) 2018/843, *supra* note 27; DESANCTIS, *supra* note 68, at 58-59; 5AMLD—5th EU Anti-Money Laundering Directive: What You Need to Know, COMPLY ADVANTAGE (Dec. 3, 2019), <https://complyadvantage.com/blog/5mld-fifth-anti-money-laundering-directive/>.

²⁵³ Ward, *supra* note 247.

²⁵⁴ Ward, *supra* note 247.

²⁵⁵ Zarobell, *supra* note 228.

²⁵⁶ Zarobell, *supra* note 228.

²⁵⁷ *The Relationship Between KYC and CDD*, Sanction Scanner: Blog, <https://sanctionscanner.com/blog/the-relationship-between-kyc-and-cdd-356> (last visited May 17, 2021); *What Is an Ultimate Beneficial Owner (UBO)?*, Medium (June 24, 2019), <https://medium.com/kyc-io-scalable-kyc-management-solutions/what-is-an-ultimate-beneficial-owner-ubo-3a1e6f267806>.

²⁵⁸ See Bumm, *supra* note 232.

²⁵⁹ See DESANCTIS, *supra* note 68, at 12-14; *Red Flag Indicators for AML-CFT*, SANCTION SCANNER: BLOG, [HTTPS://SANCTIONSCANNER.COM/BLOG/RED-FLAG-INDICATORS-FOR-AML-CFT-161](https://sanctionscanner.com/blog/red-flag-indicators-for-aml-cft-161) (last visited May 17, 2021). *What Is Watch List Screening*, SANCTION SCANNER: KNOWLEDGE BASE, <https://sanctionscanner.com/knowledge-base/watchlist-screening-58> (last visited May 17, 2021).

looting of archeological sites.²⁶⁰ Another red flag should be a buyer from a country that has extreme currency regulations, or a buyer who is reluctant to provide identification and who will not explain why.²⁶¹

Bringing transparency to art market transactions will threaten the privacy and security of wealthy clients in a variety of ways. For example, exposing them to the risk of theft and other crimes is one of the most forceful objections to regulation in the art market.²⁶² This problem could be overcome by writing the new regulations to protect the identity of beneficial owners from the general public, but to allow monitoring by the relevant agencies. This process is already standard in high-value financial transactions and adapting the process from banking and real estate to the art market would be straightforward. In the U.S., the confidentiality of SARs is already expressly and extensively protected, so there is no reason the same cannot be true under 5AMLD.²⁶³

Critics of art market regulation in both the U.S. and EU have claimed that clamping down on the regulatory gaps will merely push the market to relocate into countries friendlier to the status quo.²⁶⁴ However, the U.S. and the U.K. are the two largest art markets in the world, so it seems unlikely that buyers and sellers will inconvenience themselves to complete their transactions, if their only motivation for an art market transaction is a legitimate interest in purchasing art for its own sake, or even as a capital investment.²⁶⁵ So long as reasonable privacy protections are written into any regulations, there should be no cause for concern over privacy. Upstanding market participants should welcome the protection that regulation will offer to them. If the identities of the beneficial parties remained protected to the same extent already applicable to other financial transactions, there should be no valid grounds for objection. Auction houses and art dealers should also welcome the guarantee that they are not being unwittingly defrauded or exploited in a criminal transaction.

Indeed, the U.K. has now taken exactly this approach. The U.K. implementation of 5AMLD has imposed liability on both individual employees and senior management at art galleries and auction houses, instead of placing it entirely on the Money Laundering Reporting

²⁶⁰ See Lehr, *supra* note 8.

²⁶¹ Red Flag Indicators, *supra* note 259.

²⁶² Bradley, *supra* note 129, at 297-98.

²⁶³ DESANCTIS, *supra* note 68, at 78-79.

²⁶⁴ See Palmer, *supra* note 117.

²⁶⁵ McIlhagga, *supra* note 247; Reyburn, *Bring Your ID*, *supra* note 120.

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Officer.²⁶⁶ Penalties for non-compliance can be fines, significant prison terms, or both.²⁶⁷ The most serious charge is for knowing participation in a money laundering transaction, which carries a prison sentence of up to 14 years.²⁶⁸ Two other serious crimes are related to the SAR filings: tipping off the subject of a SAR that the transaction is being reported, and failure to report or file the SAR.²⁶⁹ Failure to report liability may be imposed on both the employee who fails to act and senior management.²⁷⁰ All of these penalties are tied together by a fourth, fines-based charge for failure to implement appropriate policies and procedures.²⁷¹

The new regulatory framework requires art market businesses to take a number of steps including: carrying out an internal risk assessment; implementing an internal AML policy; carrying out KYC/CDD; maintaining appropriate records; registering with the government; training staff and appointing a compliance officer; and reporting suspicious transactions.²⁷² Ideally, these measures will encourage art dealers to act in their own self-interests, and ultimately to meaningfully reduce the frequency of money laundering in the market. The deadline for compliance, originally set for January 10, 2021, has been extended to June 10, 2021, so the effects of the new legislation have yet to materialize.²⁷³

B. THE COUNTER ACT (H.R. 2514) AND THE ANTI-MONEY LAUNDERING ACT OF 2020

Until the end of 2020, the U.S. art market operated only under the provisions of the Uniform Commercial Code, which imposes no limits on cash transactions.²⁷⁴ In most other circumstances, cash transactions above a certain threshold (usually \$10,000 or the approximate

²⁶⁶ Rena Neville, *How Art World Leaders Can Embrace New Money Laundering Regulations and Create a 'Think Risk' Culture*, ART NEWSPAPER (Dec. 17, 2020), <https://www.theartnewspaper.com/comment/anti-money-laundering-risk>.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Caitlin Ervine, *Anti-Money Laundering Rules: Impact on the Art Market*, FORSTERS LLP: BLOG (Oct. 5, 2020), <https://www.forsters.co.uk/news/blog/anti-money-laundering-rules-impact-art-market>.

²⁷³ Naomi Rea, *The UK Has Extended the Deadline to Register Under Its New Anti-Money Laundering Rules, Giving Art Dealers a Welcome 5 Months' Reprieve*, ARTNET NEWS (Aug. 25, 2020), <https://news.artnet.com/market/uk-delays-anti-money-laundering-rules-1903930>.

²⁷⁴ DESANCTIS, *supra* note 68, at 60.

equivalent in foreign currency) already trigger automatic reporting to financial authorities in any nation that adheres to FATF guidelines, including the U.S., the U.K., and EU Member States.²⁷⁵ The Anti-Money Laundering Act of 2020 (AMLA), was passed by both Houses of Congress in December 2020 as part of the 2021 National Defense Authorization Act for Fiscal Year 2021 (NDAA).²⁷⁶ The NDAA was then vetoed by President Trump, but Congress overrode the president's veto, and the bill passed into law on January 1, 2021.²⁷⁷ The new legislation has several new provisions that will affect art market transactions.²⁷⁸

In its 2019-2020 session, Congress was considering amendments to the BSA and Patriot Act that would have imposed requirements similar to the new measures in 5AMLD on U.S. art market transactions.²⁷⁹ Until Congress enacted AMLA (2020), the primary legislation under consideration was the Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform Act of 2019 (COUNTER Act, H.R. 2514).²⁸⁰ Under H.R. 2514, antiquities dealers would have been required to file reports on cash transactions over \$10,000, and to develop internal policies and procedures for the purpose of identifying suspicious transactions.²⁸¹ The Act would have also required the Secretary of the Treasury to perform a study on the facilitation of terror financing through works of art.²⁸² As noted above,

²⁷⁵ DESANCTIS, *supra* note 68, at 58-59; *5th EU Anti-Money Laundering Directive*, *supra* note 252.

²⁷⁶ Jane Edwards, *Senate Passes \$740.5B FY 2021 National Defense Authorization Act*, GovConWire (Dec. 14, 2020), <https://www.govconwire.com/2020/12/senate-passes-740-5b-fy-2021-national-defense-authorization-act/>; *Congress Passes the Anti-Money Laundering Act of 2020, Significant Changes to the Bank Secrecy Act Ahead*, ALL ALERTS & NEWSLETTERS, CROWELL MORING (Jan. 19, 2021), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Congress-Passes-the-Anti-Money-Laundering-Act-of-2020-Significant-Changes-to-the-Bank-Secrecy-Act-Ahead>.

²⁷⁷ H.R. 6395, 116th Cong., 2d Sess. § 6001 *et seq.*, (2020); Roll Call Vote, 116th Cong. 2d Sess., (Jan. 1, 2021) https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00292; Carl A. Fornaris et al., *The Anti-Money Laundering Act of 2020: Congress Enacts the Most Sweeping AML Legislation Since Passage of the USA PATRIOT Act*, NAT'L. L. REV. (Jan. 19, 2021), <https://www.natlawreview.com/article/anti-money-laundering-act-2020-congress-enacts-most-sweeping-aml-legislation-passage>.

²⁷⁸ This Comment was originally completed early in 2020, so it did not consider AMLA in earlier drafts. A discussion of the 2020 Act has been added at the end of this section.

²⁷⁹ Burse, *supra* note 116.

²⁸⁰ See Coordinating Oversight, Upgrading and Innovating Technology, and Examiner Reform Act of 2019 (COUNTER Act), H.R. 2514, 116th Cong. (2019).

²⁸¹ H.R. 2514 §213(a)(1)(A).

²⁸² *Id.*

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the confidentiality of these filings is already closely protected.²⁸³ The House passed H.R. 2514 on October 28, 2019, and sent the bill to the Senate where it, too, died.²⁸⁴ H.R. 2514 was introduced during the same session of Congress as the Senate bill: Improving Laundering Laws and Increasing Comprehensive Information Tracking Criminal Activity in Shell Holdings Act (ILLICIT CASH Act S. 2563).²⁸⁵

The COUNTER Act, as approved by the House in October, 2019, would have amended 31 U.S.C. § 5312 (the definitions clause of the BSA) to include “a person trading or acting as an intermediary in the trade of antiquities, including an advisor, consultant or any other person who engages as a business in the solicitation of the sale of antiquities.”²⁸⁶ Imposing regulation on the market would “simply enshrine into law the steps that art dealers ought to be taking in the first place to stave off criminal acts.”²⁸⁷ The Act would have imposed the same Currency Transaction Report (CTR) regulations and Suspicious Activity Report (SAR) regulations on art and antiquities dealers as are already imposed on any other financial institution under the BSA, such as banks, securities brokers, investment firms, and even pawnbrokers.²⁸⁸ Dealers in precious metals, stones, and gems are covered under 31 U.S.C. § 5312 (a)(2)(N); persons involved in real estate transactions are covered by 31 U.S.C. § 5312 (a)(2)(U); and even informal money transfer services are already included under § 5312 (a)(2)(R).²⁸⁹ The CTR filing threshold is \$10,000, and an SAR filing would be triggered for any number of behaviors that often indicate money laundering, such as repetitive cash deposits below the CTR threshold.²⁹⁰

Two other related pieces of legislation were also introduced in Congress’s 2019-2020 session: the Kleptocracy Asset Recovery Rewards Act (KARR Act H.R. 389), which passed the House; and the Corporate Transparency Act of 2019 (CTA H.R. 2513), which has also passed the House.²⁹¹ Neither act was brought to a vote in the Senate.²⁹²

²⁸³ DESANCTIS, *supra* note 68, at 78-79.

²⁸⁴ H.R. 2514.

²⁸⁵ H.R. 2514; Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings Act of 2019 (ILLICIT CASH Act), S. 2563, 116th Cong. (2019).

²⁸⁶ H.R. 2514.

²⁸⁷ Mashberg, *supra* note 51.

²⁸⁸ H.R. 2514.

²⁸⁹ 31 U.S.C. § 5312 (a)(2)(N), (R), (U) (2004).

²⁹⁰ CASSARA, *supra* note 10, at 197-99.

²⁹¹ Kleptocracy Asset Recovery Rewards Act, H.R. 389, 116th Cong. (2019); Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019); Gershel, *supra* note 8.

²⁹² H.R. 389; H.R. 2513; Gershel, *supra* note 8.

The KARR Act would have authorized the Secretary of the Treasury to pay rewards for help in identifying stolen assets, or assets tied to government corruption “hidden behind complex financial structures.”²⁹³ The CTA would have required the disclosure of the beneficial owners of corporations and limited liability companies when they are formed, which would negate the benefit of offshore shell corporations as tax shelters.²⁹⁴

Congress subsequently did revise U.S. money laundering laws in December 2020. AMLA passed as part of the yearly reauthorization of the NDAA.²⁹⁵ AMLA contains major across the board revisions to the BSA and Patriot Act, and most importantly for the present discussion, finally brought dealers in antiquities into the BSA’s definition of a “financial institution.”²⁹⁶ The revisions also brought virtual currencies and the service providers of them under the BSA’s purview.²⁹⁷ The Secretary of the Treasury has been ordered to promulgate rules through FinCEN, in consultation with the Federal Bureau of Investigation, the Department of Justice, and other relevant agencies by January 1, 2022.²⁹⁸ It will likely be at least a few years before the effects of the new legislation will be felt.

V. Conclusion

Money laundering in the art market is a far-reaching problem, and one that warrants the sweeping response it is finally receiving.²⁹⁹ It reaches into sectors far beyond the reach of “traditional” money laundering that was done to manage the profits of organized crime. Because of the significant domestic and international damage that money laundering causes, closing this major regulatory gap in financial market-adjacent transactions is of non-negotiable importance. Achieving meaningful regulation is going to be difficult, but that does not mean the attempt should not be made. Hard law solutions that emphasize a risk-based approach are the best option and have the best chance of leading to the same successes that have been seen in financial market regulation and real estate market regulation. Art *is* unique in so many respects; regulations for the art and antiquities market will

²⁹³ H.R. 389.

²⁹⁴ H.R. 2513.

²⁹⁵ Crowell, *supra* note 276.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ DELOITTE, *supra* note 13, at 8.

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require some adjustments from the regulations appropriate to other markets, but evidence suggests that governments and the regulatory bodies assigned to the task are making strides in that direction. It remains to be seen if they will be successful.