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Regulating the "Unregulated": The European Union and United Kingdom Have Put in Place Anti-Money Laundering Directives for the Art Market. Should the United States Follow?

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REGULATING THE “UNREGULATED”:
THE EUROPEAN UNION AND UNITED
KINGDOM HAVE PUT IN PLACE ANTI-
MONEY LAUNDERING DIRECTIVES FOR
THE ART MARKET. SHOULD THE
UNITED STATES FOLLOW?

Lauren A. Turner[†]

ABSTRACT

Recently the European Union (EU) and the United Kingdom (U.K.) have implemented Anti-Money Laundering (AML) regulations adding art market professionals and businesses to the entities obligated to comply with customer due diligence and recordkeeping. While there was much speculation that the United States (U.S.) would immediately implement its own AML legislation for the art market, the U.S. government decided to only require the antiquities market to comply with AML regulations. This Note suggests that not only is there a justification for expanding AML regulations in the U.S. to include the art industry due to the vulnerabilities of the market, but also that the art market should have an active role in helping develop regulations that suit the art market and players, big and small.

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I. INTRODUCTION

SOLD! After an intense bidding war, the coveted painting has finally found a new owner. But who is the ultimate beneficial owner (UBO), and why does it matter? An UBO is the natural person at the end of a transaction who owns the property and ultimately has legal control over the item.¹ Nonetheless, it is less prevalent now for high bidders or UBOs to be physically present in an auction audience. Most often, bidding is done through an art advisor or representative, including bidding at auctions and other art market transactions, such as buying a painting at a gallery.² However, the advisor is not the person initiating the transaction—the ultimate beneficial owner is. Identifying the UBO prevents a company from engaging in illegal activity and avoids the repercussions of concealing a UBO’s identity.³ Anonymous transactions, where the UBO is unknown, allow for criminal activities such as tax evasion, money laundering, corruption, embezzlement, and terrorism financing.⁴

Major auction houses⁵ have adopted a voluntary AML program, but art advisors’ identities are typically used for AML checks.⁶ Art advisors are reluctant to disclose their clients for specific purchases for fear of being removed from a deal or having a client poached.⁷ Using an advisor’s information defeats obtaining the ultimate beneficial owners’ identity to avoid illegal activity like money laundering. The European Union, United Kingdom, and United States have increasingly attempted to add regulations to deter money laundering in the art market. However, these regulations have been met with concerns about necessity and whether governments are overregulating in an attempt to

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1. Fin. Action Task Force, *Guidance on Transparency and Beneficial Ownership*, at 8, (Oct. 2014) [hereinafter FATF].
 2. PERM. SUBCOMM. ON INVESTIGATIONS, 117TH CONG., REP. ON THE ART INDUSTRY AND U.S. POLICIES THAT UNDERMINE SANCTIONS 3 (2021) [hereinafter SUBCOMM. REP.].
 3. *Ultimate Beneficial Ownership: Why Do You Need Transparency?* ONDATO (July 1, 2022), <https://ondato.com/blog/ultimate-beneficial-ownership/> [https://perma.cc/C9AK-MDBS].
 4. *Id.*
 5. The major auction houses within the fine art market are considered Sotheby’s, Christie’s, Phillips, and Bonhams. SUBCOMM. REP., *supra* note 2, at 41.
 6. *Id.* at 3.
 7. *Id.*

fix a problem that may not exist.⁸ Recently, AML laws have been put into force in the European Union and the United Kingdom to combat the vulnerabilities of the art market.⁹ Despite a U.S. Senate Subcommittee report recognizing that “[s]ecrecy, anonymity, and a lack of regulation create an environment ripe for laundering money and evading sanctions,” the United States has failed to pass significant AML legislation for the art market.¹⁰

This Note examines the developments of money laundering regulations and their effect on the art world. It analyzes the vulnerabilities of the market and juxtaposes the resistance to AML regulations with the preference for self-regulation. It argues that AML regulations are necessary and will help establish more confidence in the art market. Finally, this Note proposes that the U.S. government regulate the art industry by enacting anti-money laundering legislation for the entire art market and argues that professionals within the field are in the best position to assist in adopting AML regulations. By introducing comprehensive AML requirements for the art industry, the U.S. government can supply tools and provide leverage to art market participants to protect their businesses and curtail illegal activity.

II. THE HISTORY OF ART ANTI-MONEY LAUNDERING REGULATIONS

A. *The Impact of Money Laundering on the Art World*

Under 18 U.S.C. §§1956-57, money laundering is a federal crime in the United States that requires the intent of the parties involved.¹¹ Requiring knowledge of unlawful activity absolves unwitting parties from being convicted of money laundering. Making it a crime to have knowledge or reasonable suspicion that a transaction is intended to disguise the nature, location, or source of ownership of illicit proceeds.¹² Participation in money laundering is subject to a substantial financial punishment of at least twice the amount of the value of the transaction, and possible jail time up to 20 years.¹³

8. See Anna Brady, ‘Damaging and Unjust’ Legislation Linking Art and Antiquities Trade to Money Laundering and Terrorism Financing Must Stop, *Industry Body Says*, ART NEWSPAPER (Mar. 14, 2022), <https://www.theartnewspaper.com/2022/03/14/damaging-and-unjust-legislation-linking-art-and-antiques-trade-to-money-laundering-and-terrorism-financing-must-stop-industry-body-says> [https://perma.cc/L5AS-UCPK].

9. See Council Directive 2018/843, art. 1, 2018 O.J. (L 156) 43, 53 (EU).

10. SUBCOMM. REP., *supra* note 2, at 3.; H.R. 5886; 31 U.S.C. § 5312(a)(2)(Y).

11. 18 U.S.C. §§1956–57.

12. *See id.*

13. *Id.* § 1956.

Money laundering consists of three elements: placement, layering, and integration.¹⁴ Placement is the act of having illicit proceeds, also known as proceeds of crime, whether from drug trafficking, investment manipulation, tax evasion, embezzlement, or fraud—and *placing* the money into the financial system, such as a bank.¹⁵ As an example, in the case of Matthew Green, here a London-based art dealer worked with a brokerage company to launder money acquired from stock manipulation through the sale of a Pablo Picasso painting,¹⁶ placement involved depositing the proceeds of the crime into a bank account.¹⁷

After placement, the funds need to be “layered.” Layering consists of engaging in further transactions to move the tainted funds away from the source, such as engaging in sales or fabricating invoices to shell companies.¹⁸ In the case of Matthew Green, layering occurred when the brokerage company set up a shell company¹⁹ and used the shell company to invoice the brokerage company for “services.”²⁰ The payment to the shell company moved the “placed” funds into another bank account, thereby carrying out the layering component.

14. FIN. CRIMES ENF’T NETWORK, U.S. DEP’T OF THE TREAS., MONEY LAUNDERING PREVENTION: A MONEY SERVICES BUSINESS GUIDE 2.

15. *Id.*

16. *See* Superseding Indictment ¶¶ 47–55, *United States v. Kyriacou*, No. 18–102 (E.D.N.Y. Mar. 20, 2018).

17. Cash transactions require currency transaction reporting. When money is deposited into a bank account, the funds need to be “smurfed” into the bank if the purpose is to illegally evade reporting thresholds. “Smurf” means to break up the proceeds being deposited under the reporting threshold where the bank is located. Funds are put into multiple accounts and then consolidated later. Although banks monitor transactions, a bank can only analyze within its own banking system. *What is the Difference Between Smurfing & Structuring?* COMPLY ADVANTAGE (May 26, 2023), <https://complyadvantage.com/insights/structuring-vs-smurfing/> [<https://perma.cc/F39X-GMPL>]; *see also* FIN. CRIMES ENF’T NETWORK, U.S. DEP’T OF THE TREAS., FATX-IX, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING (1998); *see also* Adam Hayes, *What is a Smurf and How Does Smurfing Work?*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/smurf.asp> [<https://perma.cc/Q92J-SWAH>] (June 30, 2021).

18. FIN. CRIMES ENF’T NETWORK, U.S. DEP’T OF THE TREAS., MONEY LAUNDERING PREVENTION: A MONEY SERVICES BUSINESS GUIDE, *supra* note 14, at 2.

19. A shell company is an inactive business that exists on paper only. Shell companies can have a bank account, allowing for domestic and international wire transfers, and can be the registered owner of assets. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP’T OF THE TREAS., THE ROLE OF DOMESTIC SHELL COMPANIES IN FINANCIAL CRIME AND MONEY LAUNDERING: LIMITED LIABILITY COMPANIES (Nov. 2006).

20. *See* Superseding Indictment, *supra* note 16, ¶ 61.

Following the completion of layering, the funds need to be integrated into regular commerce.²¹ Integration allows for the illicit funds to appear legitimate.²² The brokerage company’s purchase of artwork from Matthew Green constituted integration.²³ The illicit funds acquired through the criminal activity of insider trading appeared legitimate and the money became “clean” because it was integrated into regular commerce.²⁴

Money laundering in the art market can take various forms such as a client asking a dealer to “mind” or “hold onto” some money for a few days. Another example is requesting for money to be deposited into a dealer’s bank account or a client account the dealer has created.²⁵ In this scenario, the money is moved into an account that the dealer oversees for a suspected future purchase that never actually occurs.²⁶ Instead, the money is transferred to another bank account.²⁷ In this instance, the dealer is vulnerable to accusations of money laundering because possession of illegal proceeds is an offense, in the same vein as acquiring criminal proceeds.²⁸ More elaborate schemes may involve a dealer creating several invoices to sell a work of art.²⁹ Multiple invoicing allows for payment from different bank accounts and can create confusion because the paper trail makes it challenging for authorities to trace the funds back to its illicit source.³⁰ Giving the illusion that the money comes from various legitimate sources.³¹

The British Art Market Federation (BAMF) advises that there are three types of offenses that art market participants must avoid committing related to money laundering: (1) knowingly assisting in concealing or entering into arrangements for the acquisition, use, and possession of criminal property; (2) failing to report knowledge, suspicion, or where there are reasonable grounds for knowing or

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21. FIN. CRIMES ENF’T NETWORK, U.S. DEP’T TREAS., MONEY LAUNDERING PREVENTION: A MONEY SERVICES BUSINESS GUIDE, *supra* note 14, at 2.
 22. *Id.*
 23. Superseding Indictment, *supra* note 16, ¶ 48.
 24. *History of Anti-Money Laundering Laws*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/history-anti-money-laundering-laws> [<https://perma.cc/8JAK-ZVW5>].
 25. Saskia Hufnagel & Colin King, *Anti-Money Laundering Regulation and the Art Market*, 40 LEGAL STUD. 131, 142 (2019).
 26. *Id.*
 27. *Id.*
 28. *Id.*
 29. *Id.*
 30. Fin. Action Task Force, *Trade-Based Money Laundering: Trends and Developments*, at 27 (Dec. 2020).
 31. *Id.*

suspecting, that another person is engaged in money laundering; and (3) making the suspected money launderer aware of one’s suspicion, known as “tipping off,” or prejudicing an investigation.³²

B. The European Union Introduces the Fifth Anti-Money Laundering Directive (5AMLD) and the United Kingdom’s Implementation

In 2018, the European Parliament³³ agreed to amend the 2015 Fourth Anti-Money Laundering Directive (4AMLD) with the Fifth Anti-Money Laundering Directive (5AMLD) to be enforced in 2020. The 5AMLD obligates art market transactions of €10,000 or more to follow anti-money laundering regulations.³⁴ The First Anti-Money Laundering Directive (1AMLD) was enacted in 1991 and primarily focused on drug offenses. The Second Directive updated 1AMLD to comply with the Financial Action Task Force’s (FATF) anti-money laundering framework.³⁵ FATF created a series of 40 recommendations that set the international standard for money laundering prevention and was endorsed by the International Monetary Fund (IMF) and the World Bank.³⁶ The recommendations focus on structural, supervisory, and operational procedures countries should have in place to deter money laundering and terrorist financing.³⁷ With each AMLD update, the European Union expanded its anti-money laundering framework to “non-financial” businesses and professions such as legal services, accountancy, and terrorist financing.³⁸

5AMLD intends to prevent money laundering and terrorist financing by creating a hostile environment for “criminals seeking shelter for their finances through non-transparent structures.”³⁹

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32. BRIT. ART MKT. FED’N, ANTI-MONEY LAUNDERING GUIDELINES 7 (2022) [hereinafter BAMF].
33. In 2018, the European Union still included the United Kingdom. The United Kingdom officially left the European Union on January 31, 2020, in what is commonly referred to as Brexit. *Timeline—The EU-UK Withdrawal Agreement*, COUNCIL EUROPEAN UNION (May 30, 2023), <https://www.consilium.europa.eu/en/policies/eu-relations-with-the-united-kingdom/the-eu-uk-withdrawal-agreement/timeline-eu-uk-withdrawal-agreement/> [https://perma.cc/6LRM-C7Q6].
34. Council Directive 2018/843, *supra* note 9.
35. FATF is an intergovernmental policymaking body that sets standards to combat money laundering and terrorist financing through the implementation of regulatory measures. *History of Anti-Money Laundering Directive: A Summary—Part One*, COMPLY ADVANTAGE (Aug. 25, 2022), <https://complyadvantage.com/insights/brief-history-amlds-part-one/> [https://perma.cc/V7R4-M5AJ].
36. BAMF, *supra* note 32, at 30.
37. *Id.*
38. Council Directive 2015/849, art. 2, 2015 O.J. (L 141) 73, 83 (EU).
39. Council Directive 2018/843, *supra* note 9, ¶ 4.

5AMLD aims to use transparency as a deterrent.⁴⁰ Transparency within legal entities, trusts, and other legal arrangements is the foundation for integrity in financial systems.⁴¹ In connection with prevention, 5AMLD seeks to detect and investigate money laundering.⁴²

A vital component of the regulation requires each member state to conduct Know Your Client (KYC) searches and to report reasonably suspicious behavior.⁴³ As part of the KYC procedure, art market participants must identify the ultimate beneficial owner, assess the business relationship's purpose, and conduct ongoing monitoring of the business relationship.⁴⁴ Furthermore, each member state is obligated to develop its own Financial Intelligence Unit (FIU).⁴⁵ FIUs are put in place for entities to report suspicions of money laundering.⁴⁶ 5AMLD obligates art market participants to file Suspicious Transaction Reports (STR)⁴⁷ to its FIU whenever there is suspicion of money laundering, illegitimacy of the customer's identification, or fraud.⁴⁸ Further, each member state's FIU will communicate its investigative findings with each other.⁴⁹

When the European Union introduced 5AMLD, the United Kingdom was still a member state, and, despite Brexit, the United Kingdom continued to implement the Fifth Directive.⁵⁰ The United

40. *Id.*

41. *Id.*

42. *Id.*

43. See Council Directive 2015/849, *supra* note 38, art. 11.

44. See generally *id.*; Steve Schindler & Katie Wilson-Milne, *New and Impending Art World Money Laundering Regulations*, THE ART L. PODCAST (Mar. 5, 2021), <https://artlawpodcast.com/2021/03/05/new-and-impending-art-world-money-laundering-regulations/#more-678> [<https://perma.cc/PM8C-HCR9>].

45. Council Directive 2015/849, *supra* note 38, art. 32(1).

46. See Council Directive 2018/843, *supra* note 9, ¶ 17.

47. STRs, also known as Suspicious Activity Reports (SARs), are documents that record suspected financial crimes or potentially suspicious behavior. The reports alert law enforcement of suspicious transactions and allow for monitoring. See FED. DEPOSIT INS. CORP., RISK MANAGEMENT MANUAL OF EXAMINATION POLICIES § 10.1 (2017).

48. Council Directive 2015/849, *supra* note 38, art. 33.

49. Council Directive 2018/843, *supra* note 9, ¶¶ 17–18.

50. The United Kingdom's 5AMLD regulation went into effect in January 2020. Art market participants must register with HM Treasury (HMRC) by June 10, 2021. As of March 2023, HMRC has been inquiring into AMPs registration status and assessing business policies and procedures. See The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, SI 2019/1511 (UK); *What to Expect if Your Art Business Has an AML Intervention with HMRC*, ARTAML: BLOG (Mar. 22, 2023),

Kingdom’s decision to proceed to implement its version of the European directive was likely motivated by the UK’s continued commitment to combating money laundering.

In 2000, the United Nations General Assembly adopted The United Nations Convention Against Transnational Organized Crime.⁵¹ As a party to the resolution, the United Kingdom committed to taking measures against transnational organized crime, including money laundering.⁵² In response, the United Kingdom enacted the Proceeds of Crime Act (POCA), which made it an offense to arrange, buy, possess, or ship property acquired from criminal conduct.⁵³ This act extended to art market participants because any entity may be held liable if implicated in a transaction where illicit proceeds were involved.⁵⁴ Unlike U.S. money laundering laws, the POCA does not require intent; therefore, money laundering is a criminal act even if done unwittingly.⁵⁵ The United Kingdom expanded its AML directives through the enforcement of the Money Laundering, Terrorist Financing, and Transfer of Funds Regulations (MLR 2017), which obligated lawyers, accountants, asset managers, realtors, and trust managers to establish risk-based approach procedures.⁵⁶ MLR 2017 requires higher-risk entities to conduct a money laundering and terrorist financing risk assessment by identifying the risks in a written document and implementing systems and controls to address money laundering.⁵⁷ Entities must also perform customer due diligence, comply with requirements related to politically exposed persons (PEPs), establish and maintain a record-keeping system, and provide staff training.⁵⁸ While the POCA offers a criminal law approach to money laundering, the MLR 2017 provides a preventative approach and a regulatory framework for the POCA.⁵⁹ With the United Kingdom’s adoption of

<https://artaml.com/what-to-expect-if-your-art-business-has-an-aml-intervention-with-hmrc/> [https://perma.cc/3W8L-TMJJK].

51. G.A. Res. 55/25, ¶ 2 (Nov. 15, 2000).
52. *See id.*
53. Proceeds of Crime Act 2002, c. 29, §§ 327–28 (UK).
54. *Id.*
55. *Id.*
56. The Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017, SI 2014/692, art. 8, ¶¶ 1–2 (UK).
57. *Id.* at art. 16, ¶¶ 1–2.
58. *Id.* at art. 27, ¶¶ 1, 7–9.
59. Hufnagel & King, *supra* note 25, at 141.

5AMLD, the art market became a part of the regulated sector required to follow MLR 2017.⁶⁰

Overall, the United Kingdom’s regulation is more stringent than the EU directive because it provides a cohesive framework for implementation. Not only are regulated sectors obligated to comply and subjected to audits, but it is also a separate offense not to establish adequate or appropriate controls to prevent money laundering, regardless of whether the act occurs.⁶¹ The United Kingdom’s legislation is rooted in what is best suited to combat the problem and promote compliance. Yet, each European Union country has the discretion to implement the directive as it sees fit, so regulations may be in adherence with the member state’s national law, which ultimately creates inconsistency across EU countries.⁶² For instance, there is a contrast between the definition of “art” in different countries. France has one of the most thorough definitions for artworks, including what is commonly considered art, such as paintings, sculptures, and photographs; in addition to including “hand-made wallpaper and textile” and “enamel on copper that is entirely executed by hand.”⁶³ Whereas, Germany has a much more succinct definition of art limited to paintings, drawings, engravings, and sculptures.⁶⁴ Italy’s definition is similar to the robustness of France’s definition of art but also includes stamps and antiquities.⁶⁵ It can be argued that antiquities, and even ethnographic materials and decorative arts, could fall under the broader categories of paintings, sculptures, or prints, but the uncertainty presents the question of “what is considered art?” This lack of consistency across the EU brings into question what is considered art and therewith what is being regulated.

60. Schindler & Wilson-Milne, *New and Impending Art World Money Laundering Regulations*, *supra* note 44.

61. BAMF, *supra* note 32, at 7.

62. Rena Neville and Paula Trommel, *Art Market Money Laundering Crackdown Spreads from UK to the US, But What Impact is It Having and are Business Taking it Seriously?*, ART NEWSPAPER (Nov. 5, 2021), <https://www.theartnewspaper.com/2021/11/05/art-market-money-laundering-crackdown-blows-from-uk-to-the-us-but-what-impact-is-it-having-and-are-businesses-taking-it-seriously> [https://perma.cc/ZA89-FVC8]; see Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 C 326/1.

63. *Application of the Different VAT Rates*, RÉPUBLIQUE FRANÇAISE, <https://entreprendre.service-public.fr/vosdroits/F23567?lang=en> [https://perma.cc/AL7Z-6FBZ].

64. Umsatzsteuergesetzes [UStG] [Sales Tax Act], 2006, BGBl I at 9701, no. 53 (Ger.).

65. Decreto legislativo, febbraio 1995, n. 41, Feb. 25, 1995 (It.).

C. *Art AML’s Possible Spread to the U.S.*

On May 18, 2018, U.S. Congress Representative Luke Messer of Indiana introduced the Illicit Art and Antiquities Trafficking Prevention Act.⁶⁶ The Act, proposed through the annual approval of the Bank Secrecy Act (BSA), would have obligated art and antiquities dealers to comply with KYC checks, reporting, recordkeeping, and additional BSA requirements.⁶⁷ The bill did not pass. However, Congress amended the BSA to include the antiquities market as a financial institution, thereby requiring antiquities dealers to comply with anti-money laundering regulations.⁶⁸ The amendment was passed through § 6110 of the Anti-Money Laundering Act of 2020, which was enacted as part of the National Defense Authorization Act (NDAA) for Fiscal Year 2021.⁶⁹ At the time of the amendment, the particularities of how the BSA would extend to the antiquities market were unclear, but the Act mandated the U.S. Treasury Department to conduct a study on the vulnerabilities of the art market to ascertain if the BSA should extend to the entire industry.⁷⁰

In October 2021, a bipartisan bill proposing for the art market to comply with AML regulations, called the ENABLERS Act, was introduced by U.S. Congress Representative Tom Malinowski.⁷¹ The bill assigned the Financial Crimes Enforcement Network (FinCEN) to “establish a task force to develop a strategy to impose anti-money laundering safeguards and enforce requirements on certain professions.”⁷² The bill passed in the House of Representatives but was not approved in the Senate.⁷³ Like the Illicit Art and Antiquities Trafficking Prevention Act, the ENABLERS bill attempted to pass through the NDAA. U.S. Senator Pat Toomey, a ranking member of

66. H.R. 5886, 115th Cong. (2018); 31 U.S.C. § 5312(a)(2)(Y).

67. *Id.*

68. LIANA W. ROSEN, CONG. RSCH. SERV., 117th CONG., AMLA SECTION-BY-SECTION SUMMARY AND AMLA DELIVERABLES TABLE (2022), § 6110 [hereinafter AMLA].

69. *Id.*

70. *Id.*; Schindler & Wilson-Milne, *New and Impending Art World Money Laundering Regulations*, *supra* note 44.

71. Establishing New Authorities for Business Laundering and Enabling Risks to Security Act [ENABLERS Act], H.R. 5525, 117th Cong. (2021).

72. *Id.* § 3.

73. Will Fitzgibbon, *US Senate Blocks Major Anti-Money Laundering Bill, the Enablers Act*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Dec. 12, 2022), <https://www.icij.org/investigations/pandora-papers/us-senate-blocks-major-anti-money-laundering-bill-the-enablers-act/> [https://perma.cc/Y3KQ-A325].

the U.S. Senate Banking Committee,⁷⁴ was behind striking the bill from the NDAA. An aide for Senator Toomey remarked that the reason behind striking down the bill was that the ENABLERS Act should go through the regular legislative process.⁷⁵ Going through the traditional legislative process can provide an opportunity for more comprehensive and cohesive legislation.⁷⁶

III. IS ANTI-MONEY LAUNDERING REGULATION NECESSARY FOR THE ART MARKET?

A. *Did the Treasury’s Report Get it Wrong?*

In February 2022, the U.S. Treasury Department released its study on the art market, finding that there was limited evidence of money laundering in the art market and little risk of terror financing through the sale of high-value works of art.⁷⁷ Many working in the art market expected the report to conclude that the industry should be regulated concerning money laundering and terrorist financing.⁷⁸ This assumption was based on a U.S. Senate staff report that focused on the market’s lack of safeguards, particularly in the major auction houses that prevented sanctioned Russian oligarchs from acquiring high-value works of art.⁷⁹ While the Treasury’s report offers a considered opinion that the art market is vulnerable to money laundering, the report ignores and misunderstands many vulnerabilities.⁸⁰

A main concern is the report’s glaring misunderstanding of art fairs, thereby miscalculating their vulnerability. The report mischaracterizes fairs, describing the operation as a networking event instead of a venue where hundreds of galleries from across the globe come to sell art.⁸¹ The art fair description states that fair organizers do not have a transactional relationship with clients and that they make money by

74. The banking committee is behind in advancing the defense bill to a vote by Congress. *Id.*

75. *Id.*

76. *See id.*

77. U.S. DEP’T OF THE TREASURY, STUDY OF THE FACILITATION OF MONEY LAUNDERING AND TERROR FIN. THROUGH THE TRADE IN WORKS OF ART, at 28 (2022).

78. Steve Schindler & Katie Wilson-Milne, *Anti-Money Laundering Update: FinCEN’s Surprising Conclusion and the Impact of Russian Sanctions of the U.S. Art Market*, THE ART LAW PODCAST (Mar. 28, 2022), <https://artlawpodcast.com/2022/03/28/anti-money-laundering-update-fincens-surprising-conclusion-and-the-impact-of-russian-sanctions-on-the-us-art-market/> [https://perma.cc/56L4-6KTB].

79. *Id.*; see SUBCOMM. REP., *supra* note 2.

80. U.S. DEP’T OF THE TREASURY, *supra* note 77, at 11.

81. *Id.* at 13–14.

charging for gallery space, but do not assist in processing transactions.⁸² It further states that the “lack of transactional activity likely makes art fair organizers less vulnerable to exploitation by launderers.”⁸³ While it is true that art fair organizers are not involved in the transactions and thus are unlikely to be exploited by launderers, the characterization that fairs “lack of transactional activity” is entirely off base.⁸⁴ The purpose behind art fairs is for galleries to conduct transactions.⁸⁵ Galleries can make anywhere between 20 and 60% of their annual sales at fairs.⁸⁶ The art fair Art Basel Miami Beach receives over 80,000 attendees and hosts over 200 art institutions, providing an experience for the global art market and allowing art enthusiasts from around the world to interact and do business.⁸⁷ Whilst fair organizers may not face exploitation, galleries are susceptible. Vulnerability is heightened because fairs only operate for a few days, and transactions can occur quickly with clients who may be unfamiliar to gallery staff.⁸⁸

Although the report does not recommend AML requirements to extend to the art market, it recognizes the susceptibility of art finance companies and suggests that these services establish and implement AML programs.⁸⁹ The report identifies that art lending firms, auction houses with lending programs, and other financial services that provide collateral-based loans are not subject to AML requirements.⁹⁰ The report accurately identifies the threat, stating that these entities act like banks but are either not conducting customer due diligence, not in a position to obtain customer information, or do not have the expertise

82. *Id.* at 14.

83. *Id.*

84. *Contra id.*

85. See Julia Halperin, *Art-Fair Economics: Why Small Galleries Do Art Fairs Even When They Don't Make Money*, ARTNET (June 13, 2017), <https://news.artnet.com/market/art-fair-economics-small-galleries-gamble-989555/> [<https://perma.cc/C8NA-HPGW>].

86. *Id.*

87. Ginanne Brownell Mitic, *Small Galleries Assess the Benefits of Big Art Fairs*, N. Y. TIMES (Dec. 6, 2019), <https://nytimes.com/2019/12/03/arts/small-art-galleries-big-art-fairs.html> [<https://perma.cc/5HWP-E3ZX>].

88. See Halperin, *supra* note 85. Telephone Interview with Anonymous Art Dealer (Sept. 6, 2023). *Contra* U.S. DEP'T OF TREASURY, *supra* note 77, at 13 (stating that galleries are not likely to be preferred by money launders because individuals spending “large amounts of money” are probably known to gallerists. The report further notes that art fairs are networking events for galleries to engage with existing and future clients, and that galleries are not in a rush to conduct due diligence to make sales at fairs since the event’s purpose is not to transact).

89. U.S. DEP'T OF THE TREASURY, *supra* note 77, at 32.

90. *Id.* at 31–32.

to identify suspicious behavior.⁹¹ Additionally, the report notes that art finance services are better positioned to conduct AML checks than financial institutions where funds connected to a transaction may be routed.⁹² However, despite the report stating that the “mere perception that the art market is both vulnerable to (money-laundering) and unregulated creates incentives for criminals to further abuse the art market,” and that there is evidence suggesting that criminals purchase high-value art with funds generated from illicit activities to launder the proceeds, the Treasury Department ultimately recommends against adopting AML regulations.⁹³ The Treasury ultimately based its decision on the fact that there is not an excess of evidence supporting money laundering in the art market, and the department should rather prioritize “clos[ing] outstanding gaps” in anti-money laundering policies for real estate, investment advisers and “nonfinancial gatekeepers,” before the art-market.⁹⁴

An area of the market that is exposed to risk but overlooked in the report is art logistics.⁹⁵ The roles of art shippers and customs brokers are left out of the report, but information about freeports and art storage is included.⁹⁶ Art shippers and customs brokers play a vital and unique part in orchestrating how art safely moves across borders.⁹⁷ These art market participants can be integral in reporting and preventing money laundering and leaving them out of the study raises doubts about the thoroughness of the report.

The report assumes that having a high-value inventory indicates a gallery’s size and that small galleries do not carry high-value works—and, therefore, are not susceptible to money laundering.⁹⁸ However, small galleries do carry high-value works, and may be more susceptible to exploitation, because of the need to generate sales, but may lack the leverage to carry out voluntary AML checks.⁹⁹ Overall, the report only uses major market players as guides to inform its study.¹⁰⁰ For example, the report notes a delineation between sales team members and

91. *Id.* at 32.

92. *Id.*

93. *Id.* at 1

94. *Id.* at 34.

95. *Id.* at 8–9.

96. *Id.* at 18.

97. *See id.* at 3–4.

98. *Id.* at 13.

99. *See* Halperin, *supra* note 85.

100. Schindler & Wilson-Milne, *Anti-Money Laundering Update: FinCEN’s Surprising Conclusion and the Impact of Russian Sanctions of the U.S. Art Market*, *supra* note 78.

compliance members, and that certain types of information are only available to specific departments.¹⁰¹ Yet, this is characteristic of larger operations or more prominent players in the market.¹⁰² Smaller art market participants, where only one or two people complete all the sales and operational tasks of the business, can deal in high-value works, and are vulnerable to money laundering.¹⁰³ The report’s lack of regard for smaller dealers who deal in high-value transactions leaves an area of risk uncalculated.

Lastly, the report fails to examine existing protocols outside of the U.S. art market. Since 2001, antiques dealers and gallery owners in France have been subject to anti-money laundering regulations.¹⁰⁴ Although obligated to regulation, the market was not subject to supervisory or enforcement authority.¹⁰⁵ In 2016, the Directorate General of Customs and Excise (DGDDI) became the supervisory authority, and France’s Enforcement Committee was given enforcement control to sanction those contravening the law.¹⁰⁶ Notwithstanding France’s smaller share in the global art market and putting in place AML measures, the country continued to be considered highly vulnerable to money laundering risks.¹⁰⁷ France saw a 35% increase in the number of suspicious transaction reports from auctioneers and auction companies, and a 47% increase from fine art and jewelry dealers from 2016 to 2020.¹⁰⁸ The increase in reporting can be indicative of two things, first money laundering is becoming more prevalent in the art market, and second, as art market professionals become more knowledgeable about money laundering risks and implementing protocols, they will become more attuned to what to look out for and report suspicious behavior.

The shortcomings of the report underscore the fact that there is more of a need for regulation than the Treasury Department identifies. The Treasury’s report recognizes that there is a threat to the art

101. U.S. DEP’T OF THE TREASURY, *supra* note 77, at 32.

102. Schindler & Wilson-Milne, *Anti-Money Laundering Update: FinCEN’s Surprising Conclusion and the Impact of Russian Sanctions of the U.S. Art Market*, *supra* note 78.

103. *Id.*

104. See MINISTÈRE DE L’ACTION ET DES COMPTES PUBLICS, TRAITEMENT DU RENSEIGNEMENT ET ACTION CONTRE LES CIRCUITS FINANCIERS CLANDESTINS 73 (2018) [hereinafter TRACFIN].

105. *Id.*

106. *Id.*

107. See *Id.* at 71; see also MINISTÈRE DE L’ÉCONOMIE, DES FINANCES ET DE LA RELANCE, ML/TF RISK TRENDS AND ANALYSIS IN 2019–2020 43 (2020); see also Financial Action Task Force [FATF], *Anti-Money Laundering and Counter-Terrorist Financing Measures: France*, at 165 (May 2022).

108. FATF, *supra* note 107, at 5.

market, yet recommends against oversight.¹⁰⁹ While there are areas of the study that are correct, there are notable factors that the report either misses entirely or inaccurately assesses. These missteps bring the efficacy of the report into question.

B. Who Should Bear the Responsibility of Regulation?

Galleries and scholarship question whether art market participants should be responsible for conducting AML checks.¹¹⁰ Some scholars even question whether art market participants are equipped to conduct AML checks.¹¹¹ However, money laundering prevention professionals and financial scholars state that checks cannot only be conducted by the banks involved.¹¹² The private sector is needed to act as “front-line workers” to assist in combating money laundering.¹¹³ For example, lawyers and accountants provide legitimate services and take on AML responsibilities. Art market participants can form a “first line of defense against money laundering and terrorist financing”¹¹⁴ because they are in the best position to identify red flags that are particular to the industry. Art market participants can be gatekeepers to the financial system and play a vital role in “protecting the integrity of the financial system.”¹¹⁵

With the inclusion of antiquities as a financial institution under the BSA, FinCEN is the regulatory body overseeing the adoption and implementation of AML regulations.¹¹⁶ FinCEN’s oversight should extend to the remainder of the art market. FinCEN is the regulatory body that safeguards against financial crime, including money laundering and terrorist financing, through the BSA.¹¹⁷ As such, FinCEN is in the position to act as the designated administrator of the

109. U.S. DEP’T OF THE TREASURY, *supra* note 77, at 34.

110. Hufnagel & King, *supra* note 25, at 140; Steve Schindler & Katie Wilson-Milne, *Art and Financial Crimes*, THE ART LAW PODCAST (Apr. 23, 2019), <http://artlawpodcast.com/2019/04/23/art-and-financial-crimes/> [<https://perma.cc/YS99-JFLT>].

111. Timothy E. Burroughs, *US and EU Efforts to Combat International Money Laundering in the Art Market are no Masterpiece*, 52 VAND. J. TRANSNAT’L L. 1061, 1083 (2019).

112. Schindler & Wilson-Milne, *Art and Financial Crimes*, *supra* note 110.

113. Karin Svedberg Helgesson & Ulrika Mörth, *Client Privilege, Compliance and the Rule of Law: Swedish Lawyers and Money Laundering Prevention*, 69 CRIME L. SOC. CHANGE 227, 227 (2018).

114. HOME OFFICE AND HM TREASURY, ACTION PLAN FOR ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCE, 2016, at 12 (UK).

115. Hufnagel & King, *supra* note 25, at 140.

116. Bank Secretary Act, 31 U.S.C § 5312, Rulemaking (2021).

117. *History of Anti-Money Laundering Laws*, FIN. CRIMES ENF’T NETWORK, *supra* note 24.

BSA over the entire art market. The Treasury Department’s report highlighted that FinCEN could work on a harmonized AML scheme before introducing it to a new industry.¹¹⁸ Additionally, the report implied that FinCEN might seek guidance from antiquities dealers when creating the new regulations.¹¹⁹ This strategy of collaboration between the government and private sector should be used when adopting government regulations for the larger art market. In creating the United Kingdom’s Art AML regulation, the government sought the advice of art market participants to understand the industry’s concerns, and the British Art Market Federation created guidelines for compliance that were “blessed” by the U.K. government.¹²⁰ The United States can mirror the United Kingdom’s regulation development strategy while also looking at the Internal Revenue Service (IRS) Commissioner’s Art Advisory Panel as a model. The Art Advisory Panel advises and assists the IRS regarding art appraisals claimed on tax returns.¹²¹ The IRS’s advisory panel can serve as a template for FinCEN to implement AML regulations and assist with compliance. Part of the regulation should consider a transaction or aggregate sales threshold.¹²² To harmonize U.S. regulations with EU and U.K. regulations, a threshold of around \$10,000 may present less regulatory burden for global art market participants.¹²³ But to lessen the burden

118. U.S. DEP’T OF THE TREASURY, *supra* note 77, at 31.

119. *See id.* at 33.

120. *See generally* BAMF, *supra* note 32. The U.K.’s 5AMLD came into force on January 10, 2020, but the government’s compliance guideline was introduced in February. HMRC gave art market practitioners until June 2021 to register as art market participants and provided free webinars explaining AML responsibilities and obligations, in addition to publishing guidance specific to the art market. HMRC verifies the accuracy of practitioners’ registration and, in some cases, has initiated interventions. In early 2022, HMRC started penalizing late registrations. The interventions act as an audit to ‘test and challenge’ if art market participants understand AML compliance obligations and the risks associated with their business. Rena Neville, *The Honeymoon is Over for the Art Market and HMRC*, ART@LAW, (Apr. 19, 2022), <https://www.artatlaw.com/honeymoon-over-for-art-market-and-hmrc/> [<https://perma.cc/4F6U-WUEF>]; *see e.g.*, *Publicly Listed Penalties: A New Reality for Late Registration as an Art Market Participant (UK)*, ARTAML, (OCT. 25, 2022), <https://artaml.com/publicly-listed-penalties-a-new-reality-for-late-registration-of-art-market-participants-uk/> [<https://perma.cc/E78W-DCYB>].

121. I.R.S. Annual Summary Report Pub. 5392 (Rev. 6-2023) at 3.

122. U.S. DEP’T OF THE TREASURY, *supra* note 77, at 33; Under the amendment to the BSA which includes antiquities as a financial institution no minimum value of works was proposed. *See* AMLA, *supra* note 68.

123. *See* U.S. DEP’T OF THE TREASURY, *supra* note 77, at 33.

for smaller operations and to align with the IRS appraisal threshold, a \$50,000 transactional level should also be considered.¹²⁴

Art market participants prefer to self-regulate to establish trust and creditability, but there is the feeling that regulation is here to stay, and that more government regulation may be coming.¹²⁵ According to Deloitte’s Art & Finance 2021 report, 47% of collectors preferred government regulation.¹²⁶ An increase from 22% in 2019.¹²⁷ 44% of wealth managers “believe government regulation will restore trust in the art market.”¹²⁸ This number is only 36% for art professionals.¹²⁹ The growing preference for government regulation is because self-regulation has proven less effective.¹³⁰ An increase in government regulation in the art market is believed to lead to a higher level of trust,¹³¹ particularly as wealth managers and collectors have growing concerns about money laundering.¹³² Laura Patton, Specialist Leader in Risk at Deloitte, recalled a conversation with a high-end collector working on Wall Street who stated that while people in the art market may be afraid of anti-money laundering controls, in his experience when there are more controls in a market, people have more confidence in the market.¹³³

C. *Where Did the U.S. Go Wrong?*

Much of the U.S. impetus to create art AML regulations originated from a staff report from the Permanent Subcommittee on Investigations of the U.S. Senate.¹³⁴ This report was the reaction to the release of the Panama Papers’s exposure of how sanctioned Russian oligarchs purchased millions of dollars’ worth of art.¹³⁵ The report illustrated how the art industry and U.S. policy worked to undermine U.S. sanctions

124. *See id.*

125. DELOITTE, ART & FINANCE REPORT 2021 25 (7th ed. 2021).

126. *Id.*

127. *Id.* at 93.

128. *Id.*

129. *Id.* at 25.

130. *Id.*

131. *Id.* at 93.

132. *Id.* at 25. (“68% of wealth managers remain concerned about money laundering risks in the art market. The recent introduction of AML regulations in the European Union and the United States seems to have stemmed some wealth managers’ fears. Both art collectors (65%) and art professionals (63%) continue to see money laundering as a great threat to the art market’s reputation going forward.”)

133. Schindler & Wilson-Milne, *Art and Financial Crimes*, *supra* note 110.

134. *See* SUBCOMM. REP., *supra* note 2.

135. *Id.* at 9.

by using offshore accounts to purchase artwork.¹³⁶ The Staff Subcommittee report caused alarm because it highlighted behaviors that are concerning to law enforcement and intelligence professionals.¹³⁷ But buying a high-value object in New York and shipping it to a freeport in one country for onward passage to another country with the payment coming from Panama does not raise concerns for art market professionals because this is considered the ordinary course of business.¹³⁸ Ultra-high-net-worth individuals purchasing blue-chip art often do not transact in a relatable or understandable manner.¹³⁹ Conducting a transaction in this manner provides privacy and discretion.¹⁴⁰ Since the report did not understand the complexities of the art market, subsequent legislation like the Illicit Art and Antiquities Trafficking Prevention Act was sparse and offered no guidance or information on how AML laws should be introduced or executed in the art market.¹⁴¹

It's possible that the Staff Subcommittee report created a “boy who cried wolf” sentiment upon completion of the Treasury Department's investigation. If the Treasury was expecting blatant criminal activity, the discovery of little evidence of money laundering despite a significant threat might have informed the decision against regulating the art market.¹⁴² At times, governments need to act where there is a perception, even if there is little evidence, of wrongdoing. It is the government's responsibility to respond to a perceived concern or threat. To this extent, the Treasury could have offered more guidance about AML controls and what businesses should have in place. The report remarks that current voluntary controls are insufficient but offers little suggestions for regulatory and nonregulatory options.¹⁴³ The options

136. *See generally id.*

137. Schindler & Wilson-Milne, *Anti-Money Laundering Update: FinCEN's Surprising Conclusion and the Impact of Russian Sanctions of the U.S. Art Market*, *supra* note 78.

138. Schindler & Wilson-Milne, *Art and Financial Crimes*, *supra* note 110.

139. *Id.*

140. *Id.* Art sales have traditionally afforded a high level of privacy because these sales are often triggered by significant life changes like family issues, death, debt, and divorce. Individuals don't want to broadcast that they are selling their assets. There is also a safety concern when transacting in high-value works where one does not want to be exposed to security risks; Schindler & Wilson-Milne, *New and Impending Art World Money Laundering Regulations*, *supra* note 44.

141. Hufnagel & King, *supra* note 25, at 139; *See* H.R. 5886, 115th Cong. (2018); 31 U.S.C. § 5312(a)(2)(Y).

142. U.S. DEP'T OF THE TREASURY, *supra* note 77, at 1, 34.

143. *Id.* at 1.

given were very general suggestions that many art market participants might not know how to begin to implement.¹⁴⁴

The Treasury's report had the opportunity to dig deeper into the threats that exist for the art market. The staff subcommittee report emphasizes the fact that shell companies are being used to purchase artwork.¹⁴⁵ And while it is legal to conduct a transaction through a shell company, the Treasury's report does not acknowledge their prevalence in art transactions or the increased difficulty in carrying out voluntary AML checks when shell companies are used, especially for non-government entities.¹⁴⁶ Shell companies are easy to set up.¹⁴⁷ National Public Radio (NPR) likened creating a shell company in Delaware to setting up a new email address.¹⁴⁸ Shell companies make it increasingly difficult to ascertain who the ultimate beneficial owner is, making money laundering easier.¹⁴⁹ Some states require ownership information to be recorded, but no state requires that the beneficial owner be reported.¹⁵⁰ This allows for ownership through nominees or another business entity.¹⁵¹ According to FinCEN, states are not imposing effective safeguards to ensure that shell companies are being created for lawful purposes.¹⁵² Shell companies can be created by company formation agents or similar service providers.¹⁵³ These agents and service providers play an instrumental role in creating, supporting, and maintaining shell companies; still, they are not required to specify that the companies are being used for lawful purposes or to report suspicious activity.¹⁵⁴ Corrupt or unwitting agents and service providers aid in the creation of shell companies to be used for illicit purposes.¹⁵⁵ Further, shell companies can be an attractive vehicle because of the anonymity

144. *Id.*

145. SUBCOMM. REP., *supra* note 2, at 40.

146. *See generally id.*; Schindler & Wilson-Milne, *Art and Financial Crimes*, *supra* note 110.

147. National Public Radio (@npr), INSTAGRAM (Jan. 30, 2023), <https://www.instagram.com/p/CoDOFFMAi9a/> [<https://perma.cc/5JU5-9E2F>].

148. *Id.*

149. FIN. CRIMES ENF'T NETWORK, THE ROLE OF DOMESTIC SHELL COMPANIES IN FINANCIAL CRIME AND MONEY LAUNDERING: LIMITED LIABILITY COMPANIES, *supra* note 19, at 2.

150. *Id.* at 3 n.2.

151. *Id.*

152. *Id.* at 2–3.

153. *Id.* at 2.

154. *Id.* at 2–3.

155. *Id.* at 3.

regarding ownership and management, making them inherently vulnerable to abuse.¹⁵⁶

Not adopting AML regulations ignores the potential for additional schemes like the one involving dealer Matthew Green. Green agreed to sell Picasso’s *Personnages* for £6.7 million, to a buyer, who happened to be an undercover agent, with the intent of holding onto the work for an unspecified amount of time.¹⁵⁷ Part of the arrangement was that Green would later resell the painting on behalf of the buyer, take a dealer commission, and transfer the proceeds to the “buyer’s” bank account in the United States.¹⁵⁸ When arranging the deal, Green noted that it was important for his commission to be more than 5% “so that he would not be asked why he was ‘in the money laundering business.’”¹⁵⁹ This statement raises the question of whether Green has previously been investigated for money laundering and if he has carried out other schemes. One of the conspirators from the brokerage firm being surveilled, who introduced the undercover agent to Green, stated that the reason to use art to “clean the money” was because “the art business was ‘the only market that is unregulated,’ and art was a profitable investment for ‘money laundering.’”¹⁶⁰ Money laundering was not the subject of the undercover agent’s operation, but he stumbled upon it while investigating penny stock manipulation.¹⁶¹ However, criminals were aware of the exploitation capabilities.¹⁶² As other sectors continue to increase regulation, more illegal activity can enter the art market, or move to areas where regulation is lacking, like the United States.¹⁶³

Historically there is little evidence of a terrorist funding risk in the art market.¹⁶⁴ However, the raid of Abu Sayyaf’s home puts that into question. During the raid on the high-ranking Islamic State (ISIL) leader, U.S. forces found antiquities that had been looted, as well as sales catalogs, price lists, and bank numbers.¹⁶⁵ It is unclear what the

156. *Id.*

157. Superseding Indictment ¶¶ 50, 53, *United States v. Kyriacou*, No. 18-102 (E.D.N.Y. Mar. 20, 2018).

158. *Id.* ¶ 50.

159. *Id.* ¶ 51.

160. *Id.* ¶ 48.

161. *Id.* ¶ 47.

162. *See, e.g., id.* ¶ 48.

163. *See Council Directive 2015/849, supra note 38, ¶¶ 2,3.*

164. U.S. DEP’T OF THE TREASURY, *supra note 77*, at 1; Ben Taub, *The Real Value of the ISIS Antiquities Trade*, THE NEW YORKER (Dec. 4, 2015), <https://www.newyorker.com/news/news-desk/the-real-value-of-the-isis-antiquities-trade> [<https://perma.cc/9YB5-B6J2>].

165. Schindler & Wilson-Milne, *Art and Financial Crimes, supra note 110.*

value of the looted treasures was and how much was earned from any sale of antiquities.¹⁶⁶ Yet, the fact that ISIL was able to sell antiquities is a major concern and presents a possible shift in the sale of looted cultural property to launder money and finance terrorism.¹⁶⁷ Cultural property has traditionally been destroyed in acts of terrorism.¹⁶⁸ The raid calls into question whether terrorists are moving away from destruction and instead reselling cultural property to fund their activities. Despite little evidence of risk, the goal of ever-expanding AML regulations is to cut off all avenues to launder money and fund terrorism.¹⁶⁹ One reason there is not overwhelming evidence of money laundering is in large part due to the secret nature of the art market. It can be challenging to find substantial amounts when “million-dollar sales [are] conducted in secrecy and with virtually no oversight.”¹⁷⁰

But governments and markets cannot ignore existing evidence and risk just because it is not overwhelming. In 2017, actor Leonardo DiCaprio surrendered a \$3.2 million Picasso painting and a \$9 million Jean-Michel Basquiat painting, which were both gifted to him by Malaysian businessman Low Taek Jho.¹⁷¹ The paintings were part of an embezzlement scheme by Low, who misappropriated funds from the Malaysian government.¹⁷² Brazilian Federal Judge Fausto Martin De Sanctis, who handed down the money laundering conviction of Edemar Cid Ferreira, wrote a book chronicling how criminals have discovered the art market as an effective arena to launder money internationally.¹⁷³ In the Ferreira case, the businessman hid his embezzlement earnings by purchasing high-value works of art and shipping the works across the globe.¹⁷⁴ De Sanctis’s book highlights cases where art was used to launder money from the illegal distribution of prescription drugs, illegal drug trafficking, and gambling proceeds. The book further notes that

166. Taub, *supra* note 164.

167. *See id.*

168. *Id.*

169. *Id.*

170. Patricia Cohen, *Valuable as Art, but Priceless as a Tool to Launder Money*, N.Y. TIMES (May 12, 2013), <https://www.nytimes.com/2013/05/13/arts/design/art-proves-attractive-refuge-for-money-launderers.html> [perma.cc/9MAQ-WAG4].

171. Burroughs, *supra* note 111, at 1085; Elizabeth A. Harris & Alexandra Stevenson, *A Yacht, a Monet, a See-Through Piano: The U.S. Collects on a Fugitive’s Shopping Spree*, N.Y. TIMES (Dec. 9, 2018), <https://www.nytimes.com/2018/12/09/arts/jho-low-1mdb-assets-piano.html> [https://perma.cc/Q8Z2-XTGH].

172. Harris & Stevenson, *supra* note 171.

173. *See generally* FAUSTO MARTIN DE SANCTIS, *MONEY LAUNDERING THROUGH ART: A CRIMINAL JUSTICE PERSPECTIVE* (2013).

174. U.S. DEP’T OF THE TREASURY, *supra* note 77, at 4.

Korean judge, Han Chang-Hun stated, during a case, that it was common practice among owners of huge conglomerates to launder money by trading art.¹⁷⁵

To create AML checks in the absence of regulations, auction houses instituted programs to mitigate risk, legally protect their businesses, and safeguard their reputations.¹⁷⁶ But voluntary programs have limitations. Voluntary customer due diligence lacks legal authority and these initiatives do not offer the leverage that government compliance extends.¹⁷⁷ The Treasury’s report even states that these programs can be suspended, amended, or used on a case-by-case basis since they are not legally mandated.¹⁷⁸ De Sanctis’s book exposes a case where Christie’s auction house did not conduct due diligence measures for sellers who obtained artworks with illicit proceeds.¹⁷⁹ The auction house only inquired about where the proceeds of the sale should be deposited.¹⁸⁰ While, art market participants are compelled to self-regulate to maintain confidentiality,¹⁸¹ confidentiality and discretion can be found in other sectors subject to AML regulations, such as banking, estate planning, and real estate. The resistance from the art market to implement regulation may be steeped in a romanticization of the industry. But it may be time for a reckoning that the art market is attractive to money launderers because art has become commoditized.¹⁸² Jeff Poe, a Los Angeles-based dealer recognized for developing the LA art market, states that the art market has become a “hyper-driven

175. See DE SANCTIS, *supra* note 173, at 91–117.

176. Schindler & Wilson-Milne, *New and Impending Art World Money Laundering Regulations*, *supra* note 44, (“[A]round about 2010 . . . auction houses in general began to realize, even in the absence of any regulation, that money laundering risks were there in the art market.”); U.S. DEP’T OF THE TREASURY, *supra* note 77, at 6.

177. Sotheby’s, the auction house, came under fire for selling art to the Rotenbergs while members of the family were considered Politically Exposed Persons. Sotheby’s Chief Compliance Counsel explained to the Senate’s Permanent Subcommittee on Investigations that the auction house was limited in its authority to demand disclosure of the source of the funds. The Chief Compliance Counsel also expressed that because the family used an intermediary to buy art, the auction house had no legal right to know to whom the work would be resold. SUBCOMM. REP., *supra* note 2, at 82.

178. U.S. DEP’T OF THE TREASURY, *supra* note 77, at 6.

179. DE SANCTIS, *supra* note 173, at 114–15.

180. *Id.* at 115.

181. Katie L. Steiner, *Dealing with Laundering in the Swiss Art Market: New Legislation and its Threat to Honest Traders*, 49 CASE W. RESV. J. INT’L L. 351, 370–71 (2017).

182. Hufnagel & King, *supra* note 25 at 135.

commodity-based” arena.¹⁸³ Poe also states that his gallery put in place some risk mitigation procedures and does not believe that he sells to money launderers, but he can’t be sure.¹⁸⁴ There is a long-standing sentiment in the art market that the purchase of art should coincide with an appreciation of cultural heritage, aesthetics, and scholarship.¹⁸⁵ Traditionally, it was frowned upon to purchase art as an investment or commodity.¹⁸⁶ However, the market has changed with the rise of art advisors, the development of art investment firms, and art-secured loans.¹⁸⁷ Today’s art market is synonymous with the stock market where “Monet and Picasso are like Microsoft and Coca-Cola”¹⁸⁸ There has been a shift in the value system from connoisseurship to one based on scarcity.¹⁸⁹ As the motivations of many players in the market have changed, so should the operations.

For art market participants, there is also a reputational interest in being viewed as honest traders.¹⁹⁰ The Brussels-based *Confédération Internationale des Négociants en Oeuvres d’Art*, or International Confederation of Art and Antique Dealers’ Associations (CINOA), wrote an open letter condemning governments for continuously attempting to link the art market with money laundering activities, citing that there is little proof that it is a prevalent problem.¹⁹¹ Many art market participants feel the industry is being attacked, unfairly targeted, and criminalized.¹⁹² Art market professionals also mention that they work in the client services industry. Therefore, if a client wants to make a purchase, it is the art dealer’s job to make sure the purchase is completed, and it is not their concern where the money

183. Josh Baer, *Jeff Poe*, THE BAER FAXT PODCAST, (Sep. 14, 2023), <https://www.thebaerfaxtpodcast.com/> [<https://perma.cc/Z5Y9-LFX7>].

184. *Id.*

185. See DELOITTE & ARTTACTIC, ART & FIN. REP. 16, 23, 99 (5th ed. 2017).

186. See Hufnagel and King, *supra* note 25, at 149.

187. See U.S. DEP’T OF TREASURY, *supra* note 77, at 19; see also *supra* Parts I, III.

188. Rachel Corbett, *The Inheritance Case That Could Unravel an Art Dynasty*, N.Y. TIMES, <https://www.nytimes.com/2023/08/23/magazine/wildensteins-inheritance-case-art.html> [<https://perma.cc/K97Z-3NQN>] (Sept. 22, 2023) (noting that the Wildensteins, a highly regarded family of art dealers, were found guilty of tax evasion and money laundering in France, the ruling was later reversed and is currently being appealed. The family is said to have pioneered the “inscrutability” of the art market to make it a “leading conduit for sanction-evading oligarchs and other billionaires looking to launder excess capital.”).

189. See Baer, *supra* note 183.

190. See generally *id.*

191. Brady, *supra* note 8; Hufnagel & King, *supra* note 25, at 140.

192. Schindler & Wilson-Milne, *Art and Financial Crimes*, *supra* note 110.

originates.¹⁹³ Art market participants also resist AML regulations because they feel directives require them to spy on their clients, are concerned regulations may scare off clients, are conflicted about compliance at the expense of the business's profitability, and are worried about compliance bureaucracy.¹⁹⁴ Yet, Patton explains that a con artist often aims to gain an unwitting participant's confidence, where they are left holding the bag and only realize the con long after it is over.¹⁹⁵ For this reason, art market participants need to mitigate risk, which can be done within a reasonable and operable burden.¹⁹⁶ No sector benefits from a bad reputation, and it is the industry's responsibility to fight money laundering, not to create a hub.¹⁹⁷

Largely the discussion regarding AML regulations for the art market centers on the burden of regulation, such as the impact on small businesses. “[M]ore regulation inevitably imposes higher costs on companies,” which can be a threat to the livelihood of smaller businesses.¹⁹⁸ Even for small businesses, mitigating risks through AML protocols is essential. A business is likely to find itself incurring substantially more costs in legal fees or fines if it becomes the suspect of a money laundering investigation.

The United States can look at the Belgian diamond market for insight into implementation and how adding a non-financial sector to AML regulations can increase success in the market.¹⁹⁹ In 2004, the Belgian diamond market was obligated to follow AML regulations.²⁰⁰ The new legislation was initially not well received.²⁰¹ The directive was written with the financial sector in mind and not tailored for diamond traders.²⁰² It became apparent that traders were only maintaining compliance by simply going through the exercise of ticking boxes with no understanding of anti-money laundering importance or goals.²⁰³

193. *Id.*

194. *Id.*; Hufnagel & King, *supra* note 25, at 140.

195. Schindler & Wilson-Milne, *Art and Financial Crimes*, *supra* note 110.

196. *Id.*

197. DELOITTE & ARTTACTIC, *Expert Voices: Experiences from the Diamond Industry*, in ART & FINANCE REPORT 241, 243 (6th ed. 2019), <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-art-and-finance-report-2019.pdf#page=241>.

198. Hufnagel & King, *supra* note 25, at 137.

199. DELOITTE & ARTTACTIC, *supra* note 197, at 241–43.

200. *Id.* at 241.

201. *Id.*

202. *Id.*

203. *Id.*

Through the Antwerp World Diamond Center’s²⁰⁴ (AWDC) investment in training to raise awareness, giving practical guidance, and assisting in implementation, their work helped ease the adjustment for diamond dealers.²⁰⁵ Once the diamond market was more involved in the process, compliance became easier to understand and explain to clients who had misgivings about sharing additional information.²⁰⁶ There is speculation that AML policies will cause a downturn in sales. However, the Belgian case study showed that there was not much evidence of a downturn.²⁰⁷ Further, diamond centers outside Europe began implementing their own AML regulations, which made it easier to engage with clients about due diligence checks.²⁰⁸

Diamond dealers in Belgium found that compliance paid off because there was a better perception of the sector. Prior to AML regulations, banks had “stepped out” of the industry because the market was considered high risk.²⁰⁹ Art financial services could greatly benefit from AML regulations if banking institutions were involved in art lending and art-secured loans to provide more traditional financing. Also, AML compliance in Belgium brought new clients who had a perception that the market was high risk.²¹⁰

In an interview with a London-based dealer, they said that they understood why these regulations were put in place and stated that “no one bats an eye when buying a house and having to provide information.”²¹¹ The dealer also noted that they have yet to see a disruption in their business since beginning compliance.²¹² The dealer further mentioned that some clients get upset and don’t understand why they need to subject themselves to KYC procedures, but it just takes some “hand-holding” to explain and guide them through the process but in the end, clients are willing to comply.²¹³

U.S.-based dealers participating in U.K. art fairs will get a taste of complying with AML directives. Regardless of operating as a foreign business, when a company transacts in the United Kingdom, it will

204. *Id.*

205. *Id.* at 241–42.

206. *Id.* at 242.

207. *Id.* at 243.

208. *Id.*

209. *Id.*

210. *See generally id.*

211. Telephone Interview with Anonymous Art Dealer (Sept. 6, 2023).

212. *Id.*

213. *Id.*

have to comply with the 5AMLD.²¹⁴ This could help ease a possible transition of AML regulations for art market participants in the future, and may even aid in pushing forward legislation. However, there is also the possibility that AML compliance may come to the U.S. market before government action. Recently, Frieze, a U.K.-based arts business that operates the Frieze Art Fair in London, acquired the Armory Show and Expo Chicago.²¹⁵ The Armory Show and Expo Chicago are two of the longest-running art fairs in the U.S.²¹⁶ U.K.-based ownership opens up the possibility that galleries participating in these fairs will have to comply with some form of money laundering regulations, or, highly likely, the U.K.’s 5AMLD.

The Belgian study revealed that implementation of AML regulations found success when professionals were more engaged in the process and not simply ticking a box. AML compliance can ultimately add to the success of a market,²¹⁷ compliance should not be conducted simply out of fear of sanctions. There should be motivation to understand and embrace the objectives of keeping the market clean and protecting one’s business. These objectives bring commercial benefits, such as confidence in the market while still maintaining discretion.²¹⁸ To implement regulations that will be easy to comply with, art market participants should help advise government regulators, and leading art institutions should provide educational support and tools to aid compliance. As was found in the Belgian study, implementation of the regulation found success when professionals were more engaged in the process.

IV. CONCLUSION

The argument, and basis for not implementing AML regulations, that there is a lack of evidence of money laundering in the art market, is likely due to the art market’s inherent nature of secrecy and lack of transparency.²¹⁹ While vulnerability does not mean there is a rampant problem, where there is a vulnerability, there can be action. AML regulations will help safeguard the market and allow art market

214. The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692, art. 8 (UK) (amended 2019); *see* Baer, *supra* note 183.

215. Robin Pogrebin, *Frieze Art Fair Acquires Armory Show and Expo Chicago*, N.Y. TIMES (Jul. 13, 2023), <https://nytimes.com/2023/07/13/arts/frieze-acquires-armory-show-expo-chicago.html> [<https://perma.cc/P435-N47N>].

216. *Id.*

217. DELOITTE & ARTTACTIC, *supra* note 197, at 205.

218. *Id.*

219. SUBCOMM. REP., *supra* note 2, at 3.

participants to feel confident when conducting transactions. Art market participants want regulation, but typically in the form of self-regulation. Nevertheless, AML checks will allow art market participants to conduct business with confidence—not only by letting them know with whom they are doing business, but also by providing leverage to either discourage or escape transactions where they feel as though they may not be working with a legitimate buyer.

Even though there may be hesitation to acquiesce to government regulation and oversight, AML regulations are already in place in other industries where high-value tangible and intangible objects are transferred, such as precious gems, real estate, and stocks.²²⁰ In a market where extremely valuable, rare, and unique items are exchanged, it is entirely plausible that the market would be subjected to conducting KYC due diligence. The burden the art market and particularly smaller businesses may face can be avoided through thoughtful legislation, leaning on the expertise of art market professionals, and taking the time to adapt. Further, it is prudent for the United States to work slowly in this manner and use the European Union’s and United Kingdom’s efforts as guides. As Michael McCullough, a partner at the art law-focused firm Pearlstein McCullough & Lederman LLP, put it, “It’s something people can learn.”²²¹

220. Cohen, *supra* note 170.

221. Anna Louis Sussman, *Galleries Could Face “Unnecessary and Onerous” Regulation Under New Legislation*, ARTSY, (May 24, 2018, 12:38 PM), <https://www.artsy.net/article/artsy-editorial-galleries-face-unnecessary-onerous-regulation-new-legislation> [perma.cc/SP3E-EGHP].