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Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States

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Cover Page Footnote

Notes and Articles Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXIX; J.D. Candidate, Fordham University School of Law, 2019; B.A., English, Boston College, 2016. I would like to thank Professor Leila Amineddoleh for her guidance throughout the research and writing of this Note, as well as the IPLJ Editorial Board and Staff for their hard work during the editing process. I would also like to thank my parents, John and Angela, and my wonderful friends for their unending love and support.

Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States

Alessandra Dagirmanjian*

As high-net worth individuals have increasingly viewed art as a method of diversifying their portfolios, prices in the high-end global art market have exploded in the past several years. At the same time, investors have developed new methods for accessing art's liquidity, such as art lending services and exchanges. While the changing character of art towards an asset class has opened the door to new investment opportunities, it has also left the art market particularly vulnerable to money laundering schemes. Existing characteristics of the art market, including a lack of uniform record-keeping standards among dealers and the speculative nature of art, also make it hospitable to this crime. In light of the art market's vulnerability to money laundering, the need for legislation specifically addressing the industry seems clear. Yet, professional art intermediaries raise legitimate concerns about the compliance burdens and loss of confidentiality that accompany a regulatory scheme. This Note addresses the existing tension between potential anti-money laundering legislation and art dealers' interests, and proposes regulatory solutions to prevent money laundering through art without disrupting the art market.

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INTRODUCTION

In June 2014, the United States charged Philip Rivkin with fraud in the sale of biodiesel credits producing more than \$29,000,000 in profit.¹ In what was likely an attempt to conceal the fraud, Rivkin purchased more than \$18,000,000 worth of art, with his illicit gains.² His collection included high-value works such as a photograph by Edward Weston worth \$165,000 and a \$675,000 Alfred Stieglitz photograph.³ U.S. authorities discovered the works, which Rivkin had kept in storage in Houston, right before he attempted to ship them to Spain.⁴ As the government began seizing Rivkin’s photographs, he made no attempt to salvage them, likely because he had already stored money in several other assets abroad, and thus, saving the photographs “was not worth his time or effort.”⁵

Rivkin’s failed plot to ship millions of dollars of art abroad is just one example of money laundering, the process through which a criminal cleanses the proceeds of a crime so they appear

¹ Press Release, U.S. Dep’t of Justice, Houston Man Charged with Biofuels Fraud Scheme (June 19, 2014), <https://www.justice.gov/opa/pr/houston-man-charged-biofuels-fraud-scheme> [<https://perma.cc/Y29T-R2HH>] [hereinafter Biofuels Fraud Scheme]. A court later sentenced Rivkin to 121 months in prison for fraud under the Clean Air Act. Press Release, U.S. Dep’t of Justice, Houston Man Sentenced to More than 10 Years in Prison for Biodiesel Fraud Scheme (Mar. 7, 2016), <https://www.justice.gov/opa/pr/houston-man-sentenced-more-10-years-prison-biodiesel-fraud-scheme> [<https://perma.cc/Y72U-4Vff>]. The government charged him with money laundering as well, although he was not convicted on those charges. Biofuels Fraud Scheme, *supra*.

² Mario Parker et al., *The Fake Factory that Pumped Out Real Money*, BLOOMBERG BUSINESSWEEK (July 13, 2016), <https://www.bloomberg.com/features/2016-fake-biofuel-factory/> [<https://perma.cc/HVG5-8WCJ>] (citing Special Agent Lea Bauer); Press Release, U.S. Att’y’s Office Dist. of N.J., Forfeiture of More than \$15 Million Worth of Artwork Sought by U.S. Attorney’s Office (Mar. 1, 2013), <https://www.justice.gov/usao-nj/pr/forfeiture-more-15m-worth-artwork-sought-us-attorney-s-office> [<https://perma.cc/8JS3-6242>].

³ Press Release, U.S. Att’y’s Office Dist. of N.J., *supra* note 2.

⁴ Parker et al., *supra* note 2.

⁵ *Id.*

legitimate to investigators and law enforcement.⁶ Historically, money launderers have cleansed their illicit proceeds through a series of wiring transactions involving a traditional financial institution like a bank.⁷ However, since the enactment of the Bank Secrecy Act (the “BSA”), which directly targets money laundering through banks, launderers have increasingly turned to luxury markets such as the real estate market to accomplish the same task.⁸

As Rivkin’s case and others’ demonstrate, the modern art market has also become particularly vulnerable to money laundering. This vulnerability is due in part to the changing character of art and the global art market.⁹ As high-net-worth individuals increasingly turn to art as a method of diversifying their portfolios and storing value in the long term, prices in the top end of the art market have exploded,¹⁰ leading to record sales such as Jean-Michel Basquiat’s painting, *Untitled*, for \$110,000,000 at Sotheby’s in New York.¹¹ The movement towards investment in art has also facilitated new methods for doing so, such as art lending services, art exchanges, and art funds, that theoretically increase investors’ ability to access art’s value.¹² Yet, while the price of art and investors’ ability to access its value have increased,

⁶ CHARLES DOYLE, CONG. RESEARCH SERV., RL33315, MONEY LAUNDERING: AN OVERVIEW OF 18 U.S.C. § 1956 AND RELATED FEDERAL CRIMINAL LAW 1 (2017).

⁷ Hannah Purkey, Note, *The Art of Money Laundering*, 22 FLA. J. INT’L L. 111, 115 (2010); *Money Laundering*, FIN. ACTION TASK FORCE, <http://www.fatf-gafi.org/faq/moneylaundering> [<https://perma.cc/4D6W-DH47>] (last visited Dec. 7, 2018).

⁸ Jeffrey R. Boles, *Million Dollar Ghost Buildings: Dirty Money Flowing Through Luxury Real Estate Markets*, 45 REAL EST. L.J. 476, 486 (2017).

⁹ See *infra* Section I.D.1.

¹⁰ Alice Xiang, Comment, *Unlocking the Potential of Art Investment Vehicles*, 127 YALE L.J. 1698, 1700 (2018); ART & FINANCE REPORT 2017, DELOITTE 117 (2017), <https://www2.deloitte.com/content/dam/Deloitte/at/Documents/finance/art-and-finance-report-2017.pdf> [<https://perma.cc/5RK4-9ZH5>].

¹¹ Clare McAndrew, *The Art Market*, ART BASEL & UBS 104 (2018), https://d2u3kfw92fzu7.cloudfront.net/Art%20Basel%20and%20UBS_The%20Art%20Market_2018.pdf [<https://perma.cc/82NA-G3UG>].

¹² See NOAH HOROWITZ, ART OF THE DEAL: CONTEMPORARY ART IN A GLOBAL FINANCIAL MARKET 148 (2011); Monique Sofo, *How to Monetize an Art Collection*, CHRISTIE’S INT’L REAL EST.: LUXURY DEFINED (May 10, 2017), <https://www.christiesrealestate.com/blog/how-to-monetize-an-art-collection> [<https://perma.cc/7KXD-YW3F>].

so too has the money launderer's ability to monetize art for criminal ends.¹³ Unique characteristics of the art market also make it hospitable to money laundering¹⁴: professional art intermediaries do not maintain uniform standards for recordkeeping¹⁵ while the subjectivity of art and a lack of a standardized pricing methodology make its value somewhat speculative.¹⁶ Thus, the art market provides valuable assets that a launderer can purchase anonymously for an inflated price without raising government suspicion.¹⁷

Despite these vulnerabilities, though, there is no existing regulatory scheme that directly targets the use of art for money laundering, and the art market maintains very little self-policing to prevent it.¹⁸ One recent proposal for legislation against money laundering in the art market, the Illicit Art and Antiquities Trafficking Prevention Act, would amend the Bank Secrecy Act to include "dealers in art or antiquities."¹⁹ However, many art dealers and the organizations that represent them have pushed against this proposal and other regulations in the market because they threaten to impose high burdens of compliance on dealers while ignoring the legitimate reasons for maintaining privacy in art transactions.²⁰ Dealers also question whether art should be regulated in the same way as commodities with standardized valuations such as precious metals or coins.²¹ Yet, addressing money laundering is essential to the proper functioning of the art market as this crime reflects a

¹³ See *infra* Section I.D.1.

¹⁴ See *infra* Sections I.D.2–I.D.3.

¹⁵ See Allyson Shea, Note, *Shooting Fish in a Bliss Bucket: Targeting Money Launderers in the Art Market*, 41 COLUM. J.L. & ARTS 665, 671–72 (2018).

¹⁶ *Id.* at 672; HOROWITZ, *supra* note 12, at 170.

¹⁷ See *infra* Sections I.D.2–I.D.3.

¹⁸ See *infra* Section I.B.

¹⁹ Illicit Art and Antiquities Trafficking Prevention Act, H.R. 5886, 115th Cong. (§ 2(a)(3) 2018).

²⁰ *Art Trade Reacts to Threatened Bank Secrecy Act*, CULTURAL PROP. NEWS (June 25, 2018), <https://culturalpropertynews.org/congressman-wants-bank-secrecy-act-to-regulate-art-trade> [<https://perma.cc/2VVZ-TRFB>].

²¹ See Zachary Small, *Does the Art World Have a Money Laundering Problem?*, HYPERALLERGIC (Oct. 18, 2018), <https://hyperallergic.com/465736/does-the-art-world-have-a-money-laundering-problem> [<https://perma.cc/8VS4-T45T>].

complete disregard for artwork's intangible aesthetic and cultural values.

This Note explores the difficulties of imposing anti-money laundering regulations in the United States art market. Part I describes how the changing character of art, the unique culture of the art market, and a lack of regulation of professional art intermediaries have resulted in a vulnerable market. Part II lays out the tensions between the government's and art dealers' interests in regulating the market. Importantly, the same privacy that lends itself to money laundering is also essential to art dealers' ability to attract and maintain clients. Part III proposes several regulatory approaches that address the unique culture of the art market, as well as a shift in art market practices towards more effective self-regulation.

I. MONEY LAUNDERING THROUGH ART IN THE MODERN ART MARKET

This Part describes how a rapidly expanding art market in the United States without regulatory barriers has led to a booming yet vulnerable market for money laundering. Section I.A provides an overview of the federal criminal definition of money laundering and the process of money laundering through art. Section I.B describes the lack of existing anti-money laundering regulation specifically targeted at the art market. Section I.C provides a brief overview of the changing character of art as an alternative asset and some of the ways investors have made art's value more accessible. Section I.D explains how high prices and new investment methods, coupled with the unique characteristics of the art market make it particularly vulnerable to money laundering.

A. Money Laundering Through Art Defined

The Money Laundering Control Act (the "MLCA"),²² the federal statute that criminalizes money laundering in the United States, defines four types of money laundering: promotional,

²² Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956–1957 (2012).

concealment, structuring, and tax evasion.²³ The most commonly known and most relevant type for the purposes of this Note is concealment, or the cleansing of illegal funds through a series of financial transactions.²⁴ A criminal must cleanse the proceeds of a crime, because she cannot use them in the legitimate market, while they still hold the “taint” of the underlying illegal acts, without creating suspicion as to their origin.²⁵ The MLCA defines this process as engaging in or attempting to engage in a financial transaction “knowing” it is designed to “conceal” the “nature, location, the source, the ownership, or the control of the proceeds” of an “unlawful activity” and “knowing” that the property represents the proceeds of such “unlawful activity.”²⁶ Courts have interpreted the use of the word “knowing” throughout section 1956 of the MLCA to include “willful blindness or conscious avoidance.”²⁷ Thus, a professional art intermediary could face criminal liability under section 1956(a)(1)(B)(i) for willfully ignoring red flags suggesting her client is purchasing or selling a work of art to conceal the proceeds of a crime even if she did not have actual knowledge that her client was doing so.²⁸

The process of cleansing illicit gains can become quite complex depending on what method a criminal uses,²⁹ but it typically involves three basic stages: placement, layering, and integration.³⁰ In the placement stage, the first stage, the criminal disentangles her illicit proceeds from their most obvious ties to the

²³ DOYLE, *supra* note 6, at 2.

²⁴ *See id.* at 10 (citing 18 U.S.C. § 1956(a)(1)(B)(i)).

²⁵ Purkey, *supra* note 7, at 114–15.

²⁶ 18 U.S.C. § 1956(a)(1)(B)(i).

²⁷ DOYLE, *supra* note 6, at 3, 3 n.21 (quoting *United States v. Antzoulatos*, 962 F.2d 720, 725 (7th Cir. 1992)).

²⁸ *See id.*

²⁹ *See, e.g.*, ABOUT THE NEED OF FORENSIC AND ANTI-MONEY LAUNDERING SERVICES FOR ART MARKET PROFESSIONALS, DELOITTE 3 (2014), <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/risk/lu-forensic-aml-art-market.pdf> [<https://perma.cc/Z9HF-M3NM>] (describing a process through which “a criminal organi[z]ation advises an alternative investment fund to acquire a master piece for its art portfolio, and is funding the purchase of the said piece via an art dealer located in a location where cash settlement of auction sale is legal and common.”).

³⁰ Purkey, *supra* note 7, at 115.

underlying crime by introducing them into the financial system.³¹ The second stage, the layering stage, involves the movement of funds to get rid of any remaining traces of the underlying crime.³² Finally, in the integration stage, the launderer can use the money, now free of its illegal taint, in the legitimate economy.³³ Art is particularly vulnerable to money laundering in the placement and layering stages,³⁴ but it can also be used in the integration stage.³⁵ For example, a money launderer might use her illicit cash to purchase a piece of art in the placement stage.³⁶ Then in the layering stage, she might create a shell company to acquire ownership of the art—thus further distancing her identity from the original crime³⁷—and then sell it.³⁸ After selling the work, the money launderer would be free to use the proceeds in the legitimate economy.³⁹ Alternatively, a money launderer might use the placement stage to break up her illicit proceeds into smaller amounts and then deposit these into a bank account.⁴⁰ In the layering stage, she might purchase investment instruments or engage in a series of wiring transactions.⁴¹ Finally, in the integration stage, the launderer would invest the legitimate funds in luxury items, including artwork.⁴²

³¹ Fabian Maximilian Johannes Teichmann, *Twelve Methods of Money Laundering*, 20 *J. MONEY LAUNDERING CONTROL* 130, 131 (2017); FIN. ACTION TASK FORCE, *supra* note 7.

³² FIN. ACTION TASK FORCE, *supra* note 7.

³³ *Id.*

³⁴ Teichmann, *supra* note 31, at 133–34 (finding that art may be suitable for the placement and layering stages).

³⁵ FIN. ACTION TASK FORCE, *supra* note 7.

³⁶ Teichmann, *supra* note 31, at 133–34; Boles, *supra* note 8, at 480 (noting that a criminal might purchase assets during the placement stage).

³⁷ Monika Roth, *Money Laundering and the Art Market*, 11 *JUSLETTER* 6 (Jan. 11, 2016) (Ger.).

³⁸ See FIN. ACTION TASK FORCE, *supra* note 7; see also Roth, *supra* note 37, at 6; Boles, *supra* note 8, at 480 (explaining that a criminal might sell assets acquired during the placement stage in the layering stage).

³⁹ FIN. ACTION TASK FORCE, *supra* note 7.

⁴⁰ See *id.*, *supra* note 7.

⁴¹ *Id.*

⁴² *Id.*

B. Barriers to Money Laundering Through Art in the United States

The MLCA and the Bank Secrecy Act of 1970 (“BSA”)⁴³ are two pieces of legislation that act as substantial barriers to money laundering in the United States.⁴⁴ However, there is currently no regulation that specifically targets money laundering in the art market, nor does the art market itself subject professional art intermediaries to any standards of professionalism that directly address money laundering. This Section describes the existing barriers to money laundering and the large gap that remains for money laundering through art.

1. Government Oversight

The BSA is the first piece of legislation aimed at preventing money laundering in the United States.⁴⁵ Congress established the BSA in 1970 to prevent criminals from using banks to cleanse their illegal gains.⁴⁶ The BSA authorizes the Secretary of the Treasury to enforce certain anti-money laundering requirements for banks and other nonbank businesses defined as “financial institutions.”⁴⁷ Subsequent legislation expanded anti-money laundering requirements under the BSA.⁴⁸ First, the Annunzio-Wylie Anti-Money Laundering Act set requirements for financial institutions to file Suspicious Activity Reports with the Financial Crimes Enforcement Network (“FinCEN”).⁴⁹ Congress later enacted the

⁴³ Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended in scattered sections of 12 U.S.C. and 31 U.S.C.).

⁴⁴ See Boles, *supra* note 8, at 482–84.

⁴⁵ Boles, *supra* note 8, at 482–83.

⁴⁶ Michael J. Anderson & Tracy A. Anderson, *Anti-Money Laundering: History and Current Developments*, 30 J. INT’L BANKING L. & REG. 521, 523 (2015).

⁴⁷ RENA S. MILLER & LIANA W. ROSEN, CONG. RESEARCH SERV., RL44776, ANTI-MONEY LAUNDERING: AN OVERVIEW FOR CONGRESS 5 (2017). The Secretary of Treasury established the Financial Crimes Enforcement Network (“FinCEN”), under the Secretary of the Treasury, to administer the BSA. *Id.* at 14; Anderson & Anderson, *supra* note 46, at 523. FinCEN is responsible for “issu[ing] guidance, advisories, and rules on BSA implementation and maintain[ing] the federal government’s database on required reporting by financial institutions and regulated industries, including suspicious activity reports (SARs) and currency transaction reports (CTRs).” MILLER & ROSEN, *supra*, at 14.

⁴⁸ MILLER & ROSEN, *supra* note 47, at 5, 10.

⁴⁹ Boles, *supra* note 8, at 483.

Patriot Act to combat terrorism financing.⁵⁰ The Patriot Act increased the compliance burden for “financial institutions” by requiring that they establish at a minimum (1) the “development of internal policies, procedures and controls; (2) designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs.”⁵¹

While the definition of “financial institutions” does not include professional art intermediaries, the BSA does already apply to them to some extent. For example, the Internal Revenue Service, under the authority of the BSA, requires that anyone in a trade or business who engages in a transaction or several related transactions of more than \$10,000 in cash submit a report to FinCEN.⁵² As businesses, dealers in art or antiquities are required to report such transactions under the BSA.⁵³ However, because professional intermediaries in the art market are not considered financial institutions under the BSA, they do not have to comply with its anti-money laundering standards or file suspicious activity reports.⁵⁴ Thus, art dealers have little incentive other than good faith to flag possible money laundering schemes involving artwork for law enforcement.⁵⁵ Furthermore, prosecutors often discover

⁵⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 1960 and in other U.S. Code sections).

⁵¹ Boles, *supra* note 8, at 493. Section 352(c) of the Patriot Act also tasks the Secretary of the Treasury with crafting anti-money laundering regulations that are “‘commensurate with the size, location, and activities’ of the financial institutions to which such regulations apply.” Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 70 Fed. Reg. 33702, 33703 (proposed June 9, 2005) (to be codified at 31 C.F.R. pt. 103) (citing USA PATRIOT Act § 352(c)).

⁵² *Bank Secrecy Act*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/bank-secrecy-act> [<https://perma.cc/37AQ-87P4>] (last visited Dec. 7, 2018); *see also* Anderson & Anderson, *supra* note 46, at 529–31.

⁵³ *See* INTERNAL REVENUE SERV., *supra* note 52; *see* 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> [<https://perma.cc/ZVV2-VUB8>].

⁵⁴ *See* Zachary Small, *Art Dealers Could be Under More Financial Scrutiny with New US Bill*, HYPERALLERGIC (June 25, 2018), <https://hyperallergic.com/448705/bank-secrecy-act-art-dealers-luke-messer> [<https://perma.cc/TF63-F5WR>]; Cohen, *supra* note 53.

⁵⁵ *See* Cohen, *supra* note 53.

money laundering schemes involving art through suspicious banking activity or violations of customs laws rather than reports of cash transactions over \$10,000.⁵⁶

2. Self-Regulation

The art market itself maintains little oversight of its professionals in a way that would encourage them to help law enforcement prevent money laundering through art.⁵⁷ The national professional trade organization for art dealers in the United States is the Art Dealers Association of America (“ADAA”).⁵⁸ While the ADAA’s code of ethics generally requires that each member “comply with all applicable laws and regulations,” it does not maintain any ethical provisions pertaining to money laundering through art specifically.⁵⁹ There are several state organizations for professional art dealers as well; however, these organizations have similarly unspecific ethical guidelines for their members.⁶⁰ Additionally, while the ADAA has 180 members, there are an estimated 1500 art dealers in New York City alone.⁶¹ Furthermore, dealers may join only by invitation from the ADAA’s board if they “have an established reputation for honesty, integrity and professionalism among their peers, and [] make a substantial contribution to the cultural life of the community by offering

⁵⁶ *Id.*

⁵⁷ Jason-Louise Graham, *Art Exchange? How the International Art Market Lacks a Clear Regulatory Framework*, in ART, CULTURAL HERITAGE AND THE MARKET 319, 337 (Valentine Vadi & H.E.G.S. Schneider eds., 2014) (citing Patty Gerstenblith) (“[T]he art market is an active and vital segment of commercial transactions which require the formulation of a flexible and realistic yet also adequate model for protection of those consumers who do venture into that marketplace.”); *see also* Shea, *supra* note 15, at 673.

⁵⁸ *About*, ART DEALERS ASS’N AMERICA, <https://www.artdealers.org/about/mission> [https://perma.cc/4SF4-QJGF] (last visited Dec. 7, 2018).

⁵⁹ *Code of Ethics and Professional Practices*, ART DEALERS ASS’N AMERICA, <https://www.artdealers.org/about/code-of-ethics-and-professional-practices> [https://perma.cc/Y85Y-TN2S] (last visited Dec. 7, 2018).

⁶⁰ *See, e.g., Code of Ethics*, ART DEALERS ASS’N CALIFORNIA, <http://artdealersassociation.org/CodeOfEthics.html> [https://perma.cc/YQ3D-VWGF] (requiring that dealers “[w]ork to protect the community against those who would engage in unethical or illegal actions”) (last visited Dec. 7, 2018).

⁶¹ ART DEALERS ASS’N AMERICA, *supra* note 58 Howard Halle, *Best Art Galleries in New York City*, TIMEOUT (Apr. 20, 2018), <https://www.timeout.com/newyork/art/best-art-galleries-in-new-york-city-galleries> [https://perma.cc/7SYC-YUKE].

works of high aesthetic quality, presenting worthwhile exhibitions and publishing scholarly catalogues.”⁶² Finally, since dealers are not required to join the ADAA to practice in the art trade, they have practically no incentive to do so.⁶³ Thus, with only a small handful of members who are already conducting reputable practices, the ADAA and state organizations do little to prevent the use of art for money laundering.⁶⁴

Auction houses are not subject to any oversight from within the market either. However, several of the major auction houses in the United States have their own anti-money laundering systems in place.⁶⁵ For example, Christie’s global compliance team manages an anti-money laundering program, which includes staff training, due diligence, and record-keeping.⁶⁶ The auction house also limits the amount of cash that a customer may use in the purchase of an item and does not allow third parties to pay for a work.⁶⁷ Sotheby’s similarly restricts customers’ ability to pay through cash or a third party.⁶⁸ Its guidelines provide, “[y]ou can pay by bank transfer, cheque or cash (subject to certain restrictions and legal limits). Certain credit cards are accepted at particular Sotheby’s locations Payment must be sent from the invoiced party and

⁶² ART DEALERS ASS’N AMERICA, *supra* note 58; *see also* Shea, *supra* note 15, at 673. Similarly, the Art Dealers Association of California “carefully selects dealers committed to the profession, dealers in fine art who have earned an outstanding reputation in their communities for integrity and expert knowledge.” *Qualifications for Membership*, ART DEALERS ASS’N CALIFORNIA, <http://www.artdealersassociation.org/Qualifications.html> [<https://perma.cc/FC24-WGZG>] (last visited Dec. 7, 2018).

⁶³ Shea, *supra* note 15, at 673 (noting that even well-known and reputable galleries such as Gagosian are not members of the ADAA).

⁶⁴ *Id.*

⁶⁵ Eileen Kinsella, *US Art Dealers May Soon be Subject to Government Financial Regulation*, ARTNET NEWS (May 2, 2018), <https://news.artnet.com/art-world/us-art-dealers-financial-regulation-1277351> [<https://perma.cc/R85W-5L63>]; *see also, e.g., Compliance*, SOTHEBY’S, <https://www.sothebys.com/en/departments/compliance> (last visited Dec. 7, 2018) [<https://perma.cc/T9B9-LXPZ>]; *Selling at Christie’s*, CHRISTIE’S, <https://www.christies.com/selling-services/selling-guide/financial-information> [<https://perma.cc/LF4H-5378>] (last visited Dec. 7, 2018).

⁶⁶ CHRISTIE’S, *supra* note 65.

⁶⁷ *See id.*

⁶⁸ Shea, *supra* note 15, at 674 n.53 (citing *Buy & Sell*, SOTHEBY’S, <https://www.sothebys.com/en/buy-sell#buying-basics> [<https://perma.cc/56DG-ZSGN>]).

not from a third party.”⁶⁹ However, without any oversight from the government or the art market, it is not clear how effective these individual anti-money laundering programs actually are.

C. *The Modern Art Market*

Understanding the threat of money laundering in the modern art market requires an examination of the changing character of art. In recent years, the price of art, particularly in the high-end of the art market, has grown rapidly.⁷⁰ This has brought attention not only from wealthy collectors but also from a new class of investors⁷¹ that has developed new methods of increasing stability in the art market.⁷² This section describes the various impetuses behind massive growth in the high-end art market and provides two examples of new strategies for accessing the monetary value of art.

1. The Rise of the Art Market

The global art market has seen significant growth over the past several years.⁷³ In 2017, sales in the art market totaled more than 63 billion dollars, up 12% from 56 billion dollars in 2016.⁷⁴ Three major auction houses, Sotheby’s, Christie’s, and Phillips, saw a total increase in sales of 18% from 2016.⁷⁵ One extreme example of this growth is Christie’s sale of Leonardo DaVinci’s painting, *Salvatore Mundi* for \$450,000,000 in 2017, the most money ever paid for a single piece of art.⁷⁶ The United States is a key player in

⁶⁹ *See id.*

⁷⁰ Gaby Del Valle, *Why is Art So Expensive?*, VOX (Oct. 31, 2018, 1:50 PM), <https://www.vox.com/the-goods/2018/10/31/18048340/art-market-expensive-ai-painting> [<https://perma.cc/EV5G-BBQ9>].

⁷¹ *See* Graham, *supra* note 57, at 322.

⁷² *See id.* at 324.

⁷³ *See id.* at 320.

⁷⁴ McAndrew, *supra* note 11, at 15. The market saw two years of contraction in 2015 and 2016. *2017 Summary: The Art Market Enters a New Phase*, ARTPRICE, <https://www.artprice.com/artprice-reports/the-art-market-in-2017/2017-summary-the-art-market-enters-a-new-phase> [<https://perma.cc/5S4M-YYQ8>] (last visited Jan. 21, 2019).

⁷⁵ DELOITTE, *supra* note 10, at 40.

⁷⁶ Del Valle, *supra* note 70; *see also* Paul Melton, *Art Market Histories of the 20th Century*, SOTHEBY’S INST. ART (Mar. 5, 2018), <https://www.sothebysinstitute.com/news-and-events/news/art-market-histories-of-the-20th-century> [<https://perma.cc/2XAS-RSWR>].

this global art market, maintaining the largest portion of total sales value of any country at 42%.⁷⁷ The majority of this increase in value can be attributed to works at the top end of the market.⁷⁸ While sales by art dealers for less than \$50,000 accounted for the majority of dealer transactions in 2017, they represented only 30% of the value of dealers' total sales.⁷⁹ The same is true in the auction market, where artists whose works sold for more than \$10,000,000 dominated the value of total sales, but accounted for only 0.2% of sellers at auction.⁸⁰

There are several forces behind this massive growth in high-end transactions. First, the number of high-net-worth individuals—investors who are often interested in purchasing luxury goods—has increased in the last several years.⁸¹ Additionally, the art market has become increasingly globalized as individuals from new countries begin to participate more and more in high-end transactions.⁸² Finally, the finance market has become increasingly interested in art as an asset class.⁸³ Particularly, since the financial crisis in 2008, investors have sought out alternative assets, such as art and other collectibles for stability.⁸⁴ While many financial experts are still skeptical about art's ability to provide significant returns in the long term,⁸⁵ wealth managers are beginning to view

⁷⁷ McAndrew, *supra* note 11, at 15.

⁷⁸ Del Valle, *supra* note 70.

⁷⁹ McAndrew, *supra* note 11, at 56. 74% of sales by professional intermediaries in 2017 were for less than \$50,000. *Id.*

⁸⁰ *Id.* at 122–23. “Just 25 artists accounted for nearly half of all contemporary auction sales in the first six months of 2017.” Del Valle, *supra* note 70.

⁸¹ Kyle Sommer, *The Art of Investing in Art*, J.P. MORGAN, <https://www.jpmorgan.com/country/US/en/jpmorgan/is/thought/magazine/3Q2013/art> [<https://perma.cc/XVV4-4H23>] (last visited Jan. 21, 2019).

⁸² *See id.* For example, individuals from China, Russia, and the Middle East have increasingly taken part in transactions in the global art market. *Id.* Additionally, China surpassed the United Kingdom for the second largest share of value in the global art market in 2010, despite holding less than 5% of the market's value in 2006. McAndrew, *supra* note 11, at 34.

⁸³ *See generally* DELOITTE, *supra* note 10.

⁸⁴ Graham, *supra* note 57, at 322.

⁸⁵ McAndrew, *supra* note 11, at 13. Global Chief Investment Officer of UBS, Mark Haefele, explains that art does not provide some of the long term benefits that stocks and bonds do, such as “dividends, coupons, and risk premia, and the opportunity to diversify, rebalance, and liquidate.” *Id.*

art as a new method of diversifying a portfolio.⁸⁶ There are several theoretical benefits to adding art to a wealth management offering. First, art may have a low correlation with other asset classes, such that it performs better than stocks and bonds during periods of economic decline.⁸⁷ Art can also be an effective way to store value when the market faces a period of inflation.⁸⁸ Finally, art prices have tended to rise over long periods of time, thus offering at least moderate returns as long-term investments.⁸⁹

2. Accessing the Value of Art: Dealing with Illiquidity in the Art Market

Despite its benefits as an alternative asset, art has several inefficiencies that inhibit investment opportunities.⁹⁰ One aspect of art that is prohibitive to investment is its illiquidity.⁹¹ Collectibles like art tend to be illiquid⁹² in part because purchasing and selling them requires large transaction costs that offset their value.⁹³ Unlike a sale of stock, a collector cannot sell his Picasso by simply pushing a button.⁹⁴ For example, it typically takes an auction house three to six months after consignment to sell a piece of art.⁹⁵ During this time, the owner will have to pay for storage of the work, as well as its maintenance.⁹⁶ These costs can significantly

⁸⁶ Xiang, *supra* note 10, at 1700; DELOITTE, *supra* note 10, at 36, 117 (finding that 48% of wealth managers surveyed stated that the best reason to include art in a portfolio is for diversification and 88% said that art should be included as part of a wealth management offering).

⁸⁷ Xiang, *supra* note 10, at 1700.

⁸⁸ *Id.* at 1700–01.

⁸⁹ Sommer, *supra* note 81.

⁹⁰ Adriano Picinati di Torcello, *Why Should Art be Considered as an Asset Class?*, DELOITTE 20 (2010), <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-art-asset-class-122012.pdf> [<https://perma.cc/3NLQ-CLQD>].

⁹¹ Xiang, *supra* note 10, at 1713–15.

⁹² “Illiquid refers to the state of a security or other asset that cannot easily be sold or exchanged for cash without a substantial loss in value.” *Illiquid*, INVESTOPEDIA, <https://www.investopedia.com/terms/i/illiquid.asp> [<https://perma.cc/3HWU-KFV7>] (last visited Dec. 7, 2018).

⁹³ Xiang, *supra* note 10, at 1710.

⁹⁴ HOROWITZ, *supra* note 12, at 170.

⁹⁵ *Id.*

⁹⁶ Xiang, *supra* note 10, at 1710.

offset the value the owner of the work will receive in the sale.⁹⁷ Additionally, art is unique and subject to trends and personal tastes, which means there may not always be demand for a work in the market, making it difficult for the investor to sell right away.⁹⁸ Thus, illiquidity can be prohibitive to investors attempting to access the monetary value of a work of art quickly. It is also prohibitive to purchasers who cannot afford to commit significant capital to an asset without knowing they will be able to sell it for cash any time soon.⁹⁹

Investors have used several methods to combat this illiquidity. One way to avoid substantial transaction costs between the acquisition and sale of a work of art is through the use of freeports.¹⁰⁰ As the art market has expanded in the past several years, so too has the need for space to store one's work.¹⁰¹ Freeports are tax-free and duty free storage spaces for art and other collectibles.¹⁰² Investors often store a work of art to keep it out of sight so that they can create greater demand for it by later reintroducing it to the market as a "fresh" work.¹⁰³ Freeports allow the investor to store the work without incurring certain significant costs during the period between purchase and sale.¹⁰⁴ A second method through which investors have combatted art's illiquidity is

⁹⁷ *Id.*

⁹⁸ See Henri Neuendorf, *Art Demystified: What Determines an Artwork's Value?*, ARTNET NEWS (June 29, 2016), <https://news.artnet.com/market/art-demystified-artworks-value-533990> [<https://perma.cc/FLY3-9TX2>].

⁹⁹ Xiang, *supra* note 10, at 1702.

¹⁰⁰ Katie L. Steiner, *Dealing with Laundering in the Swiss Art Market: New Legislation and its Threat to Honest Traders*, 49 CASE WESTERN RESERVE J. INT'L L. 351, 359 (2017).

¹⁰¹ Eileen Kinsella, *Amid a Booming Market, UOVO Plans to Open its Fourth Art Storage Facility in Bushwick, Brooklyn's Hipster Art Capital*, ARTNET NEWS (Aug. 27, 2018), <https://news.artnet.com/market/uovo-bushwick-brooklyn-1337819> [<https://perma.cc/RH3W-9NKX>]; see also, e.g., 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> [<https://perma.cc/SE3B-3VE9>] [hereinafter Kinsella, *Uber-High-Tech Art Warehouse*] (describing ARCIS, New York's first, duty-free art storage space).

¹⁰² Steiner, *supra* note 1010.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

art lending services. Art lending allows an investor to quickly access some of the value of a work of art, without bearing the costs of selling it.¹⁰⁵ Mostly specialized boutiques¹⁰⁶ and auction houses¹⁰⁷ engage in art monetizing services;¹⁰⁸ however, banks sometimes outsource art management groups to offer art-based loans.¹⁰⁹ Art lending services include term loans, acquisition financing, revolving lines of credit, dealer inventory financing, bridging loans, and arranging loans to museums and exhibitions.¹¹⁰ A lender typically will offer 45% to 60% of the market value of the work.¹¹¹ Thus, art financing allows an art investor to use the value of her art—without selling it—such that she can engage in other investment opportunities.¹¹² While freeports and art lending are not necessarily new methods of accessing art's value,¹¹³ they are becoming increasingly accessible to investors.¹¹⁴

¹⁰⁵ Sofo, *supra* note 12.

¹⁰⁶ See, e.g., *Art Financing*, ARTEMUS, <http://www.artemus.com/sale-leaseback> [<https://perma.cc/EV5T-U4HY>] (last visited Jan. 21, 2019).

¹⁰⁷ See, e.g., *Sotheby's Financial Services*, SOTHEBY'S, <https://www.sothebys.com/en/about/services/sothebys-financial-services> [<https://perma.cc/PAY5-RACJ>] (last visited Dec. 7, 2018).

¹⁰⁸ Picinati di Torcello, *supra* note 90, at 16.

¹⁰⁹ Graham, *supra* note 57, at 326.

¹¹⁰ Picinati di Torcello, *supra* note 90, at 16.

¹¹¹ Graham, *supra* note 57, at 327.

¹¹² See Sofo, *supra* note 12.

¹¹³ Graham, *supra* note 57, at 326 (noting that art lending existed almost thirty years ago) (citing Skate's art industry investment report of February 2013 at p. 22).

¹¹⁴ See, e.g., Steiner, *supra* note 100, at 355 (noting the expansion of the Swiss Freeport in 2014); Sofo, *supra* note 12 (noting that traditional banks would only lend against art with the additional support of the client's "financial assets or general creditworthiness," whereas Athena—a monetizing fund—has greater flexibility to lend primarily against a collector's art). In the last five years, art financing has grown 15% to 20% each year and is now a \$15,000,000,000 market in the United States. Katya Kazakina, *Art of Shadow Banking: How an Auction House Got into the Picture*, WEALTH MGMT. (July 28, 2016), <https://www.wealthmanagement.com/high-net-worth/art-shadow-banking-how-auction-house-got-picture> [<https://perma.cc/E2JE-Y7PE>] (citing ART & FINANCE REPORT 2016, DELOITTE 117 (2016) <https://www2.deloitte.com/content/dam/Deloitte/at/Documents/finance/art-and-finance-report2016.pdf> [<https://perma.cc/4CXP-JKSJ>])).

*D. The Potential for Money Laundering Through Art:
A Vulnerable Market*

The lack of regulation of high-value transactions combined with increasingly greater access to art's value has left an art market that is particularly vulnerable to money laundering.¹¹⁵ Additionally, several characteristics of art and art dealers' practices make it a particularly attractive laundering tool.¹¹⁶ Thus, while there are no existing convictions for money laundering achieved solely through the purchase and sale of art, and the extent of this problem is not entirely clear,¹¹⁷ the potential certainly is. This Section explores in depth the characteristics of the modern art market that make it vulnerable to money laundering.

1. Art as an Asset

Rising prices and investment opportunities in the modern high-end art market have made it vulnerable to money laundering for several reasons.¹¹⁸ First, the high value of an individual work of art is beneficial rather than prohibitive to money launderers.¹¹⁹ It is much easier for a money launderer to cleanse her ill-gotten gains through a transaction involving one expensive asset rather than several transactions of less expensive goods.¹²⁰ Additionally, a money launderer has substantial capital, presumably from partaking in illegal acts, to purchase a work of art and does not have the "same economic rationale for transactions" as legitimate investors.¹²¹ Thus, a high acquisition price is beneficial rather than prohibitive to money launderers.¹²²

Second, investors' use of new tools to combat art's illiquidity have also fostered criminal activity. A recent example demonstrates how a money launderer might take advantage of an

¹¹⁵ DELOITTE, *supra* note 29 at 3. "Booming economies might not yet be fully aware of money laundering risks or equipped to identify money laundering schemes." *Id.*

¹¹⁶ Teichmann, *supra* note 31, at 133–34.

¹¹⁷ See Small, *supra* note 21. Anti-money laundering expert John Byrne addressed the lack of convictions, noting this did not prove the absence of the crime itself. *Id.*

¹¹⁸ DELOITTE, *supra* note 29, at 3.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

art monetizing fund.¹²³ In November 2018, the United States charged Low Taek Jho and other Malaysian officials with conspiring to launder money embezzled from a Malaysian investment fund.¹²⁴ The government alleged that Low attempted to launder money “through the U.S. financial system by purchasing, among other things, luxury residential real estate in New York City and elsewhere, and artwork from a New York-based auction house, and by funding major Hollywood films.”¹²⁵ The launderers purchased paintings from Christie’s by Basquiat, Rothko, and Van Gogh.¹²⁶ Later, a Cayman Island Company, which Low wholly owned, obtained a loan of \$107,000,000 from Sotheby’s, using several of the paintings purchased from Christie’s as collateral.¹²⁷ Thus, art monetizing services enable money launderers, as well as legitimate buyers, to access the value of a work.

2. Confidentiality in Transactions

A unique aspect of the art market is the anonymity involved in transactions through professional intermediaries such as private dealers and auction houses. Often, the buyer and seller in private sales and public auctions do not know one another’s identities¹²⁸

¹²³ See Kazakina, *supra* note 114.

¹²⁴ Press Release, U.S. Dep’t of Justice, Malaysian Financier Low Taek Jho, Also Known As “Jho Low,” and Former Banker Ng Chong Hwa, Also Known As “Roger Ng,” Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018), <https://www.justice.gov/opa/pr/malaysian-financier-low-taek-jho-also-known-jho-low-and-former-banker-ng-chong-hwa-also-known> [https://perma.cc/B9AK-DWVD].

¹²⁵ *Id.*

¹²⁶ Graham Bowley & William K. Rashbaum, *Has the Art Market Become an Unwitting Partner in Crime?*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/arts/design/has-the-art-market-become-an-unwitting-partner-in-crime.html> [https://perma.cc/G5P2-EE33].

¹²⁷ *Id.* A former special prosecutor for the Federal Bureau of Investigation’s Art Crime Team explains that money launderers may choose to take advantage of art loans from small boutiques or auction houses rather than large banks because “[t]he level of scrutiny you’ll receive from a bank is much higher than you will receive from an auction house.” See Kazakina, *supra* note 114 (internal quotations omitted). Before taking a loan from Sotheby’s, Low had explained to his art dealer that he preferred “the boutique banks that can move fast” as opposed to “the large ones like [J.P. Morgan].” See *id.*

¹²⁸ Cohen, *supra* note 53. “A painting might sell at a public auction for more than \$100 million, and the identities of the seller, the guarantor, the external bidders and the final buyer will remain cloaked in confidentiality.” Scott Reyburn, *A Tug of War Over Art-*

and even large transactions are often conducted entirely through cash.¹²⁹ Art dealers do not maintain uniform recordkeeping practices and often do not share information about their prior sales with third parties.¹³⁰ The ability of purchasers to transact anonymously in the art market makes it difficult for authorities to trace a money launderer to an underlying crime, especially if art dealers have no incentive to report suspicious activity.¹³¹ A recent case provides an example of how a money launderer could hide behind a professional art intermediary to launder illicit gains without detection. In March 2018, the United States charged Matthew Green,¹³² an art dealer in the United Kingdom, with conspiracy to hide \$9,000,000 obtained through a securities fraud scheme under section 1956(a)(3)(A)(ii) of the MLCA.¹³³ According to the indictment, Green and three other individuals proposed a plan to an undercover agent, posing as a member of the money laundering conspiracy, for him to purchase a Picasso painting titled *Personnages* from Green.¹³⁴ The agent would purchase the painting, estimated to be worth \$4,000,000 to \$7,000,000 in 2010, using some of the proceeds from the securities fraud.¹³⁵ The agent would then keep the painting for an unspecified amount of time until Green arranged to resell it, and Green would

Sales Transparency, N.Y. TIMES (Sept. 25, 2015), https://www.nytimes.com/2015/09/28/arts/international/a-tug-of-war-over-art-sales-transparency.html?_r=0 [https://perma.cc/Z3JN-7BDM].

¹²⁹ Teichmann, *supra* note 31, at 134; DELOITTE, *supra* note 29, at 3.

¹³⁰ Shea, *supra* note 15, at 671–72.

¹³¹ See 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> [https://perma.cc/5VPW-PXGA].

¹³² Green's father, Richard Green, is a well-known art dealer in London, and owns the Richard Green Art Gallery. 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> [https://perma.cc/8FJN-4NF4].

¹³³ Superseding Indictment at 7, 26–27, *United States v. Kyriacou*, No. 18-102 (S-1) (KAM) (E.D.N.Y. Mar. 20, 2018). Section 1956(a)(3)(A) covers financial transaction offenses where law enforcement pose as agents attempting to launder money, thus tricking the suspected money launderer into conveying his plan. DOYLE, *supra* note 6, at 8.

¹³⁴ Superseding Indictment, *supra* note 133, at 17–18.

¹³⁵ Kinsella, *supra* note 132.

then transfer the proceeds to the agent through a bank account in the United States.¹³⁶ One of the members of the conspiracy explained to the agent that they had chosen to launder part of their proceeds through art because the art market is “the only market that is unregulated.”¹³⁷

Two other methods of investing in art also allow a buyer to maintain anonymity. First, collectors and investors may keep their identity private by using shell corporations to purchase art.¹³⁸ Second, in addition to providing lower transaction costs, freeports also allow investors to store their works confidentially.¹³⁹ A recent example of a transaction revealed by the Panama Papers demonstrates the usefulness of these layering techniques for money launderers. In 2012, Phillipe Maestracci, the grandson of a Jewish art dealer, sued the Nahmad Gallery for the return of a painting by Amedeo Modigliani titled *Seated Man with a Cane* that he alleged the Nazis stole from his grandfather.¹⁴⁰ The Nahmad family asserted that they did not have the painting and Christie’s records showed that an offshore corporation registered in Panama, called International Art Center, purchased it in 1996 at an auction.¹⁴¹ In 2016, the release of the Panama Papers revealed that the Nahmad family is actually the sole shareholder of International Art Center.¹⁴² Maestracci was not able to link the Nahmad family to the International Art Center previously because there were multiple layers of anonymity between the two.¹⁴³ First, the International Art Center was incorporated in Panama, a secrecy jurisdiction that renders the discovery of beneficial ownership of a shell

¹³⁶ *Id.*

¹³⁷ *Id.*; see also Superseding Indictment, *supra* note 133, at 16–17.

¹³⁸ See, e.g., Reyburn, *supra* note 128. “A shell corporation is a corporation without active business operations or significant assets.” See *Shell Corporation*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/shellcorporation.asp> [https://perma.cc/G8MG-GUW4] (last visited Dec. 7, 2018). See generally *Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401 (N.Y. App. Div. 2017).

¹³⁹ Steiner, *supra* note 100, at 357–58.

¹⁴⁰ *Maestracci*, 155 A.D.3d at 401–02.

¹⁴¹ *Id.* at 402; Reyburn, *supra* note 128.

¹⁴² John Zarobell, *What the Panama Papers Do Not Reveal About the Art Market*, INT’L ART & CULTURE (Oct. 3, 2016), <http://sfaq.us/2016/10/what-the-panama-papers-do-not-reveal-about-the-art-market> [https://perma.cc/XB99-X67N].

¹⁴³ *Id.*

corporation impracticable.¹⁴⁴ Second, the Nahmad family stored the works confidentially in a freeport.¹⁴⁵ Thus, while the Nahmad family did not launder money through the purchase of the Modigliani painting, this case demonstrates how an individual can purchase a work of art without leaving any trace of her identity.¹⁴⁶

3. Speculative Pricing

The lack of price transparency for artwork is also attractive to money launderers.¹⁴⁷ Art's intangible aspects make it difficult, especially for investors who are new to the market, to value.¹⁴⁸ Trends and personal tastes often affect the price of a work.¹⁴⁹ Buyers are interested in new artists who will be “the next big thing” in the market as well as those artists who have already

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Another interesting example of anonymity in the art market is the use of third-party guarantors in auctions. Lawrence M. Kaye & Howard N. Spiegler, *The Art Market: Would More Regulation Spoil All the Fun?*, HERRICK (Oct. 2016), <http://www.herrick.com/publications/the-art-market-would-more-regulation-spoil-all-the-fun> [<https://perma.cc/XD64-MLDJ>]. Auction houses often advance money to a bidder to acquire the artwork before the auction or make an agreement with a private dealer or collector to guarantee the price. *Id.* While long-time bidders might know these third parties exist, they often do not know who they are. *See id.* For example, in 1997, Christie's sold a 118-piece collection of modernist works, including several by Pablo Picasso, for \$206,500,000. Reyburn, *supra* note 128. At the time of the sale, the buying-public assumed the collection was “fresh from the estate” of the Manhattan couple who had put it together. *See id.* The Panama Papers later revealed, however, that the majority of the works in the collection had previously been sold to a billionaire currency trader who made a sizable profit by flipping the works with Christie's help. *See id.*; Juliette Garside et al., *How Offshore Firm Helped Billionaire Change the Art World Forever*, THE GUARDIAN (Apr. 7, 2016, 2:00 PM), <https://www.theguardian.com/news/2016/apr/07/panama-papers-joe-lewis-offshore-art-world-picasso-christies> [<https://perma.cc/Q4JD-NDLT>].

¹⁴⁷ *But see* Margaret Carrigan, *US Anti-Money Laundering Bill Could Reappear Early Next Year*, THE ART NEWSPAPER (Dec. 11, 2018, 11:24 GMT), <https://www.theartnewspaper.com/news/us-anti-money-laundering-bill-could-reappear-early-next-year> [<https://perma.cc/99CP-4L72>]. (citing former specialist with United States Customs and the Department of Homeland Security, James McAndrew, who argues that the speculative nature of art actually makes it an ineffective tool for money laundering.)

¹⁴⁸ Neuendorf, *supra* note 98 (“To art world outsiders, the distinctions in price can be confusing.”).

¹⁴⁹ *See id.*

achieved recognition in their respective periods.¹⁵⁰ Furthermore, the price of a work of art may be dependent on its aesthetic or sentimental value to particular collectors.¹⁵¹ How rare or unique a work of art is will also influence its price.¹⁵² These intangible values can be difficult for those who are not art experts to quantify.¹⁵³ Furthermore, there is currently no “standardized art valuation methodology” or “quantitative analysis” to determine the fair market value of a piece of artwork.¹⁵⁴

This uncertainty surrounding art’s valuation allows a money launderer to manipulate the price of a work of art,¹⁵⁵ which is advantageous to a criminal scheme for several reasons. First, it allows a money launderer to import or export a work of art across borders without detection.¹⁵⁶ Through “trade-based money laundering” a criminal can transfer the value gained from an illicit crime by moving an asset such as art out of one country and into another.¹⁵⁷ Because U.S. customs law does not require documentation of merchandise worth less than \$200, a criminal can avoid customs detection by stating a work’s value as less than that amount.¹⁵⁸ Additionally, customs officials are not art experts, and therefore, do not have the knowledge base to question the stated price of a work.¹⁵⁹ Thus, a launderer can purchase a work of

¹⁵⁰ *See id.*

¹⁵¹ Picinati di Torcello, *supra* note 90, at 21 (explaining that experts usually determine the price of a work through a qualitative analysis of “the scarcity of supply relative to demand, consumption utility and individual perceptions.”).

¹⁵² Neuendorf, *supra* note 98.

¹⁵³ *Id.*

¹⁵⁴ Picinati di Torcello, *supra* note 90, at 21. There is also no “government agency or industry organization” to oversee how works of art are valued before a sale. *See* Christopher Lopez, *In Plain Sight: Hiding Illicit Funds in Artwork*, BANKING EXCHANGE (Mar. 9, 2018, 11:45 PM), <http://m.bankingexchange.com/news-feed/item/7418-in-plain-sight-hiding-illicit-funds-in-artwork> [<https://perma.cc/T9YU-LCR4>].

¹⁵⁵ Lopez, *supra* note 154.

¹⁵⁶ Shea, *supra* note 15, at 674.

¹⁵⁷ Purkey, *supra* note 7, at 126.

¹⁵⁸ Cohen, *supra* note 53.

¹⁵⁹ Purkey, *supra* note 7, at 126.

art worth millions of dollars, and transport it into the United States by stating it is worth only \$100 without raising suspicion.¹⁶⁰

Second, launderers can manipulate the price of a work at purchase or sale.¹⁶¹ For example, a launderer might inflate the acquisition price of a piece to launder more money through it¹⁶² or sell a work at an inflated price.¹⁶³ Due to the somewhat subjective nature of art, innocent purchasers and authorities would be hard-pressed to determine whether a purchaser has overpaid.¹⁶⁴ One recent example of a dispute between a buyer and a seller demonstrates the difficulty of identifying price manipulation, and how a money launderer might enlist a professional art intermediary to help her to do so. In October 2018, a billionaire art collector, Dmitry Rybolovlev brought suit against Sotheby's in New York for aiding Yves Bouvier, a Swiss art dealer, in defrauding him through the sale of several works of art.¹⁶⁵ Rybolovlev previously brought suit against Bouvier, who purchased the works for lower values than he disclosed, and then sold them to Rybolovlev at an inflated price.¹⁶⁶ For example, Bouvier sold Rybolovlev one piece, by Modigliani, for \$118,000,000, despite having previously purchased it for only \$93,500,000 from a private collector.¹⁶⁷ In his suit against Sotheby's, Rybolovlev claimed that the auction house "knowingly and intentionally bolstered the plaintiffs' 'trust and confidence in Bouvier and rendered the whole edifice of fraud plausible and credible' by brokering certain sales and inflated

¹⁶⁰ Shea, *supra* note 15, at 674 (providing as an example a Brazilian banker's import of a Jean-Michel Basquiat painting entitled *Hannibal* worth \$8,000,000 by listing the price of the work as \$100).

¹⁶¹ Lopez, *supra* note 154; *The Art Market and Money Laundering: A Symposium*, CASE WESTERN RESERVE U. SCH. LAW (Oct. 12, 2018), <https://law.case.edu/Lectures-Events/EventId/386/e/the-art-market-and-money-laundering-a-symposium-12-oct-2018> [<https://perma.cc/7DNL-Q5AC>].

¹⁶² See, e.g., DELOITTE, *supra* note 29, at 3.

¹⁶³ See Steiner, *supra* note 100, at 363 (describing money laundering opportunities in the Swiss freeports); see also CASE WESTERN RESERVE U. SCH. LAW, *supra* note 161.

¹⁶⁴ Steiner, *supra* note 100, at 364; Lopez, *supra* note 154.

¹⁶⁵ Margaret Carrigan, *Russian Billionaire Rybolovlev Sues Sotheby's for \$380m in Fraud Damages*, ART NEWSPAPER (Oct. 3, 2018, 20:38 GMT), <https://www.theartnewspaper.com/news/russian-billionaire-rybolovlev-sues-sotheby-s-for-usd380m-in-fraud-damages> [<https://perma.cc/T3EF-Z79K>].

¹⁶⁶ *Id.*

¹⁶⁷ Steiner, *supra* note 100, at 363–64.

valuations.”¹⁶⁸ While Bouvier did not launder money through this sale, the transaction demonstrates the lack of price transparency in the sale of art, which exists as a tool for money launderers.

II. REGULATION VERSUS PRACTICE: IMPOSING ANTI-MONEY LAUNDERING LEGISLATION ON THE MODERN ART MARKET

While the vulnerability of the art market makes clear the need for measures to prevent money laundering, the implementation of regulatory burdens presents a substantial conflict between the government’s and market operators’ interests. Section II.A provides an overview of a recent proposal for specific legislation to target money laundering in the art market. Section II.B describes the art market’s criticisms of the bill and regulation in the art market in general. Section II.C examines similar conflicts arising from the application of BSA regulations to real estate and precious metals dealers.

A. *The Illicit Art and Antiquities Trafficking Prevention Act*

A recent proposal for legislation would implement the first regulations to directly target money laundering through art.¹⁶⁹ On May 18, 2018, Congressman Luke Messer introduced an amendment to the BSA, the Illicit Art and Antiquities Trafficking Prevention Act (the “Illicit Art Act”), that would add “dealers in art or antiquities” to the list of financial institutions under the BSA.¹⁷⁰ Thus, in addition to reporting cash transactions over \$10,000, professional art intermediaries would also be responsible for at a minimum “(i) the development of internal policies, procedures and controls; (ii) the designation of a compliance officer; (iii) an ongoing employee training program; and (iv) an independent audit function to test [programs].”¹⁷¹ Additionally, dealers, as financial institutions, would also likely have to file

¹⁶⁸ Carrigan, *supra* note 165.

¹⁶⁹ Kinsella, *supra* note 65.

¹⁷⁰ Illicit Art and Antiquities Trafficking Prevention Act, H.R. 5886, 115th Cong. (2018). The Illicit Art Act lapsed at the end of December, and needs a new sponsor as Congressman Messer lost his seat in the midterm elections. Carrigan, *supra* note 147. However, the bill may be re-introduced in 2019. *Id.*

¹⁷¹ Boles, *supra* note 8, at 493.

Suspicious Activity Reports with FinCEN.¹⁷² The specific regulations that FinCEN enforces in the art market under the authority of the act would likely be similar to those for dealers in precious metals, stones, and jewels.¹⁷³ For example, the art market has speculated that the regulations would apply to dealers in art or antiquities who purchase more than \$50,000 in covered goods and receive the same amount in gross proceeds from the sale of artwork each year.¹⁷⁴

Congressman Messer has stated the purpose of the Illicit Art Act is to “reduce international money laundering and crack down on terrorist organizations like ISIS.”¹⁷⁵ The amendment would specifically target the pervasive anonymity in art market transactions, by creating strong incentives for dealers to prevent money laundering.¹⁷⁶ Art dealers would have to take the same compliance measures as other “financial institutions” under the BSA, and the financial consequences of non-compliance with the BSA can be quite large.¹⁷⁷ Thus, the regulatory burdens would theoretically prevent dealers and auction houses from turning a blind eye to money laundering, and encourage them to join investigators and prosecutors in helping to detect it.

¹⁷² See *id.* at 483. FinCEN did not impose the requirement of suspicious activities reports on dealers in precious metals, stones, and jewels. See Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 70 Fed. Reg. 33702 (proposed June 9, 2005) (codified at 31 C.F.R. § 103).

¹⁷³ CULT. PROP. NEWS, *supra* note 20 (citing 31 C.F.R. § 1027.100 (2018)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* According to the Washington Post, estimates of how much money ISIS had made from the sale of looted antiquities range from \$4,000,000 to \$7,000,000,000. Fiona Rose-Greenland, *How Much Money Has ISIS Made Selling Antiquities? More than Enough to Fund Its Attacks*, WASH. POST (June 3, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/03/how-much-money-has-isis-made-selling-antiquities-more-than-enough-to-fund-its-attacks/?utm_term=https://perma.cc/68CF-TZQM.

¹⁷⁶ Kinsella, *supra* note 65. “The new law would zero in on the beating heart of the art market: the financial relationship between dealers and their clients...” *Id.* (quoting Thomas C. Danziger, of Danziger, Danziger & Muro) (internal quotations omitted).

¹⁷⁷ For example, FinCen charged B.A.K. Precious Metals, Inc. \$200,000 in regulatory fines for failing to adopt compliance measures under the BSA. *FinCen Assesses Money Penalty Against Precious Metals Dealer for Violations of Anti-Money Laundering Law*, FIN. CRIMES ENFORCEMENT NETWORK (Dec. 30, 2015), https://www.fincen.gov/sites/default/files/news_release/20151230.pdf [<https://perma.cc/Y8QQ-2XNR>].

B. A Dealer's Perspective: Opposing Regulation of the Art Market and the Illicit Art Act

Organizations representing professional art intermediaries have opposed regulations in the art market, including the Illicit Art Act, for several reasons.¹⁷⁸ First, dealers are concerned that regulations would hinder positive relationships with clients who value their privacy. Second, small businesses in the art market are worried about the costs of compliance with the BSA. Finally, pushback from the art market reflects the sentiment that art's inherent value and speculative pricing should exempt it from regulation as a commodity.

1. Privacy in Transactions

While the pervasive anonymity in the art market allows money launderers to hide their identities, it also has several legitimate benefits to collectors and investors. For example, a collector may want to avoid the embarrassment of public inquiry if she is selling her artwork because of a financial rut.¹⁷⁹ Collectors may also generally want to prevent “industry gossip” pertaining to their sale of a work.¹⁸⁰ Additionally, a valuable work becomes vulnerable to theft if it is sold to a collector whose name is publicly disclosed and left in the collector's home.¹⁸¹ Anonymous transactions and confidential storage spaces such as freeports allow individuals to protect their expensive collections from theft.¹⁸² As explained above, a savvy investor might also utilize the secrecy of a freeport to add value to a work by keeping it out of the public eye, and later re-introducing it to the market as a “fresh work.”¹⁸³ Ultimately, art dealers may choose not to reveal their clients' information to third

¹⁷⁸ See, e.g., Letter from Clinton R. Howell, President, CINO, to Jeb Hensarling, Chairman, Fin. Servs. Comm., <https://culturalpropertynews.org/wp-content/uploads/2018/05/letter-from-CINO.pdf> [<https://perma.cc/F7TC-AZ4G>] (raising the three concerns listed in this paragraph, as well as casting doubt on the claim that art and antiquities are used to launder funds for terrorism).

¹⁷⁹ Steiner, *supra* note 100, at 357–58.

¹⁸⁰ Shea, *supra* note 15, at 679–80.

¹⁸¹ Steiner, *supra* note 100, at 358.

¹⁸² *Id.*

¹⁸³ *Id.* at 359.

parties or keep records of their transactions,¹⁸⁴ because these practices are beneficial to collectors and investors, not because they are trying to promote criminal activity.¹⁸⁵

In light of the above considerations, the possibility that the application of the BSA to the art industry might require extensive investigations by dealers into their clients' backgrounds and identities poses a serious conflict.¹⁸⁶ The development of internal policies and procedures under the BSA might require dealers to verify the identity of their clients or investigate their backgrounds.¹⁸⁷ Furthermore, an independent audit would force a dealer to give a third-party auditor access to the information the dealer does gain about her client.¹⁸⁸ According to international art confederation CINOA, requiring clients to provide identifying information would actually deter them from purchasing artwork.¹⁸⁹ Many dealers are also worried that information provided to the government could lead to government searches of private collections.¹⁹⁰ Consequently, while the Illicit Art Act targets the use of anonymity for criminal gains, it may also have a negative effect on clients' legitimate privacy interests.

2. Regulatory Burdens on Small Businesses

The compliance burdens of an anti-money laundering program under the BSA have two potential negative effects on the art industry. First, as the ADAA has argued, small businesses may not be able to incur the costs of regulatory burdens.¹⁹¹ As Joe Laird of

¹⁸⁴ Shea, *supra* note 15, at 671–72.

¹⁸⁵ See Letter from Clinton R. Howell, President, CINOA, to Jeb Hensarling, Chairman, Fin. Servs. Comm., *supra* note 178.

¹⁸⁶ See CULT. PROP. NEWS, *supra* note 20.

¹⁸⁷ See, e.g., Kevin L. Shepherd, *The USA PATRIOT Act: The Complexities of Imposing Anti-Money Laundering Obligations on the Real Estate Industry*, 39 REAL PROP., PROB. & TR. J. 403, 424 (explaining the potential application of the same standards to lawyers in real estate dealings).

¹⁸⁸ See *id.* at 425 (explaining the potential application of the same standards to lawyers in real estate dealings).

¹⁸⁹ Letter from Clinton R. Howell, President, CINOA, to Jeb Hensarling, Chairman, Fin. Servs. Comm., *supra* note 178.

¹⁹⁰ CULT. PROP. NEWS, *supra* note 20.

¹⁹¹ Anna Louie Sussman, *Galleries Could Face “Unnecessary and Onerous” Regulation Under New Legislation*, ARTSY (May 24, 2018, 12:38 PM), <https://>

Patterson Belknap Webb & Tyler LLP notes, dealers “come in all shapes and sizes . . . They can be large galleries with a number of different locations, or they can be literally someone in Kansas working out of their apartment.”¹⁹² The implementation of an anti-money laundering program under the BSA might be entirely feasible for large auction houses which appear already to have similar programs in place.¹⁹³ Yet, compliance under the BSA can cost from \$2000 to \$5000 for small businesses each year.¹⁹⁴ Accordingly, art and antiques dealers have argued that compliance costs would be quite burdensome for small businesses who do not have the same “infrastructures or resources” as the major auction houses.¹⁹⁵ Second, the imposition of compliance burdens could deter individual collectors from expanding their collections. As art and cultural heritage attorney Leila Amineddoleh explains, there are many individuals who collect art for their own enjoyment—as opposed to professional dealers whose objective is to make a profit from the purchase and quick sale of art—but still trade in millions of dollars of art each year.¹⁹⁶ With extensive regulation, those individual collectors who are not willing to adopt anti-money laundering programs may turn to collecting other luxury assets instead, thereby impairing the art industry as a whole.

3. The Character of Art

Another concern with proposed regulation of the art market is the treatment of art as a commodity. According to this view, the government should not regulate art in the same way it regulates financial commodities¹⁹⁷ because art has cultural and other

www.artsy.net/article/artsy-editorial-galleries-face-unnecessary-onerous-regulation-new-legislation [<https://perma.cc/N8XD-QNWE>].

¹⁹² *Id.* (quoting Laird).

¹⁹³ *See supra* Section I.C.2; *see also* Kinsella, *supra* note 65 (citing Michael McCullough, previously associate counsel at Sotheby’s).

¹⁹⁴ CULT. PROP. NEWS, *supra* note 20.

¹⁹⁵ Sussman, *supra* note 191; Small, *supra* note 21.

¹⁹⁶ Small, *supra* note 54 (quoting Leila Amineddoleh).

¹⁹⁷ “A commodity is a basic good used in commerce that is interchangeable with other commodities of the same type.” *Commodity*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/commodity.asp> [<https://perma.cc/SB5Y-AAM8>] (last updated Apr. 23, 2018).

intangible values, and no set value.¹⁹⁸ For example, determining the price of a jewel involves a quantitative evaluation of its cut, clarity, and color.¹⁹⁹ In contrast, as explained above, an evaluation of the price of a piece of art involves substantial qualitative evaluation of the history of the work, current market trends, inherent cultural and aesthetic values, and how rare the piece is.²⁰⁰ Furthermore, there is no standardized valuation methodology for determining the price of a piece of art.²⁰¹ Thus, because art is not a commodity, art market operators have argued that it should not be subject to the same regulations as commodity goods.²⁰²

C. Similar BSA Conflicts in Other Markets

In considering how to apply regulations to the art market, it is helpful to examine the application of the BSA to other financial markets. The imposition of the BSA on real estate and precious metals dealers presented similar conflicts of client confidentiality and financial burdens. This Section describes the relevant conflicts and several proposals for or final resolutions of them.

1. The BSA and Real Estate Dealers

After the enactment of the PATRIOT Act, FinCEN attempted to craft regulations for “persons involved in real estate closings and settlements”—essentially all real estate dealers—which are part of the BSA’s definition of financial institutions.²⁰³ As this definition was somewhat broad and ambiguous,²⁰⁴ FinCEN temporarily

¹⁹⁸ Small, *supra* note 54.

¹⁹⁹ See, e.g., *Gem Price Guide*, INT’L GEM SOC’Y, <https://www.gemsociety.org/article/gem-pricing-guide-sample> [<https://perma.cc/PQ9T-V9L9>] (last visited Dec. 7, 2018).

²⁰⁰ See *supra* Section I.D.3.

²⁰¹ See *supra* Section I.D.3.

²⁰² Small, *supra* note 21.

²⁰³ Shepherd, *supra* note 187, at 406. Congress added real estate dealers to the definition of “financial institutions” in 1988. *Id.* at 407.

²⁰⁴ *Id.* at 414–15 (explaining that “[t]he universe of participants in real estate transactions is potentially broad, even in the simplest residential real estate transaction.” In all real estate closings and settlements, the participants include the buyer and the seller. Beyond those two core participants, the participants in a real estate closing and settlement may include the real estate agent or broker; the mortgage lender; the mortgage banker; the appraiser; the surveyor; the title insurance company; the respective lawyers for the

exempted this group from BSA compliance in 2002 to consider its specific characteristics before implementing regulations.²⁰⁵ FinCEN has yet to promulgate final regulations for real estate dealers, but in 2003 it issued an advance notice of proposed rulemaking for relevant market operators to comment on what the regulations should look like.²⁰⁶ Several market operators responded to the invitation for comment, noting in particular the difficulty lawyers involved in real estate transactions would face in complying with BSA reporting requirements while maintaining attorney-client confidentiality.²⁰⁷ Under the Model Rules of Professional Responsibility, “[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation This contributes to the trust that is the hallmark of the client-lawyer relationship.”²⁰⁸ Thus, the imposition of BSA compliance, requiring that an attorney investigate her clients’ background and allow for an independent auditor to review this information,²⁰⁹ would not be compatible with these goals.²¹⁰ The investigation into the client’s background alone would create a problematic “adversarial relationship” between the attorney and her client, while revelation of information to a third party would violate the duty of confidentiality.²¹¹ Market operators were also concerned that the regulations would impose significant burdens on real estate dealers who do not engage in many transactions.²¹²

The comment letters included several suggestions for how FinCEN might tailor regulations in the real estate market to avoid confidentiality conflicts and onerous compliance burdens.²¹³ Three

buyer, seller, and lender; an escrow agent; the environmental consultant; the pest inspector; and the building inspector or engineer. Thus, a real estate closing and settlement may involve over a dozen participants.” (alteration in original)).

²⁰⁵ See Boles, *supra* note 8, at 493–94.

²⁰⁶ Shepherd, *supra* note 187, at 410.

²⁰⁷ *Id.* at 421.

²⁰⁸ *Id.* at 423 (citing MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR ASS’N 2018)).

²⁰⁹ See *supra* Section I.B.1.

²¹⁰ See Shepherd, *supra* note 187, at 424–25.

²¹¹ See *id.* at 424–25.

²¹² See *id.* at 421.

²¹³ See *id.* at 428–32.

are particularly relevant. First, the Real Property Section of the Florida Bar (“Florida Real Property Section”) suggested that to protect the lawyer-client relationship, attorneys should be exempted entirely from anti-money laundering regulations.²¹⁴ Second, to prevent overburdening real estate dealers, the Mortgage Bankers Association of America (“MBAA”) proposed a safe harbor for persons involved in real estate closings “if they contract with other financial institutions to collect or verify customer identification.”²¹⁵ Similarly, the American Land Title Association (“ALTA”) suggested that FinCEN exempt transactions such as residential mortgage loan refinances, which have a low risk of money laundering.²¹⁶

2. The BSA and Precious Metals Dealers

The definition of “financial institutions” under the BSA also includes “a dealer in precious metals, stones, or jewels.”²¹⁷ In 2002, FinCEN deferred application of anti-money laundering requirements to precious metals dealers to examine the industry.²¹⁸ In response to FinCEN’s Notice of Proposed Rulemaking, businesses selling precious metals pointed out that imposition of regulations in this industry presented substantial compliance burdens.²¹⁹ In its Notice of Proposed Rulemaking, FinCEN addressed the fact that businesses that purchase precious metals from other dealers are less vulnerable to money laundering because

²¹⁴ *See id.* at 430 (citing Letter from Louis B. Guttman, Chair-Elect, Real Property, Probate and Trust Law Section of the Florida Bar, to FinCEN I n.1 (June 9, 2003), <http://www.fincen.gov/guttman.pdf> [<https://perma.cc/Q65T-JBGC>]).

²¹⁵ *See id.* at 431 (citing Letter from Stephen A. Bromberg, President, American College of Mortgage Attorneys, to FinCEN 1 (June 6, 2003), <http://www.fincen.gov/bromberg.pdf> [<https://perma.cc/LPZ3-GG38>]).

²¹⁶ *See id.* at 432 (citing Letter from Ann vom Eigen, Legislative and Regulatory Counsel, American Land Title Association (“ALTA”), to FinCEN 1, 4 (June 5, 2003), <http://www.fincen.gov/vomeigen.pdf> [<https://perma.cc/EN4Z-B2XQ>]).

²¹⁷ Currency and Foreign Transaction Reporting Act, 31 U.S.C. § 5312(a)(2)(N) (2012).

²¹⁸ Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 68 Fed. Reg. 8480, 8481 (proposed Feb. 21, 2003) (codified at 31 C.F.R. § 103).

²¹⁹ Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 70 Fed. Reg. 33702, 33711 (proposed June 9, 2005) (to be codified at 31 C.F.R. pt. 103).

to “abuse [the] industry, a money launderer must be able to sell as well as purchase” precious metals.²²⁰ Thus, “there is substantially less risk that a retailer who purchases goods exclusively or almost exclusively from dealers” that are already subject to anti-money laundering requirements under the regulations would “be abused by money launderers.”²²¹ For this reason, in its interim final rule FinCEN largely exempted retailers from regulation under the BSA.²²² Thus, the definition of dealers who must establish money laundering programs excludes those retailers who “during the prior calendar or tax year, purchased more than \$50,000 in covered goods from persons other than dealers or other retailers.”²²³ FinCEN also addressed the burden presented by the requirement of independent auditing.²²⁴ In its Interim Final Rule, FinCEN allowed precious metals dealers to utilize their own employees—as opposed to an unaffiliated service provider—to accomplish the BSA’s audit requirement, as long as the employee is not the designated compliance officer or otherwise involved in the business’s anti-money laundering program.²²⁵

III. A PROPOSAL FOR PREVENTING MONEY LAUNDERING IN THE MODERN ART MARKET

The art market’s vulnerability to money laundering and lack of incentive for professional intermediaries to help prevent it makes government oversight necessary. This Part proposes several key elements of a regulatory framework in the art market as well as suggestions for the art market to adopt more standardized practices. Section III.A argues for nuanced regulation in the art market, which takes into consideration the legitimate concerns of professional art intermediaries. Section III.B suggests changes from within the art market to prevent money laundering.

²²⁰ Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 68 Fed. Reg. at 8482.

²²¹ *Id.*

²²² Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 70 Fed. Reg. at 33717.

²²³ *Id.*

²²⁴ *Id.* at 33711.

²²⁵ *See id.*

A. *Regulating the Modern Art Market*

Regulations imposed on the art market should improve rather than stifle professional art intermediaries' relationships with collectors and investors. If Congress were to apply the BSA to dealers in art or antiquities, FinCEN would have the task of interpreting the regulations for the art industry, with the authority to consider "the extent to which the requirements imposed . . . are commensurate with [dealers'] size, location, and activities . . ."²²⁶ This Section presents several solutions for tailoring regulations—whether for the Illicit Art Act or other legislation—so that they aid professional art intermediaries in conducting anti-money laundering investigations without disrupting the art market. It also suggests implementing regulation outside the art market to directly target criminal use of shell corporations.

1. Addressing Compliance and Privacy Concerns

To prevent overburdening small art dealers and galleries, any regulation in the art market should apply only to professional art intermediaries who are particularly vulnerable to money laundering risks. Money launderers tend to favor high-priced pieces to move large amounts of illicit cash.²²⁷ Thus, similar to low-risk residential mortgage loan refinances, lesser value works likely do not pose as high of a money laundering risk as high-value works do, and galleries that only sell low-value works or only a few high-value works each year should not have to bear the costs of compliance.²²⁸ Therefore, regulations in the art market should exempt transactions involving works of art with low monetary values.²²⁹ For example, in interpreting the definition of "dealers in

²²⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, § 352(c), 115 Stat. 272, 322.

²²⁷ DELOITTE, *supra* note 29, at 3.

²²⁸ Shepherd, *supra* note 187, at 432 (citing Letter from Ann vom Eigen, Legislative and Regulatory Counsel, American Land Title Association ("ALTA"), to FinCEN 1, 4 (June 5, 2003), <http://www.fincen.gov/vomeigen.pdf> [<https://perma.cc/EN4Z-B2XQ>]).

²²⁹ The European Union recently adopted anti-money laundering regulations for the art market in its Fifth Anti-Money Laundering Directive. Eileen Kinsella, *Art Dealers Push Back Against the European Union's New Money Laundering Regulations*, ARTNET NEWS (Apr. 30, 2018), <https://news.artnet.com/art-world/european-union-tightens-art-market->

art or antiquities,” under the definition of “financial institutions” in the BSA, dealers should be defined as only those trading in, “[x] number or more works above [x] price per year.”²³⁰ Thus, the regulation would target the most vulnerable transactions, without stifling small dealers’ businesses.

Burdens would also be lessened if regulations applied only to professional art intermediaries engaged in the purchase and sale of art as businesses, not to individual collectors and investors. As explained above, there are wealthy collectors who purchase and sell high-value artworks, but are not engaged as professional intermediaries.²³¹ Imposing compliance burdens on many of these individuals in addition to dealers, would be unnecessarily duplicative where they are purchasing most of their works through professional intermediaries, such as dealers and auction houses, who are already covered under regulations. It would also hurt the art industry because collectors forced to establish anti-money laundering systems might stop purchasing art altogether and search for other luxury items to collect instead.²³² Thus, similar to the precious metals retailers who purchase mainly from precious metals dealers, the potential for money laundering abuse is low in transactions between art collectors and art dealers who would already have anti-money laundering systems in place under the

oversight-1275338 [<https://perma.cc/7K5G-DS9Z>]. The regulations require dealers to verify the identity of clients who purchase a work for more than 10,000 euros. *Id.* In reaction to this threshold, CINOA commented that “far too many art and antiques market transactions would be caught by the measures.” *Id.*

²³⁰ See, e.g., Loi fédérale sur la mise en oeuvre des recommandations du Groupe d’action financière, révisés en 2012 [Federal Law on the Implementation of the Financial Action Task Force Recommendations, Revised in 2012] Dec. 12, 2014, FF 9465, 9476, arts. 129 (2014) (Switz.), available at <https://www.admin.ch/opc/fr/federal-gazette/2014/9465.pdf> [<https://perma.cc/K3LS-L9Q3>] [hereinafter Loi fédérale]. Recently enacted Swiss regulations preventing money laundering in freeports pertain specifically to transactions exceeding 100,000 CHF (about \$100,000), rather than the gross profit of the intermediary. Steiner, *supra* note 100, at 365–66. Ascertainment of the prices posing the most substantial risk of money laundering requires further investigation beyond the scope of this Note.

²³¹ Small, *supra* note 54 (quoting Leila Amineddoleh).

²³² See *supra* Section II.B.2.

regulation of the art industry.²³³ Thus, regulations should exempt collectors who purchase only a very small portion of their work from sellers, other than covered art dealers, or auction houses. For example, in the application of the BSA, those collectors who purchase less than a certain amount of their art from sellers other than “dealers” should be excluded from the definition of “dealers.”²³⁴ Thus, even if a collector would fit in the definition of “dealers”—those professional intermediaries who sell x amount of x-priced paintings per year—she would be exempted if most of her purchases were from other “dealers.”²³⁵

Finally, to protect art clients’ privacy concerns, regulations imposed on the art market should allow a client to maintain confidentiality for legitimate reasons in transactions. Clients’ privacy concerns center on their fear of public inquiry about the sale and the protection of their collections from theft. Thus, requiring that an art dealer investigate a client’s background and expose client information to a third-party auditor may be a concern for many collectors. One way to assuage this concern would be to allow art dealers to conduct independent audits through one of their employees, rather than an outside auditor, similar to FinCEN’s Interim Final Rule for precious metals dealers.²³⁶ Alternatively, the regulations might assuage client concerns by giving them a choice of whom to reveal their information to. Unlike attorneys who breach their duty of confidentiality to their clients if they share their confidential information with anyone,²³⁷ art dealers may be able to share client information with certain groups without deterring clients from purchasing art. Similar to the

²³³ See Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 68 Fed. Reg. 8480, 8482 (proposed Feb. 21, 2003) (codified at 31 C.F.R. § 103).

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 70 Fed. Reg. 33702, 33711 (proposed June 9, 2005) (to be codified at 31 C.F.R. pt. 103).

²³⁷ MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR ASS’N 1983) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”).

MBAA suggestion that real estate dealers should be exempt if they contract with another financial institution to collect or verify customer identification, regulations of art dealers could exempt transactions involving a financial intermediary such as a credit card company.²³⁸ For example, regulations for art dealers under the BSA could include a safe harbor from identification and due diligence for those transactions involving a financial intermediary such as a bank.²³⁹ If a client were concerned about “industry gossip” for example, she might choose to conduct the transaction through a bank rather than providing extensive background information to the art dealer and auditor. The transaction would still be monitored for money laundering risk because the bank would have its own systems in place to verify it.²⁴⁰

2. Targeting Shell Corporations

As the Nahmad case demonstrates, money launderers can take advantage of beneficial ownership to hide their identities in the purchase and sale of art.²⁴¹ The use of shell corporations to hide beneficial ownership in transactions creates money laundering risks not only in the art industry but also in other industries such as real estate.²⁴² Thus, the United States should directly target the lack of transparency in beneficial ownership across all industries.²⁴³ One solution is the Incorporation Transparency and Law Enforcement Assistance Act (the “Incorporation Transparency Act”),²⁴⁴ proposed in 2017, which would require that U.S. companies disclose their beneficial ownership to the

²³⁸ See, e.g., Loi fédérale, *supra* note 230 (allowing clients to choose between due diligence on the part of the professional intermediary or conducting the transaction through a bank).

²³⁹ See, e.g., Shepherd, *supra* note 187, at 431 (describing Mortgage Banker’s suggestion that regulations for real estate professionals include a safe harbor for “persons involved in real estate closing[s] and settlements’ if they contract with other financial institutions to collect or verify customer identification.”)

²⁴⁰ See Steiner, *supra* note 100, at 365–66.

²⁴¹ See *generally* *Maestracci v. Helly Nahmad Gallery, Inc.*, 155 A.D.3d 401 (N.Y. App. Div. 2017).

²⁴² Boles, *supra* note 8, at 486.

²⁴³ See *id.* at 505–06.

²⁴⁴ H.R. 4450, 114th Cong. (2016).

government.²⁴⁵ The legislation would task the Treasury Department with creating guidelines for the registration of a corporation including “(i) identification of beneficial owners by name, current address, and non-expired passport or state-issued driver’s license; (ii) identification of any affiliated legal entity that will exercise control over the incorporated entity; and (iii) consistent updating of lists of beneficial owners no later than 60 days after any change in ownership.”²⁴⁶

The Incorporation Transparency Act would target anti-money laundering risk without disrupting art dealers’ practices because it would prevent the use of beneficial ownership for illegitimate aims in all markets, not just the art market. Furthermore, it would only require that corporations disclose their owners to the government, not that clients disclose their identity to professional art intermediaries or the public.²⁴⁷ For example, if the Incorporation Transparency Act were to pass, then theoretically an individual who wanted to obtain beneficial ownership information would have to ask the court to require the government to reveal it. Nevertheless, in such a case where the plaintiff can demonstrate evidence of her need for such information in discovery, it would not be impossible to trace the ownership. Thus, an art client could utilize a shell corporation to purchase art, while keeping the transaction private from the art-buying public for legitimate reasons; however, if the government had evidence that the use of a shell corporation was actually for laundering purposes, it could trace the beneficial ownership to prevent further abuse.

B. Self-Regulation: Enforcing Professional Standards Within the Art Market

While legislation directly targeted at money laundering through art is essential to aiding law enforcement in identifying the crime, the art market itself should also begin to develop its own standards to protect legitimate dealers and clients. Self-regulation in the art

²⁴⁵ *See id.* at 497.

²⁴⁶ *See id.* at 497–98.

²⁴⁷ *Id.* at 505–06 (noting the regulations promulgated through the Incorporation Transparency Act should not require public disclosure or a public registry of beneficial ownership as this would conflict with privacy concerns in the real estate market).

market is equally important, because it would enable uniform standards of professional practice in the industry and enforcement of such standards from experts who best understand its unique characteristics. This kind of standardization is essential, particularly in a market that is rapidly expanding and inviting new types of clients.

One suggestion that reflects the changing character of the art market towards investment is the creation of a regulatory agency similar to the Securities and Exchange Commission.²⁴⁸ This “Art Exchange Commission” would enlist existing art organizations and art lawyers to create standard policies and best practices by dealers and auction houses.²⁴⁹ The commission could also create greater transparency by granting licenses to dealers and auction houses based on their practices or creating a rating system for businesses.²⁵⁰ Legislation might eventually enable such a commission to legally enforce its standards in the art market.²⁵¹ An Art Exchange Commission, with regulatory authority, might be a nuanced approach to creating greater transparency in the art market because the enforcement would come from dealers and art lawyers who understand and appreciate the importance of its unique characteristics.

The U.S. art market might also move towards requiring licensing for professional art intermediaries with an organization like the ADAA.²⁵² Smaller organizations like the ADAA who enforce professional standards in the art industry are not particularly effective in combatting money laundering because they do not have standards specifically addressing this crime, and even if they were to adopt money laundering guidelines, dealers are not required to join these organizations or adhere to such standards.²⁵³ Because of a rapidly expanding art market, and the

²⁴⁸ Graham, *supra* note 57, at 337.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² FAUSTO MARTIN DE SANCTIS, MONEY LAUNDERING THROUGH ART 200 (2013) (suggesting that Brazil “require licensing to works as an art dealer, so as to lend some transparency to their dealings”).

²⁵³ See *supra* Section I.B.2; Shea, *supra* note 15, at 673 (describing how the ADAA’s exclusive membership makes enforcement of standards across the market impracticable);

threat of money laundering, as well as numerous other criminal schemes, art dealers should move towards standardized practices that are enforceable across the market.²⁵⁴ Additionally, these practices should supplement anti-money laundering regulations, rather than merely duplicate them. Thus, in addition to ethical guidelines requiring that dealers comply with all relevant laws,²⁵⁵ an organization could also adopt mandatory educational courses that teach dealers what red flags to look out for and how to comply with anti-money laundering regulations. Efforts from within the industry to combat practices that enable money laundering would be beneficial as they would come from individuals with knowledge of an art business's operations. Furthermore, these guidelines would actually be enforceable if dealers were required to join such an organization in order to practice.

CONCLUSION

The high-end art market is increasingly becoming an area of financial gain, rather than simply intellectual and cultural value. Yet, as investors flock to the art world and open doors to new investment opportunities, money launderers also enter with nefarious ends. The unique culture of privacy and lack of any incentive to report suspicious transactions allows launderers to access art's value without detection and while most art dealers are honest traders, those such as Green who take advantage of their unique positions, have little to fear with regards to detection. Without any oversight from the market itself, stringent anti-money laundering programs are necessary so that dealers have adequate incentive to aid law enforcement in detecting illicit schemes.

*see also, e.g., Guidelines on Combating Money Laundering and Terrorist Financing, RESPONSIBLE ART MKT, <http://responsibleartmarket.org/guidelines/guidelines-on-combating-money-laundering-and-terrorist-financing> [https://perma.cc/CV9D-YBU4] (last visited Dec. 7, 2018). Several global organizations, such as Responsible Art Market have attempted to create standards in the art market that are similar to BSA anti-money laundering compliance measures. *Id.**

²⁵⁴ GRAHAM, *supra* note 57, at 337 (quoting Patty Gerstenblith) (“[T]he art market is an active and vital segment of commercial transactions which require the formulation of a flexible and realistic yet also adequate model for protection of those consumers who do venture into that marketplace.”).

²⁵⁵ *See, e.g., ART DEALERS ASS'N AMERICA, supra* note 59.

Targeting money laundering through art is important not only to identify and punish criminals for their underlying crimes, but also to prevent their abuse of art. Criminals who use art to launder money view works as mere vessels for cleansing illicit gains,²⁵⁶ thus disposing of a work's aesthetic, cultural, and educational values. Philip Rivkin's scheme, in particular, reflects this reduction of art's value to merely monetary. Rivkin hid of millions of dollars-worth of famous photographs and made no attempt to prevent the United States from seizing them likely because it was not financially beneficial to him to do so.²⁵⁷

To prevent this abuse without disrupting the culture of the art market and legitimate dealers' practices, legislators and regulators must pay careful attention to market operators concerns. In crafting regulations for the art market, they should respect legitimate reasons for privacy, and avoid burdening dealers who have very little vulnerability to money laundering schemes. The art market, in the face of increasingly high prices and globalization, should also begin to develop more standardized practices and enforcement. Thus, with greater oversight and standard professional practices, the art market can aid law enforcement in preventing money laundering through art.

²⁵⁶ DE SANCTIS, *supra* note 252, at 58.

²⁵⁷ Parker et al., *supra* note 2.