

## **Shooting Fish in A Bliss Bucket: Targeting Money Launderers in the Art Market**

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## INTRODUCTION

In almost all cases in which the arc of a great empire reaches its apogee and turns downward—which is not the same thing as beginning a long inevitable slide into decadence, although such definitive decline is always a possibility—the diminution of momentum and influence that results rattles many and affects absolutely everyone. In “our” own art world we are experiencing such a diminution of growth and influence—and in many locales a sharp contraction of opportunity in relation to the supply of aspirants—even as we are simultaneously witnessing the unanticipated proliferation, expansion, and diversification of other art worlds.

- Robert Storr<sup>1</sup>

You can launder money so many different ways. It’s as unique as snowflakes.  
- Federal Agent Robert Mazur<sup>2</sup>

Barreling toward the viewer out of a cinematic mountainscape, the titular words of Ed Ruscha’s painting *Bliss Bucket* seem to burst forth from the screen like the opening sequence of a film, vibrating with stereoscopic energy. The phrase “Bliss Bucket” is at once comic, nonsensical, and strangely evocative. Ruscha challenges his audience to question both the relationship between text and image and the meaning of the phrase itself. What *is* a “Bliss Bucket?” A metaphor for nature as a vehicle for joy? Some source of spiritual nirvana? A joke? The artist, for one, has left these questions open for the viewer. Yet perhaps not even Ruscha could have anticipated that his words would take on such a literal meaning as they did when *Bliss Bucket* became a vessel for storing illegal funds. In May 2013, the painting and four others were purchased for a collective price of nearly \$60 million, paid for with money stolen from the Malaysian government.<sup>3</sup>

Money laundering has become increasingly prevalent in the art world over the last several decades. The “art world” itself is aptly named. The network of creators, patrons, and agents that facilitate the international sale of artwork is a universe unto itself. While this tight-knit structure supports a thriving artistic community, it has also created an opaque industry. The international art market has become a multibillion-dollar business. As a result of an explosion in market prices over the last several decades, art is now seen by many as a legitimate alternative investment. A recent survey of wealth managers shows that seventy eight percent (up from fifty five percent in 2014) think art and collectibles should be included as part of wealth management offerings.<sup>4</sup> However, the industry still operates via the

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1. Robert Storr, Address at CAA Annual Conference, *The Art World We’ve Made, the Communities We Belong to, the Language We Use, and the Work We Have Yet to Do*, (Feb. 16 2013), <https://perma.cc/H2Q3-BC7G>.

2. Cindy Perman, *This Ex-Undercover Agent Infiltrated Pablo Escobar’s Drug Cartel as a Money Launderer*, CNBC (July 15, 2016, 11:51 PM), <https://perma.cc/9UMV-G34A>.

3. Complaint at ¶ 349, ¶ 352, *U.S. v. One 18-Carat White Gold Diamond Jewelry Set et al.*, 2017 WL 2600386 (C.D. Cal. 2017) (trial pleading) (No. CV 17-4445).

4. DELOITTE, *ART AND FINANCE REPORT 54* (2016), <https://perma.cc/A8U8-63Y7>.

kind of informal handshake agreements that were customary nearly half a century ago.

Art has been described as the “last unregulated market.”<sup>5</sup> In a 2016 study, sixty two percent of wealth managers identified a lack of regulation in the art market as the biggest impediment to incorporating art into their services.<sup>6</sup> Money laundering, price fixing, and tax evasion have become common in the industry. In fact, during a 2015 panel at the World Economic Forum, the economist Nouriel Roubini proclaimed the art industry “shady.”<sup>7</sup> Whether and how the art market should be regulated has been the subject of frequent debate in recent years. Although various governmental and self-regulatory schemes have been proposed, little progress has been made. The problem of whether and how to regulate the art market has been compounded by this insular industry’s global reach and willingness to close ranks.

While many concerns facing this field can be addressed through self-regulation, the same cannot be said for money laundering—the process of funneling illegal profits by means of legitimate financial systems. As regulation of financial institutions and other markets such as real estate have tightened, art has become an increasingly attractive asset class for criminal actors.<sup>8</sup> Given current industry practices, even the most careful and diligent art dealers are vulnerable. Art’s transportability, high value, and variable pricing make it an ideal tool for funneling or hiding illegal funds. Its appeal as a vehicle for money laundering is compounded by opacity and disorganization within the industry itself. A 2016 set of guidelines on money laundering from the Basel Institute on Governance, an independent organization dedicated to encouraging self-regulation by industry players including gallerists, auction houses, and institutions (“art market operators”), indicated that “[a]rt market operators are at risk of being misused by persons seeking to launder the proceeds of criminal activity, thereby creating potentially serious reputational, legal and financial consequences for the art trade.”<sup>9</sup> Yet the art world has been resistant—in many ways rightfully so—to the guidelines proposed by this and other similar groups.

This Note argues that the art industry cannot sufficiently deter money laundering through self-regulatory measures and that an effective approach to combatting these crimes must begin with government oversight. Part I provides an overview of the qualities that make art an attractive market for money launderers and examines several common money laundering practices within the industry. Part II considers self-regulatory and governmental strategies that have recently been proposed as potential solutions to these problems. Part III argues that ultimately, focusing on

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5. Marc Spiegler, *The Art Trade is the Last Major Unregulated Market*, ART NEWSPAPER (June 2005), <https://perma.cc/P526-KELR>.

6. DELOITTE, *supra* note 4, at 18.

7. John Gapper & Peter Aspden, *Davos 2015: Nouriel Roubini says art market needs regulation*, FINANCIAL TIMES (Jan. 22, 2015), <https://perma.cc/H2X4-2ME8>.

8. Hanna Purkey, Note, *The Art of Money Laundering*, 22 FLA. J. INT’L L. 111, 113 (2010).

9. Basel Institute on Governance, *Basel Art Trade Principles on Anti-Money Laundering: Green Paper for Public Consultation 2* (June 17, 2016), [hereinafter *BAT Principles on Anti-Money Laundering*], <https://perma.cc/QC7Y-E5A4>.

targeted enforcement and deterrence through existing anti-money laundering laws offers the best approach to both preventing wrongdoing in the industry and ensuring the future stability of the market. Using the recent success of the Kleptocracy Asset Recovery Initiative as a model, I propose that the United States could make a focused effort to root out bad actors within this market and make the art industry less attractive to criminals.

## I. MONEY LAUNDERING THROUGH ART WORKS AND CULTURAL PROPERTY

### A. OVERVIEW OF MONEY LAUNDERING AND CURRENT REGULATION

Although the practice was documented as early as 2000 B.C., the term “money laundering” first came into use during Prohibition in the United States.<sup>10</sup> Traditional means of laundering money have included the use of shell corporations, off-shore banking, and investments in legitimate business establishments.<sup>11</sup> International money laundering took on a feverish pace during the drug wars of the 1980s. By the end of that decade, global leaders recognized the need to address this issue together. The Financial Action Task Force (“FATF”), an intergovernmental body developed under the Organization for Economic Cooperation and Development in response to this trend, issued its first recommendations for combatting money laundering in December 1989.<sup>12</sup> The current set of guidelines, comprising forty specific recommendations, was released in 2012 (the “2012 Recommendations”). The first, known as the Risk-Based Approach (“RBA”), provides that:

[c]ountries should identify, assess, and understand the money laundering and terrorism financing risks of the country, and take action to mitigate them. . . . Where countries identify higher risks, they should ensure that their [anti-money laundering] regime adequately addresses such risks. Where countries identify lower risks, they may decide to allow simplified measures for some of the FATF Recommendations under certain conditions.<sup>13</sup>

The 2012 Recommendations also stress the need to foster international cooperation by means of treaties, mutual legal assistance (including plans for freezing and confiscating assets), and extradition agreements.<sup>14</sup>

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10. Purkey, *supra* note 8, at 114.

11. *Id.*

12. FAUSTO MARTIN DE SANCTIS, *MONEY LAUNDERING THROUGH ART: A CRIMINAL JUSTICE PERSPECTIVE* 11 (2013) (“These recommendations are not binding, but they do exert strong international influence on many countries (including nonmembers) to avoid losing credibility, because they are recognized by the International Monetary Fund and the World Bank as international standards for combating money laundering and the financing of terrorism. In the 1996 version, they were adopted by 130 countries. In the 2003–2004 version, they were adopted by over 180 countries.”).

13. Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* 9 (2012), [hereinafter *International Standards on Combating Money Laundering*], <https://perma.cc/46MV-M2CT>.

14. *Id.* at 25–28; DE SANCTIS, *supra* note 12, at 149.

In addition to the steps outlined above, the RBA also provides that “[c]ountries should require financial institutions and designated non-financial businesses and professions . . . to identify, assess and take effective action to mitigate their money laundering and terrorist financing risks.”<sup>15</sup> In addition to defined financial institutions, the FATF established six categories of Designated Non-Financial Businesses (“DNFB”) subject to the 2012 Recommendations. Real estate agents and dealers in precious metals and/or stones—professionals whose businesses share substantial similarities with those of art dealers—are classified as DNFBs.<sup>16</sup> Curiously, no art market operators are included among the DNFBs.

For its part, the United States first adopted both civil and criminal penalties to combat money laundering in 1986 with the Money Laundering Control Act, codified at 18 U.S.C. §§1956–57. 18 U.S.C. § 1956(a)(1)(B)(i) provides that a person is guilty of money laundering when:

- (1) the defendant conducted or attempted to conduct a financial transaction;
- (2) the transaction involved the proceeds of a statutorily specified unlawful activity;
- (3) the defendant knew the proceeds were from some form of illegal activity; and
- (4) the defendant knew a purpose of the transaction was to conceal or disguise the nature, location, source, ownership, or control of the proceeds.<sup>17</sup>

Criminal violations of § 1956 carry a maximum twenty-year prison sentence and a fine of \$500,000 or twice the value of the transaction, whichever is greater. The statute also includes a civil penalty provision. Under § 1956(b), persons who engage in violations of subsections 1956(a)(1), (a)(2) or (a)(3) are liable to the United States for \$10,000 or the value of the funds involved in the transaction, whichever is greater. Under § 1957, the four intent elements required by § 1956

15. INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING, *supra* note 13, at 113-14.

16. *Id.* (“Designated non-financial businesses and professions means: a) Casinos. b) Real estate agents. c) Dealers in precious metals. d) Dealers in precious stones. e) Lawyers, notaries, other independent legal professionals and accountants – this refers to sole practitioners, partners or employed professionals within professional firms. It is not meant to refer to ‘internal’ professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to AML/CFT measures. f) Trust and Company Service Providers refers to all persons or businesses that are not covered elsewhere under these Recommendations, and which as a business, provide any of the following services to third parties: v acting as a formation agent of legal persons; v acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons; v providing a registered office,; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement; v acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement; v acting as (or arranging for another person to act as) a nominee shareholder for another person.”).

17. *U.S. v. Miles*, 290 F.3d 1341, 1355 (11th Cir. 2002) (citing 18 U.S.C. § 1956(a)(1)(B)(i)).

are replaced with a \$10,000 threshold amount for each non-aggregated transaction and a requirement that a financial institution be involved in the transaction.<sup>18</sup>

The International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, passed as Title III of the Patriot Act, amended portions of the Money Laundering Control Act and the Banking Securities Act. The new act provides, in relevant part, that nonfinancial businesses are required to report any all-cash payments in excess of \$10,000.<sup>19</sup> However, unlike financial institutions, nonfinancial businesses (including art and antiquities dealers) are under no obligation to report suspicious activities to the U.S. government.<sup>20</sup>

### B. REAL ESTATE AND THE CRIMINAL APPEAL OF NON-FINANCIAL INSTITUTIONS

As financial industries become more regulated, criminal actors interested in laundering funds tend to shift their attention toward non-financial institutions.<sup>21</sup> Real property has often served as a popular means of hiding or transferring large amounts of money, especially because it can be difficult to monitor and explain variations in property prices because of a lack of reliable and uniform information.<sup>22</sup> Common money laundering techniques in the real estate industry include: credit-financing schemes, over- and under-valuing property, cash payments, and mortgage schemes.<sup>23</sup> One popular method of laundering money through over-valuation, for example, involves successive sales and purchases. Using this system, a launderer would purchase an apartment for \$500,000 through a shell corporation and subsequently sell the property to another shell corporation for \$550,000—injecting \$50,000 of unclean money. This process may be repeated several times.<sup>24</sup>

While real estate investment avoids the strict regulatory schemes that have attached to financial institutions in recent years, the industry is still subject to some regulation.<sup>25</sup> First, real estate titles and deeds require a name, even if the name is that of a shell corporation.<sup>26</sup> Additionally, real estate agents and mortgage brokers have licensing requirements, which compel them to learn and demonstrate

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18. Dept. of Justice, *CRIMINAL RESOURCE MANUAL*, <https://perma.cc/ES4Q-2Z7R> (last visited Aug. 17, 2017).

19. 31 USCA § 5331.

20. 31 USCA § 5318 Note.

21. Patricia Cohen, *Valuable as Art, but Priceless as a Tool to Launder Money*, N.Y. TIMES (May 12, 2013), <https://nyti.ms/2pbtYFb>.

22. Financial Action Task Force, *Money Laundering & Terrorist Financing through the Real Estate Sector 5* (2016), <https://perma.cc/M2MR-FSN4>.

23. *Id.* at 7, 17, 18, 21.

24. *Id.* at 17.

25. In 2016, the Treasury Department announced the introduction of a pilot program to monitor high end real estate transactions in Manhattan and Miami-Dade County. The program requires title insurance companies to report the true beneficial owner for all-cash transactions made through shell corporations. Press Release, U.S. Dept. of Treas., *FinCEN Takes Aim at Real Estate Secrecy in Manhattan and Miami* (Jan. 13, 2016), *available at* <https://perma.cc/TD4J-G5XZ>.

26. Cohen, *supra* note 21.

sufficient knowledge of legal industry practices with regard to money laundering. In the United States, this includes the obligation under the U.S. Patriot Act to report any cash payments in excess of \$10,000.<sup>27</sup> As previously noted, real estate agents are also included in the FATF's list of Designated Non-Financial Businesses.<sup>28</sup>

### C. THE ART MARKET

Tom Keatinge, the director of the Centre for Financial Crime and Security Studies at the Royal United Services Institute, has observed that “we live in an environment where [criminals] look for the cracks in the financial system. And as it currently stands, the art dealer community—and one or two other industries for sure—are cracks.”<sup>29</sup> Several qualities intrinsic to the art object, such as its portability and high, yet often volatile or arbitrary, valuation, contribute to its attractiveness as a vehicle for money laundering. Further, the art market's lack of transparency serves to shield this illegal activity.<sup>30</sup>

#### 1. Art's Unique Appeal as a Vehicle for Laundering Money

The art and real estate markets share a number of similarities—namely that they can be volatile and difficult to monitor. However, there are aspects of art that make it even more attractive to would-be money launderers than real property.

First, artwork is extremely portable. It is far easier to transport a painting than a penthouse apartment. Artwork's scale lends itself to smuggling, allowing criminals to circumvent customs and tax agencies. Its transportable nature allows owners to easily move around and hide art assets.

Second, the art market's lack of transparency can serve as a tool to mask criminal activity. Unlike professionals in other industries, art market operators are under no legal obligation to report suspicious transactions.<sup>31</sup> Currently, the banks through which these transactions flow—which are subject to reporting requirements—serve as the primary mechanism for flagging potential illegal activity.<sup>32</sup> The industry is also subject to very little actual oversight by law enforcement officials. Art security consultant Robert Spiel has observed that “criminals who are comfortable functioning in the art world far outnumber their police or law enforcement counterparts.”<sup>33</sup> Furthermore, there are no standard

27. 31 USCA § 5331.

28. INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING, *supra* note 13, at 113-14.

29. Georgina Adams, *Guidelines to regulate market are an 'impossible dream,'* THE ART NEWSPAPER, (Mar. 1, 2015), <https://perma.cc/E832-LSCD> (quoting Tom Keatinge, *Islamic State: Looting for Terror*, (BBC Radio 4 broadcast Feb. 17, 2016)).

30. See *United States v. Crabtree*, No. 92-6330, 1993 WL 359689, at \*1 (10th Cir. Sept. 3, 1993) (affirming defendant's money laundering conviction where defendant transferred \$50,000 of proceeds from the sale of a Renoir painting to an account to hide funds from the bankrupt estate).

31. Cohen, *supra* note 21.

32. *Id.*

33. Robert Spiel, *Art Theft and Forgery Investigation: the Complete Field Manual* 25 (2000).

recordkeeping practices within the industry. This creates the opportunity for individuals to falsify provenance or financial information related to an art object. Even where art market operators keep diligent and accurate records, there are legitimate reasons—including maintaining client confidentiality and concerns about anti-competitive practices—why reputable dealers may not wish to share their records with other individuals in the industry, let alone public or governmental agencies.<sup>34</sup>

Lack of access to prior sales records for an art object can create the opportunity for price manipulation. Appraising the value of an artwork requires highly specialized knowledge and, even so, can often be subjective.<sup>35</sup> A highly publicized dispute between a major gallery and a serious collector serves to illustrate the uncertainty and variability in pricing that may occur when even the most sophisticated actors are involved. In 2012, billionaire art collector Ronald Perelman brought suit against Gagosian Gallery alleging fraud and breach of fiduciary duty related to the sale and exchange of several works of art, including *Leaving Paphos Ringed with Waves*, a painting by Cy Twombly.<sup>36</sup> According to court filings, Mr. Gagosian first offered Mr. Perelman—a longtime client—the Twombly painting for \$8 million in April 2011.<sup>37</sup> When Mr. Perelman made an offer on the work the following week, Mr. Gagosian represented that it had been sold to another party.<sup>38</sup> In fact Mr. Gagosian had sold the work for \$7.25 million to an entity controlled by the Mugaris, a family of serious collectors and sometime partners of Mr. Gagosian.<sup>39</sup> The painting was paid for, in part, with the Mugaris' ownership stake in artwork co-owned with Mr. Gagosian.<sup>40</sup> Two months later, and without disclosing the identity of the new owner, Mr. Gagosian informed Mr. Perelman that the Twombly work was back on the market, now at a price of \$11.5 million.<sup>41</sup> By the fall of 2011, the parties had agreed to a sale of the work to Mr. Perelman's MAFG Art Fund for \$10.5 million—financed through cash and an exchange of artwork.<sup>42</sup> In less than six months, the Mugaris made a \$2 million profit and Mr. Gagosian earned a \$1 million commission.<sup>43</sup> In his complaint, Mr. Perelman alleged that Mr. Gagosian not only overvalued the Twombly painting, but also undervalued the prices of the works Mr. Perelman traded into the gallery exchange for the piece.<sup>44</sup>

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34. See *infra*, subsection II.A.2.

35. Purkey, *supra* note 8, at 114.

36. Amended Complaint, MAFG Art Fund, LLC v. Gagosian, 123 A.D.3d 458 (N.Y. 2014) (No. 6531892012) [hereinafter MAFG Complaint].

37. *Id.* at ¶ 62.

38. *Id.* at ¶ 63.

39. Robert Frank, *The Feud That's Shaking Gallery Walls*, N.Y. TIMES, Oct. 19, 2014, at BU 4, <https://nyti.ms/2v23B49>.

40. *Id.*

41. MAFG Complaint, *supra* note 36, at ¶ 64.

42. *Id.* at ¶ 67.

43. Frank, *supra* note 39.

44. MAFG Complaint, *supra* note 36, at ¶ 62.



Ultimately, the court dismissed these charges, finding that Mr. Perleman did not conduct independent due diligence and “[a]s to the claim that defendants misrepresented the value of certain art works, statements about the value of art constitute ‘nonactionable opinion that provide[s] no basis for a fraud claim.’”<sup>45</sup> Even so, the case demonstrates both the speed at which market prices may fluctuate and the sometimes-arbitrary nature of art valuation practices.

Finally, despite the large amounts of money involved in many transactions, art world practices remain strikingly informal. Often, sales occur without a written agreement between the parties. Indeed, it is not uncommon for collectors or dealers to trade pieces—conducting like-kind exchanges of artwork in which not a penny ever changes hands.<sup>46</sup> This informality and the absence of written agreements are attractive to actors who do not wish to create a paper trail. Further, there are no licensing requirements for participation in the art market. In many industries, trade organizations act as self-regulatory bodies intended to enforce industry practices and fill gaps left by government regulation. For example, the American Medical Association and American Bar Association have established rules for ethics, conflicts, disciplinary action, and accreditation in the medical and legal professions respectively. Art industry trade organizations are highly selective and require a proven track record of fair and honest dealings prior to consideration for membership. For example, the membership in both the Art Dealers Association of America (“ADAA”) and the Association of Professional Art Advisors is by invitation-only.<sup>47</sup> However, because these organizations self-select only the most reputable art market operators for membership, they cannot do much in the way of educating or regulating industry-wide ethical practices. Indeed, membership in a trade organization is not a prerequisite for success in the field. Notably, Gagosian Gallery, one of the world’s largest and most profitable galleries, is not a member of the ADAA. Despite the ethical practices maintained by a large portion of art market operators, there remains the possibility that some appraisers or dealers may be “bought or even made up—insofar as no license or qualification is required of them (reputation and experience being sufficient)—and no authorization is even required for dealing in art.”<sup>48</sup>

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45. *MAFG Art Fund, LLC v. Gagosian*, 123 A.D.3d 458, 459 (N.Y. 2014) (citing *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1108 (N.Y. 2011)).

46. *DE SANCTIS*, *supra* note 12, at 53.

47. *About*, ART DEALERS ASSOCIATION OF AMERICA, <https://perma.cc/MNT3-48G5> (last visited Aug. 17, 2017); *About*, ASSOCIATION OF PROFESSIONAL ART ADVISORS, <https://perma.cc/V63N-C5LH> (last visited Aug. 17, 2017).

48. *DE SANCTIS*, *supra* note 12, at 58.

## 2. How Money Is Laundered Through Art

### *a. Cash Payments*

One of the simplest ways criminals launder money is through all-cash payments.<sup>49</sup> Compliance with the United States anti-money laundering laws,<sup>50</sup> FATF's 2012 Recommendations,<sup>51</sup> and various international anti-money laundering statutes<sup>52</sup> requires disclosure of cash payments above a certain amount. However, given the art industry's global scope, these requirements do not provide a comprehensive solution. First, there are still many countries with no disclosure requirements or extremely high thresholds for the requirements, including Switzerland, discussed *infra*. Individuals interested in laundering money are free to make purchases in cash abroad, import the artwork into the United States, and sell it through legitimate channels. Further, many art institutions operate in multiple countries, including jurisdictions where these requirements do not apply or may not be enforced. Both Christie's and Sotheby's allow payment to be remitted in cash.<sup>53</sup> This is especially notable considering these auction houses' increasing involvement in facilitating private sales.<sup>54</sup>

### *b. Under- and Over-Valuation*

As previously discussed, the opaque nature of the art market creates an opportunity for price manipulation. As in real estate, an individual interested in laundering money may create a series of successive sales and purchases. Lack of education in art and art valuation amongst customs agents allows importers to circumvent customs. In one galling example, the Brazilian banker Edemar Cid Ferreira attempted to import a painting into the United States with a declared value of \$100. In fact, the shipment contained *Hannibal*, a painting which the artist Jean-Michel Basquiat estimated to be worth \$8 million.<sup>55</sup>

49. International Standards on Combating Money Laundering, *supra* note 13, at 99.

50. See 18 U.S.C. § 1957.

51. International Standards on Combating Money Laundering, *supra* note 13, at 97.

52. See, e.g., E.U. regulations (10,000 EUR), Switzerland (100,000 Swiss Francs), Luxembourg, U.K.

53. According to Sotheby's website, "You 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 but please contact these sale locations directly for specific information. *Payment must be sent from the invoiced party and not from a third party.*" *Buy & Sell*, SOTHEBY'S, <https://perma.cc/HS7M-26GC> (last visited Jan. 20, 2017) (emphasis added). This policy seems consistent with U.S. and international anti-money laundering statutes. Christie's stated policy is vaguer: "We accept wire transfers, bank drafts or cashier's orders, cash or checks. Under certain circumstances, some Christie's salerooms may accept payment by credit card (check with your local Post-Sale Services team for details)." *Post-Sale Services*, CHRISTIE'S, <https://perma.cc/QF6N-R9EQ> (last visited Jan. 20, 2017).

54. Anna Brady, *What do auction house private sales mean for collectors and the art market?*, APOLLO MAGAZINE (Aug. 4, 2016), <https://perma.cc/37GT-TPGT>; Marion Maneker, *How Private Sales Conquered Auction Houses*, ART MARKET MONITOR (Nov. 10, 2014), <https://perma.cc/QK38-6A4N>.

55. Cohen, *supra* note 21. Ferreira was convicted of money laundering and other financial crimes in Brazil in 2006 and sentenced to twenty-one years in prison. The U.S. Government filed a forfeiture

*c. Record Falsification*

Money launderers can also conceal art assets from authorities by falsifying sales and loan records. In *Absolute Activist Value Master Fund Ltd. v. Devine*, defendant Susan Devine and her husband established a criminal enterprise in order to hide the proceeds of a penny stock market manipulation scheme.<sup>56</sup> One method for concealing funds included concealing valuable art and furniture. The defendant created an inventory of art and furniture located in her Mallorca, Spain home with an estimated value exceeding £2.2 million, which she sent to a coconspirator.<sup>57</sup> The coconspirator sent back a fraudulent loan agreement, backdated by two years, and signed on behalf of a shell corporation, New York Art Trading. Through the agreement, New York Art Trading purported to lend Devine art and furniture with an estimated value of €2 million. Devine signed the backdated agreement, which gave the false appearance that the valuable property was lent to, rather than owned by, the defendant.<sup>58</sup> This property was sent to Switzerland for safekeeping before being returned to Spain the following year.<sup>59</sup>

*d. Black Market Transactions*

It is also the case that a large amount of the artwork used to launder money is stolen work. Stolen artwork can be sold through black market channels and eventually make its way into the legitimate art market. A criminal actor may purchase a stolen artwork with illegally obtained funds through an all-cash transaction and then, by misrepresenting the work as legally obtained, sell it through an art market operator. While databases like the Art Loss Register and Interpol's stolen art register have made strides toward documenting lost, stolen, and missing artwork, art theft and the sale of stolen artwork remain major problems.<sup>60</sup>

Several national statutes and international treaties attempt to address these issues. In 1970, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") drafted a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Convention requires special export licenses and an administrative control system to enable State Parties to prevent illegal importation and exploitation of artworks.<sup>61</sup> As of 2017, 134 states are party to the Convention.<sup>62</sup> In

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notice for the work under 19 U.S.C. § 1595a(c). In 2014, the Second Circuit Court of Appeals held that use of materially false invoices was sufficient to establish that artwork was "smuggled or clandestinely imported or introduced" into United States and affirmed the judgment of civil forfeiture. See *United States v. Broadening-Info Enterprises, Inc.*, 578 F. App'x 10 (2d Cir. 2014).

56. No. 2:15-cv-328-FtM-29DNF, 2015 WL 12838168 at \*1 (M.D. Fla. July 1, 2015).

57. *Id.* at \*9.

58. *Id.*

59. *Id.*

60. See *About Us*, ART LOSS REGISTER, <https://perma.cc/8HAT-R7TT> (last visited Jan. 20, 2017); *Works of Art: Database*, INTERPOL, <https://perma.cc/799V-XMZZ> (last visited Jan. 21, 2017).

61. DE SANCTIS, *supra* note 12, at 16.

the United States, the Bureau of Educational and Cultural Affairs oversees claims in violation of the UNESCO Convention.<sup>63</sup> At the request of UNESCO, in 1995 the UNIDROIT International Institute for the Unification of Private Law drafted a Convention on Stolen or Illegally exported Cultural Objects in order to establish a uniform minimum body of private law rules for the international art trade to complement the 1970 UNESCO Convention.<sup>64</sup> Additionally, 19 U.S.C. §§ 2601–13, the U.S. Cultural Property Implementation Act of March 1983, provides a series of administrative measures intended to protect cultural property imported into the United States. Section 2609(a) of the Act establishes that “[a]ny designated archaeological or ethnological material or article of cultural property which is imported into the United States in violation of Section 2606 of this title or Section 2607 of this title shall be subject to seizure and forfeiture.”<sup>65</sup> 18 U.S.C. § 542 also makes it a crime to import goods into the country “by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal,” and specifically addresses smuggling.<sup>66</sup> There have also been efforts by arts trade organizations over the years to combat trafficking in stolen works, efforts which have ramped up given that, “[i]t can be assumed that the problem of illegal trafficking in art objects and measures taken to combat it are destined to become more significant over the next years.”<sup>67</sup> Properly conducted and maintained provenances for each art work also serve as a key tool in preventing the trafficking and sale of stolen works by ensuring a work has a continuous chain of legal owners. Yet the fact that art crime is on the rise despite these laws and practices underscores the fact that these protections, as currently enforced, are inadequate.

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62. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO (last updated Aug. 25, 2017), <https://perma.cc/CKV8-AB3P>.

63. *Id.*

64. *Convention on Stolen or Illegally exported Cultural Objects*, UNIDROIT (1995), <https://perma.cc/KW5Q-QEPK>. It should be noted that, based on feedback provided to the authors of the BAT Guidelines, the UNIDROIT “Convention on the whole, appears to be unacceptable to art market participants.” Dr. Thomas Christ and Claudia von Selle, *Basel Art Trade Guidelines: Intermediary Report of a Self-Regulation Initiative 23* (2012), [hereinafter *BAT Guidelines*], <https://perma.cc/4VLA-USUM>.

65. 19 U.S.C. § 2609.

66. 18 U.S.C. §§ 542, 545.

67. *BAT Guidelines*, *supra* note 64, at 23.

## II. PROPOSED SELF-REGULATORY MEASURES AND RECENT TRENDS IN GOVERNMENT REGULATION

### A. THE BASEL ART TRADE GUIDELINES AND BASEL ART TRADE PRINCIPLES ON ANTI-MONEY LAUNDERING

#### 1. An Impossible Dream: Development of the Guidelines

Acknowledging the unique challenges facing their industry, certain market actors have attempted to address the problem of money laundering through art. The Basel Institute on Governance is an independent non-profit organization located in the Swiss city that has become the home of the industry's most spirited and profitable annual circus: the Basel Art Fair. In 2010, it convened meetings of art professionals, including lawyers, art dealers, and representatives of auction houses, to discuss potential self-regulatory solutions.<sup>68</sup> These meetings resulted in a working proposal introduced as the Basel Art Trade Guidelines ("BAT Guidelines") in 2012.<sup>69</sup> The BAT Guidelines tend to track both the FATF's 2012 Recommendations and anti-laundering guidelines promulgated by financial groups.<sup>70</sup> In particular, they advocate rigorous due diligence for all art transactions.<sup>71</sup> The BAT Guidelines are intended to apply to both art market operators and art market objects themselves (i.e. cultural property and collectable objects).<sup>72</sup> According to the authors of the BAT Guidelines, "it is in the interests of all art market participants to adopt and implement these guidelines. Precisely because an art market operator may adopt interchangeable roles, proper due diligence conducted as a seller will likely benefit that same operator when acting as a buyer."<sup>73</sup>

Although major art world players participated in the initial meetings, dialogue and negotiations over the BAT Guidelines eventually broke down.<sup>74</sup> Large auction houses argued that they already had rigorous anti-laundering policies in place, and other organizations remained concerned about the financial implications of such strict rules.<sup>75</sup> Attorney Lawrence Kaye, who participated in initial discussions, characterized the BAT Guidelines as an "impossible dream."<sup>76</sup> Indeed, when the Guidelines were eventually completed and released, the authors themselves noted in their conclusion that:

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68. *Id.* at 1.

69. *Id.*

70. See *Anti-Money Laundering Principles for Private Banking*, WOLFSBERG (2000, rev. 2012), [hereinafter *Wolfsberg AML Principles*], <https://perma.cc/KHM9-N9DM>.

71. Adams, *supra* note 29; Wolfsberg AML Principles, *supra* note 70.

72. BAT Guidelines, *supra* note 64, at 8-10.

73. *Id.* at 9-10.

74. Adams, *supra* note 29. Participants included representatives from Christie's, Sotheby's, and Phillips, as well as The Fine European Art Fair ("TEFAF"), art dealers, and attorneys. *Id.*

75. *Id.*

76. *Id.*

Unfortunately, the art trade has shown a pronounced lack of interest in constructively dealing with the proposed draft BAT Guidelines and the issues it addresses. Reactions to a letter sent out to key representatives of the art trade industry by the Basel Institute on Governance in July 2011 were met with reservation and outright refusal to engage. Both the arbitrating role of the Institute and the Guidelines as such have remained unacceptable or unimportant to art market participants.<sup>77</sup>

## 2. The Impracticality of Effective Self-Regulation

Following the passage of more stringent anti-money laundering regulations in Switzerland in 2015, see *infra*, the Basel Institute on Governance published a green paper, the Basel Art Trade Principles on Anti-Money Laundering (“BAT Principles on Anti-Money Laundering”), in 2016.<sup>78</sup> The paper “suggests that art market operators should implement a reasonably designed risk based approach by which they identify the criteria to measure potential money laundering risks.”<sup>79</sup> With regard to money laundering, the three primary considerations the BAT Guidelines and the BAT Principles on Anti-Money Laundering identify are that an art market operator should know: his customer, the provenance of the art object, and the provenance of the funds used to purchase the object.<sup>80</sup> However, this approach places too much of the onus on arts professionals. While it is true that art market operators are in the best position to ensure the provenance of works of art, many are not properly equipped to fully address the other two factors.

Art market operators are in the best position to develop and maintain thorough, accurate provenances for the works of art and other cultural property that pass through their hands. Establishing complete provenances for works in their possession is a best practice that most reputable art dealers already perform in their ordinary course of business. The BAT Guidelines provide further guidance for best practices for research, including:

requesting identification information from the seller, establishing credibility and plausibility references relating to the seller, referring to publicly available databases and listings relating to the parties to the transaction and the art object respectively; obtaining any relevant and available legal documents, witness declarations, [or] expert opinions as the case may be, and checking the restoration history as appropriate and presenting circumstantial evidence when no direct documentation is available.<sup>81</sup>

The BAT Guidelines also provide for enhanced due diligence if there are questions as to the work’s provenance or if the seller requests that his identity remain confidential. Enhanced due diligence includes seeking a second opinion, consulting further databases, and conducting background checks on the seller—including his previous art dealings.<sup>82</sup> Finally, the BAT Guidelines propose that all

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77. BAT GUIDELINES, *supra* note 64, at 23.

78. BAT Principles on Anti-Money Laundering, *supra* note 9.

79. *Id.* at 3.

80. BAT GUIDELINES, *supra* note 64, at 11.

81. *Id.* at 13.

82. *Id.*

expenses incurred in the process of this enhanced research process are to be borne by the seller.<sup>83</sup>

Though the guidelines for research and evidence gathering are sound, some industry professionals have pushed back against the enhanced due diligence requirements laid out in the BAT Guidelines. In defending the BAT Guidelines, its authors have pointed to these commenters' lack of knowledge about what the law actually requires,<sup>84</sup> but there are still legitimate concerns about what has been called the "'excessive and unrealistic' scope of the BAT Guidelines, especially with respect to the requirement of a second expert opinion."<sup>85</sup> Requiring a seller to cover the cost of researching and establishing provenance is not standard industry practice, and many law-abiding sellers may balk at the idea of incurring such costs. Dealers will either pay these costs and pass them on to the buyer or absorb the costs themselves. As a result, only one party in this procedure has any incentive to mandate compliance. This dynamic highlights one area in which art market operators are unlikely or unwilling to change their practices because of the possible financial—and personal—implications of compliance. Because the art market is such a small world involving repeat players, where interpersonal relationships are essential, art industry operators may determine that conducting rigorous investigations will create the impression that one is suspicious of a seller's trustworthiness. Accordingly, dealers may not act in the most prudent manner for the sake of maintaining good relations.

Know Your Customer ("KYC") is an approach that tracks the customer due diligence requirements the United States' Financial Crimes Enforcement Network ("FinCEN") proposed in 2014.<sup>86</sup> The four central requirements of KYC are: (a) identifying and verifying the identity of customers, (b) identifying and verifying the identity of "beneficial owners"—the person or persons who enjoy property benefits in equity—when a work is bought or sold by a legal entity, (c) understanding the nature and purpose of customer relationships, and (d) conducting ongoing monitoring to maintain and update customer information and identify suspicious transactions.<sup>87</sup> The BAT Principles on Anti-Money Laundering guidelines address KYC requirements as a stand-alone category, requiring an art market operator to identify both the buyer and seller by "name, date of birth, address, and such further information that may be appropriate or required by law or regulation."<sup>88</sup> Though the desire for confidentiality may seem suspicious, there are many legitimate reasons—including, amongst others, the desire not to attract

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83. *Id.* at 14.

84. "Those without a legal background found it somewhat difficult to assess the various provisions regarding unclear or doubtful provenance and residual doubt. However, elucidation on this (and other) finer points of the BAT Guidelines will be a projected part of the implementation procedure." *Id.* at 22.

85. *Id.*

86. Customer Due Diligence Requirements for Financial Institutions, 79 Fed. Reg. 45151 (proposed Aug. 4, 2014).

87. Dan Ryan, *FinCEN: Know Your Customer Requirements*, HARV. LAW SCH. FORUM ON CORP. GOVERNANCE AND FIN. REGULATION (Feb. 7, 2016), <https://perma.cc/GJ8L-988D>.

88. BAT PRINCIPLES ON ANTI-MONEY LAUNDERING, *supra* note 9, at 5.

undue public attention or to avoid industry gossip—for which clients may wish to keep their identities private.<sup>89</sup>

Under the BAT Principles on Anti-Money Laundering, enhanced due diligence with regard to client identification is required for:

- Persons residing in and/or having funds sourced from countries identified by credible sources as having inadequate AML standards or representing high risk for crime and corruption.
- Persons engaged in types of economic or business activities or sectors known to be susceptible to money laundering.
- Certain categories of “Politically Exposed Persons” (which may/may not include so called domestic PEPs), referring to individuals holding or, as appropriate, having held, senior, prominent, or important public positions with substantial authority over policy, operations or the use or allocation of government-owned resources, such as senior government officials, senior executives of government corporations, senior politicians, important political party officials, etc., as well as their close family and close associates.
- Persons who are not physically present.<sup>90</sup>

While these requirements are rational and would likely lead to greater compliance and transparency, they are not a workable solution for all transactions in the stubbornly opaque art world. While art world operators acting as intermediaries between two parties—a seller (either an artist on the primary market or a consignee on the secondary market) and a buyer—should be able to and, indeed, have a responsibility to conduct reasonable KYC due diligence, the situation becomes more complicated when multiple art market operators are transacting with each other on behalf of their clients. Frequently, art market operators will make a sale through an intermediary (often an art advisor or a gallery) acting on behalf of a client who wishes to remain anonymous.

Art market operators lack the incentives to conduct the rigorous background investigation the BAT Guidelines propose, especially in the context of the art fair circuit, which has emerged as the dominant primary market for sales, where art deals are often made in a matter of minutes.<sup>91</sup> Accordingly, art market operators are highly resistant to the requirement of advanced due diligence in this area. Furthermore, as discussed above, confidentiality and reputation serve as valuable currency within the art world. Requiring extensive disclosures would chill the informal and often decades-long relationships between art dealers, advisors, and collectors that underpin the industry. In fact, the Anglo-American representatives reviewing the BAT Guidelines specifically rejected article 3.2, addressing “balancing interests” between disclosure and confidentiality, “on the grounds that it

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89. See *Hoffman v. L&M Arts, et al.*, 838 F.3d 568, 573 (5th Cir. 2016).

90. BAT PRINCIPLES ON ANTI-MONEY LAUNDERING, *supra* note 9, at 6.

91. Y-Jean Mun-Delsalle, *The Art Fair Boom Is Forever Changing the Way the Art Market Does Business*, FORBES (Apr. 7, 2016), <https://perma.cc/EMH5-3R5S>.



fails to adequately take into account the specific conditions and circumstances of the art market, which they believe to be unable to function at all without the current levels of commercial confidentiality.”<sup>92</sup>

Additionally, some art market operators lack both the resources and incentives to certify the provenance of monies used to purchase art. Galleries, although they deal in multimillion-dollar works of art within an international market, are small businesses.<sup>93</sup> The BAT Principles on Anti-Money Laundering suggested that “[s]mall businesses may not have the resources to address money-laundering risks in the same way that large auction houses or major dealers and galleries will have, and may have a different risk exposure.”<sup>94</sup> Yet this is not exactly accurate. While it is certainly true that these businesses do not have the same financial capabilities, it is hardly the case that they are not subject to the same level of risk. Indeed, because small businesses often lack the financial and human capital that larger arts organizations can devote to identifying suspicious activity, they may be even more susceptible to being taken advantage of by criminal actors by virtue of their size. But requiring small and mid-sized galleries to invest substantial resources in the rigorous due diligence protocol laid out in the BAT Guidelines and the BAT Principles on Anti-Money Laundering would put these organizations at a competitive disadvantage compared to auction houses and international mega-galleries.

The desire for confidentiality and anonymity that pervades the industry can also create challenges for art market operators when tracing the provenance of funds. The BAT Principles on Anti-Money Laundering propose several highly beneficial policies that art market operators can and should follow, including only accepting payment from reputable financial institutions located in countries that have implemented anti-money laundering measures, and not accepting cash payments.<sup>95</sup> However, some other proposed payment policies prove problematic, especially those related to third parties. This is particularly true given the increasing role art advisors play in facilitating sales.<sup>96</sup> The BAT Principles on Anti-Money Laundering propose that art market operators should “adopt a policy of not accepting payments from third parties,” and “[i]f the buyer is a domiciliary company, or acting as an intermediary or otherwise on behalf of a third party, the art market operator must establish the ultimate beneficial owner of the funds (the natural person).”<sup>97</sup> This type of approach would certainly deter criminal actors from relying on third parties to provide a cloak of anonymity when buying or selling art. However, it also illustrates the problems and impracticalities of

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92. BAT GUIDELINES, *supra* note 64, at 21.

93. Katya Kazakina, *Desperate Art Galleries Give Up as Chelsea Rents Double*, Bloomberg (Feb. 20, 2013), <https://perma.cc/35KG-JQPE>; *Running a Gallery: An HBR Small Business Interview*, HARVARD BUS. REV. (Jan. 13, 2013), <https://perma.cc/C845-Y726>.

94. BAT PRINCIPLES ON ANTI-MONEY LAUNDERING, *supra* note 9, at 2 n.2.

95. *Id.* at 8.

96. Henri Neuendorf, *Art Demystified: What Is The Role of Art Advisors?*, Artnet (Aug. 11, 2016), <https://perma.cc/G4Q7-V2XS>.

97. *See supra* note 94.

importing anti-money laundering procedures from other industries into the idiosyncratic art market.

Requiring a financial institution to confirm the beneficial owners of transactions conducted through a third party proves reasonable in the realm of bank transfers.<sup>98</sup> As long as a beneficial owner is not conducting illegal activity, he is in no way harmed by the process. Under these circumstances, the process amounts to fact checking. However, this approach creates problems in the context of the art market where there are practical and perfectly legal reasons why an art collector may be reluctant to disclose to an art market operator information that he would otherwise freely share with a bank for identification purposes. As previously stated, the high-end art market is a core group of repeat players. Facts and gossip can travel quickly through any small network. A participant may wish to keep his sales or purchases private for any number of personal, social, or financial reasons. For example, a participant may want to avoid unwanted solicitations in the future. Sending unsolicited materials to collectors, in the form of exhibition catalogues, emails, formal offers, and press kits, is one of art dealers' primary sales tactics.<sup>99</sup> To be certain, many collectors appreciate these packages. However, others who prefer not to receive unsolicited materials might employ art advisors as a tactic to avoid unwanted and invasive communications from art market operators.

## B. RECENT TRENDS IN GOVERNMENT REGULATION

### 1. Switzerland

Spurred in part by an ongoing court battle between Russian oligarch Dmitry Rybolovlev and Swiss art dealer Yves Bouvier involving a painting by Modigliani,<sup>100</sup> last year Switzerland adopted an amendment to its Customs Act intended to restrict "freeports." These warehouses for goods in transit serve as tax havens for the wealthy, and have become the loci of numerous questionable art transactions.<sup>101</sup> Forty percent of the products stored in Swiss ports are cultural property.<sup>102</sup> According to art law expert Andrea Raschèr, in Swiss freeports, sales "of cultural items are negotiated without ever leaving [the freeports]."<sup>103</sup> If the buyer and seller both have storage space within the facility, an item may be exchanged for cash and transported to a new location within the freeport without any customs or sales records. There are even exhibition rooms within the freeports,

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98. Lest we forget, these principles are modeled after the Wolfsberg Anti-Money Laundering Principles regulating banks.

99. This is primarily true for art dealers and galleries. Joel Mesler, *The Art of Art Dealing*, N.Y. OBSERVER (Dec. 2, 2013), <https://perma.cc/69VJ-DJLV>.

100. Robert Frank, *A Multimillion-Dollar Markup on a Modigliani*, N.Y. TIMES (Apr. 4, 2015), <https://nyti.ms/2yKnrDn>; Sam Knight, *The Bouvier Affair*, NEW YORKER (Feb. 8, 2016), <https://perma.cc/K8RU-JDSN>.

101. Isabelle Eichenberger, *Art: the new frontier in the fight against money laundering*, SWISS INFO (June 1, 2015), <https://perma.cc/C23L-XFUS>.

102. *Id.*

103. *Id.*

“parallel arrangements which bear no relation to the purpose of these structures that were created with the intent of transiting merchandise, not storing it for decades.”<sup>104</sup> There have traditionally been no reporting requirements for cash transactions under Swiss law, so many sales are conducted in cash “because a lot of people take their money out and keep it” in the freeports.<sup>105</sup>

While the new Swiss amendment does not expressly mention art dealers, it requires all traders—a category that includes art dealers—to follow certain procedures, including: (1) the verification of the identity of the buyer; (2) the identification of the beneficial owner and the judicial structure of the buyer; and (3) the establishment and retention of documents relating to the transaction; in the case of cash payments in excess of 100,000 Swiss francs, additional due diligence may be required.<sup>106</sup> Although the amendment came into effect on January 1, 2016, the government is still in the process of creating a strategy for its application and enforcement.

It is unclear what impact these new regulations will have on actual market practices. Even if the Swiss government is able to devise a comprehensive approach to enforcement, the 100,000 Swiss franc minimum requirement for disclosure is still high enough to leave ample room for questionable transactions to occur.

## 2. United Kingdom

In March 2017, the British government announced plans to create a new Office for Professional Body Anti-Money Laundering Supervision (“OPBAS”) within its Financial Conduct Authority.<sup>107</sup> These proposed reforms were prompted by concerns that inconsistencies in guidance and compliance across industries created loopholes for criminals and that, “whilst some supervisors are highly effective in some areas, there is room for improvement across the board, including in understanding and applying a risk-based approach to supervision and in providing a credible deterrent.” Following a call for further information, the British government released a set of draft regulations, “Oversight of Professional Body Anti-Money Laundering Supervision Regulations 2017,” on July 27, 2017. Under the draft regulations, if enacted, OPBAS would act as a sort of uber-watchdog working with and supervising industry specific regulatory bodies in the hope of making the U.K. a “hostile environment for illicit finance.”<sup>108</sup>

104. *Id.*

105. *Id.*

106. Sandrine Ciroud & Deborah Lechtman, *Art, money laundering and terrorist financing: new developments in Swiss law - Art, Cultural Institutions and Heritage Law*, INT’L BAR ASS’N (Sept. 29, 2015), <https://perma.cc/9ULN-6RQB> (“Art dealers who... accept cash transactions above 100,000 Swiss francs will also have to mandate an auditor who will report to the authority in charge of supervising dealers, and will need to report to [the Money Laundering Reporting Office of Switzerland] if the dealer under supervision does not comply with his or her communication duties.”).

107. Press Release, Financial Conduct Authority, FCA seeks views regarding the Office for Professional Body Anti-Money Laundering Supervision (July 24, 2017), <https://perma.cc/T7D3-BZ4X>.

108. *Id.*

While there is no specific regulatory body for art market operators, any business operating in the U.K. that accepts more than €10,000 in cash for a single purchase must register as a High Value Dealer, meaning that it will fall under the supervision of the Financial Conduct Authority. In addition to reporting transactions over €10,000, High Value Dealers are subject to a number of requirements tracking the FAFT's 2012 Recommendations' Risk-Based Approach, including: (1) establishing policies and procedures for identifying risky transactions; (2) ensuring that the business has enough trained staff to implement those policies; (3) conducting customer due diligence (including enhanced customer due diligence for politically exposed persons and their associates); (4) reporting any suspicious activity; and (5) maintaining accurate, up-to-date records. Failure to comply with these regulations may result in unlimited criminal financial penalties and up to two years in prison.<sup>109</sup> However, compliance with these requirements for High Value Dealers in the art market has not been as closely monitored as in financial industries.<sup>110</sup> If established, OPBAS will provide strict oversight to ensure compliance with these existing regulations.

Art market operators may be wary of the burdens associated with strict compliance. Rebecca Davies, chief executive of the Association of Art & Antiques Dealers stated, "Although we support the concept of a simplification of the anti-money laundering (AML) rules, they must be fit for purpose. The art market is already subject to great swathes of regulation and added bureaucracy simply results in poorer regulation, increased costs and reduced competition."<sup>111</sup> However, it is important to note that, unlike under the proposed BAT Guidelines, the UK's system provides an opt-out mechanism: art market operators are only required to register as High Value Dealers if they accept cash payments in excess of €10,000. Small businesses and other organizations who might find compliance overly burdensome may avoid these requirements by making it a policy to never accept cash payments above that amount—a policy that itself discourages money laundering. Ultimately, if actually enforced under OPBAS, the UK's proposed scheme for the regulation of high value art transactions offers a promising blueprint.

### III. ALTERNATIVES: DATABASES, GOVERNMENT REGULATION, AND THE KLEPTOCRACY TASKFORCE

The chilly reception that the BAT Guidelines and anti-money laundering recommendations have received from industry actors suggests self-regulation will likely never offer a workable solution to money laundering in the art market. Traditional anti-laundering efforts hinge on disclosure. However, the specific economic disadvantages associated with transparency in the art marketplace are simply too large for art professionals to willingly establish anti-money laundering

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109. HM Revenue & Customs, *Anti Money Laundering Supervision: Guidance for High Value Dealers*, 2010 (UK).

110. David Elsworth, *Cost fears rise for High Value Dealers after money laundering legislation announcement*, *TLCompliance* (Mar. 21, 2017), <https://perma.cc/P929-267D>.

111. *Id.*

regulation. Accordingly, government intervention seems to offer the only possible avenue to a solution.

Industry commenters understandably balked when the BAT Guidelines proposed establishing a register of art sales that could be accessed by both members and law enforcement.<sup>112</sup> Others have proposed the United States create a federally-funded database wherein, when a sale is made, an art market operator must register the details—including the work's details, the sale price, and the identities of the buyer and seller—with a confidential system. It is true that establishing such a database would be a major step toward providing law enforcement with data about art sales that would be useful in combating not only money laundering but other art related crimes like tax evasion.<sup>113</sup> While this approach seems simpler and more attractive than self-regulation, it too fails. First, with the exception of new artwork created after the system has been established, the value of existing artwork would be self-reported upon entry (indeed, if reported at all), meaning there would be no way to confirm the accuracy of a reported value. Indeed, a self-reporting requirement may even facilitate the kinds of over- and under-valuation schemes that the subjective price of artwork already make possible. Additionally, reporting requirements would create an incredible administrative burden for arts organizations and galleries, which are often already understaffed.<sup>114</sup> There are also very real concerns related to cybersecurity and hacking.<sup>115</sup>

Reporting and disclosure requirements do seem to offer a better solution. Yet any governmental attempts to establish new and inclusive anti-money laundering regulations will face challenges similar to those encountered by would-be self-regulators. Specifically, the regulations that might work for large scale art market operators like auction houses and mega-galleries would cripple small, independent dealers. Accordingly, a structure similar to the U.K. High Value Dealers system—whereby businesses who would be overburdened by compliance may de facto opt out by not engaging in cash transactions over \$10,000—may offer a feasible solution, if it was properly enforced.

However, the most effective way to deter criminal actors from using the U.S. art market—and, by extension, the international market—as a shelter for illegal funds is rigorous enforcement of existing money laundering laws within the industry. Taking an aggressive approach to rooting out criminal actors could be the most effective way to deter use of the art market as a vehicle for laundering illegal money. The Department of Justice's Kleptocracy Asset Recovery Initiative provides a possible model for an anti-money laundering task force dedicated to the art market. This initiative was established in 2010 as part of an expanded effort to

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112. BAT GUIDELINES, *supra* note 64, at 21.

113. Tess Bonelli, *The Art Market Database: Preventing Art Crime and Regulating the New Global Currency*, 20 *Holy Cross J.L. & Pub. Pol'y* 119, 168 (2016).

114. Benjamin Gennocchio, *Balancing Art and Business*, *N.Y. Times* (May 25, 2008), <https://nyti.ms/2kgADIR>.

115. *Id.*

combat the flow of illegal funds into the United States.<sup>116</sup> It particularly targets “kleptocrats”: international government officials that embezzle public funds. The Initiative has been an incredible success, freezing \$3 billion in assets taken illegally from countries like Nigeria, Malaysia, and Equatorial Guinea. Notably, work by many artists, including Van Gogh and Monet, were amongst the assets recovered as a part of these efforts, underscoring the need for additional oversight in this area.

A similar effort focused on monitoring artworks that may be desirable to criminals, rather than the bad actors themselves, could prove a novel and effective strategy. Currently, money laundering through art is usually only discovered incidentally and “tends to be handled case by case.”<sup>117</sup> But a directed effort toward tracking illegal activity through art purchases could actually be an effective strategy for identifying money launderers rather than vice versa. It should be noted that some of the very characteristics that make it difficult to regulate money laundering in the art market—namely, its small scale and idiosyncratic products—could actually make the industry a fertile ground for identifying the flow of illegal funds through the United States. Notably, many individuals laundering money through art have similar tastes. Works by the same small group of artists (Monet, Van Gogh, Picasso, Basquiat) turn up again and again in asset forfeiture cases.<sup>118</sup> Since these artists are deceased, their entire bodies of work are complete and thus can be monitored by a government task force with relative ease.<sup>119</sup> Such an approach could not only prove useful for identifying new criminal activity, but would also put would-be bad actors on notice that the art market is no longer a viable refuge for money laundering and encourage dealers to conduct thorough due diligence when dealing with these objects.

#### IV. CONCLUSIONS

Criminal behavior thrives in the shadows and, over the last several decades, the art market has provided an increasingly attractive place for these activities to hide. Art’s portability, high value, and subjective pricing make it an ideal medium in which to hide illegal funds. In addition, the art world’s opacity and secrecy help in shielding money launderers from the eyes of law enforcement agencies. Art professionals can take steps to limit this behavior by conducting rigorous provenance searches and due diligence, but the premium the industry places on reputation and confidentiality may prevent them from digging too deep. While proposals for self-regulatory programs such as the BAT Guidelines are admirable,

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116. Press Release, Dept. of Just., United States Seeks to Recover More Than \$1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund (July 16, 2016), <https://perma.cc/S2QW-2ELF>.

117. Cohen, *supra* note 21.

118. See *U.S. v. One Oil Painting Entitled “Femme En Blanc” by Pablo Picasso*, 362 F. Supp. 2d 1175, 1178; Trial Pleading, No. CV 17-4443, 2017 WL 2600378 (C.D. Cal. 2017) (seized property included “Nature Morte au Crane de Taurear” by Pablo Picasso; One Collage Entitled “Redman One” by Jean-Michel Basquiat; and One Photograph Entitled “Boy with the Toy Hand Grenade by Diane Arbus”).

119. This is especially true given that a catalogue raisonné exists for each artist.

art market operators have no incentive to adopt a system that requires more transparency. Legislation such as Switzerland's new customs requirements are a step in the right direction but do not go far enough. The U.K.'s recent efforts to more strictly enforce existing regulations, if passed, could prove an attractive model for monitoring art sales in this country. Ultimately, though, the existing body of U.S. anti-money laundering laws, if properly and rigorously enforced, could deter money laundering in the art world by making it clear to criminal actors that the market is no longer a safe haven for this type of activity.