

# GALLERY-SUPPORTED ART EXHIBITIONS: CRITIQUING “CRAYOLA”

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## *Abstract*

*For-profit art galleries are making news for the donations they are providing to nonprofit art organizations to support exhibitions by artists these galleries represent (part of a broader practice I term “crayola,” in reference to payola, the word invented to describe a similar practice of paying for airtime on radio and television). Yet nonprofit art organizations are committed to advancing art for the public interest, not for private profit. This Article examines whether there are any meaningful limits on crayola gallery donations that support art exhibitions at nonprofit arts organizations, focusing on the legal framework governing federal tax-exempt status, as well as the self-regulatory rules and informal norms of the art industry. Does the existing regime allow gallery-supported art exhibitions or do these activities contravene nonprofit art organizations’ missions? What short-term and long-term solutions are available and appropriate in light of the causes and context of gallery-supported art exhibitions? These questions are animated by the broader dialogue about equitable access to publicly funded resources, with the answers having important implications for what it means to promote art that is representative of American society.*

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I. INTRODUCTION.....	69
II. INSTITUTIONAL FRAMEWORK.....	73
A. Commercial and Noncommercial Art Exhibitions .....	73
B. Strategies for Financing Art Exhibitions at Museums.....	75
C. Genesis of Gallery-Sponsored Art Exhibitions .....	77
D. Impacts of Gallery-Sponsored Art Exhibitions .....	78
E. Alternatives to Gallery-Sponsored Art Exhibitions.....	80
III. REGULATORY FRAMEWORK.....	82
A. Federal Tax Exemption under the Internal Revenue Code’s Operational and Other Tests.....	82
B. Self-Regulatory Industry Associations and Museum Guidance .....	86
C. Informal Art Market Norms.....	88
IV. CRITIQUING GALLERY-SUPPORTED ART EXHIBITIONS .....	90
A. Exempt Purpose and Its Exclusive Pursuit in Question.....	91
1. <i>Private Inurement</i> .....	91
2. <i>Private Benefit</i> .....	94
3. <i>A Special Case of Private Benefit: Joint Ventures</i> .....	99
4. <i>Commerciality and Unrelated Business Income Tax</i> .....	102
B. Lack of Self-Discipline .....	107
C. Cooperation is Currently the Only Option.....	107
V. RECOMMENDATIONS AND CONCLUSION .....	108
A. Structural Changes to the Institutional and Regulatory Framework.....	109
B. Eliminating and Expanding Gallery-Supported Art Exhibitions .....	110
C. Increased Disclosure about Gallery-Sponsored Art Exhibitions .....	111

## I. INTRODUCTION

In 2007, “©MURAKAMI”, a large-scale retrospective exhibition for Japanese artist Takashi Murakami, opened at the Museum of Contemporary Art in Los Angeles (MOCA). Murakami’s art is acclaimed for its direct engagement with commerciality, and ©MURAKAMI did not disappoint. In addition to a number of his other artworks and exhibition-related merchandise that were for sale, the retrospective debuted “Oval Buddha”, a twenty-foot tall, platinum leaf-covered sculpture created after Murakami’s own likeness.<sup>1</sup> Following the exhibition, Oval Buddha ultimately sold at an art fair—where a majority of galleries’ art sales takes place today<sup>2</sup>—for \$8 million.<sup>3</sup> More notable than the price was the way that ©MURAKAMI was funded and produced. The Murakami retrospective at MOCA largely owed its existence to the financial backing of private galleries that had represented Murakami for many years. Blum & Poe, a Los Angeles-based gallery that had shown Murakami’s work for decades, not only chartered a private jet to fly out Oval Buddha from Tokyo, but also donated \$100,000 dollars toward the exhibition, bought \$50,000 worth of tickets to the opening night gala, and paid for the exhibition’s advertising. Gagosian Gallery, which represents Murakami in New York, Emmanuel Perrotin, who represents him in Paris, and a third gallery who formerly represented Murakami each matched Blum & Poe’s six-figure donation.<sup>4</sup>

The ©MURAKAMI exhibit is one high profile example of a trend in which for-profit galleries fund exhibitions of the artists they represent at nonprofit art museums, art organizations and alternative arts spaces – spaces committed to advancing art for the public interest, not for profit. Gallery-supported exhibitions at museums, in particular, occur when a commercial gallery provides money to a nonprofit museum to support an exhibition, which may or may not be a pre-planned part of the nonprofit museum’s programming. Bruce Altshuler, director of the museum studies program at New York University and former director of the Isamu Noguchi Garden Museum, a nonprofit art museum in New York City, compared the practice to “accepting money from a corporation to display its merchandise.”<sup>5</sup> Galleries’ donations vary in size, with estimates ranging from \$5,000 to \$200,000 per gallery. Museums claim to tailor contributions to a gallery’s capacity to pay.<sup>6</sup> Even so, the figure is substantial, given that even expensive

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<sup>1</sup> DON THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* 222 (2010). ©MURAKAMI included an entire room in the exhibition devoted to exhibition-related merchandise, as well as a Louis Vuitton boutique that sold the luxury fashion label’s limited edition handbags designed by Murakami, reportedly averaging sales of ten bags per day. *Id.* See also Carol Vogel, *Many Old Names but Few Showstoppers at Art Basel*, N. Y. TIMES (June 5, 2008), <http://www.nytimes.com/2008/06/05/arts/design/05fair.html> [perma.cc/2VSF-FBZ9].

<sup>2</sup> ISABELLE GRAW, *HIGH PRICE: ART BETWEEN THE MARKET AND CELEBRITY CULTURE* 68 (2010) (“the majority of a gallery’s business has been made at a growing number of art fairs”); *but see* Robin Pogrebin, *How a Dealer Prepares for the “Most Important” Art Fair of the Year*, N. Y. TIMES (June 8, 2016), <http://www.nytimes.com/2016/06/09/arts/design/how-a-dealer-prepares-for-the-most-important-art-fair-of-the-year.html> [perma.cc/T87A-JXKH] (“fairs account for about 40 percent of gallery sales by value, according to the TEFAF Art Market Report”).

<sup>3</sup> Vogel, *supra* note 2.

<sup>4</sup> Jori Finkel, *Museums Solicit Dealers’ Largess*, N. Y. TIMES (Nov. 18, 2007), <http://www.nytimes.com/2007/11/18/arts/design/18fink.html> [perma.cc/6CRW-FZUP].

<sup>5</sup> *Id.* (commenting on the ©MURAKAMI exhibition specifically and expressing concern about MOCA’s fund-raising from galleries as more problematic than its hosting of the Louis Vuitton boutique, which seemed to him “perfectly in the spirit of Murakami’s work”).

<sup>6</sup> Pogrebin, *supra* note 2.

exhibitions at nonprofit art museums are likely to incur direct expenses between \$13 to \$200 per square foot, in addition to high indirect costs of conservation, packing, artifact loans, shipping and exhibition advertising.<sup>7</sup>

For example, using such data from a recent Smithsonian study to estimate the cost of the 35,000 square foot ©MURAKAMI exhibition,<sup>8</sup> the donations made by the galleries representing Murakami alone would have accounted for fifty percent of direct exhibition costs – and this estimate excludes indirect costs covered by the gallery such as advertising and Oval Buddha’s transpacific private jet transportation.<sup>9</sup> Alternatively, if the total direct expenses of ©MURAKAMI ran on the high end of industry averages for direct exhibition costs, calculations using such industry data suggest that ©MURAKAMI could have cost \$7 million. Figures so large in the absolute suggest that even a donation comprising a small fraction of the total cost may be determinative in bringing an exhibition to the public, given the extreme cost of the entire exhibition.<sup>10</sup> Today’s tight budgets and limited funding availability mean that such margins may make the difference in choosing which exhibitions to present.

While galleries have always provided scholarly support to museums exhibiting their artists’ work, it is becoming common for galleries to pay the nonprofit institutions to present shows featuring work by the artists represented by such galleries.<sup>11</sup> I term this practice “crayola” in reference to payola, the word invented to describe a similar practice of paying for airtime on radio and television. For those galleries that can afford it, they feel they compelled to pay given the reciprocal benefit.<sup>12</sup> For those that cannot, the practice raises concerns of a pay-to-play system that distorts art programming at the expense of the independence, curatorial integrity and especially the tax-exempt status of museums and other nonprofit art institutions.<sup>13</sup> Specifically, the practice of galleries providing financial backing for nonprofit art exhibitions raises legal questions about whether galleries’ financing of exhibitions advances the public purpose of a nonprofit art institution. Artist Bill Powhida prominently critiqued questionable curating practices in

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<sup>7</sup> Sarah Bartlett & Christopher Lee, *Measuring the Rule of Thumb: How Much Do Exhibitions Cost?*, EXHIBITIONIST (2012), [http://name-aam.org/uploads/downloadables/EXH.fall\\_12/8.%20EXH%20fall\\_12\\_Measuring%20the%20Rule%20of%20Thumb\\_Bartlett\\_Lee.pdf](http://name-aam.org/uploads/downloadables/EXH.fall_12/8.%20EXH%20fall_12_Measuring%20the%20Rule%20of%20Thumb_Bartlett_Lee.pdf) [perma.cc/Z92L-BPYW] (citing indirect costs of art exhibitions); Mark Walhimer, *How Much Do Museum Exhibitions Cost?*, MUSEUM PLANNER (June 23, 2011), <http://museumplanner.org/how-much-do-exhibits-cost/> [perma.cc/F9Q6-548X] (indicating per square foot cost of art museum exhibitions between \$75 and \$200); Smithsonian Institution Office of Policy and Analysis, *The Costs of Funding Exhibitions* (2002), <http://www.si.edu/Content/opanda/docs/Rpts2002/02.08.CostsFundingExhibitions.Final.pdf> [perma.cc/29PU-G9EP] (indicating art museums’ median per square foot exhibition costs at \$13 to \$27 per square foot).

<sup>8</sup> SARAH THORNTON, SEVEN DAYS IN THE ART WORLD 100 (2008) (stating location of ©MURAKAMI as MOCA’s 35,000 Geffen Contemporary building).

<sup>9</sup> This estimate was calculated by dividing the \$300,000 donation from Blum & Poe, Gagosian and Perrotin galleries by the total estimated cost of the exhibition (\$17 per square foot in direct costs multiplied by the 35,000 square foot Geffen exhibition space, for a total cost of \$595,000 to \$7 million).

<sup>10</sup> See *infra* note 30.

<sup>11</sup> *Id.* (citing examples including the partial funding of the Whitney Museum of American Art’s 2015 Frank Stella retrospective by the Marianne Boesky and Dominique Lévy galleries, which jointly represent Mr. Stella; the Museum of Fine Arts, Houston’s Vera Lutter exhibition by the Gagosian Gallery, which represents Ms. Lutter; and the Los Angeles County Museum of Art’s Pierre Huyghe show by the Marian Goodman Gallery, which represents Mr. Huyghe).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

his work *How the New Museum Committed Suicide with Banality* (2009). His cartoon, which he bluntly subtitled, “How to Use a Non-Profit Museum to Elevate Your Social Status and Raise Market Values,” likened the subject art institution to a showroom.<sup>14</sup> Powhida’s analogy underscores the important legal question as to whether exemption from federal income tax is appropriately granted to nonprofit art institutions, whose marquee programming seems to be increasingly in furtherance of select commercial, non-exempt galleries’ interest. This inquiry echoes similar questions raised with respect to the for-profit activities of nonprofit museums and art organizations<sup>15</sup> and in other areas of the fine arts,<sup>16</sup> as well as in other industries.<sup>17</sup> However, the practice of galleries funding art exhibitions at nonprofit art organizations has not been previously examined in legal scholarship.

This Article examines galleries’ practice of financially supporting art exhibitions presented by nonprofit art institutions, in light of the requirement imposed upon charitable organizations by the United States Internal Revenue Code to “exclusively” conduct activities that advance a public interest.<sup>18</sup> Board members of nonprofit art organizations have fiduciary duties that require fidelity to the organizational mission, but courts’ deferential position results in tax rules being more restrictive in practice.<sup>19</sup>

<sup>14</sup> William Powhida, *How the New Museum Committed Suicide with Banality*, BROOKLYN RAIL (Nov. 2009), <http://www.brooklynrail.org/2009/11/> [perma.cc/ER7A-S6L7].

<sup>15</sup> See, e.g., Leila John, *Museums and the Tax Collector: The Tax Treatment of Museums at the Federal, State, and Local level*, 15 U. PA. J. BUS. L. 877 (2013); Elizabeth Bildner, *Conflicting Ethics: A Case Study of New Museum’s Exhibit “Skin Fruit: Selections from the Dakis Joannou Collection,”* 21 NYSBA ENTERTAINMENT, ARTS & SPORTS L. J. 100 (2010); Andras Kosaras, *Note: Federal Income and State Property Tax Exemption of Commercialized Nonprofits: Should Profit-Seeking Art Museums Be Tax Exempt?*, 35 NEW ENG. L. REV. 115 (Fall 2000); Carolyn C. Clark and John Sare, *Income-producing Activities of US Museums: Where does Charity stop and Commerce begin?*, 21 INT’L LEGAL PRAC. 82 (1996); Peter A. Levitan, *Serving God and Mammon: Financing Alternatives for Nonprofit Cultural Enterprises*, 8 COLUM. J.L. & ARTS 403 (1983-1984).

<sup>16</sup> See, e.g., Miranda Perry Fleischer, *How is the Opera Like a Soup Kitchen?*, in THE PHILOSOPHICAL FOUNDATIONS OF TAX LAW (Monica Bhandari ed., 2016); Leia LeFay, *One Singular Sensation: The Rise of Enhancement Deals Between Nonprofit Theatres and Commercial Producers*, 21 NYSBA ENTERTAINMENT, ARTS AND SPORTS L. J. 88 (2010); Carolyn Casselman, *Waltzing with the Muse or Dancing with the Devil: Enhancement Deals Between Nonprofit Theaters and Commercial Producers*, 27 COLUM. J.L. & ARTS 323 (2004).

<sup>17</sup> See, e.g., Lloyd Hitoshi Mayer and Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387 (2014); Peter Molk, *Reforming Nonprofit Exemption Requirements*, 27 FORDHAM J. CORP. & FIN. L. 475 (2012); Lloyd Hitoshi Mayer, *The “Independent” Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51 (2012); John D. Colombo, *Article: The NCAA, Tax Exemption, and College Athletics*, 2010 U ILL. L. REV. 109 (2010).

<sup>18</sup> See Part III.A, *infra*.

<sup>19</sup> State agency and nonprofit corporation laws impose certain duties, fiduciary and otherwise, upon both galleries and art museums that may affect museums’ ability to accept funding to present an exhibition. To the extent that an artist entrusts work to the gallery through a consignment or more comprehensive artist-dealer agreement, the gallery becomes an agent of the artist. Whether an art organization is organized as a nonprofit corporation or a trust, the directors and employees of such art organizations are also fiduciaries to their organization, and can be sued for their role in activities that deviate from the art organization’s mission. See generally Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 ART ANTIQUITY AND LAW 103 (analyzing fiduciary duties of art museum board member duties with respect to artwork deaccessioning activities at museums). Museums and other nonprofit art organizations, as charitable organizations, have obligations to the public as their beneficiaries, and the state has the power to enforce such obligations. Leonard DuBoff, Christy O. King & Sally Holt Caplan, *The Museum Organization*, 2 in THE DESKBOOK OF ART LAW, T-21 (1997). In each case, state agency law governs the fiduciary relationship between the fiduciary and principal. Agency law in general requires the fiduciary to act only in the interest of the

Nonprofit art organizations receive federal income tax exemption conditional upon their pursuit of a charitable purpose that serves a public, rather than a private, interest.<sup>20</sup> Organizations do not have a charitable, exemption-eligible purpose if they conduct their activities in a commercial manner.<sup>21</sup> In addition, 501(c)(3) organizations operate subject to the condition that their assets do not benefit of any individual who exercises control over them.<sup>22</sup> A further restriction on 501(c)(3) organizations, the “private benefit doctrine,” prohibits third parties to the organization from benefiting from a relationship with the nonprofit more than incidentally.<sup>23</sup> It is the broader public, rather than any individual insider(s) or external private entity(s), who should benefit from the organization’s mission and activities in furtherance thereof.<sup>24</sup> These rules have fairly strictly prohibited nonprofit art galleries from selling art. It is unclear whether the same rules can and do extend to the practice of gallery-supported art exhibitions, which seem to effectively enable for-profit galleries to conduct—for the price of a “donation” fee—some of their commercial activities in connection with nonprofit art exhibitions.

This Article concludes that the relevant legal and nonlegal framework suggests limits upon nonprofit art institutions display of gallery-supported exhibitions in at least some circumstances. Yet, it also acknowledges the complex nature of art and its relationship to the commercial sphere, as well as the structural, budget-constrained conditions that compel nonprofit art institutions to seek such assistance in the first place. Therefore, this Article’s broader argument is for policy that is more sensitive to the complicated context of the art market, as well as supportive of all artists and the art they create. Ultimately, this Article seeks to raise awareness of the legal issues and implications presented by gallery-supported museum exhibitions among gallerists, curators, board members of nonprofit art museums, and the taxpaying public. Only with such awareness can such actors effectively dialogue about the appropriate limits on nonprofit art museums’ relationship with galleries and place in our public cultural life more broadly. This Article’s principal contribution is to the tax law literature addressing

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principal and forgo all personal advantage aside from reasonable compensation. For a commercial gallery that represents an artist, this means maximizing sales. Meanwhile, in order for any exhibition to be presented in accordance with the museum’s duties, it must further the charitable mission of the museum. Curatorial integrity is central to achieving the museum’s mission, so museums must avoid any financial or other influences that compromise it or give the appearance of doing so. Therefore, in considering whether to accept sponsorship of art exhibitions, a museum or other nonprofit art institution “should consider the public’s view of such sponsorship and question whether it compromises the purpose and goals of the cultural institution or the particular exhibit receiving the support.” *Id.* at T-40. In evaluating fiduciary duty compliance, courts are generally hesitant to replace directors’ judgment with their own. *Chen, supra* note 19, at 119. Fuller discussion of fiduciary duties’ finer contours and their applicability to gallery-supported art exhibitions is outside the scope of this Article.

<sup>20</sup> A charitable purpose is any which fits within the broad language of I.R.C. § 501(c)(3), namely the promotion of “religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition..., or for the prevention of cruelty to children or animals...” I.R.C. § 501(c)(3).

<sup>21</sup> See Part IV.B.4, *infra*.

<sup>22</sup> Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835, 838 (1980).

<sup>23</sup> *Redlands Surgical Servs. v. Comm’r*, 113 T.C. 47, 74 (1999). Occasional economic benefits flowing to persons as an incidental consequence of an organization pursuing exempt charitable purposes will not generally constitute prohibited private benefits. *Am. Campaign Acad. v. Comm’r*, 92 T.C. 1053, 1065–66 (1989).

<sup>24</sup> Treas. Reg. 1.501(c)(3)–1(d)ii (1982) (“An organization is not organized or operated exclusively for one or more of the purposes specified in [subdivision (d)(i)] unless it serves a public rather than a private interest.”).

exempt organizations' primary purpose requirement and the appropriate treatment of transactions between for-profit and nonprofit institutions in the art world. Beyond its primary focus, this Article also has broader implications for theory and policy in other areas of law, including sponsorship law, nonprofit governance, and the public/private distinction.

Though gallery-supported art exhibitions take place at nonprofit art institutions across the spectrum, including art museums and alternative arts spaces such as Redcat in Los Angeles,<sup>25</sup> this Article will focus primarily upon museums as one example in a wider trend of nonprofit art organizations that accept galleries' financial support in presenting art exhibitions. Specifically, this Article examines whether gallery-supported art exhibitions comply with nonprofit art institutions' requirement to exclusively conduct exempt activities and whether such institutions comply with industry regulations and norms. Part II discusses the art market and its actors, with an emphasis on art museums, galleries and other relevant art exhibition spaces, and each of their respective roles in exhibiting art. This section also offers a more detailed description of gallery-supported art exhibitions. Part III presents the federal tax law governing cooperation between nonprofit and for-profit entities, focusing on determination of exempt purpose, excess benefit and taxation on non-exempt activities conducted by nonprofit organizations. This section also examines select applicable self-regulatory industry association guidance, and industry norms applicable to gallery-supported art exhibitions. Part IV analyzes gallery-supported art exhibitions under this guidance, finding that they may even endanger nonprofit art museums' exempt status entirely.

## II. INSTITUTIONAL FRAMEWORK

In order to accurately analyze gallery-supported museum exhibitions, it is necessary first to precisely contextualize art museums, galleries and the art market. Of course, the nature of the art market and its actors is a source of timeless debate. Therefore, this section does not seek to settle such questions, but rather provides a rough overview based on industry, media, academic and legal sources.

### A. Commercial and Noncommercial Art Exhibitions

In the United States, nonprofit art organizations and for-profit galleries have traditionally occupied distinct roles in the production of art, even while both entities engage in the exhibition of art. A for-profit art gallery, such as a commercial, cooperative or vanity gallery, exhibits and offers art for sale on behalf of artists, with whom the gallery has a formal relationship as the artists' agent or dealer. Meanwhile, nonprofit art museums engage and educate the public about art outside of the market. Historically, the primary purpose of for-profit galleries has been to sell or re-sell art on the primary market, while the art market's noncommercial actors—not only museums, but also alternative spaces and nonprofit galleries—exist both as a part of the discourse setting infrastructure of the art industry and as contextualizing institutions that provide the public with an opportunity to see artworks in context. Accordingly, when for-profit art galleries sell works, the gallery owner and artist take home the income. The income, if any, derived from works produced in the noncommercial context primarily benefits the wider public and is reinvested in future programming or operational costs. Thus, galleries represent the commercial, private interest in the art market; art museums

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<sup>25</sup> Finkel, *supra* note 4.

represent the noncommercial, public interest; and alternative spaces and nonprofit galleries both exist somewhere at the intersection of for-profit galleries and art museums.

These commercial and noncommercial entities comprise part of the growing multi-dimensional art market composed of different sectors that function together to produce and legitimize art. These sectors include (1) the commercial art market, which is split into a primary market of artists, galleries, and collectors, and a secondary market of dealers and auction houses; (2) the knowledge market, including conferences, art academies, and publications; (3) the market of institutions, dominated by museums and art societies; and (4) the market of major exhibitions such as the Bienniales, Manifestas, and Documentas.<sup>26</sup> These individual markets exist side by side and also overlap.<sup>27</sup> Within this web, the role of art museum exhibitions, and art museums generally, functions as one institution that contributes to the generation of art's symbolic value<sup>28</sup> that in turn drives art's commercial value.<sup>29</sup>

Commercial exhibitions of art in a for-profit gallery are created by the artist for the primary market and produced by a gallerist that coordinates and markets all aspects of the exhibition. A single individual or corporate patron may commission art works and cover costs, or the production cost may be funded by the artist and recouped upon sale. A commercial gallery may also advance or subsidize an artwork's production costs especially in the case of capital-intensive projects.<sup>30</sup> The costs of unprofitable artworks are borne by the artist, and in some cases a gallery, to the extent it advances funds to the artist. If an artwork sells, artists usually see half of the profit from sales of their work, with galleries retaining a 50% commission to compensate for efforts in marketing and placing the art with buyers on the primary market. Furthermore, if a repurchase and/or resale right is negotiated, the gallerist and artist may receive additional income on subsequent sales of the same artwork. Otherwise, neither the gallerist nor artist receives further income from future sales made by art dealers or auction houses on the secondary market. Another feature of commercial exhibitions is that traditionally they have not been presented in an art historical or otherwise critical manner, beyond any artist statement or marketing materials the gallery may provide in connection with the exhibition.

Exhibitions of art in noncommercial settings date back to the establishment of the first art museums in the United States in the late nineteenth century. A desire to provide classical education of the American public, as well as an intent to shape a popular culture

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<sup>26</sup> According to Sarah Thornton, "a biennial is not just a show that takes place every two years; it is a goliath exhibition that is meant to capture the global artistic moment . . . A true biennial is international in outlook and hosted by a city rather than a museum . . . Unlike an art fair, where the displays are organized by participating galleries, the underlying structures of biennials are determined by national identity and other curatorial themes." THORNTON, *supra* note 8, at 100. The Venice Biennial is among the largest and most noteworthy. *Id.* Others include Manifesta, a biennial hosted by a different European city every other year, and Documenta, hosted in Kassel, Germany every five years. *About the Biennial*, MANIFESTA, [<http://manifesta.org/biennials/about-the-biennials>] [perma.cc/9PJA-Z958]; THORNTON, *supra* note 8, at 100.

<sup>27</sup> GRAW, *supra* note 2, at 65.

<sup>28</sup> See Part III.D, *infra*, for a more detailed discussion on the meaning of symbolic value of art.

<sup>29</sup> GRAW, *supra* note 2, at 21. See generally OLAV VELTHUIS, TALKING PRICES: SYMBOLIC MEANINGS OF PRICES ON THE MARKET FOR CONTEMPORARY ART (2007).

<sup>30</sup> W.A.G.E. (Working Artists and the Greater Economy), *Certification Background*, "Production Costs," <http://www.wageforwork.com/certification/5/certification-background> [perma.cc/UDM8-LBDQ] (last visited Nov. 10, 2017).



in which art was prominent, drove wealthy businessmen, industrialists and heirs to establish art museums. Traditionally, noncommercial exhibitions presented art belonging to a museum's collection that, except in rare cases, was not commissioned or otherwise directly acquired from an artist. Rather, art museums' collections comprised of art either purchased on the secondary market from a dealer or through an auction house, or donated by a collector. Today, more than ninety percent of the art collections held in public trust by America's art museums have been donated by private individuals.<sup>31</sup>

#### B. Strategies for Financing Art Exhibitions at Museums

A museum's costs entail a budget for purchasing, preserving and interpreting art, in addition to operational costs associated with overhead and the administration of the museum by its curator and staff. To cover such costs, neither direct government funding<sup>32</sup> nor the sale of works from art museums' collections (also known as deaccessioning)<sup>33</sup> are available as primary sources of support. Rather, art museums have historically depended upon direct funding from the private sector to cover costs,<sup>34</sup> in seeming contradiction to art museums' noncommercial purpose and anti-market stance. A decrease in direct private funding, combined with growing operating and programmatic

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<sup>31</sup> ASSOCIATION OF ART MUSEUM DIRECTORS, ASSOCIATION OF ART MUSEUM DIRECTORS STANDARDS & PRACTICES: ART MUSEUMS, PRIVATE COLLECTORS AND PUBLIC BENEFIT (2007), <http://aamd.org/sites/default/files/document/PrivateCollectors3.pdf> [perma.cc/Y672-7LNE].

<sup>32</sup> Ford W. Bell, *You Asked: How Are Museums Supported Financially in the United States?*, U. S. DEPT. OF STATE BUREAU OF INT'L INFO. PROGRAMS (Mar. 14, 2012), <http://iipdigital.usembassy.gov/st/english/pamphlet/2012/05/201205155699.html#axzz4EsSZbYBt> [perma.cc/P7WU-KTJE] (stating that direct government support comprises only 24 percent of art museum funding). Although the government provides relatively little in the way of direct federal, state and local funding support of the arts, it otherwise acts as a "facilitator" to create the conditions that allow cultural production to happen through a highly decentralized arts infrastructure. *See generally* Harry Hillman Chartrand & Claire McCaughey, *The Arm's Length Principle and the Arts: An International Perspective - Past, Present and Future*, in WHO'S TO PAY? FOR THE ARTS: THE INTERNATIONAL SEARCH FOR MODELS OF SUPPORT (M.C. Cummings Jr. & J. Mark Davidson Schuster eds., 1989), <http://www.compilerpress.ca/Cultural%20Economics/Works/Arm%201%201989.htm> [perma.cc/7T6F-5DRV]. Cultural organizations and cultural production are therefore subsidized by taxes, since contributions to cultural organizations are made tax-deductible for the philanthropists and corporations who support them; in this way, the government encourages cultural patronage by its citizens and private organizations. *Id.*

<sup>33</sup> Originally bequests circumscribed museums' ability to sell, or deaccession, art in order to make sure that museum directors did not engage in self-dealing in their own interest at the expense of the art and its purpose. Peter Temin, *An Economic History of Museums*, in THE ECONOMICS OF ART MUSEUMS 179–94, 182 (Martin Feldstein ed., 1991). These restrictions were increased and institutionalized in the 1970s after the Metropolitan Museum of Art received major scrutiny for selling art to fund the acquisition of other art. *Id.* at 183–84.

<sup>34</sup> The civic groups active in creating the early museums included figures from the arts as well as from business. Jennifer A. Donnelly, *The CEO Art Museum Director: Business as Usual?*, TRANSATLANTICA REV. DÉTUDES AMÉRICAINES AM. STUD. J. (2010), <http://transatlantica.revues.org/5044> [perma.cc/FG6B-PD9D]. *See generally* Temin, *supra* note 33, at 181–83. This is because American society lacked an aristocratic class to seed art museums (as was the case in European counterparts), and government provided only token, in-kind support for the arts. *Id.* at 181. Private support remained critical in the period following the first museums' establishment, as the institutions expanded and more were built. *Id.* at 182. The federal government became a significant patron of the arts as a result of the Depression and the New Deal and has remained a source of funding with the 1965 establishment of the National Endowment for the Arts. Donnelly, *supra* note 34. Nonetheless, the private sector has historically been the largest source of the noncommercial art museum's support, and remains so today. Bell, *supra* note 32.

costs,<sup>35</sup> has driven a shift away from traditional, collection-focused noncommercial art exhibitions. The stated mission of today's art museums remains educational; due to museums' perpetual search for more and more private support, however, their activities and programming have significantly expanded in scope.

Among the most prominent techniques to raise funds and broaden audiences attending art museums is the temporary "blockbuster" exhibition.<sup>36</sup> Although some museums were organizing temporary exhibitions in the 1940s, "blockbuster" temporary traveling exhibitions were new in their large scale and scope of funding. The blockbuster strategy boosted attendance at the same time that it raised the standard for exhibitions to attract wide audiences and revenue. This expectation persists today, despite the budget cuts driven by the faltering global economy in the early twenty-first century, as well as criticisms that "blockbusters" detract resources and distract attention from museums' missions.<sup>37</sup>

Beyond the "blockbuster" exhibition, museums are continually looking for new ways to fund the programming that drives their donations. Other techniques to attract donations included shifting the focus of art museums' fundraising campaigns to financing the construction of new buildings; buildings were then built cheaply enough to support operational expenses with the remaining funds after construction completed.<sup>38</sup> Museum membership drives became another successful strategy, as well as unrestricted gifts.<sup>39</sup> Art museums now seek donors not only among wealthy individuals, but among corporations as well, despite the numerous concerns such commercial support raises.<sup>40</sup> In the wake of the 2008 financial crisis, however, already waning corporate funding for the arts has decreased even more.<sup>41</sup> It is in this climate that art museums have again gone looking for the next untapped well of private sector support, and gallery-supported museum exhibitions seem to represent the latest result of that search. While the first gallery-supported museum exhibitions predated the financial crisis,<sup>42</sup> they became more prevalent thereafter<sup>43</sup> — and therefore more problematic.

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<sup>35</sup> Donations dropped after the 1986 tax code reforms increased marginal tax rates and the regulation of art museums' operations and management — leaving museums with a deficit created by fewer donations and more administrative burdens that cost money. Temin, *supra* note 33, at 185. In addition, growing inflation in the 1970s took its toll on museums. Donnelly, *supra* note 34.

<sup>36</sup> Donnelly, *supra* note 34. The first such show in the United States is usually said to be "Treasures of Tutankhamen," shown at six museums (including the Metropolitan Museum of Art in New York City) between 1976 and 1978 following its spectacular success at the British Museum in 1972. *Id.*

<sup>37</sup> Specifically, "blockbusters" have been criticized for siphoning resources and attention from permanent collections and from worthy but possibly less sensational subjects; distracting from the museum's core missions of acquisition, preservation, and interpretation; and placing the focus on attendance numbers, attention in the press, and growth for the museum. *Id.*

<sup>38</sup> Temin, *supra* note 33, at 186.

<sup>39</sup> *Id.*

<sup>40</sup> Donnelly, *supra* note 34.

<sup>41</sup> Robin Pogrebin, *Corporate Support for the Arts*, N. Y. TIMES (Feb. 21, 2007), <http://www.nytimes.com/2007/02/21/arts/21fund.html> [perma.cc/WC7D-2HPP] (describing pre-financial crisis dip in corporate support for arts).

<sup>42</sup> See *infra*, Part C.

<sup>43</sup> Powhida, *supra* note 14 (drawing attention to and criticizing gallery-supported art exhibitions as they became more common).

### C. Genesis of Gallery-Sponsored Art Exhibitions

One of the first exhibitions to draw the nation's attention to this practice was "Sensation" at New York City's Brooklyn Museum of Art in 1999.<sup>44</sup> Wealthy art dealers, galleries and collectors who had financial interests in the artworks shown in Sensation funded the estimated \$2 million exhibition in significant part: among other examples, the museum's director and his assistants solicited donations of at least \$10,000 from dealers who represented many of the artists whose works were on display, and even asked one well known collector, Charles Saatchi, to underwrite the entire show.<sup>45</sup> Then-Mayor Rudolph Giuliani ordered city lawyers to "follow the money trail," but the litigation ultimately settled out of court.<sup>46</sup> Since Sensation, the trend of galleries providing financial backing for nonprofit art exhibitions has only increased in prevalence and magnitude.

The practice most recently garnered press again in early 2016, after the New York Times reported the role of galleries in funding the new Whitney Museum of American Art's opening exhibition, as well as a number of other recent exhibitions at major art museums around the United States.<sup>47</sup> Despite the recurring headlines spreading awareness about galleries' role in supporting art over the past fifteen years, however, no change has resulted to date. Such inaction stands in curious contrast to the art industry's self-regulating response to corporate sponsorships of art museum exhibitions, which many museums addressed when they adopted revised codes of ethics addressing corporate sponsorship. In spite of this, crayola donations that fund gallery-supported art exhibitions have persisted unfettered.

How a gallery-sponsored art exhibition comes to fruition at a museum varies. Some curators visit galleries to gather ideas for potential exhibitions.<sup>48</sup> Among the nonprofit art museums that have presented gallery-sponsored exhibitions (because some categorically do not),<sup>49</sup> some curators say that they exclusively approach galleries for

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<sup>44</sup> David Barstow, *Brooklyn Museum Recruited Donors Who Stood To Gain*, N. Y. TIMES (Oct. 31, 1999), <http://www.nytimes.com/1999/10/31/nyregion/brooklyn-museum-recruited-donors-who-stood-to-gain.html> [perma.cc/8HBL-694D]. Better known for featuring provocative artworks like *The Holy Virgin Mary* (1996), a canvas depicting the religious icon of the same name adorned with elephant dung, the Sensation exhibition led then-Mayor Rudolph Giuliani to cut the Brooklyn Museum of Art's funding and fire its board, actions ultimately reversed as unconstitutional curtailment of free speech. Challenging that censorship motivated his actions, however, Giuliani said: "This is all about dollar signs . . . It's actually a desecration of the First Amendment, as much as it is a desecration of religion, to use the First Amendment as a shield in order to take money out of the taxpayers' pockets in order to put that money into the pockets of multimillionaires."

<sup>45</sup> *Id.*

<sup>46</sup> Alan Feuer, *Giuliani Dropping His Bitter Battle with Art Museum*, N. Y. TIMES (Mar. 28, 2000), <http://www.nytimes.com/2000/03/28/nyregion/giuliani-dropping-his-bitter-battle-with-art-museum.html> [perma.cc/LF4K-RWNL].

<sup>47</sup> Robin Pogrebin, *Art Galleries Face Pressure to Fund Museum Shows*, N. Y. TIMES (Mar. 7, 2016), <http://www.nytimes.com/2016/03/07/arts/design/art-galleries-face-pressure-to-fund-museum-shows.html> [perma.cc/DG8U-6CKL].

<sup>48</sup> Lawrence Alloway, *When Artists Start Their Own Galleries*, N. Y. TIMES (Apr. 3, 1983), <http://www.nytimes.com/1983/04/03/arts/when-artists-start-their-own-galleries.html> [perma.cc/C4VF-NKWF] ("Museum curators accept the idea that it is the function of the galleries to filter the masses of new artists, and indeed welcome the tidying hand."). See generally RENAUD PROCH & MARI SPIRITO, MAVERICKS: THE SHAPE OF THINGS TO COME (2015). See also Interview with Anonymous Guggenheim Museum of Art Representative (Oct. 26, 2013).

<sup>49</sup> Pogrebin, *supra* note 47.

help realizing an exhibition and reject the suggestion that they respond to offers by galleries. Some galleries report that museums have approached them to express interest in exhibiting the work of an artist represented by a gallery, conditional upon financial support from the gallery for the exhibition. If a gallery does not have the means to provide monetary support, museums may tailor the contribution to the budget of the gallery. Other museums have offered to match a gallery with a wealthy donor interested in the work of an artist represented by the gallery, who will loan money to the gallery to fund the museum show, in exchange for a work by the artist. In such arrangements, the sum loaned by the donor may be below the going market price of the artist's work.

In addition to outright financial support, museums may also ask artists to make an in-kind donation of their artwork that it will sell or auction at a fundraising reception associated with the exhibition or otherwise. Other nonmonetary support may include framing of artwork, organizing of the opening reception, coordination of loans from collectors, and production of exhibition catalogs. Galleries may directly pay for indirect costs associated with an artist's creating new work for a show, such as advertising, shipping costs for any loaned artworks appearing in the show, art installation and even fabrication costs of the art itself. One gallery indicated that "the only thing [it has] not been asked for is postage."<sup>50</sup>

Some museums may commission artworks appearing in the exhibition; to the extent the new piece is not destined for the museum's permanent collection, some museums will enter into agreements with dealers for the artwork's ultimate sale, and some may not as a matter of museum policy.<sup>51</sup> Artists may also create art specifically for the exhibition even if it is not commissioned by the museum, and the exhibition may feature previously produced art that is or will soon be for sale on either the primary or the secondary market. Beyond rights regarding the individual artworks, other rights over the exhibition – namely control over its content and execution, and rights in the exhibition catalogue, images and merchandise, sponsorship credit and reciprocal sponsorship – vary as well. The gallery support arrangements addressing these issues may be structured as a straightforward sponsorship or similar to a traditional licensing agreement. In some cases, the nonprofit museum controls all rights in the exhibition, including its content, and is responsible for its genesis and production. The gallery is but a silent, albeit credited, sponsor in the exhibition's opening as well as in any other exhibitions at museums to which it travels, often for a fee. In other cases, the artist and gallery retain greater rights and exert more control. For example, the activities of the entire ©MURAKAMI exhibit were controlled by the artist himself, pursuant to four contracts: (1) a co-publishing agreement for the exhibition catalogue, (2) an image licensing agreement for the publicity, (3) a data treatment memorandum related to the use of super-high resolution files to make things like merchandise, and (4) a seven-page letter of agreement outlining, among other details, Murakami's "final right of approval on all aspects of everything."<sup>52</sup>

#### D. Impacts of Gallery-Sponsored Art Exhibitions

In practice, some recent gallery-museum collaborations resemble actual joint ventures carried out to generate revenue, permitting the gallery and museum to each have

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<sup>50</sup> *Id.*

<sup>51</sup> Finkel, *supra* note 4.

<sup>52</sup> *Id.*; THORNTON, *supra* note 8, at 181–218.

some control in the project.<sup>53</sup> Although the revenue generated from the exhibition ultimately may not appear to offset the costs of the exhibition, the audiences attracted by the exhibition are critical to the success of future grant awards and donations. In addition, the exhibition may travel, generating a continuing income stream from fees paid by host museums. Meanwhile, benefits for the gallery include, in the words of Jeffrey Deitch, longtime dealer and former director of the Museum of Contemporary Art, Los Angeles, “the best platform in the art world for free, where they can sell work to their clients on the walls of the greatest museums.”<sup>54</sup> Another dealer, James Cohan, echoes this sentiment: “The competition to get one’s artist seen in a noncommercial context like a museum or international survey is quite intense but ultimately hugely gratifying. It’s part of our job to step up to support our artists.”<sup>55</sup> A gallery’s other artists may indirectly benefit as well from the raised profile and increased legitimacy brought by a prominent exhibition sponsorship.

To be sure, galleries’ financial support helps bring big budget art exhibitions to the public that might not otherwise occur in an era of falling arts funding. However, in the art industry, bigger is not necessarily better, and the market’s limited ability to determine art’s significance compounds the worry that such nonprofit art institutions – and the public they serve – are missing out on the work of talented and culturally important artists who are not represented by galleries with the means to sponsor art exhibitions.<sup>56</sup> In addition, galleries’ role in sponsoring art exhibitions has significant non-legal implications that may threaten the integrity of art institutions, as value-legitimizers central to an already opaque art-financial industry,<sup>57</sup> and as cultural establishments that are inclusive and representative of society at large.

There remains a scarcity of artists who are not of culturally dominant demographic groups (including nonmale, nonwhite, nonheterosexual, noncisgender and/or non-Eurocentric artists) from the rosters of galleries that have resources to finance museum exhibitions. Galleries financed approximately one third of the major solo exhibitions at American art museums between 2007 and 2013.<sup>58</sup> Of the 121 artists currently represented by such galleries, nineteen (15.7%) are women and ten (8.3%) are nonwhite artists.<sup>59</sup> Gender disparity is especially pronounced; only around thirty percent

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<sup>53</sup> *Joint Venture*, BLACK’S LAW DICTIONARY (10th. ed. 2014) (defining a joint venture as “[a] business undertaking by two or more persons engaged in a single defined project. The necessary elements are (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member’s equal voice in controlling the project.”).

<sup>54</sup> Pogrebin, *supra* note 2.

<sup>55</sup> *Id.*

<sup>56</sup> For example, one potential consequence of art exhibitions relying upon galleries for financial support is that there may be fewer exhibitions of noncommercial art that are difficult to own or sell in any conventional way, such as performance art and social practice art.

<sup>57</sup> Stuart Plattner, *A Most Ingenious Paradox: The Market for Contemporary Fine Art*, 100 AM. ANTHRO. 482, 8, <http://www.stuartplattner.com/aa-art-paradox.pdf> [perma.cc/FF3P-CKLX] (examining the lack of clear guidance supporting the valuation of art).

<sup>58</sup> Julia Halperin, *Almost one third of solo shows in US museums go to artists represented by just five galleries*, THE ART NEWSPAPER (Apr. 2, 2015), <http://old.theartnewspaper.com/articles/Almost-one-third-of-solo-shows-in-US-museums-go-to-artists-represented-by-just-five-galleries/37402> [perma.cc/Q3EU-TKZ3].

<sup>59</sup> See generally GAGOSIAN GALLERY, *Artists*, <http://www.gagosian.com/artists> [perma.cc/9HHE-Q7RS]; PACE GALLERY, *Artists*, <http://www.pacegallery.com/> [perma.cc/CHX8-98QV]; MARIAN GOODMAN GALLERY, *Artists*, <http://www.mariangoodman.com/artists> [perma.cc/FN3G-NESM]; HAUSER & WIRTH, *Artists*, <http://www.hauserwirth.com/artists/> [perma.cc/T36S-8BHE].

of the artists represented by commercial galleries in the United States are women.<sup>60</sup> This is in stark contrast to recent figures that show women represent more than sixty percent of the students in art programs in the United States.<sup>61</sup> This discrepancy may thus affect the representativeness of the supposedly critically acclaimed art presented by art museums, providing yet another reason to be troubled by galleries' financing of museums exhibitions. Indeed, the percentage of solo exhibitions by female artists at five major contemporary art museums in the United States – the Museum of Modern Art, the Whitney Museum of American Art, the Guggenheim Museum, the Museum of Contemporary Art Los Angeles and the Los Angeles County Museum of Art – hovers around only twenty percent.<sup>62</sup> Black artists have recently seen greater success in major art museums but “[i]t’s not happening everywhere, and there’s still a long way to go.”<sup>63</sup>

As more galleries and art museums cooperate to bring in audiences at gallery-supported museum exhibitions, there are increasingly fewer truly independently produced exhibitions of art in the United States today. The art exhibited at museums is determined by popular pressures, market demand and the galleries that can pay for them. In turn, galleries, increasingly corporate<sup>64</sup> and characterized by temporary, transactional partnerships with artists, have lost their loyalty to artists and the fixed-profile, programmatic vision of art that they formerly championed.<sup>65</sup> Instead, galleries are driven by the art market – and in the huge contemporary art market, with total global sales of \$63.8 billion in 2015 of which the United States has a market share of 43%,<sup>66</sup> the effect of such demand is enormous. Since the 1990s at the latest, collectors and their buying habits, alongside gallerists, influence the process of art’s value creation much more than critics do.<sup>67</sup>

#### E. Alternatives to Gallery-Sponsored Art Exhibitions

The collaboration between commercial galleries and art museums in producing gallery-supported museum exhibitions is especially troubling in light of the decline of other producers of “noncommercial” art exhibitions. In theory, nonprofit galleries and alternative art spaces crowd the contemporary noncommercial art exhibition scene and

<sup>60</sup> Maura Reilly, *Taking the Measure of Sexism: Facts, Figures, and Fixes*, ARTNEWS (May 26, 2015), <http://www.artnews.com/2015/05/26/taking-the-measure-of-sexism-facts-figures-and-fixes/> [perma.cc/FE3B-HAJL].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Randy Kennedy, *Black Artists and the March Into the Museum*, N. Y. TIMES (Nov. 28, 2015), <http://www.nytimes.com/2015/11/29/arts/design/black-artists-and-the-march-into-the-museum.html> [perma.cc/C3WH-QU6P].

<sup>64</sup> GRAW, *supra* note 2, at 18; Legacy Russell, *Beauty & The Beast: Collectivity and the Corporation*, GUERNICA (2012), <http://www.guernicamag.com/daily/legacy-russell-beauty-the-beast-collectivity-and-the-corporation/> [perma.cc/PAT8-Q8XZ] (last visited Jul 20, 2016).

<sup>65</sup> See GRAW, *supra* note 2, at 118; Robin Pogrebin, *It’s an Art Gallery. No, a Living Room. O.K., Both.*, N. Y. TIMES (July 3, 2016), <http://www.nytimes.com/2016/07/04/arts/design/its-an-art-gallery-no-a-living-room-ok-both.html> [perma.cc/TXP4-LKM6] (describing the art world as one “in which dealer representation is increasingly hard to come by”).

<sup>66</sup> *TEFAF 2016 Art Market Report*, ARTNET NEWS (2016), <http://news.artnet.com/market/tefaf-2016-art-market-report-443615> [perma.cc/585V-VDRU].

<sup>67</sup> GRAW, *supra* note 2, at 121; *Id.* at 59 (stating that artists, galleries and art collectors are business partners who live in a single economic sphere); *Id.* at 99 (discussing the “now-pervasive figure of the ‘collector-dealer’ who tends to claim the additional functions of a curator or publicist. He collects and deals in art, speculating on the appreciation of his purchases, which he buys at attractive prices, possibly splitting resale profits with the gallerist.”).

complicate art museums' role in the art market. Nonprofit galleries operate as the commercial-lite, lower commission, educational version of a for-profit gallery, assuming the nonprofit gallery even sells the work at all. Alternative arts spaces are anti-commercial, independent venues that put on shows and workshops which defy traditional standards of art display and categorization. Emerging and experimental artists may exhibit, show or workshop their art at nonprofit galleries or alternative art spaces. Their art may be unsaleable or not commercially viable for any reason, and therefore unsuitable to a for-profit gallery; it may also be outside the scope of a museum's mission, or not yet recognized as a work of stature warranting inclusion in a museum's collection.<sup>68</sup> Like art museums, noncommercial nonprofit galleries and anti-commercial alternative arts spaces lack a financial mandate to maximize profits. Furthermore, both nonprofit arts galleries and alternative arts spaces may be tax-exempt organizations like art museums, and can seek tax-deductible donations from individuals, foundations and corporations, as well as government funding from municipal, regional, state and national programs. Art museums of an earlier era nonetheless would have been clearly distinct from the other noncommercial actors based on their purpose and elitism alone. Today, however, the boundary may be blurred, especially among contemporary art museums that deepen their community engagement and broaden their range to include experimental and ephemeral art.

Whatever the similarities among the noncommercial actors in today's art market, market presence remains a significant difference between art museums on the one hand and the remaining nonprofit galleries and alternative art spaces on the other. More importantly, while nonprofit galleries and alternative art spaces still operate, they do so in significantly smaller numbers<sup>69</sup> than during their height in the 1970s. The reduction of public funding for artists and for the arts generally, restructuring of federal supports upon which some artists relied,<sup>70</sup> and even proscription of alternative art and the galleries that featured them<sup>71</sup> contributed to the decline of alternative spaces and nonprofit galleries by the 1990s. Therefore, nonprofit art museums and commercial art galleries remain the primary actors in the art market presenting art exhibitions today, at the same time that an increasing number of gallery-supported museum exhibitions and museum quality gallery shows drive their programmatic profiles to converge.

Despite the decline of nonprofit galleries and alternative arts spaces, nonprofit public arts museums have not cornered the market for noncommercial art exhibition. Galleries are also beginning to stage exhibitions on par with both public and private museums. For example, "Piero Manzoni: A Retrospective" was what is known as a

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<sup>68</sup> Alloway, *supra* note 48.

<sup>69</sup> Brian Wallis, *Public Funding and Alternative Spaces*, in *ALTERNATIVE ART*, NEW YORK, 1965-1985 164, 164 (Julie Ault ed., 2002).

<sup>70</sup> Joseph McLellan, *NEA: The First 20 Years; Looking Back On the Up-and-Down Union of Government and Art*, WASH. POST (Sept. 26, 1985), [http://www.washingtonpost.com/archive/lifestyle/1985/09/26/nea-the-first-20-years/5e31fcb3-f712-48f8-8a16-8b50915bb9c1/?utm\\_term=.f5996c3760c0](http://www.washingtonpost.com/archive/lifestyle/1985/09/26/nea-the-first-20-years/5e31fcb3-f712-48f8-8a16-8b50915bb9c1/?utm_term=.f5996c3760c0) [perma.cc/S68K-B6WP].

<sup>71</sup> See, e.g., *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); Jackie Demaline, *Mapplethorpe battle changed art world*, THE CINCINNATI ENQUIRER, May 21, 2001, [http://www.enquirer.com/editions/2000/05/21/loc\\_mapplethorpe\\_battle.html](http://www.enquirer.com/editions/2000/05/21/loc_mapplethorpe_battle.html) [perma.cc/ZU86-ESLK].

“museum quality gallery show” put on by the Gagolian Gallery in New York.<sup>72</sup> Germano Celant, a well-known Italian art historian, curated the exhibit, and used the works of Manzoni’s contemporaries in the show to help illustrate the art historical and political context of the artist. While the exhibition ostensibly was meant to be didactic, like that of any museum show, the exhibition ultimately was about the sale of art – even if only one or two lone pieces were for sale among the many exhibited. This wide sweeping and well researched “museum quality gallery show” is not unique, and increasingly galleries stage similar exhibitions.<sup>73</sup> A more recent example is Yayoi Kusama’s museum quality gallery show “I Who Have Arrived in Heaven” at David Zwirner Gallery in New York City, which was compared to both *Fireflies on the Water* (2002), an artwork that she exhibited at the Whitney American Museum of Art, as well as *Rain Room* (2012), an artwork created by art collective Random International that appeared at MoMA around the same time.<sup>74</sup> In addition, a new crop of nonprofit private art museums that have been established by private collectors have also recently entered the art exhibition scene.<sup>75</sup> Facing increased competition for art audiences from galleries, private art museums and other forms of cultural entertainment, attendance and revenues at nonprofit public art museums are down, even as their admission fees remain some of the lowest among all kinds of museums.

### III. REGULATORY FRAMEWORK

All of the foregoing art market factors contribute to museums’ identity crisis<sup>76</sup> and precarious financial position, and their acceptance of crayola gallery sponsorship is therefore predictable. The question is whether such reliance is or should be permissible in light of current rules on the commercial and noncommercial exhibition of art.

#### A. Federal Tax Exemption under the Internal Revenue Code’s Operational and Other Tests

The Internal Revenue Code exempts organizations from federal income tax under section 501(a) if they meet the requirements of section 501(c) or (d). Section 501(c)(3) includes, among others, entities the conduct of which is charitable or educational purposes. Federal tax law recognizes “promotion of the arts” as an exempt charitable or educational purpose, but any organization that exhibits art must still apply to the Internal Revenue Service (IRS) for exemption from taxation. If successful, the IRS will

<sup>72</sup> Howard Halle, PIERO MANZONI, “A RETROSPECTIVE” | ART | REVIEWS, GUIDES, THINGS TO DO, FILM TIME OUT NEW YORK (2009), <http://www.timeout.com/newyork/art/piero-manzoni-a-retrospective> [perma.cc/5CPZ-392T].

<sup>73</sup> Hilarie M. Sheets, *Female Artists Are (Finally) Getting Their Turn*, N. Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/04/03/arts/design/the-resurgence-of-women-only-art-shows.html> [perma.cc/YCB3-KCFQ].

<sup>74</sup> William Grimes, *Yayoi Kusama’s “Mirrored Room” at David Zwirner Gallery*, N. Y. TIMES (Dec. 1, 2013), <http://www.nytimes.com/2013/12/02/arts/design/yayoi-kusamas-mirrored-room-at-david-zwirner-gallery.html> [perma.cc/9Q8J-46M2].

<sup>75</sup> Nizan Cohen *Art Collectors Gain Tax Benefits From Private Museums*, N. Y. TIMES (Jan. 10, 2015), <http://www.nytimes.com/2015/01/11/business/art-collectors-gain-tax-benefits-from-private-museums.html> [perma.cc/KNE9-6GHD]; Nizan Shaked, *Something out of Nothing: Marcia Tucker, Jeffrey Deitch and the Deregulation of the Contemporary Museum Model*, ART & EDUC., <http://www.artandeducation.net/paper/somethingoutofnothingmarciatuckerjeffreydeitchandthederegulationofhecontemporarymuseummodel/> [perma.cc/QP53-87NR] (describing trend of private individuals establishing museums).

<sup>76</sup> PROCH & SPIRITO, *supra* note 48.



recognize the art organization's exemption pursuant to a determination letter, and thereafter it may pursue, tax-free, activities that are in furtherance of its exempt purpose.

In order to receive and maintain tax-exempt treatment under Section 501(c)(3) of the Internal Revenue Code, an organization must be organized and operated "exclusively"<sup>77</sup> for one or more exempt purposes.<sup>78</sup> With respect to exempt purpose, activities conducted for cultural and artistic purposes can qualify as exempt.<sup>79</sup> Specifically, exhibition of art,<sup>80</sup> and promotion of the arts generally, has consistently been recognized by courts as both charitable and educational,<sup>81</sup> two categories of exempt purpose under Section 501(c)(3).<sup>82</sup> Museums are expressly identified by the Treasury Regulations as educational organizations under section 501(c)(3), and recent IRS decisions confirm the exempt status of museums.<sup>83</sup> The organizational test likewise does not present a significant obstacle to organizations that exhibit art. In relevant part,<sup>84</sup> the organizational test requires that the organizational documents pursuant to which an exempt organization is established limit its purpose to only exempt activities. Such documents must not expressly empower it to engage in activities that further non-exempt purposes, unless those activities are an insubstantial part of the organization's overall activities.<sup>85</sup>

Notwithstanding a recognized exempt purpose and formation documents that comply with the organizational test, the presence of substantial nonexempt activities mean that the organization is not operated exclusively for an exempt purpose, as required by the operational test.<sup>86</sup> Whether an activity is substantial is a fact-determination for which there is no formal definition; it has been measured by both importance to the

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<sup>77</sup> *Better Business Bureau of Washington, D.C., Inc. v. United States*, 326 U.S. 279 100 (1945) ("The presence of a single [nonexempt] purpose, if substantial in nature, will destroy exemption regardless of the number or importance of truly [exempt] purposes."); *Universal Church of Jesus Christ, Inc. v. Comm'r*, 55 T.C.M. (CCH) 143 (1988). In addition, a "primary purpose" test looks at an organization's purposes, and asks whether the organization's activities accomplish one or more tax-exempt purposes.

<sup>78</sup> *Treas. Reg. § 1.501(c)(3)-1(a)-(d)*.

<sup>79</sup> *Treas. Reg. § 1.501(c)(3)-1(d)(2) and (3)(ii)*; *Rev. Rul. 65-271*, 1965-2 C.B. 161.

<sup>80</sup> *Rev. Rul. 66-178*, 1966-1 C.B. 138. *See also, e.g., Bob Jones Univ. Museum & Gallery v. Comm'r*, 71 T.C.M. (CCH) 3120 (1996).

<sup>81</sup> *See Goldsboro Art League, Inc. v. Comm'r*, 75 T.C. 337 (1980). *See also Plumstead Theatre Soc., Inc. v. Comm'r*, 74 T.C. 1324 (1980).

<sup>82</sup> *Treas. Reg. § 1.501(c)(3)-1(d)(1)*.

<sup>83</sup> *P.L.R. 2007-34-024* (May 30, 2007).

<sup>84</sup> In addition to the requirements of the organizational test specified here, the organizational documents of an organization seeking tax exemption must specify that the organization will dedicate its assets to an exempt purpose in the case of its dissolution. *Treas. Reg. § 1.501(c)(3)-1(b)(4)*. The organization's documents also may not give the organization characteristics of an action organization. An organization is an action organization if it has at least one of the three following characteristics: a substantial part of the organization's activities is attempting to influence legislation, by propaganda or otherwise; the organization participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office; or the organization's main or primary objective(s) may be attained only by legislation or defeat of proposed legislation and the organization advocates or campaigns for the attainment of such main or primary objective(s). *See Treas. Reg. § 1.501(c)(3)-1(c)(3)*. However, these requirements are not applicable to museum organizations, and therefore this Article omits further discussion of them.

<sup>85</sup> *Treas. Reg. § 1.501(c)(3)-1(b)(2)*.

<sup>86</sup> *Treas. Reg. § 1.501(c)(3)-1(c)(1)*.

organization<sup>87</sup> as well as size (e.g., the amount of revenues and/or expenditures vs. other revenues/expenditures of the organization, the number of employees involved and so forth).<sup>88</sup> One court found that less than 10% of nonexempt activity did not jeopardize exempt status,<sup>89</sup> while more than 30% seemed too much to another.<sup>90</sup> The operational test focuses on the actual purposes the organization advances by means of its activities,<sup>91</sup> and is a question of fact to be determined under the facts and circumstances of each case.<sup>92</sup> The operational test under section 501(c)(3) generally focuses on the purpose accomplished by, rather than the nature of, any activity.<sup>93</sup> The organization bears the burden of demonstrating that it meets and continues to operate in compliance with the requirements under Section 501(c)(3), the Treasury Regulations, IRS interpretations and judicially constructed doctrines.<sup>94</sup>

Among other reasons,<sup>95</sup> an organization may fail the operational test if *any* of its net earnings are “private inurement” and benefit any person having a personal and private interest in the activities of the organization.<sup>96</sup> In addition, courts have imposed another test, now baked into the statutory framework of Section 501(c)(3), known as the “private benefit doctrine.” This test applies not only to an organization’s insiders captured in the private inurement test, but also prohibits an organization from operating to benefit disinterested private interests to more than an insubstantial extent.<sup>97</sup> Such benefits may include advantage, profit, privilege, gain, or interest.<sup>98</sup> A separate, non-statutory test known as the “commerciality doctrine” further considers the nature of an organization’s

<sup>87</sup> See, e.g., *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 855-56 (10th Cir. 1972) (opining that the “no substantial part” test for the lobbying limitation is not purely a mathematical assessment but rather a balancing test that measures how important lobbying is to the underlying objectives of the organization).

<sup>88</sup> Treas. Reg. § 1.501(c)(3)-1(e) (2008) (stating that whether the operation of an unrelated business is a primary purpose of an organization is measured in part by “the size and extent of the trade or business and the size and extent of the activities which are in furtherance of one or more exempt purposes.”). See, e.g., *Goldsboro Art League, Inc. v. Comm’r*, 75 T.C. 337, 341-342 (1980) (rejecting the IRS’s argument that exemption should be denied to Goldsboro because it operated two art galleries at which it sold art to the public in part because of the minor amount of money involved (gross receipts never exceeded \$6,500 per year, and profits were negligible).

<sup>89</sup> *World Family Corp. v. Comm’r*, 81 T.C. 958, 100 (1983).

<sup>90</sup> *Orange County Agric. Soc’y, Inc. v. Comm’r*, 55 T.C.M. 1602, 1604 (1988), *aff’d*, 893 F.2d 647 (2nd Cir. 1990).

<sup>91</sup> Treas. Reg. § 1.501(c)(3)-1(c)(1); see *Living Faith, Inc. v. Comm’r*, 950 F.2d 365, 371 (7th Cir. 1991).

<sup>92</sup> See Treas. Reg. § 1.501(c)(3)-1(f)(1).

<sup>93</sup> *Federation Pharmacy Services v. Comm’r*, 72 T.C. 687 (T.C. 1979), *aff’d*, 625 F.2d 804 (8th Cir. 1980).

<sup>94</sup> See Treas. Reg. § 1.501(c)(3)-1(f)(1).

<sup>95</sup> An organization will also fail the operational test if it is an action organization. See *supra* note 84, *infra*.

<sup>96</sup> Treas. Reg. § 1.501(a)-1(c); Treas. Reg. § 1.501(c)(3)-1(c)(2). *United Cancer Council, Inc. v. Comm’r*, 165 F.3d 1173, 1176 (7th Cir. 1999) (interpreting the term “private shareholders or individuals” to mean insiders of the organization – the founder, members of the board, their families, or anyone else equivalent to an owner or manager of the organization).

<sup>97</sup> See *Am. Campaign Academy v. Comm’r*, 92 T.C. 1053 (T.C. 1989); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii). It is sometimes impossible for organizations to serve exempt public purposes without providing benefits to private individuals. Accordingly, substantial private benefit that is incidental to the primary public benefit provided by an organization’s operations does not jeopardize the organization’s tax-exempt status. See Rev. Rul. 70-186, 1970-1 C.B. 128 (Jan. 1970).

<sup>98</sup> See *Retired Teachers Legal Def. Fund v. Comm’r*, 78 T.C. 280, 286 (T.C. 1982).

activities and if the manner of its conduct transforms its stated exempt purpose into a nonexempt, commercial purpose.<sup>99</sup> Increasingly, the Internal Revenue Service is relying on the commerciality doctrine's "smell test" as the lines between for-profit and non-profit activities become messier. Partnership with a for-profit organization may cause nonprofit organizations to run afoul of any of these limitations under certain circumstances. Private inurement, private benefit and the commerciality doctrine have presented challenges to art museums and other nonprofit art organizations that display art. The application of these operational test rules and limitations to nonprofit organizations that exhibit art, independently or jointly in cooperation with a for-profit entity, is discussed in more detail in Part IV below.

Even when a nonprofit organization possesses an exempt purpose and passes the organizational and operational tests, it may still be subject to tax upon certain activities that are unrelated to its exempt purpose. Specifically, activities unrelated to an organization's purpose, but that do not rise to the level of being conducted for a commercial purpose, may be subject to tax for generating unrelated business income (UBIT).<sup>100</sup> In order to qualify as taxable unrelated business income, income must come from a trade or business, such trade or business must be regularly carried on by the organization, and the conduct of such trade or business must not be substantially related, other than through production of funds, to the organization's performance of its exempt functions.<sup>101</sup> The "fragmentation" rule permits the IRS to apply the UBIT to separate revenue streams, even if those revenue streams are part of a single business.<sup>102</sup> For example, the fragmentation rule allows the IRS to apply the UBIT to the sale of souvenir pens at a museum gift shop, but not to sales of postcards with art reproductions.<sup>103</sup>

The primary objective of UBIT is to eliminate a source of unfair competition by taxing the income from unrelated business activities of exempt organizations the same as the income earned by nonexempt businesses with which the exempt organizations' business activities compete.<sup>104</sup> By imposing this tax, regulators can sanction exempt organizations engaging in unrelated business activities without revoking exemption entirely.<sup>105</sup> Generally, unrelated business activities must be a less than substantial part of an exempt organization's overall activities or the organization will lose its exemption.<sup>106</sup> Substantiality is often determined by looking the ratio of unrelated business income to total income<sup>107</sup> – with this method, a ratio of about one-third has found to be "substantial"

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<sup>99</sup> *Living Faith, Inc. v. Comm'r*, 950 F.2d 365, 371 (1991). See also BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* (10th ed. 2011).

<sup>100</sup> Treas. Reg. § 1.513-1(a).

<sup>101</sup> *Id.*

<sup>102</sup> I.R.C. § 513(c) (stating that "an activity does not lose identity as trade or business merely because it is carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purpose of the organization"); Treas. Reg. § 1.513-1(b).

<sup>103</sup> Rev. Rul. 73-105, 1973-1 C.B. 264 (1973) (sales of art reproductions are substantially related, but sales of science books and general souvenir items relating to city in which art museum was located were not substantially related to museum's exempt purpose of promoting public understanding of art.). See also Rev. Rul. 73-104, 1973-1 C.B. 263 (1973) (sales of postcards with art reproductions are not subject to UBIT).

<sup>104</sup> Treas. Reg. § 1.513-1(b).

<sup>105</sup> HOPKINS, *supra* note 99, at 634.

<sup>106</sup> See Treas. Reg. § 1.501(c)(3)-1(c)(1); Rev. Rul. 66-221, 1966-1 C.B. 220 (1966).

<sup>107</sup> Rev. Rul. 64-182, 1964-1 C.B. 186 (1964); see also HOPKINS, *supra* note 99, at 635.

and thus disqualified an organization from exemption.<sup>108</sup> However, the IRS occasionally applies a “commensurate test,” under which it will permit substantial unrelated business income where the exempt organization also spends a significant amount of time or funds on exempt functions.<sup>109</sup>

Profitable activities have recently gained greater relevance to art museums and nonprofit organizations that display art, as exhibitions and other revenue-generating activities become a critical source of funding. Many kinds of activities undertaken by museums have not been considered impermissibly commercial in nature, including the operation of retail and gift shops, restaurants, event space rental, and even direct sale and lending of original artworks by the art museum. In some cases, these activities also are considered to take place in furtherance of a museum’s purpose and remain untaxed.<sup>110</sup> The application of the UBIT rules as applied specifically in the context of art exhibition activities by nonprofit organizations is discussed in more detail in Part IV, below.

#### B. Self-Regulatory Industry Associations and Museum Guidance

Many professional self-regulatory associations, such as the American Alliance of Museums (AAM), the Association of Art Museum Directors (AAMD), the Association of Art Museum Curators (AAMC) and the College Art Association (CAA), exist as a means of promoting communication as well as uniform policies and ethical guidelines among museums, arts organizations and arts professionals.<sup>111</sup> The organizations are based on voluntary memberships, but joining creates certain responsibilities, in addition to benefits, for the museum. The AAM is the most prestigious museum organization in the United States and offers an accreditation process for arts institutions. AAM accreditation gives both credibility to the institution among the arts community and broader funding opportunities, since many arts grants will only be given to AAM accredited museums.<sup>112</sup>

<sup>108</sup> *Orange County Agric. Soc’y, Inc. v. Comm’r*, 893 F.2d 529 (1990).

<sup>109</sup> HOPKINS, *supra* note 99, at 636.

<sup>110</sup> Whether gallery-supported art exhibitions constitute an activity in furtherance of an art museum’s exempt purpose may depend on the meaning of “in furtherance of,” a concept which remains unsettled under federal tax law. The key issue is whether “in furtherance of” means that the activity must functionally advance exempt purpose, or simply that profits therefrom are used in commensurate proportion to exempt activities. In general, court cases and IRS rulings provide support for both interpretations. Assuming that art exhibitions funded by galleries are commercial and therefore not an activity that advances a museum’s exempt purpose for all the reasons provided above, the distinction in interpretations may have consequences for a museum’s exempt status. If “in furtherance of” means that the profits from gallery-supported art exhibitions support a commensurate amount of other charitable activities, they are likely to withstand the challenge in light of the other activities art museums undertake to promote art. According to the 2015 AAMD Annual Report, museums spend approximately 51 to 67 percent of their annual budget on programs or program-related expenses. ASS’N OF ART MUSEUM DIRECTORS, *Art Museums By the Numbers 2015*, ASS’N OF ART MUSEUM DIRECTORS (2016), <http://aamd.org/our-members/from-the-field/art-museums-by-the-numbers-2015> [perma.cc/5KGQ-CT67]. However, if “in furtherance of” means functional relation, commercial – and therefore functionally unrelated – gallery-supported museum exhibitions could endanger museum’s exempt status to the extent they are substantial in relation to the museum’s overall activities.

<sup>111</sup> AM. ALLIANCE OF MUSEUMS, About Us, AM. ALLIANCE MUSEUMS, <http://www.aam-us.org/about-us> [perma.cc/3895-AFEV]; ASS’N OF ART MUSEUM DIRECTORS, Mission, ASS’N OF ART MUSEUM DIRECTORS, <https://www.aamd.org/about/mission> [perma.cc/U67E-ZEF3]; ASS’N OF ART MUSEUM CURATORS, Mission & Vision, ASS’N OF ART MUSEUM CURATORS, <http://www.artcurators.org/?page=MissionVision> [perma.cc/943Z-3CEE]; COLLEGE ART ASS’N, About CAA, COLLEGE ART ASS’N, <http://www.collegeart.org/about/> [perma.cc/73AG-ACSX].

<sup>112</sup> AM. ALLIANCE MUSEUMS, Benefits of Accreditation, AM. ALLIANCE MUSEUMS, <http://www.aam-us.org/resources/assessment-programs/accreditation/benefits> [perma.cc/9YDP-MQUB].

More specialized organizations, such as the AADM, offer a forum for museum staff to share information with each other and stay current with various practices. In addition, the organizations often put forward guidelines or best practices in their respective fields regarding professional ethics.<sup>113</sup>

Consequences of violating the guidelines may result in discipline by reprimand, suspension, expulsion from the association and even sanctions, such as suspension of loans and shared exhibitions with members. While a minimum effort to follow the organizations' guidelines is necessary on the part of museums or specific staff members to maintain their membership,<sup>114</sup> the professional organizations have no power of enforcement over museum activities. Similarly, an association's power to enforce sanctions is also limited.<sup>115</sup>

No museum association requires a policy be in place for museums working with corporations or other for-profit entities. The AAMD provides a series of questions that museums are encouraged to consider when working with either a for-profit, a donor, or a corporation. The AAM provides guidelines that are meant to be employed by individual museums to create their own specific policy for working with corporations. However, there is no specific warning against working with corporations or other for-profit institutions. The AAM simply cautions museums to be aware of the risk and the potential consequences of working with these entities and to avoid practices that provide an individual or business with benefits at the expense of the museum's mission, reputation, or the community it serves. The AAMC addresses employment of curators by dealers. It also addresses curators' acceptance of compensation from dealers in their personal capacity, but seems directed at compensation in curators' personal capacity and not on behalf of the museum.<sup>116</sup>

Significant variation exists in what guidelines, if any, have been adopted by individual museums regarding gallery financing of museum exhibitions. Infrequently, museums' written guidelines may explicitly prohibit acceptance of financial

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<sup>113</sup> ASS'N OF ART MUSEUM DIRECTORS, Code of Ethics, ASS'N OF ART MUSEUM DIRECTORS, <http://www.aamd.org/about/code-of-ethics> [perma.cc/J7YB-8WLG]; AM. ALLIANCE MUSEUMS, Ethics, Standards, and Best Practices, AM. ALLIANCE MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices> [perma.cc/ZMR2-64AU]; COLLEGE ART ASS'N., Standards and Guidelines, COLLEGE ART ASS'N, <http://www.collegeart.org/guidelines/> [perma.cc/XRM4-US3C]; ASS'N OF ART MUSEUM DIRECTORS, *supra* note 113; ASS'N OF ART MUSEUM CURATORS, Professional Practices for Art Museum Curators (2007), [http://www.collegeart.org/pdf/AAMC\\_Professional\\_Practices.pdf](http://www.collegeart.org/pdf/AAMC_Professional_Practices.pdf) [perma.cc/U5CQ-BTGA].

<sup>114</sup> Margie Fishman, Delaware Art Museum Loses Accreditation, DELAWARE ONLINE (June 19, 2014), <http://www.delawareonline.com/story/life/2014/06/18/museum-directors-sanction-delaware-art-museum/10757111/> [perma.cc/672M-KGYM] (describing loss of AAM accreditation by the Delaware Art Museum after it sold one of their paintings in order to pay museum operating costs, which is against the ethical guidelines of the AAM).

<sup>115</sup> See ASS'N OF ART MUSEUM DIRECTORS, Ass'n of Art Museum Directors Sanctions Delaware Art Museum, ASS'N OF ART MUSEUM DIRECTORS (June 18, 2014), <http://aamd.org/for-the-media/press-release/association-of-art-museum-directors-sanctions-delaware-art-museum> [perma.cc/N3N6-6EMY]; ASS'N OF ART MUSEUM DIRECTORS, Ass'n of Art Museum Directors Statement on Randolph College and Maier Museum of Art, ASS'N OF ART MUSEUM DIRECTORS (Mar. 12, 2014), <http://aamd.org/for-the-media/press-release/association-of-art-museum-directors-statement-on-randolph-college-and> [perma.cc/6FVD-HCZV].

<sup>116</sup> ASS'N OF ART MUSEUM CURATORS, *supra* note 113.

compensation (including donations) from dealers for any reason,<sup>117</sup> whether or not related to an exhibition, or more narrowly prohibit compensation for certain types of exhibition-related expenses.<sup>118</sup> Other written museum policies may address certain aspects of gallery relationships with museums, such as artwork loans to galleries, but do not specifically address gallery sponsorship of a museum's art exhibitions.<sup>119</sup> Some museums may have general conflict of interest policies that allow donations for any general or special purpose of the museum, provided that they do not undermine the museum's best interest or the public's confidence in the museum's integrity.<sup>120</sup> In other cases, policies are either publicly unavailable<sup>121</sup> or available upon request,<sup>122</sup> and it therefore unclear whether there exist any written policies on gallery donations for exhibitions or otherwise.

### C. Informal Art Market Norms

Social norms are one of four modalities by which behavior may be regulated or constrained, as Lawrence Lessig observes in setting forth his "New Chicago School" regulatory theory.<sup>123</sup> Therefore, no discussion of the rules applicable to the funding by galleries of art museum exhibitions can be complete without acknowledging the art industry's "relatively heteronomous"<sup>124</sup> norms and overarching informal nature. A brief summary of relevant art market dynamics recently examined by an art industry expert, Professor Isabelle Graw, follows.

Experts including Professor Graw describe the art market as an "informal economy" thriving on personal agreements, unwritten laws, casual conversations, and a distinctive language, logic and set of laws.<sup>125</sup> This leads to "practices capable of plunging

<sup>117</sup> MOMA, CODE OF CONDUCT FOR STAFF OF THE MUSEUM OF MODERN ART (2001), [http://moma.org/momaorg/shared/pdfs/docs/about/code\\_of\\_conduct\\_staff\\_4.2014.pdf](http://moma.org/momaorg/shared/pdfs/docs/about/code_of_conduct_staff_4.2014.pdf) [perma.cc/98LF-L6C3].

<sup>118</sup> Finkel, *supra* note 4 (citing Walker Museum of Art's written guidelines).

<sup>119</sup> *See, e.g.*, MOMA, COLLECTIONS MANAGEMENT POLICY (2010), [http://www.moma.org/momaorg/shared/pdfs/docs/explore/CollectionsMgmtPolicyMoMA\\_Oct10.pdf](http://www.moma.org/momaorg/shared/pdfs/docs/explore/CollectionsMgmtPolicyMoMA_Oct10.pdf) [perma.cc/N996-DBPF]; Whitney Museum, *Collections Management Policy* (2013) [http://whitney.org/file\\_columns/0004/5939/cmp\\_december\\_2013.pdf](http://whitney.org/file_columns/0004/5939/cmp_december_2013.pdf) [perma.cc/9CGT-2LAA].

<sup>120</sup> LACMA, LACMA AUDIT COMMITTEE OF THE BOARD OF TRUSTEES, POLICY AND PROCEDURES FOR REVIEW OF CONFLICT OF INTEREST TRANSACTIONS (2009), <http://www.lacma.org/sites/default/files/conflict-of-interest-policy.pdf> [perma.cc/Y5ZH-NKMK]; LACMA, AMENDED AND RESTATED BYLAWS OF MUSEUM ASSOCIATES AS OF JANUARY 13, 2016 (Jan 13, 2016), [http://www.lacma.org/sites/default/files/LACMA\\_Amended\\_and\\_Restated\\_Bylaws\\_1\\_13\\_16.pdf](http://www.lacma.org/sites/default/files/LACMA_Amended_and_Restated_Bylaws_1_13_16.pdf) [perma.cc/R4Q4-W776] (last visited Jul 20, 2016).

<sup>121</sup> *Id.*

<sup>122</sup> *See* Christopher Knight, *MOCA's questionable painting loan to a Culver City art gallery*, L.A. TIMES, (June 11, 2014), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-moca-loan-frank-stella-honor-fraser-gallery-20140610-column.html> [perma.cc/MM5B-CNNG] (referring to a written museum policy obtained by email request).

<sup>123</sup> Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998).

<sup>124</sup> GRAW, *supra* note 2, at 142 (defining relative heteronomy in contrast to relative autonomy, to mean that external constraints – primarily the economy and the market – prevail, but only in a relative fashion due to the specific rules and conditions of the art world).

<sup>125</sup> *Id.* at 62 ("Anyone entering the art market as a novice will inevitably be confronted with business practices that would be quite unthinkable in conventional business relationships. As if it were the most natural thing in the world, collectors cancel orders payments are delayed, and invoices simply ignored. Not to mention the large amounts of 'dirty' money that circulate in this field on account of the many transactions 'off the books.'"). *See* JUDITH B. PROWDA, VISUAL ARTS AND THE LAW: A HANDBOOK FOR PROFESSIONALS 182 (ed. 2013) ("The art world is one where relationships play an inestimable role between

any accountant into disrepair,” as well as price manipulation and insider trading.<sup>126</sup> Rather than brazen disregard for rule of law and moral deficiency, however, Professor Graw believes that the “the reason why this market has developed its own, unorthodox practices . . . lies in its product – the work of art – which itself eludes economic categories.”<sup>127</sup> The value of art is determined, and uniquely characterized, by both symbolic and market value. In turn, this dualistic nature of art’s value has implications on the professional profiles of and interactions between museums and galleries.

The symbolic and market values of art remain conceptually distinct and in conflict with one another; at the same time, they are dependent upon each other and inextricably fused.<sup>128</sup> Art’s market value derives necessarily from its existence within a capitalist system, with its price determined by buyers and sellers who agree upon an amount for which to exchange it.<sup>129</sup> In turn, this value and its expression as a price is driven by art’s symbolic value, which goes beyond what economic terms can measure. Symbolic value is about cultural relevance, and is an expression of the manner in which art is loaded with idealistic concepts, such as an “artist’s reputation, promise of originality, prospect of duration, claim to autonomy and intellectual acumen” as well as the artwork’s singularity and “arthistorical verdict.”<sup>130</sup> These concepts (and thus symbolic value) are negotiated by a broad range of contributors, including the art historians, critics, curators – and also more recently, the art market itself.<sup>131</sup> In contrast to art’s prior tolerance of its market value during the 1970s and 1980s as a “necessary means for making sadly inevitable financial transactions,” the nature of art’s market value as relative and conditional is now obscured as an end in itself.<sup>132</sup>

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transacting parties. . . Buyers and sellers alike must rely on the personal relationships and integrity of such intermediaries. This system of reliance often leads to artworks of great value changing hands in an informal manner. . .”).

<sup>126</sup> GRAW, *supra* note 2, at 45 (describing collusion between buyers at auctions and the minimum auction price guarantees that auction houses grant to sellers); *Id.* at 61 (describing the art market to know only unwritten laws and be rife with murky goings-on). See also John Gapper & Peter Aspden, *Davos 2015: Nouriel Roubini says art market needs regulation*, FIN. TIMES (Jan. 22, 2015), <http://www.ft.com/intl/cms/s/0/992dcf86-a250-11e4-aba2-00144feab7de.html#axzz4B9DT8w1u> [perma.cc/Q8NS-LACC].

<sup>127</sup> GRAW, *supra* note 2, at 147. But see Andrew M. Goldstein, *Would the Art Market Benefit From More Regulation?*, ARTSPACE (Jan. 28, 2013), [http://www.artspace.com/magazine/news\\_events/1\\_28\\_13](http://www.artspace.com/magazine/news_events/1_28_13) [perma.cc/2AD9-ENAD] (stating that the key reason that art market regulation has been difficult to achieve is that galleries do not comply with the law requiring listing of prices).

<sup>128</sup> GRAW, *supra* note 2, at 7 (describing art as a “dialectical unity of opposites, an opposition whose poles effectively form a single unit.”). See generally MARTHA BUSKIRK, *CREATIVE ENTERPRISE: CONTEMPORARY ART BETWEEN MUSEUM AND MARKETPLACE* (3rd ed. 2012) (describing inseparable dynamics of art and business of art).

<sup>129</sup> GRAW, *supra* note 2, at 29; DIETRICH DIEDERICHSEN, *ON (SURPLUS) VALUE IN ART* (2008); THORNTON, *supra* note 8, at 100 (“On one level, the art market is understood as the supply and demand of art, but on another, it is an economy of belief.”).

<sup>130</sup> GRAW, *supra* note 2, at 26–27. See THORNTON, *supra* note 8, at 100 (describing the art market as a “symbolic economy” in which artwork is made by artists, dealers, curators, critics and collectors); see also GRAW, *supra* note 2, at 20–21 (stating that art’s symbolic value is the “surplus and an assumption of meaning and worth that goes beyond the concrete object used to refer to it”).

<sup>131</sup> GRAW, *supra* note 2, at 21.

<sup>132</sup> *Id.* at 55. See THORNTON, *supra* note 8, at 100 (“Many worry that the validation of a market price has come to overshadow other forms of reaction, like positive criticism, art prizes and museum shows.”).

Today, art's symbolic value remains its driving force, but “[d]uring the art boom of the first years of the new millennium, market success became the measure of all things, while at the same time remaining curiously dependent on the consecrating authorities that vouch for symbolic importance (criticism, art history, the museum).”<sup>133</sup> The result is that the market significantly influences the process of value creation more than critics do,<sup>134</sup> even while market value alone is no guarantee for long-term symbolic importance.<sup>135</sup> The convergence of art's driving values has compelled previously distinct professional spheres to similarly merge within the art industry.<sup>136</sup> Art industry actors have embraced broader professional profiles that span both market and non-market roles, such as the collector-dealer who also functions as a curator or publicist, or auction houses' acquisition of ownership stakes in galleries.<sup>137</sup> Increasingly, each hybrid art industry actor acts in cooperation with other hybrid art industry actors.<sup>138</sup> Accordingly, “few figures in the art world are entirely free of conflicting roles, although these conflicts are hardly experienced as such” in light of the prevailing demand for transdisciplinarity across all art industry actors,<sup>139</sup> with art criticism in particular undergoing a change in function.<sup>140</sup>

The blurring of the “commercial” and “institutional” spheres is a bid for symbolic legitimacy on the part of market actors as much as it is a general tendency toward market imperialism.<sup>141</sup> Yet Professor Graw acknowledges that the problem is not the lack of a rigid division of labor. She nonetheless emphasizes that it “makes a difference whether [an art industry actor] cultivates an awareness of [conflicts] in order to consciously set limits on them, or whether one simply neglects the problem, considering oneself separate from the conditions of market.”<sup>142</sup>

#### IV. CRITIQUING GALLERY-SUPPORTED ART EXHIBITIONS

As the analysis in this Part IV demonstrates, examining gallery-supported art exhibitions results in the following conclusions. Gallery-supported art exhibitions are unlikely to confer private inurement, but may bestow private benefit upon galleries and artists in limited circumstances – especially when nonprofit art organizations do not fully control the exhibitions, when gallery donations preference artists for consideration in an art exhibition, and when the sponsorship rights granted to a gallery in exchange for making a donation facilitate galleries' ability to sell art outside of the art exhibition. Gallery-supported art exhibitions may be impermissibly commercial when sponsored by commercial galleries; however, only if gallery-supported art exhibitions are also found to comprise a substantial part of a museum's activities do they threaten museum's exempt

<sup>133</sup> GRAW, *supra* note 2, at 54. See Plattner, *supra* note 55, at 8 (describing the increase in the market's weight in determining short-term artistic relevance).

<sup>134</sup> *Id.* at 121. See THORNTON, *supra* note 8, at 100 (describing how auctions “market-test” artwork).

<sup>135</sup> *Id.* at 26; See THORNTON, *supra* note 8, at 100 (describing the test for artistic authenticity as “the perceived depth and longevity of [artists'] ‘intervention’ in art history”).

<sup>136</sup> *Id.* at 99.

<sup>137</sup> *Id.* at 99–100.

<sup>138</sup> See generally *id.* at 103–06.

<sup>139</sup> *Id.* at 102–03.

<sup>140</sup> *Id.* at 229.

<sup>141</sup> Russell, *supra* note 64 (discussing the relationship between symbolic and financial capital); GRAW, *supra* note 2, at 44.

<sup>142</sup> GRAW, *supra* note 2, at 102.



status. Meaningful, enforced self-regulation and internal norms against gallery-supported museum exhibitions are all but absent, even as the industry itself recognizes the troublingly close nature of gallery-museum relationships. This state of affairs is, at least in part, a result of the current structure of the art market, with galleries at its center.

A. Exempt Purpose and Its Exclusive Pursuit in Question

1. *Private Inurement*

Private inurement has the potential to present issues for museums that conduct gallery-supported art exhibitions.<sup>143</sup> Private inurement is well defined by the IRS and the courts as siphoning off the assets of an exempt organization to an insider. This may occur when the charity charges too little for property or services it provides to an insider (some examples in the museum context might be free event space rental or curatorial services). Alternatively, private inurement may also occur when a charity overpays for property or services provided by an insider (for example, an unreasonable salary or other compensation in excess of market value). Even *de minimis* private inurement violates the operational test and threatens an organization's exempt status as a whole. However, in lieu of revoking exemption, the penalty for inurement transactions in most cases is not revocation of exempt status, but the imposition of excise taxes under Section 4958.

The IRS has issued guidance to clarify the factors it will consider in determining whether to revoke the exempt status of a tax-exempt organization that engages in excess benefit transactions such as private inurement.<sup>144</sup> In providing such guidance, now officially reflected in the Treasury Regulations, the IRS specifically addressed the situation in which a museum and art dealers have too cozy of a relationship. The first such example provided in the Treasury Regulations interpreting Section 4958 describes an art museum created for the purpose of exhibiting art to the general public, and governed by a board comprised of art dealers.<sup>145</sup> The museum directly purchases art solely from the dealers at prices exceeding fair market value, and the museum exhibits and offers for sale all of the art it purchases.<sup>146</sup> The IRS states that the purchase of art from the dealers constitutes private inurement.<sup>147</sup> Furthermore, the IRS compares the museum's activities to "dealing in such art in a manner similar to a commercial art gallery."<sup>148</sup> Notably, the IRS states that such transactions are so significant in size and scope in relation to the museum's exempt purpose that, unless remedied,<sup>149</sup> they would

<sup>143</sup> Although arts administrators' salaries have significantly risen in recent years, this Article sets aside the private inurement issue of unreasonable compensation to administrators in art museums as a general and tangential issue, despite whatever contribution to higher salaries is facilitated by the operational budget savings made possible in part by galleries' donations. See RM Vaughn, *Point of View: Who makes up the 1%? In the arts, it's the bureaucrats*, CBC (July 8, 2016), <http://www.cbc.ca/beta/arts/point-of-view-who-makes-up-the-1-in-the-arts-it-s-the-bureaucrats-1.3607715> [perma.cc/2TYG-TERS].

<sup>144</sup> T.D. 9390, 2008-18 I.R.B. 852, 855 (2008), <http://www.irs.gov/pub/irs-irbs/irb08-18.pdf> [perma.cc/Z3WU-WVLG].

<sup>145</sup> Treas. Reg. § 1-501(c)(3)-1(f)(2)(iv) Examples 1-3.

<sup>146</sup> Treas. Reg. § 1-501(c)(3)-1(f)(2)(iv) Example 1(i).

<sup>147</sup> Treas. Reg. § 1-501(c)(3)-1(f)(2)(iv) Example 1(ii).

<sup>148</sup> Treas. Reg. § 1-501(c)(3)-1(f)(2)(iv) Example 1(iii).

<sup>149</sup> The IRS indicates elsewhere in the Treasury Regulation that a museum's exempt status would not be in question if it addresses the conflicts presented by museum-dealer transactions. Specifically, if the museum replaces its board with "members of the community who are not in the business of buying or selling art and who have skills and experience running charitable and educational programs and institutions"; no longer buys art from current or former board members; and adopts written conflict of interest and art

cause the museum to lose its exempt status.<sup>150</sup> This is an extreme example, and it does not explicitly address the situation in which a third-party gallery funds a museum show; nonetheless, at a more general level the example highlights the concern of the IRS with dealers who financially benefit from, and are involved in the decision-making that takes place at, an art museum.

Significantly, the mere exhibition of art – even in the absence of a sale – also results in excess benefit to someone who has a financial interest in that art, due to the “nature of art” and the impact display has on its value.<sup>151</sup> The IRS directly acknowledged this in its 1992 Private Letter Ruling 9408006, stating:

There is no requirement that an [art] exhibition be of a commercial nature or that a sale must accompany an exhibition for the exhibition to result in private benefit. The nature of art is such that every exhibition increases the value of each piece on display and the value of all other works of that artist, including those pieces presently in existence and those that the artist will create in the future.<sup>152</sup>

The IRS made this sweeping pronouncement in the course of examining the exempt status of a 501(c)(3) organization formed to further the promotion of textile art. The board governing the organization consisted of the organization’s former attorney, as well as a well-known textile artist, her husband and her brother-in-law; in addition, the artist and her husband were the sole contributors to the organization. Although the organization stated in its application for exemption that it planned to develop textile artists, sponsor educational public art events, publish materials for cultural and educational activities and display textile art of the highest quality, the organization’s actual activities told a different story. In fact, the IRS found that the organization in Private Letter Ruling 9408006 almost exclusively exhibited the work of a single artist: namely, the well-known textile artist who was a board member and one of the organization’s contributors.

The case again demonstrates the influence that an interested art industry actor – this time the artist herself, unaided by an intermediary gallery – can wield over a nonprofit art organization’s dealings. The organization had formal selection criteria in place, as well as a sizable collection, that presented it with options in choosing among the art it wanted to promote. Nonetheless, in most instances, the organization showed only the contributor-artist’s art.<sup>153</sup> Even when the organization combined financial resources

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valuation policies, the museum would retain its exempt status. Treas. Reg. § 1-501(c)(3)-1(f)(2)(iv) Example 2 (2008).

<sup>150</sup> Treas. Reg. § 1-501(c)(3)-1(f)(2)(iv) Example 1(iii) (“The size and scope of the excess benefit transactions collectively are significant in relation to the size and scope of any of O’s ongoing activities that further exempt purposes . . . [the museum] has not implemented safeguards . . . to prevent such transactions in the future. The excess benefit transactions have not been corrected, nor has [the museum] made good faith efforts to seek correction from the disqualified persons who benefited from the excess benefit transactions (the trustees). The trustees continue to control [the museum]’s Board. Based on the application of the factors to these facts, [the museum] is no longer described in section 501(c)(3). . .”).

<sup>151</sup> P.L.R. 94-08-006 (Dec. 4, 1992) (“The nature of art is such that every exhibition increases the value of each piece on display and the value of all other works of that artist, including those pieces presently in existence and those that the artist will create in the future.”).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* The organization sent only the contributor-artist’s work to several exhibitions in which it participated. It also staged a solo exhibition of only the contributor-artist’s art that displayed pieces from her

to fund a group show of multiple artists, it showed only the contributor-artist's work among the others from its collection. The organization also solicited European museums and others to host traveling exhibitions of the contributor-artist's art, and printed catalogs containing her biography and a listing of the art from her personal collection. Although the organization received all proceeds from the sale of the catalog, it incurred significant other direct and indirect expenses of showing the contributor-artist's work.

The IRS ultimately revoked the organization's exemption, rejecting the argument that because the contributor-artist was already well known, any benefit that she received was incidental and tenuous. Instead, the IRS concluded that the contributor-artist received substantial "private benefit"<sup>154</sup> from the organization's aforementioned existence and activities. This determination is consistent with a long line of IRS interpretive guidance and Tax Court decisions that prohibits insiders of an art organization from selling their art through such organizations. The IRS recently confirmed its position in 2014 with Private Letter Ruling 201210043, when it revoked the exemption of a nonprofit cooperative art gallery that not only exhibited, but also sold its members' art.<sup>155</sup> The exhibiting artists were exclusively members of the organization; therefore, they were also insiders. They also set prices and selected works for exhibition; significantly, the IRS determined that the members' financial and in-kind donation, required by the organization from its member artists in order to exhibit their work, constituted a sales commission. The artists received all proceeds from the sale of their art less such commission, thereby constituting forbidden inurement.<sup>156</sup>

Even after this recent decision, Private Letter Ruling 9408006 remains relevant. Specifically, the IRS acknowledged in that case that "[t]here is no reason why [the contributor-artist] could not realize the appreciation resulting from the display of her art in a private sale of the art or donate the appreciated art for higher charitable deductions."<sup>157</sup> In other words, the IRS embraces the fluid reality of the contemporary art market with its recognition that there is little meaningful difference between exhibits by commercial art gallery or an art museum. Both create interest in and esteem for an artist's work, and both may lead to sales. Accordingly, in light of Private Letter Ruling 9408006, the rules against private inurement apply not only to the traditional notion of insiders who have significant control and a current financial interest in the art; it also captures insiders with significant control and only a latent or prospective financial interest in art.

The critical effect of Private Letter Ruling 9407006 expands the scope of private inurement in a way that could encompass not only artists, but also their galleries as the agents who act on their behalf. However, despite this expansion, the effect of Private Letter Ruling 9408006 is likely to have a greater impact on gallery sponsorship of

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personal collection and one of her collector's collections. At other times, the organization exhibited her art together with some art from its own collection.

<sup>154</sup> *Id.*

<sup>155</sup> P.L.R. 2012-10-043 (2011). While this decision did not deal directly with museums, it explicitly stated that the gallery was "like the [museum] described in Example 2 of Section 1.501(c)(3)-1(d)(1)(iii) of the Regulations."

<sup>156</sup> *Id.* ("Providing a display and retail space for member artists and allowing each member artist to set the sales price, select the works for sale, and receive a commission promotes the private interests of the artist members. . . since the individuals who will be selling and retaining any proceeds are members they are also insiders. As insiders, any direct benefit derived through your operations is inurement.")

<sup>157</sup> P.L.R. 2012-10-043, *supra* note 155.

museum exhibitions from the perspective of private benefit, rather than private inurement. For example, even if Takashi Murakami delegated his “final right of approval on all aspects of everything” over ©MURAKAMI to his gallery, this would be insufficient to subject the gallery to the prohibition on private inurement. Arrangements that grant gallerists ultimate control over exhibitions on behalf of the artists they represent – in addition to their inherent financial interest – do not necessarily make gallerists into museum insiders. For that to be the case, gallerists and artists would need to possess “significant formal voice in [an exempt organization’s] activities generally and . . . substantial formal and practical control over most of [the organization’s] income” like the contributor-artist in Private Letter Ruling 9408006 or the member artists in Private Letter Ruling 201210043.<sup>158</sup>

While some art museums do indeed have artists or gallery owners in positions of power within their organization, the majority of gallery relationships with museums are temporary and transactional, formed for the purpose of producing a single exhibition. Gallery support of museum exhibitions tend to look more like licensing contracts or sponsorship agreements between the gallery and museum. They may also take the form of a three-way arrangement among a donor, museum and gallery. In such multi-party arrangements, a museum identifies a donor to advance money to a gallery; the gallery in turn contributes such funds to the museum’s exhibition of the artist; and the artist provides an artwork to the donor, often for less than the value of the donor’s advance to the gallery. In any case, a contractual relationship alone has been ruled insufficient to make a third party an insider, even when the contract considerably favors such third party.<sup>159</sup> Therefore, most crayola gallery sponsorships of museum exhibitions are unlikely to support a finding of private inurement, and this Article’s analysis thus excludes further discussion of private inurement, excess benefit transactions and intermediate sanctions.<sup>160</sup> However, even a short-term relationship nonetheless may still present a basis for challenging gallery sponsorship of museum exhibitions, from the perspective of a private benefit or joint venture analysis.

## 2. *Private Benefit*

A commercial gallery that works with a nonprofit art museum to present an exhibition of its artists’ work could stand to reap prohibited substantial private benefit. In addition to any benefits inherent to exhibiting art in a museum (such as elevated prestige and greater name recognition), the private benefits associated with gallery-supported museums may include legal rights for the gallery or others included in negotiating the donation. These benefits may be specified in the sponsorship or licensing agreement, and include: signage, program and advertising credits, hospitality, tie-in promotions, access to star personnel, merchandising, and in some cases, even ultimate control over the

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<sup>158</sup> See *Variety Club Tent No. 6 Charities, Inc. v. Comm’r*, 74 T.C.M. 1485, 1493 (1997).

<sup>159</sup> See *United Cancer Council, Inc. v. Comm’r*, 165 F.3d 1173 (7th Cir. 1999) (reversing the Tax Court’s finding of private inurement and remanding for consideration of private benefit present in a contract that gave 90% of the contributions received by the charity to the fundraising company it hired).

<sup>160</sup> It would be necessary to examine the individual provisions in licensing and sponsorship agreements to determine with greater certainty whether a commercial gallery’s relationship with a nonprofit museum justifies disqualified person status and thus makes the intermediate sanctions and excess benefit provisions applicable.

exhibition.<sup>161</sup> Whether any of these benefits are permissible is determined by the rules on private benefit.

Private benefit is a judicially-constructed doctrine that can cause an organization to lose its exemption if, as a result of serving its charitable class, it confers an excessive benefit (often, but not necessarily, a financial benefit) on parties outside of the charitable class. Unlike private inurement transactions, the private benefit doctrine extends to independent, disinterested third parties to the organization,<sup>162</sup> even if when transactions are fairly and objectively priced at market value.<sup>163</sup>

As with private inurement, the Treasury Regulations specifically address the example of an art museum that, in pursuing its mission of exhibiting art to the public, provide indirect, secondary benefits to specific individuals outside the intended charitable class. In this example, the IRS describes an art museum that displays the work of unknown but promising artists; unlike the example provided in the case of private inurement, the board governing the art museum is unrelated to these artists. Nonetheless, because the art exhibited is for sale pursuant to a consignment arrangement that gives the artist 90% of the proceeds, the primary activity of the art museum serves the artists' interest, and the art museum is not exempt.<sup>164</sup> While the IRS recently confirmed this position in denying exempt status to an art gallery that it deemed to be like the museum described in the Treasury Regulations,<sup>165</sup> the private benefit doctrine is even broader than the Treasury Regulation suggests. The key case establishing the doctrine, *American Campaign Academy v. Commissioner*,<sup>166</sup> disallowed exemption of an educational institution whose graduates nearly all worked for a single political party, and whose curriculum and faculty mostly originated from programs previously conducted by that party. There was no evidence that the political party exerted insider influence or funneled off funds, yet the court still found that the political party benefitted to an impermissibly substantial degree.<sup>167</sup> Therefore, while the Treasury Regulation again does not explicitly address the situation in which a third-party gallery funds a museum show, *American Campaign Academy* establishes that a gallery that neither exerts influence over an art exhibition nor improperly takes funds from the presenting art organization could nonetheless be the recipient of forbidden private benefit.

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<sup>161</sup> Mark Walhimer, *The Museum Toolbox: Sample Museum Exhibit Sponsorship Agreement*, MUSEUMS 101, 190 (2015). See also Mary Hutchins Reed, *Sponsorship and the Arts: A Brief Overview of Legal Issues for Not-For-Profits*, 13 ENT. SPORTS LAW 13 (1995) (describing common benefits provided in sponsorship agreements); Barstow, *supra* note 44 (detailing hospitality benefits provided in exchange for Christie's sponsorship of an exhibition at the Brooklyn Museum); THORNTON, *supra* note 8, at 100 (describing contracts between artist and exhibiting museum that grant artist ultimate control).

<sup>162</sup> *American Campaign Academy v. Comm'r*, 92 T.C. 1053 (1989).

<sup>163</sup> *United Cancer Council, Inc. v. Comm'r*, 165 F.3d at 1176 (suggesting that a one-sided contract may effectively support a finding of private benefit.).

<sup>164</sup> Treas. Reg. § 1-501(c)(3)-1(d)(1)(iii) Example 2.

<sup>165</sup> P.L.R. 2015-16-066 (2015).

<sup>166</sup> *American Campaign Academy*, *supra* note 162.

<sup>167</sup> *Id.*

When taken to an extreme, the implications of *American Campaign Academy* are that exhibitions of art, gallery-supported or not, would confer private benefit to the artist and gallery, and call into question the exempt status of all nonprofit art institutions. Indeed, the exact doctrinal scope of the potentially all-encompassing private benefit prohibition is unclear. It derives from IRS and court interpretations of Treasury Regulation §1.501(c)(3)-1(d)(1)(ii), which provides:

An organization is not . . . [qualified for exemption] . . . unless it serves a public rather than private interest. Thus . . . it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled directly or indirectly, by such private interests.<sup>168</sup>

The doctrine itself does not appear anywhere in the statute supposedly interpreted by such regulations, however. An IRS General Counsel's Memorandum issued in 1987 provides the most exhaustive explanation of the doctrine available:

An organization is not described in section 501(c)(3) if it serves a private interest more than incidentally. . . . If, however, the private benefit is only incidental to the exempt purposes served, and not substantial, it will not result in a loss of exempt status . . . A private benefit is considered incidental only if it is incidental in both a qualitative and a quantitative sense. In order to be incidental in a qualitative sense, the benefit must be a necessary concomitant of the activity which benefits the public at large, i.e., the activity can be accomplished only by benefiting certain private individuals . . . To be incidental in a quantitative sense, the private benefit must not be substantial after considering the overall public benefit conferred by the activity.<sup>169</sup>

Thus, a balancing test determines the presence of private benefit by assessing the benefits to private individuals or organizations of an organization's activity, against those received by the charitable class. If the former is substantial, the organization is not exempt – even if the activity also serves the latter. Substantial benefits may include a direct financial stake in an organization's profits from its otherwise exempt activities.<sup>170</sup> In the context of organizations that exhibit art, several possessed solely a profit motive to sell the work of artists they exhibited and thus lost their exemptions for such reason.<sup>171</sup> On the other hand, if the incentives created by the private benefit also benefit the community – for example, to encourage participation or the expansion of resources in an underserved area – the very same incentives might be justified as necessary, and thus

<sup>168</sup> Treas. Reg. § 1.501(c)(3)-1(d)(2)(ii).

<sup>169</sup> I.R.S. Gen. Couns. Mem. 39,598 (1987).

<sup>170</sup> I.R.S. Gen. Couns. Mem. 39,862, 36 (1991) (determining that financial incentives for doctors to promote the competitive position of a hospital do not necessarily constitute a public benefit).

<sup>171</sup> See, e.g., Rev. Rul. 71-395, 1971-2 C.B. 228 (revoking exemption of an organization that had a stated purpose of selling its members' art); Rev. Rul. 76-152, 1976-1 C.B. 152 (revoking exemption of an organization that had a stated purpose to sell local artists' art); P.L.R. 80-34-018 (1980) (revoking exemption of organization whose stated purpose was not to sell art, but whose sales activities grew to comprise 75% of its operations).

permissible private benefit.<sup>172</sup> For example, the IRS has granted exempt status to galleries that promote art by providing such incentives for high schoolers,<sup>173</sup> economically disadvantaged artisans<sup>174</sup> and artists with disabilities,<sup>175</sup> and for artists in areas distant from other organizations that exhibit or sell art.<sup>176</sup> Considering the audiences that art exhibitions at major art museums already draw, it is difficult to say that an incentive encouraging galleries' display of artwork by artists they represent is necessary to get good art into museums. In addition, there is already a concentration of art museums in the major markets in which gallery-supported museum exhibitions take place. Thus, further private benefit, beyond the benefit inherent to exhibition, seems unnecessary in order to promote art, and there should be no exception for gallery-supported art exhibitions to the general rule that private benefit be incidental.<sup>177</sup>

Private benefit must be both quantitatively and qualitatively incidental. To be quantitatively incidental, the private benefit must be insubstantial, measured in the context of the overall exempt benefit conferred by the activity.<sup>178</sup> Applying this part of the test, the Tax Court in several decisions scrutinized everything from an organization's frequency of its art-related newsletters to the total number of hours engaged in educational activities compared against some measured financial benefit to artists.<sup>179</sup> The IRS has likewise assessed quantitative incidental benefit with vigor.<sup>180</sup> Most frequently, its comparisons evaluate the number and regularity of educational activities compared against the hours spent, or dollars earned, in the undertaking of sales activity.<sup>181</sup> If the requirement that private benefit be quantitatively incidental was applied to a situation in which a gallery funded an art museum's exhibition of art, the test would utilize similar

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<sup>172</sup> I.R.S. Gen. Couns. Mem. 39,862, *supra* note 170, at 76 ("We recognize that there may well be legitimate purposes for joint ventures, whether analyzed under the anti-kickback statute or the tax Code. These may include raising needed capital; bringing new services or a new provider to a hospital's community; sharing the risk inherent in a new activity, or pooling diverse areas of expertise.").

<sup>173</sup> Rev. Rul. 78-131, 1978-1 C.B. 157.

<sup>174</sup> *Aid to Artisans v. Comm'r*, 71 T.C. 202 (1978); P.L.R. 8849072 (Sept. 10, 1988).

<sup>175</sup> P.L.R. 9141053 (1991).

<sup>176</sup> *Goldsboro Art League, Inc. v. Comm'r*, 75 T.C. 337, 341-42 (1980); *Cleveland Creative Arts Guild v. Comm'r*, T.C.M. 1985-316; P.L.R. 8634001 (1986); P.L.R. 201441017 (July 18, 2014) (denying exemption to gallery located in an area with other galleries and organizations that exhibit art).

<sup>177</sup> For the purpose of this Article, the author does not challenge the fiction in which IRS and courts engage: that the labor to produce art is free. This assumption is implicit in the IRS and Tax Court interpretations, which find that full compensation for artists work constitutes private benefit. The average rate for reasonable compensation of artists is a 50% commission, though the power imbalance of artist-gallerist relationship undermines the validity of this market-based profit allocation. Therefore, it is actually impossible to provide art without necessarily benefitting the private interests of artists in doing so, and one would never suggest such an arrangement in other industries; for example, that doctors are not paid for medical services they deliver in the realm of health care. In any event, the IRS is hardly alone in making this problematic assumption, and therefore the scope of the issue and its associated implications are best left for other forums.

<sup>178</sup> *E.g.*, *Ginsburg v. Comm'r*, 46 T.C. 47 (1966); Rev. Rul. 75-286, 1975-2 C.B. 210; Rev. Rul. 68-14, 1968-1 C.B. 243.

<sup>179</sup> *Aid to Artisans v. Comm'r*, 71 T.C. 202 (1978); *Goldsboro Art League, Inc. v. Comm'r*, 75 T.C. 337, 341-342 (1980); *Cleveland Creative Arts Guild v. Comm'r*, T.C.M. 1985-316 (1985).

<sup>180</sup> *See, e.g.*, P.L.R. 88-49-072 (Sept. 10, 1988) and P.L.R. 86-34-001 (Aug. 13, 1986) (each approving exemption after lengthy analysis). *See also* P.L.R. 80-34-018 (May 14, 1980); P.L.R. 2008-29-046 (Apr. 17, 2008); P.L.R. 2011-25-044 (Mar. 30, 2011); and P.L.R. 2014-41-017 (Jul. 18, 2014) (each disapproving exemption after lengthy analysis).

<sup>181</sup> *Id.*

arithmetic. Provided a nonprofit art organization engages in no direct art sales activity (that is, it does not sell art off its walls), the quantitative test would seem to easily result in a public benefit that outweighs private benefit to galleries or the artists they represent. Yet, Private Letter Ruling 9407006's statement that the commercial and noncommercial spheres of the art market are not so easily distinguished casts doubt upon this outcome.<sup>182</sup> In stating that "[t]here is no requirement that an [art] exhibition be of a commercial nature or that a sale must accompany an exhibition for the exhibition to result in private benefit," the ruling provides support for finding private benefit even in the absence of a specific sum of revenue directly obtained by the artist or gallery through a particular exhibition. This result is consistent with the approach of the IRS and Tax Court to date, which relies only upon rough approximations of public and private benefit and does not utilize available models for measuring museum impact or artwork value. As importantly, any other result is difficult to reconcile consistently with Private Letter Ruling 9407006's determination that nonprofit art exhibitions at which no sales take place can confer private benefit.

Private Letter Ruling 9407006's unsettling expansion of quantifiable private benefit can be narrowed when considered together with the limitation that private benefit be qualitatively incidental. To be qualitatively incidental, private benefit must be a necessary concomitant of the exempt activity, in that the exempt objectives cannot be achieved without necessarily benefiting certain individuals privately.<sup>183</sup> Depending on how broadly or narrowly the phrase "exempt objectives" is interpreted, the qualitative incidental requirement places some limit upon the otherwise boundless implications of Private Letter Ruling 9407006. As the IRS recognized in that ruling, all exhibitions of art, commercial and noncommercial alike, benefit anyone with an interest in the exhibited art. To state that a museum would be unable to achieve its purpose without engaging in private benefit and therefore the benefit of all exhibitions are incidental, however, eviscerates the limitation of its meaning.

More carefully confined, however, the requirement that private benefit be qualitatively incidental is useful in separating gallery-supported art exhibitions that confer private benefit from exhibitions, gallery-supported or otherwise, that do not. Specifically, it compels the question of what art an organization must display in order for the public to benefit from its exhibition, and whether certain conditions under which the art is displayed vary the extent of private benefit. Thus, the contributor-artist's argument from Private Letter Ruling 9407006 has merit in the context of private benefit, as an exhibition likely confers less benefit for an artist who is already well-known than one who is unknown; likewise, some exhibitions confer greater benefit to galleries and artists than others,<sup>184</sup> such as those that take place at major art museums. A particular exhibition of art might also confer greater benefit if the artist's work is currently or will soon be on

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<sup>182</sup> P.L.R. 94-08-006 (Dec. 4, 1992) ("There is no requirement that an [art] exhibition be of a commercial nature or that a sale must accompany an exhibition for the exhibition to result in private benefit. The nature of art is such that every exhibition increases the value of each piece on display and the value of all other works of that artist, including those pieces presently in existence and those that the artist will create in the future.").

<sup>183</sup> See Rev. Rul. 70-186, 1970-1 C.B. 128.

<sup>184</sup> THORNTON, *supra* note 8, at 100.



the market,<sup>185</sup> or if the price for the exhibited art is already higher to begin with than unexhibited art.<sup>186</sup> However, these private benefits exist whether or not a gallery makes a donation to a nonprofit art organization. On the other hand, a gallery-supported art exhibition might specifically confer greater private benefit to galleries when their donations preference the artists they represent for consideration in an art exhibition, and when the sponsorship rights granted to a gallery in exchange for making a donation facilitate galleries' ability to sell art outside of the art exhibition. Under such circumstances, it is likely that gallery-supported art exhibitions confer more than a quantitatively and qualitatively incidental private benefit to galleries and the artists they represent.

### 3. *A Special Case of Private Benefit: Joint Ventures*

The characteristics of the short-term relationship between a museum and gallery may be impermissible as a joint venture.<sup>187</sup> While the law overall is clear that exempt organizations may partner with for-profits without affecting the former's exempt status or tax liability, this rule is not absolute – especially when collaborations between for-profit and tax-exempt organizations present the potential for substantial benefits to for-profit participants. Accordingly, joint ventures are a special case of private benefit, and the IRS has challenged many transactions in which a charity enters into a joint venture with private investors, even in circumstances where transactions did not involve insiders or siphoning off of the exempt organization's assets. While the majority of such decisions have taken place in the health care industry,<sup>188</sup> the IRS has taken issue with exempt arts organizations that work with for-profit partners to produce their programming.<sup>189</sup> It is therefore conceivable that the IRS could challenge art exhibitions put on by museums with the assistance of galleries as joint ventures.

In general, galleries' financing of museum exhibitions does not take the form of joint venture entities or explicit joint venture agreements. Substance matters more than form under federal tax law, however; therefore, when galleries fund art museum exhibitions, the IRS and courts may characterize their cooperation as a joint venture. The classic joint venture recognized under federal tax law involves an exempt organization and a discrete legal entity, such as a partnership, limited liability company or other unincorporated association, through or by means of which any business, financial operation or venture is carried on. The joint venture rules also apply to a wide variety of other legal forms, including potentially the types of agreements made between galleries and museums. Joint ventures may exist between or among discrete legal entities, when they combine their resources to carry out a single business venture for joint profit, but do not create a formal incorporated or unincorporated association to do so. For example, a tax-exempt organization and the for-profit entity might enter into an agreement to conduct an activity together, such as the exhibition of art. In determining whether an

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<sup>185</sup> BARSTOW, *supra* note 44. This situation occurred in connection with the Sensation exhibition. Christie's auction house explicitly said it wanted to make the most of its \$50,000 donation to the exhibition, its largest ever such contribution to a museum.

<sup>186</sup> Even if the gain in value from exhibition is proportionate, 10% of \$10 million (\$1 million) is objectively larger than 10% of \$100,000 (\$10,000).

<sup>187</sup> *Supra*, Part II.A.1.

<sup>188</sup> See, e.g., I.R.S. Gen. Couns. Mem. 39,862, *supra* note 170, at 39–47 (Nov. 22, 1991) (holding that “revenue stream” joint venture arrangements between doctors and a hospital for outpatient services violated the private benefit doctrine).

<sup>189</sup> *Plumstead Theatre Soc., Inc. v. Comm’r*, 74 T.C. 1324 (1980).

arrangement constitutes a joint venture, some courts find the parties' intention to be the most important factor. Others disregard "nomenclature" and consider all facts and circumstances, emphasizing especially the elements of control and risk of loss. Therefore, even when tax-exempt and for-profit entities do not explicitly intend to create a joint venture, a court or the IRS may find that the parties' relationship and behavior warrants characterization as a "law imposed joint venture" anyway.<sup>190</sup>

Furthermore, federal tax law recognizes variation in the level of joint venture involvement. Members in the joint ventures may actively participate in the joint venture through management, decision-making and execution, or they may be passive investors who supply funds and exercise limited agency but nonetheless profit from the joint venture's activities. In addition, the scope of the joint venture may encompass all or some of a tax-exempt entity's activities. At one extreme, the entirety of the exempt organization is in the venture; these joint ventures are called "whole entity" joint ventures. In the middle, the primary operations of the exempt organization are in the venture. In "ancillary joint ventures," less than the primary operations of the exempt organization are in the venture.

Depending on the degree of a museum's collaboration with a gallery to produce an exhibition, the cooperation between a tax-exempt museum and a for-profit gallery to produce an exhibition could be subject to scrutiny as a law-imposed joint venture. Pursuant to the terms of the sponsorship agreement, galleries provide monetary or in-kind donations to fund the exhibition; the IRS has found that an art organization's voluntary donations are provided in exchange for a benefit to artists.<sup>191</sup> In addition, galleries exercise some (sometimes even ultimate) control over the exhibition. In light of galleries' fiduciary duties to the artists they represent, such activities are conducted in their best interest with a profit motive, not a public interest.<sup>192</sup> Meanwhile, museums provide resources ranging from exhibition space, curatorial expertise and administrative coordination. A gallery-supported museum exhibition thus could constitute a joint venture, and whether it is an ancillary joint venture or something more depends on whether its activities are substantial.

A gallery-supported art exhibition remains an ancillary joint venture if it constitutes an insubstantial portion of the museum's overall activities. Even so, any ancillary joint venture activities that do not further an exempt purpose generate unrelated business income subject to the UBIT thereupon.<sup>193</sup> Formal guidance issued by the IRS states that an exempt organization would not be subject to the UBIT if it retains control over the joint venture and its operations that constitute one or more related businesses. An exempt organization may retain control in ways other than by means of composition of a governing board of the joint venture, such as agreements that grant the exempt organization decision-making power. Conversely, if such agreements grant control to the

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<sup>190</sup> P.L.R. 2006-22-055 (Mar. 7, 2006); P.L.R. 2012-35-021 (June 4, 2012); P.L.R. 2013-09-016 (Dec. 5, 2012).

<sup>191</sup> P.L.R. 2012-10-043 (Dec. 13, 2011).

<sup>192</sup> See *supra* note 20.

<sup>193</sup> In ancillary joint ventures, the operational test is not at issue because the joint venture constitutes an insubstantial part of an exempt organization's total operations (provided the exempt organization otherwise operates primarily for exempt purposes).

for-profit in the joint venture or are unrelated to an exempt purpose, its activities may be subject to the UBIT.<sup>194</sup>

Gallery-supported museum exhibitions that comprise a substantial portion of a museum's programmatic budget could even rise to the level of a joint venture that conducts the primary operations of the exempt museum. Such joint venture's activities may endanger the exempt organization's exempt status entirely. This risk derives from the conflict that arises when an exempt organization serves in a managing capacity as a general partner of the joint venture. This is because the joint venture's general partner has fiduciary duties to the other partners that conflict with an exempt organization's obligation to pursue an exempt purpose exclusively. Therefore, unless the principal purpose of the joint venture is to advance exempt purposes, an exempt organization that serves as general partner of a joint venture will lose or be denied exemption. Furthermore, the for-profit partners must not receive an undue economic return or other more than incidental private benefit, and the exempt organization must be insulated from the day-to-day management of the joint venture. At the same time, however, the exempt organization cannot cede full control to a for-profit partner in a joint venture, either. The IRS has suggested that a for-profit partner's control of joint venture activities that constitute an exempt organization's primary purpose raises private benefit issues. In addition, even where the activities of the joint venture are related to the exempt purpose of the tax-exempt organization, control of such related activities by a for-profit convert the otherwise exempt activities into an unrelated business, and will lead to the loss of exempt status.<sup>195</sup>

Whether a joint venture is ancillary or constitutes an exempt organization's primary purpose, control is the crucial indicator in both cases that determines whether the joint venture's activities advance an exempt purpose – even if such activities are inherently related to the exempt organization's stated exempt purpose. Accordingly, exhibition of art – one of the exempt purposes of art museums – effectively may not constitute an exempt purpose in a joint venture, if a for-profit such as a gallery or artist has control over such exhibition. Therefore, gallery-supported museum exhibitions like ©MURAKAMI, which granted final say to the artist and his gallery, would all but certainly mean that the exhibition furthered a nonexempt purpose. Such finding would be consistent with the position of the IRS in Revenue Ruling 2004-51, 2004-1 C.B. 974, in which it found that ancillary joint ventures did not endanger the exempt organization's status when the exempt organization maintained exclusive control over all major decisions, and at least equal control over all other, non-administrative issues.<sup>196</sup> In subsequent decisions considering such issue, the for-profit partners in other joint ventures have similarly not possessed control over the joint venture, and the exempt organization was able to maintain its status.<sup>197</sup> Conversely, even when exempt organizations ceded only constructive,<sup>198</sup> substantial<sup>199</sup>, majority<sup>200</sup> or shared control<sup>201</sup> the IRS denied their applications for exempt status.

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<sup>194</sup> Mary Hutchins Reed, *Sponsorship and the Arts: A Brief Overview of Legal Issues for Not-For-Profits*, 13 ENT. SPORTS LAW 13 (1995); Gilbert, *Corporate Sponsorship: The UBIT Analysis*, C786 ALI-ABA 21 (1992).

<sup>195</sup> HOPKINS, *supra* note 99.

<sup>196</sup> Rev. Rul. 2004-51, 2004-1 C.B. 974.

<sup>197</sup> P.L.R. 2005-28-029 (Apr. 20, 2005); P.L.R. 2014-19-015 (Feb. 14, 2014).

<sup>198</sup> P.L.R. 2008-51-033 (Sept. 25, 2008).

Such decisions strongly suggest that Revenue Ruling 2004-51's standard – full control over major decisions and equal control over all other non-administrative decisions – is the minimum level of control that an exempt organization must possess over a joint venture's activities in order for such activities to further an exempt purpose. If a museum has anything less than full control over a gallery-supported museum exhibition, revenue from such exhibition may be taxable as unrelated business income or even cause the museum to lose its tax exemption if it constitutes a substantial portion of the museum's activities.

#### 4. *Commerciality and Unrelated Business Income Tax*

Beyond benefit to private interests (disinterested or otherwise), cooperation between for-profit galleries and nonprofit museums in producing exhibitions also poses the question of whether such activity is commercial in nature. Outside of tax law, at least one court has determined that certain activities undertaken by museums in connection with art exhibitions, such as advertising a collection and publishing a guidebook for sale, constitute commercial activity.<sup>202</sup> In addition, under federal tax law, nonprofit galleries' ability to conduct art sales remains very restricted as nonexempt commercial activity.<sup>203</sup> However, the IRS and the courts have not explicitly extended this rule to noncommercial, but commercial gallery-supported, art exhibitions. And while Private Letter Ruling 9407006 significantly blurred the distinction between the commercial and noncommercial exhibition of art, it did not erase them entirely. In stating that “[t]here is no requirement that an [art] exhibition be of a commercial nature or that a sale must accompany an exhibition for the exhibition to result in private benefit,” it implicitly acknowledged that some—but not all—art exhibitions are commercial. Therefore, even though a nonprofit art organization may not directly engage in art sales at a gallery-supported art exhibition, the commercial nature of such exhibition remains an important determination relevant to exempt status, especially in light of the role that for-profit gallery sponsors play.

Generally, an exempt organization may engage in profit-seeking activities in furtherance of its exempt purpose, as long as the organization's mission itself is not commercial, and its primary objective is not the production of profits. Under the commerciality doctrine, however, an organization that conducts substantial activities in a commercial manner may be found to be engaged in nonexempt activity that risks its exempt status entirely. Furthermore, although commercial activity will not endanger exemption if it is insubstantial, it may still be subject to the UBIT. A clear, definitive test

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<sup>199</sup> P.L.R. 2013-14-047 (Jan. 10, 2013) (denying exemption to an organization where one of its four directors owned a for-profit and such director made significant decisions about the operations of the organization).

<sup>200</sup> P.L.R. 2014-36-050 (June 12, 2014).

<sup>201</sup> P.L.R. 2010-07-072 (Sept. 24, 2009).

<sup>202</sup> *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1205 (C.D. Cal. 2011).

<sup>203</sup> See *supra* notes 162-67. But see *Aid to Artisans, Inc. v. Comm'r*, 71 T.C. 202 (T.C. 1978) (finding that an organization that engaged in activities similar to those of a commercial import firm – the purchase, import, and sale of handicrafts – was nonetheless operated exclusively for exempt purposes because those activities were carried out exclusively to accomplish the exempt purpose of helping disadvantaged artisans); P.L.R. 9141053 (Jul. 19, 1991) (finding that the sale of consigned art by disabled artists as well as the sale of donated art by nondisabled artists is in furtherance of an exempt purpose and not subject to UBIT, where all proceeds supported operations); P.L.R. 8634001 (Aug. 13, 1986) (finding rental and sale of art in furtherance of an exempt purpose and not subject to UBIT).

for determining the commercial nature of an activity has not developed under the commerciality doctrine.<sup>204</sup> An activity may be commercial in nature if it is conducted in the same manner as is the case in the realm of for-profit organizations.<sup>205</sup> Competition, profitability, and an otherwise “commercial hue” are all evidence that an activities’ manner of conduct are too for-profit like.

With respect to profitability, gallery donations primarily cover exhibition costs, and a straightforward summation of a museum’s ticket sales revenue from a gallery-supported art exhibition would likely show minimal net earned income, if any.<sup>206</sup> However, considering the gain that galleries expect to obtain for their artists in exchange for their donations, it seems that gallery donations are payment for a services and therefore would be most appropriately categorized as earned income, like ticket sales. This classification of gallery contributions as profit seems especially appropriate when an art organization professes that it would still be conducting the same exhibition in the absence of gallery donations; if the organization conducts the same activities and brings in the same revenue only at a lower cost due to galleries’ donations, the difference results in a greater profit.<sup>207</sup> This fact significantly distinguishes gallery-supported art exhibitions from other exhibitions at nonprofit art organizations, such that the former results in greater profitability than the latter.

Commercial hue is the extent to which a nonprofit organization’s activities are largely animated by a commercial purpose and directed fundamentally to ends other than exempt purposes.<sup>208</sup> A definite meaning of commercial hue is missing from the tax framework, inviting subjective assessment of art exhibitions and whether their quality renders them commercial.<sup>209</sup> In addition, application of the commercial hue factor to art is further complicated by the dual nature of art as both a commodity and something more than a market good, such that art is simultaneously both commercial and anti-commercial in character.<sup>210</sup> While these conceptual challenges are valid in broad strokes, it may nonetheless be possible to discern meaningful marginal variation in the commercial hue of gallery-supported art exhibitions when compared against non-gallery-supported art

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<sup>204</sup> Indeed, the commerciality doctrine suffers same definitional problems as private benefit, and has a potentially limitless application as the bounds of what is commercial and noncommercial blur in today’s economy of social enterprise, triple bottom lines, and the creative industry.

<sup>205</sup> *Living Faith, Inc. v. Comm’r*, 950 F.2d 371 (1991) (finding that competition with commercial firms is a strong suggestion that a substantial nonexempt purpose exists; evidence of such competition may include setting market (rather than below-cost) prices, locating near similar for-profit enterprises, investing in promotional advertising, and reaping profits).

<sup>206</sup> Mike Boehm, *Report shows art museums rely mainly on kindness, not commerce*, L.A. TIMES, Jan. 9, 2015, <http://www.latimes.com/entertainment/arts/culture/la-et-cm-art-museums-financial-survey-getty-lacma-eli-broad-hammer-aamd-20150108-story.html> (reporting that art museums’ earned income from ticket sales and concessions cover only 15% of average art museum expenses) [perma.cc/VW66-AT7M].

<sup>207</sup> John D. Colombo, *In Search of Private Benefit*, 58 FLA. L. REV. 1063, 1087 (2006) (arguing that the private benefit doctrine does not apply to a tax-exempt organization’s day-to-day services but may apply to its “core services” central to its mission). See also Brian Frye, *Arts Funding & “Private Benefit,”* NONPROFIT LAW PROF BLOG (2016), <http://lawprofessors.typepad.com/nonprofit/2016/05/arts-funding-private-benefit.html>.

<sup>208</sup> *Better Business Bureau of Washington, D.C., Inc. v. United States*, 279 U.S. 279, 326 (1945).

<sup>209</sup> Jessica Pena & Alexander L.T. Reid, *A Call for Reform of the Operational Test for Unrelated Commercial Activity in Charities*, 76 N.Y.U. L. REV. 1855, 1877 (Dec. 2001).

<sup>210</sup> An exception is nearly unsellable work, like the land art of Christo and Jeanne-Claude or Robert Smithson; however, even unsellable art may be sold in the form of derivative works, such as the artist’s study sketches or photographs of the work.

exhibitions. Reports of gallery-supported art exhibitions locate them at large, corporatized art organizations. While commercial hue does not mean that art organizations must not professionally operate or provide their goods and services free of charge,<sup>211</sup> such institutions are often the same institutions with greatest power to legitimize—and therefore increase the commercial value of—art.<sup>212</sup> Gallery-supported art exhibitions are not taking place at smaller, unknown nonprofit art organizations, even though these institutions seem as if they would be most in need of sponsorship in light of their commensurately smaller budgets and collections. This distribution of gallery-supported art exhibitions seems indicative of their commercial hue, with the function of such nonprofit art organizations and galleries thus converging as commercial.

The final factor indicative of commerciality considers the existence of competition among for-profit counterparts to the exempt organization's activity. An activity is commercial in nature if it has a direct counterpart in for-profit organizations. Evidence of competition with such counterparts may include setting market (rather than below-cost) prices, locating near similar for-profit enterprises, investing in promotional advertising, or otherwise conducting operations in a manner similar to that of analogous commercial entities. Reaping profits is also evidence of competitive commercial operations.<sup>213</sup>

Art exhibitions' below market prices to view art (for the price of only an admission ticket) generally undermines a finding of competitiveness that is indicative of commerciality. Whether they are collecting or non-collecting institutions, museums and other nonprofit art organizations are contextualizing institutions in theory that are a part of the discourse setting infrastructure of the art industry. The value they deliver to the public is the opportunity to see artworks in context, an activity that would be prohibitively expensive for most people if only for the curating and art shipping costs, let alone the cost of, and access to, the artworks themselves. Indeed, in the commercial market, generally there may be no way to view an artwork after it is sold into a collection, in light of the strong norm disfavoring resale and the lack of public information about the location and owners of artworks. In effect, but for nonprofit art organizations' efforts in curating and coordinating exhibitions, art would be largely inaccessible and unaffordable to the public. A museum admission ticket enables viewing of many artworks for a fraction of what it would cost to own artworks as a private collector.

The for-profit private collector counterpart analogy breaks down, however, if the artworks are for sale.<sup>214</sup> Even when nonprofit art organizations are not directly selling a work, simply hosting an exhibition can lead to sales. Every artwork loan is potentially a sale and can lead to establishing a consignment relationship with the lending collector. Also, exhibitions help galleries cultivate relationships with artists or estates that galleries

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<sup>211</sup> *Plumstead Theatre Soc., Inc. v. Comm'r*, 74 T.C. 1324 (1980), *aff'd* 675 F.2d 244 (9th Cir. 1982).

<sup>212</sup> *GRAW*, *supra* note 2, at 92 (stating that the greater the success in “preserving art’s reputation as . . . more than objects of speculation – which they really are—the greater the positive impact on [the] business” of selling art”).

<sup>213</sup> *Living Faith, Inc.*, 950 F.2d at 373; *B.S.W. Group, Inc. v. Comm'r*, 70 T.C. 352, 359 (1978).

<sup>214</sup> Museums are generally prevented from selling their collections on account of strict deaccessioning policies and norms. However, artworks that are loaned to a museum by a gallery or a collector are not bound by such museum policies.

hope to ultimately represent.<sup>215</sup> While this is the case in any exhibition facilitated, even if not financially supported, by a gallery, it is even truer when the gallery sponsoring the exhibition has negotiated for advertising credits and other sponsorship rights that help them make sales. In this sense, gallery-supported art exhibitions that take place at art museums are the functional equivalents of temporary, for-profit pop-up galleries, with the gallery's donation to the art museum best understood as rent for the period of the pop-up rather than a gratuitous gift. In this case, the applicable counterpart to a nonprofit art organization is not a private collector but rather a gallery,<sup>216</sup> which exhibits works at no cost to the viewing public to solicit sales. As an increasing number of galleries are hosting "museum quality gallery shows," this alternative analogy becomes even more appropriate.

The remaining factors used in evaluating the presence of competition, and thus commerciality, weigh against the exempt status of nonprofit art organizations. Nonprofit art organizations undertake significant advertising of gallery-supported museum exhibitions—typically paid for by the gallery itself as a condition of its sponsorship. Many of the museums hosting gallery-supported art exhibitions are also located near for-profit galleries; even if the exhibitions travel, they often go to museums in cities with significant numbers of commercial galleries and not remote locations lacking in the availability of commercially or non-commercially exhibited artwork. For example, the ©MURAKAMI exhibition traveled from MOCA to the Brooklyn Museum of Art in New York; the Museum für Moderne Kunst in Frankfurt; and lastly the Guggenheim Museum Bilbao, Spain. Each such city is a significant art center with some of the highest concentrations of galleries in their respective markets.

All three aspects that assess competition plausibly support that nonprofit art organizations hosting gallery-supported art exhibitions do so in a commercial manner that competes with other for-profit galleries—specifically, other for-profit galleries that do not have the benefit of the hosting tax-exempt exhibitions. In addition, the factors evaluating a gallery-supported art exhibition's profitability and commercial hue are also indicative of commerciality. While no precedent directly supports a definitive finding that for-profit gallery sponsorship of nonprofit art museum exhibitions is commercial, it is not a question that the IRS or courts have precisely considered to date. In a relevant decision, however, the IRS has concluded that sales and exhibition activity conducted by a volunteer committee of a nonprofit art museum is unrelated to an art museum's exempt purpose.<sup>217</sup>

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<sup>215</sup> SHEETS, *supra* note 73.

<sup>216</sup> That private collections are ultimately donated to the collections of existing public museums or to the collections of newly established private operating foundation museums is of no consequence to the analogy.

<sup>217</sup> In Private Letter Ruling 80-40-014, the IRS considered whether insubstantial art sales and rental activities conducted at a nonprofit art museum jeopardized the museum's exempt status. The Women's Committee of the museum operated a gallery, which presented four shows each year, generating gross income constituting less than four percent of the museum's gross income for the year in question. All such income from the operation of the gallery was used exclusively for the benefit of the museum. The IRS found that the gallery's activities served the private interest of artists, rejecting the museum's contention that the gallery's operation substantially related to the museum's exempt purpose. Because the gallery's activities were insubstantial in comparison to the museum's primary activities, however, the IRS concluded the museum was still operated exclusively for exempt purposes. P.L.R. 80-40-014 (July 9, 1980).

Even if gallery-supported art exhibitions are commercial, they may not necessarily undermine exempt status entirely, provided that they are insubstantial in nature. Instead, insubstantial commercial activities are subject to the UBIT as previously discussed. One IRS decision suggested that insubstantial gallery sales and rental activities conducted at a nonprofit art museum did not jeopardize the museum's exempt status, but potentially could be subject to the UBIT as a separate revenue stream under the fragmentation rule.<sup>218</sup> Alternatively, it is conceivable that gallery donations provided to a museum in support of an exhibition of its artists might be considered unrelated business income as a "substantial return benefit," if a gallery's sponsorship was not considered to be a "qualified sponsorship payment," which does not generate unrelated business income.<sup>219</sup> "Qualified sponsorship payments" are excluded from the unrelated business income of exempt organizations when there is no arrangement or expectation that the payor of the sponsorship will receive a "substantial return benefit" for the payment, other than the use or acknowledgement of the name or logo (or product lines) of the payor's trade or business in connection with the tax-exempt organization's activities.<sup>220</sup> The benefits enumerated by the IRS in its interpretive guidance that might constitute a "substantial return benefit" are comprehensive in scope: among others, advertising, intellectual property rights, goods, services and "other privileges."<sup>221</sup> While the IRS has applied these rules to art museums and other arts organizations in illustrative examples included in its binding interpretive guidance,<sup>222</sup> these enumerated benefits have not been interpreted to capture the significant benefits that galleries receive from an exhibition it sponsors at an art museum.

Specifically, the IRS has overlooked benefits to galleries from exhibitions they sponsor at museums including: the space in which the exhibition takes place; the costs of installing the exhibition; the curatorial services of the staff in arranging the exhibition; the connections to potential purchasers of an artist's works that would otherwise be facilitated by art consultants in private art transactions; and the most valuable benefit of all, the appreciation in value of an artist's works, both those shown in the exhibition or others in the artist's oeuvre. Especially when gallery-sponsored exhibitions take place at major art museums, such appreciation can be significant, resulting from an artwork's more varied provenance as a result of appearing in the show, and the increased esteem of the artist due to his or her appearance of the exhibition and its inclusion an additional line on the artists' curriculum vitae. Establishing the exhibition as the cause of such appreciation could be accomplished by using the expertise of art valuation experts before and after an exhibition. To date, however, this appreciation has not been measured or otherwise considered to constitute an "other privilege" to the sponsoring gallery under the

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<sup>218</sup> *Id.*

<sup>219</sup> I.R.C. § 513(i)(1). A "substantial return payment" is any benefit other than (a) goods, services or other benefits of insubstantial benefits that are disregarded under Treas. Reg. § 1.1513-4(c)(2)(ii) or (b) a use or acknowledgement described in Treas. Reg. § 1.1513-4(c)(2)(iv). Treas. Reg. § 1.513-4(c)(2)(i).

<sup>220</sup> I.R.C. § 513(i)(2)(A).

<sup>221</sup> Benefits may include advertising, an exclusive provider arrangement, certain goods, facilities, services or other privileges, and an exclusive or nonexclusive right to use an intangible asset (*e.g.*, trademark, patent, logo, or designation) of the exempt organization. Treas. Reg. § 1.1513-4(c)(2)(iii).

<sup>222</sup> Treas. Reg. 1.513-4(c)(2)(iii), Illustration N (describing how a dinner provided to sponsors of an art exhibition would be considered a substantial return benefit); Treas. Reg. § 1.1513-4(f), Illustration T (describing how a symphony orchestra's promotion of a sponsor's business in the symphony's program guide and complimentary tickets to a symphony show are substantial benefits).



“substantial return benefit” rules. Because appreciation, if any, benefitting a sponsoring gallery is not considered to be a “substantial return benefit,” the result is that the amount of the gallery donation that is taxable to the art museum as unrelated business income is reduced or entirely eliminated.

In any case, whether gallery-supported art exhibitions generate unrelated business income or not is unlikely to have a significant deterrence effect upon their continuation. Even if profit were defined expansively to include not only gallery donations but also admission ticket revenues and even grants received because of successful attendance numbers at gallery-supported exhibitions, there likely would be little or no “profit” subject to the UBIT. Museums could deduct all business expenses and proportionate overhead directly attributable to the gallery-supported exhibition, leaving little revenue to tax. A review of recent museum unrelated business tax reporting on Form 990-T confirms this outcome,<sup>223</sup> and there is little reason to think that characterizing gallery donations as additional unrelated business income would change the current practice.

#### B. Lack of Self-Discipline

The art industry demonstrates a near total lack of industry self-discipline with respect to the permissibility of gallery-supported museum exhibitions. Among the publicly available written guidelines reviewed, no self-regulatory museum association and, with rare exception, no individual museum specifically prohibits donations made by galleries, as a general matter or specifically with respect to underwriting the direct costs of an exhibition. Gallery-supported art exhibitions are thus largely permissible under individual museum and other industry association guidelines. Even if museums or the art industry adopted such guidelines, the absence of meaningful enforcement mechanisms fail to provide confidence that museums would observe them. For example, following the AAMD’s 2014 sanction of the Delaware Art Museum for its deaccession of several artworks, the Delaware Art Museum nonetheless collaborated with an AAMD-member – the director of the Smithsonian American Art Museum no less.<sup>224</sup> Even if AAMD members honor sanctions, they may not be sufficiently severe to deter violations, such as in the case of the two-year sanction for the National Academy Museum.<sup>225</sup>

#### C. Cooperation is Currently the Only Option

The art industry demonstrates self-awareness of the potential for conflict that gallery-supported museum exhibitions present. For example, the Whitney Museum of American Art did not allow Robert Morris to arbitrage art with the museum’s funds and his insider knowledge—even for the museum’s benefit and not his own—as proposed for

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<sup>223</sup> See, e.g., ART INSTITUTE OF CHICAGO, FORM 990-T, EXEMPT ORGANIZATION BUSINESS INCOME TAX RETURN (2015).

<sup>224</sup> *Our America: The Latino Presence in American Art*, DEL. ART MUSEUM, <http://www.delart.org/exhibits/our-america-the-latino-presence-in-american-art/> [perma.cc/VJQ4-GLDW] (last visited Jul 23, 2016); *Members*, ASS’N OF ART MUSEUM DIRECTORS, <https://aamd.org/our-members/members> [perma.cc/YRE2-R9GB] (last visited July 23, 2016).

<sup>225</sup> NATIONAL ACADEMY MUSEUM, NATIONAL ACADEMY ON THE SUSPENSION OF SANCTIONS BY AAMD (Oct. 18, 2010), <http://www.nationalacademy.org/wp-content/uploads/2012/08/National-Academy-on-Suspension-of-Sanctions-by-AAMD.pdf> [perma.cc/S87P-SNH2] (last visited July 23, 2016); Carolina Miranda, *Museums behaving badly: Are sanctions too little, too late?*, L.A. TIMES (June 21, 2014), <http://www.latimes.com/entertainment/arts/miranda/la-et-cam-museums-behaving-20140619-column.html> [perma.cc/MU43-HMHS].

his piece *Money* (1969).<sup>226</sup> Just two years later, however, the art world demonstrated that the “market casts a long shadow reaching into the economy-free zone of the public museum” with Hans Haacke’s *Shapolsky et al. Manhattan Real Estate Holdings, A Real Time Social System, as of May 1, 1971* (1971).<sup>227</sup> The artwork was 142 photographs of the properties owned by a well-known New York slumlord, and was to be presented at the Guggenheim until its exhibition was cancelled in light of the show’s political and economic overtones. More recently, the subject of several artworks has critically addressed hybrid, conflicting roles within the art industry. Andrea Fraser’s performance art pieces *Official Welcome* (2001) and *Untitled* (2003) have juxtaposed the characters of critic, artist, curator, and collector, and Bill Powhida’s aforementioned work *How the New Museum Committed Suicide with Banality* (2009) directly addressed one museum-related dealer’s relationship to New Museum-exhibited artists.

However, norms have not yet evolved to set limits on gallery-supported art exhibitions. This persistence is at least partially attributable to the art industry norms discussed in Part III that do not frown upon, and even encourage, cooperation of the sort that would be considered questionable in other contexts. In addition, no other option exists in the art market’s current configuration but close cooperation. Museums have always had to work with galleries to present complete exhibitions that entailed borrowing works from private collector’s collections. Art transactions are not public knowledge, and therefore museums must rely upon galleries in order to identify collectors and coordinate artwork loans. Closer cooperation has occurred as nonprofit art organizations have turned to galleries for financial support as well, in light of the declines in government grants, private donations from individuals, and corporate sponsors. Not presenting high profile exhibitions that require significant artwork loans and financial resources has not seemed to be a viable option either, as these productions maintain the cultural legitimacy that give museums the power to execute their function in the first place.

Existing legal standards have not yet been applied to current market practices to directly confront for-profit galleries’ funding of exhibitions presented by nonprofit art museums. Industry self-regulation also has not evolved to address gallery-supported art exhibitions. The result further exacerbates an already limited number of genuinely noncommercial art exhibition spaces that can show art free from market pressures.<sup>228</sup> Accordingly, any attempt to restrict gallery-supported art exhibitions must address the ultimate causes of the practice itself as well as industry norms. Regulation that is insensitive to context is likely to be ill-suited and distorting in the best case and ignored and ineffective in the worst case.

## V. RECOMMENDATIONS AND CONCLUSION

Analysis of the laws, self-regulatory guidance, and industry norms reveals that there are a number of possible responses to address the problem of gallery-supported museum exhibitions.

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<sup>226</sup> GRAW, *supra* note 2, at 211.

<sup>227</sup> *Id.* at 202.

<sup>228</sup> *But see* Pogrebin, *supra* note 65 (describing the proliferation of temporary noncommercial artist spaces in artists’ homes).

### A. Structural Changes to the Institutional and Regulatory Framework

At one end of the spectrum is structural overhaul of the existing regime to address the causes that lead museums to seek galleries' financial support. At its most extreme, such response might entail direct public funding for the arts—a highly improbable proposal in light of a recent proposal to eliminate the National Endowment for the Arts.<sup>229</sup> Alternatively, structural change within the facilitation model for supporting the arts that the United States currently uses might look like relaxation of rules that would permit greater indirect funding to artists. For example, the IRS could reverse its current position that nonprofit galleries' compensation of artists for their artworks do not constitute private benefit but rather reasonable compensation. This reversal would be consistent with the position of the IRS that other contexts, such as nonprofit health care or higher education, do not require service providers (in each example, physicians and professors) to work for free. The narrowest structural response would target the art industry with special rules within tax law—for example, establishing better, objective standards for the IRS to evaluate the process by which nonprofit art organizations select programming. Unless such standards were carefully crafted to focus solely on curatorial methods, one drawback of this approach might be that it all but compels the IRS to judge the merits of artwork, which has proven problematic in other areas of law, such as copyright.<sup>230</sup> This response also might create further doctrinal chaos in the already muddled areas of private benefit and commerciality, so modifying or augmenting the law in this way may be undesirable.

Effective structural reform addressing gallery-sponsored art exhibitions should also comprehensively contemplate the panoply of problematic practices—in the art world and beyond—that raise the same or similar issues in order to foster a cohesive regulatory scheme. These practices include sponsorship of museum programming by artists or private collectors of artworks, such as when Kakai Kiki, the artist collective-slash-gallery started by Murakami, sponsored an exhibit of one of its own artists,<sup>231</sup> or when the private collectors who owned Alexander Calder's famous Flying Fish mobile sponsored its exhibition only a few years before its record-shattering auction at Christie's for nearly \$26 million.<sup>232</sup> Examination of the role of for-profit sponsorship at nonprofits may even extend to programming outside of art museums, like a hypothetical "Finding Nemo Day" sponsored by Disney at a nonprofit public aquarium or paid product placement in television programs and movies. Similar to the fact-driven approach taken in this Article, each of these context demands careful scrutiny before blanket curtailment. As Professor

<sup>229</sup> Eileen Kinsella, *Donald Trump's Newly Released 2018 Budget Calls for Eliminating the NEA*, ARTNET NEWS (May 23, 2017), <https://news.artnet.com/art-world/trump-budget-proposes-steep-cuts-to-arts-funding-969641> [<https://perma.cc/CXT9-MKU2>].

<sup>230</sup> See *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239 (1903); see generally Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935 (2000).

<sup>231</sup> SEATTLE ART MUSEUM, *Past Exhibitions*, <http://www.seattleartmuseum.org/exhibitions/liveon> [<https://perma.cc/DH3A-ELDQ>] (last visited Nov. 10, 2017); Kaikai Kiki Co., Ltd., *Artists: Mr.*, <http://english.kaikaikiki.co.jp/artists/list/C7/> [<https://perma.cc/3YRA-BJGG>] (last visited Nov. 10, 2017).

<sup>232</sup> Juan Perez, Jr., *Art collection by Chicago couple fetches millions at auction*, CHI. TRIBUNE (May 14, 2014), [http://articles.chicagotribune.com/2014-05-14/news/chi-art-collection-by-chicago-couple-fetches-millions-at-auction-20140514\\_1\\_art-collection-art-institute-wayne-thiebaud](http://articles.chicagotribune.com/2014-05-14/news/chi-art-collection-by-chicago-couple-fetches-millions-at-auction-20140514_1_art-collection-art-institute-wayne-thiebaud) [<https://perma.cc/U7QR-LFF9>]; MUSEUM OF CONTEMPORARY ART CHICAGO, *Past Exhibitions: Alexander Calder and Contemporary Art: Form, Balance, Joy*, <https://mcchicago.org/Exhibitions/2010/Alexander-Calder-And-Contemporary-Art-Form-Balance-Joy> [<https://perma.cc/PM8K-3R7M>] (last visited Nov. 10, 2017).

Zahr Said points out in her article, *Embedded Advertising and the Venture Consumer*, this is because sponsorship can have positive effects in certain circumstances, such as when consumers are educated, empowered, and discerning; when product placement improves allocation of costs and risks; and when the additional cash flow provided by “embedded advertising” improves programming quality.<sup>233</sup> These circumstances ultimately do not translate, however, to the realm of gallery-sponsored art exhibitions at museums; at the very least, programming quality is highly subjective and promoting art is an educational activity, and therefore the target “consumer” museum patron is by definition uneducated. However needed structural reform addressing gallery-sponsored art exhibitions at museums may be, any structural change requires proactive policy introductions that are unlikely to take place in the current stalemate political climate.

#### B. Eliminating and Expanding Gallery-Supported Art Exhibitions

Within the existing framework, the challenges most likely to be successful in curbing certain gallery-supported art exhibitions are that they constitute a joint venture in which galleries possess too great of control, therefore obtaining impermissible private benefit; that the preferential consideration for exhibitions, the sponsorship rights they grant to galleries, or both are also impermissible private benefit; or that the gallery-supported art exhibitions are substantial commercial activities that do not further an exempt purpose. The effect of these determinations would likely put an end to museum demand for galleries’ generosity, as it is unlikely that a museum would throw away its valuable exempt status in exchange for any gallery’s financial support.

Eliminating gallery-supported art exhibitions at some nonprofit art organizations would not necessarily eliminate such exhibitions entirely. Similar forms of such exhibitions might continue to take place at galleries, while the profile of some nonprofit art organizations would diverge therefrom—making space for truly non-and anti-commercial exhibitions of art to take place. For the cities that do not have galleries that host museum-quality gallery shows or the smaller-scale museums that do not currently attract gallery-sponsored art exhibitions, there still may be a case for galleries to work with museums to present these shows. In fact, perhaps somewhat counterintuitively, the charitable purpose of promoting art may be better served by encouraging more gallery-sponsored exhibitions to take place in such locations. Doing so could channel more funding for higher quality exhibitions to venues that currently suffer from lower quality programming from lack of financial support. Another possible outcome is that curbing gallery-sponsored art exhibitions in certain circumstances might drive demand for alternative art spaces. To the extent such spaces don’t exist yet, they may crop up to the delight of cities that are currently vying to establish and attract art venues. For example, dealers interested in displaying their artists’ work but that are unable to do so at a museum might invest in infrastructure to do so. These outcomes are consistent with the incentives of federal tax law that seek to promote art through wide dissemination to markets that are otherwise without access.

While ending gallery-supported exhibitions at nonprofit art organizations would represent short-term progress toward the conscious boundary setting for which Professor Isabelle Graw advocates, this solution ultimately does nothing to address the trifold structural causes ultimately driving the need for a boundary. Museums’ lack of funding compels them to seek donations from galleries in the first place. Secondly, museums lack

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<sup>233</sup> See Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. Rev. 99 (2010).

independent access to the critical information exclusively possessed by galleries about culturally important artworks. Even the most extensive permanent museum collections do not contain all the necessary artworks to present a complete thematic exhibition, and therefore museums are unable to produce complete exhibitions without borrowing works from collectors. Galleries fiercely protect this private and proprietary information about their clients, so it is not public information that museums can obtain without a dealer's assistance. Third, the incredibly high prices and market imperialism as of late across all art world institutions compel museums to engage with the market in order to maintain their industry relevance. Museums need to resolve their identity crisis and establish their place in relation to the art market in order to curtail their dependence upon it.

### C. Increased Disclosure about Gallery-Sponsored Art Exhibitions

Currently Form 990 annual informational returns filed by museums do not disclose the identities of donors. Also, there does not seem to be self-regulatory organization guidance requiring that museums post disclosures about the sponsors of exhibits. Increased disclosure could put museum patrons on notice that the artworks they are viewing may be on display for reasons including those unrelated to their merit. Nonetheless, such disclosures are unlikely to be effective in addressing the issues raised by gallery-supported art exhibitions. The issue is not so much disclosure as it is the very fact that sponsored exhibitions are occurring and potentially crowding out others of equal or greater merit but with fewer financial resources to pay-to-play. Therefore, more disclosure is not a responsive reform.

Even if disclosure was nonetheless part of a solution for addressing gallery-sponsored museum exhibitions, its efficacy depends upon its location and audience. The Form 990 informational return is not an effective place to disclose sponsorship; museum patrons are unlikely to dig up nonprofit art museums' tax returns to identify sponsored exhibits a year after they visit a museum when the museum's tax returns are filed and become public. Disclosures juxtaposed with artworks at a gallery-sponsored art exhibition may present yet other limitations. Absent is a "shareholder" base to scrutinize informational returns in the same way that securities disclosures are analyzed by public capital markets, and enforcement of nonprofit laws is lax in light of primary responsibility falling upon state attorney generals and an underfunded federal agency. Further disclosure drawbacks may be the same as those identified in Professor Zahr Said's *Embedded Advertising and the Venture Consumer*, including burdening the museum patron's "immersion interest" and whether or not the consumer even cares.<sup>234</sup> (However, beyond the ways in which embedded advertising in television and movies was distinguished from gallery-supported art exhibitions in the foregoing section, what is at stake in museums—cultural production and preservation—may be greater than television and movies. Among other distinctions, even if the artistic endeavors embodied in television and movies also contribute to culture, television and movies may not share the same cultural function as museums beyond their entertainment function.)

Counterintuitively, mandating disclosure might even increase the benefit to sponsors as free advertising, at the same time that it decreases crayola donations to museums, who often use billing credit as a negotiation chip to increase gift size. There is research demonstrating that sponsors already desire credit for their "altruism" and treat donations as advertising (for example, Professor Vikramaditya Khanna's research

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<sup>234</sup> *Id.*

suggests that corporate social responsibility expenditure mandates may decrease advertising spending).<sup>235</sup>

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The art industry ultimately must reckon with the structural causes of gallery-supported art exhibitions in order to sustain the existence and integrity of art museums in the long-term. Appropriate redress will necessarily be as complex as the cause, and there are no easy solutions. Direct public funding for the arts is likely to take a back seat to other budget priorities in light of fiscal conservatism, a privatization imperative, and other reasons. Promoting market transparency and efficient pricing for a more well-functioning art market are goals that already have significant support and therefore may resonate more broadly. However, the devil is in the details with respect to developing and implementing an appropriate art market regulatory apparatus. The effort required to do so would be worthwhile in light of the importance of museums, and art and culture more broadly, to our society. Our society as a whole should care about museums, because they are where we express, understand, and negotiate our cultural identities and relevance to one another. We want institutions responsible for something as important as cultural preservation to be inclusive and protected from self-serving elitism that perpetuates cultural dominance.

Finally, addressing these structural issues provides an opportunity to reflect upon what it means to promote art responsibly, especially in an age of burgeoning cultural production, shrinking art organization budgets and programming, and increasingly inequitable access to art. How can we restructure the provision of resources and power to museums in light of financial stress upon art organizations more broadly, as well as wealth and social inequality in general? This is part of a broader conversation about access to publicly funded resources, and how to negotiate growing demands upon them from an increasingly diverse general public with varying needs, at the same time that such resources become more limited. What is public? What is private? What level of habitability do we want of our public cultural life, and how low can diversity in the arts go before promotion of arts instead becomes the reproduction of power and privilege?<sup>236</sup> In light of the importance of art to culture and community cohesion, we want to answer this question proactively, and not let the market decide for us.

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<sup>235</sup> Dhammika Dharmapala & Vikramaditya Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013* 4 (Univ. Of Chicago Pub. Law & Legal Theory Working Papers, Paper No. 601, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2862714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862714) [<https://perma.cc/93XM-3QZP>] (analyzing findings of recently mandated corporate responsibility in India to suggest substitution between corporate social responsibility spending and advertising).

<sup>236</sup> See Holland Cotter, *Making Museums Moral Again*, N. Y. TIMES (Mar. 17, 2016), [http://www.nytimes.com/2016/03/17/arts/design/making-museums-moral-again.html?\\_r=0](http://www.nytimes.com/2016/03/17/arts/design/making-museums-moral-again.html?_r=0) [[perma.cc/R4V7-CTMU](https://perma.cc/R4V7-CTMU)] (arguing that museums should show more socially just art).