

## Art and Money Laundering

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The potential role of high-end art and antiquities in money laundering schemes has attracted increasing attention over the last several years, particularly as the prices for such objects steadily rise and a tightening global enforcement and regulatory net has rendered other possible avenues for money laundering increasingly less attractive. The effort to subject U.S. dealers in art and antiquities to Anti-Money-Laundering (“AML”) obligations recently has gained new life.

As we [blogged](#), the House Financial Services Committee just [released three proposed bills](#) to codify many of the reform ideas that have been swirling around the Bank Secrecy Act (“BSA”) and AML and Combating the Financing of Terrorism (“CFT”) laws. One of the bills — entitled as the [“To make reforms to the Federal Bank Secrecy Act and anti-money laundering laws, and for other purposes”](#) — catalogues various detailed provisions seeking to reform the BSA and AML laws. Nestled amidst all of the other, generally higher-profile proposals (such as the creation of a BSA whistleblower program), one short section of this bill simply expands the list of defined “financial institutions” covered by the BSA to include “dealers in art or antiquities,” and then states that the Secretary of the Treasury shall issue implementing regulations within 180 days of the bill’s enactment.

Regardless of whether this provision ultimately is enacted, the underlying issue will persist. This post discusses some of the general concerns that the art and antiquities world can be misused as a conduit for dirty money. We then discuss the [AML Standards for Art Market Operators](#) proposed by the [Basel Institute on Governance](#), and similar standards set forth by the [Responsible Art Market](#), both of which attempt to set forth a framework for those in the business of trading art to mitigate their money laundering risks.

### ***An Ideal Vehicle for Laundering Money?***

Stories of art and money laundering tend to be media friendly, and often involve the wealthy behaving poorly. In [one notorious case](#), the Department of Justice (“DOJ”) seized, via a civil forfeiture action, Jean Michel Basquiat’s 1981 painting, [Hannibal](#). This work — later returned to Brazil by the DOJ — had been smuggled into the U.S. by Edemar Cid Ferreira, a former Brazilian banker who was convicted of money laundering and other offenses, and who allegedly converted some of his laundered proceeds into a significant art collection. [According to the DOJ](#), although [Hannibal](#) had been appraised at a value of \$8 million, it had been smuggled by Ferreira into the U.S. from Brazil, via the Netherlands, with false shipping invoices stating that the contents of the shipment were worth \$100. Other stories provide less genteel tales of drug cartels, terrorist organizations and other criminal syndicates financing themselves through [systemic looting and the illicit antiquities trade](#).

Art is an attractive vehicle to launder money. It can be hidden or smuggled. Transactions often are private, and prices can be subjective and manipulated — as well as extremely high. According to [The Globe and Mail](#):

Once purchased, the art can disappear from view for years, even decades. A lot of the art bought at auctions goes to freeports – ultra-secure warehouses for the collections of millionaires and billionaires, ranging from Picassos and gold to vintage Ferraris and fine wine. The freeports, which exist in Switzerland, Luxembourg and Singapore, offer a variety of tax advantages because the goods stored in them are technically in transit. The Economist magazine reported that the freeport near the Geneva airport alone is thought to hold \$100 billion (U.S.) of art.

Once inside the freeport, the art can be sold privately and anonymously to other buyers. The art need never leave the warehouse after the private sale is completed.

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Further, and as noted, other traditional vehicles for laundering money have become less attractive, thereby driving those who need a mechanism to launder large sums into the arms of the art world. As we repeatedly have [blogged](#), one of the most time-honored and relatively convenient vehicles for laundering — real estate — is under intense scrutiny and now is subject in the U.S. to the Financial Crimes Enforcement Network (“FinCEN”)’s [ongoing](#) Geographic Targeting Orders (these require U.S. title insurance companies in many parts of the U.S. to identify the natural persons behind legal entities used in purchases of residential real estate involving \$300,000 or more and performed without a bank loan or similar form of external financing).

Of course, certain countries already impose AML regulations on the art world. The European Union Commission issued its [5th Anti-Money Laundering Directive](#) in June 2018, which must be implemented by Member States by January 2020, and which in part expands its coverage of “obliged entities” to persons trading in art, acting as intermediaries in the trade of art, or storing art in freeports, if the value of the transaction or a group of linked transactions equals €10,000 or more. In the United States, although the BSA already applies to [dealers in precious metals, stones and jewels](#), and thereby requires them to file Suspicious Activity Reports and comply with other AML obligations, no such rules currently apply to U.S. dealers in art.

If the BSA is extended to apply to dealers in art and antiques, FinCEN can expect a robust notice and comment period for the implementing regulations. Further, when proposing such regulations, FinCEN might draw upon some existing AML guidelines for the art trade, including those from two not-for-profit groups — one independent, the other supported by industry. We explore those guidelines in the rest of this post.

Of course, beyond AML-related process concerns, any art dealer — just like any business person — always must remember that just about any financial transaction that involves proceeds *known* to have originated from illegal activity represents a criminal money laundering offense. Stated otherwise, even if the BSA is not expanded to include dealers in art and antiques, those in the U.S. art industry still need to bear in mind, in extreme examples, the omnipresent federal criminal code. Sometimes, the provenance of the funds can be more critical than the provenance of the art.

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## ***The Basel Institute Standards***

The [AML Standards for Art Market Operators](#) (“AML Standards”) are set forth by the Basel Institute on Governance, an independent not-for-profit organization. Not surprisingly, the AML Standards adopt a “risk based” approach to establishing measures to mitigate money laundering risks, and further note that “[s]mall businesses may not have the resources to address money-laundering risks in the same way that large auction houses or major dealers and galleries will have, and may have a different risk exposure.” The AML Standards are intended to apply to everyone trading in art objects, and intermediaries between buyers and sellers. They also suggest that service industries supporting the trade in art objects that are already subject to AML laws, like financial institutions, should identify their clients and customers in the art trade “as higher risk as long as there are no internationally applicable standards.”

According to the AML Standards, a risk-based approach will address three risk categories: the client’s identity; the provenance of the art object; and — importantly — the origin of the buyer’s funds involved in the transaction. The art dealer should establish a risk profile which considers the following non-exhaustive list:

- Countries where sales are conducted;
- Jurisdictions where the art dealer obtains its inventory;
- Markets;
- Delivery channels;
- Services offered to clients;
- Types of transactions;
- Client profiles;
- The location of contracting parties;
- The source of funds;
- Financing methods; and
- The value of the art objects.

Consistent with general AML principles, the AML Standards stress that beneficial ownership may be obscured behind multiple layers of intermediaries, such as shell companies or offshore companies involving trusts. The AML Standards further provide a list of possible red flags for identifying increased risks of money laundering presented by a client that:

- Is evasive or reluctant to provide adequate information relating to their identity or property or provides information which appears to be false;

- Insists on paying in cash (perhaps with a de minimis limit) or anonymous credit or cash cards;
- Asks detailed questions about procedures for reporting suspicious activity and/or financial matters to tax authorities;
- Knowingly wishes to sell at an artificially low or inflated price;
- Makes multiple low value cash payments for a single or connected transactions;
- Suggests unusually complicated structures for achieving a purchase or sale;
- Is a Politically Exposed Person (PEP) or closely connected to a PEP, e.g. government officials or persons who hold a prominent public function;
- Is known to be (or associated with) a person subject to criminal or regulatory investigation, prosecution or conviction; or
- Lives, operates or banks in a higher risk jurisdiction such as countries where drug trafficking, terrorism and/or corruption are prevalent or where tax and money laundering regulations are less stringent.

Finally, and emphasizing their non-binding nature, the AML Standards urge art dealers to report transactions to the authorities when the “source of funds give rise to grounded suspicions of money laundering and in the absence of plausible explanation.”

### ***The Responsible Art Market Standards***

The [Responsible Art Market](#), or RAM, is an industry-supported not-for-profit organization which describes itself as “[r]aising awareness of risks faced by the art industry and providing practical guidance on establishing and implementing responsible practices to address those risks.” On its website, RAM provides both an [Art Transaction Due Diligence Toolkit](#), as well as [Guidelines on Combatting Money Laundering and Terrorist Financing](#) (“AML Guidelines”). The AML Guidelines are similar to the protocols set forth by the Basel Institute, but provide slightly more concrete detail. They set forth eight basic principles:

Guideline 1 – Do a risk assessment of your business and apply risk based measures;

Guideline 2 – Know and comply with the laws where you are doing business and be alert to “red flags;”

Guideline 3 – Know Your Clients (KYC) and establish their risk profiles – Check for client red flags;

Guideline 4 – Research the artwork, its ownership and provenance – Check for artwork red flags;

Guideline 5 – Know the background and purpose of transaction – Check for transaction red flags;

Guideline 6 – Keep records;

Guideline 7 – Train staff and monitor processes and procedures; and

Guideline 8 – If grounded suspicions exist, know how to act.

When addressing the KYC procedures under Guideline 3, the AML Guidelines explain that establishing a client’s risk profile will require an art business to obtain information on the client; understand the purpose and intended nature of the transaction; and understand the client’s source of wealth and how they acquired their art collection. The AML Guidelines also stress the need to identify beneficial ownership, “even if the contracting client raises confidentiality concerns,” and note that the art business “may also choose to include appropriate warranties and representations in their agreements with their clients to emphasise the importance of this point.” Further, art businesses should perform due diligence on intermediaries, such as art advisors or brokers, acting for one of the parties to a transaction.

When addressing the efforts to establish an artwork’s provenance history and authenticity under Guideline 4, the AML Guidelines provide that “[i]t is important to obtain and publish in any catalogue or sales document as much information as possible about the artwork, including any known provenance,” and to “check major databases of stolen and looted art and obtain any relevant and available legal documents, witness declarations, [and] expert opinions[.]” In addition to a physical examination of the artwork and a technical analysis and dating of the materials used, “[d]ocuments helpful in establishing ownership and provenance include invoices, receipts, dated photographs, insurance records, valuations, official records, exhibition catalogues, invoices for restoration work, diaries, dated newspaper articles, original signed and dated letters.”

The AML Guidelines set forth three basic issues when a dealer seeks to learn the background and purpose of a transaction in order to check for potential red flags under Guideline 5: the purpose of the transaction; the form and structure of the transaction; and the source of funds. The AML Guidelines state:

The Art Business should examine the client’s background and purpose behind the contemplated transaction. For example, are the artworks being sold by the client consistent with what is known about the client’s collection? Is

the level at which the client is selling or buying consistent with their past transactions and what is known about their professional activities and personal wealth? If not, the Art Business may want to ask the client for further information.

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Art Businesses should also consider the form of the transaction, such as whether the transaction is taking place through intermediaries, face to face, entirely via the Internet, over the phone, or by any other similar non face to face means. In some circumstances, depending on the nature, value and/or geographic location of the transaction, enhanced due diligence may be appropriate.

In regards to the critical issue of the source of the funds, the AML Guidelines “encourage” art businesses “to decline payments from a third party who is not their client and buyer of record. If there are legitimate reasons why it is justified for the Art Business to accept payment from a third party, before doing so the Art Business should conduct enhanced due diligence on both their buyer of record and the third party payer[.]” The AML Guidelines also articulate a “preference” for art businesses only “to accept payments from reputable banks in jurisdictions subject to AML regulation and supervision. Such reputable banks and financial institutions are generally subject to a high degree of AML regulation. That said[,] Art Businesses should remain vigilant and not rely entirely on the fact that banks and financial institutions will have carried out the necessary checks and verification to be satisfied that the source of funds is clean.”

Finally, under Guideline 6, the AML Guidelines provides that art businesses must maintain adequate records of their due diligence efforts. Perhaps stating the obvious, but perhaps also implicitly acknowledging the existence of practices by certain dealers, the AML Guidelines observe that “[a]ll documents issued by an Art Business in connection with a transaction (e.g. valuations, sale and purchase agreements, invoices, shipping documents, import / export declarations etc.) should be true, accurate and contemporaneous and represent the honestly held professional opinions of the Art Business.” Likewise, dealers “should refuse all requests from clients to alter, back date, falsify or otherwise provide incomplete or misleading documentation or information relating to a transaction. If there are legitimate reasons for altering a document (e.g. invoicing error etc.) the circumstances and justification should be fully documented and retained on file for future reference and audit.”

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