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## How Free Should a Freeport Be?: Reducing Money Laundering in the Art Market through Freeport Regulation

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# How Free Should a Freeport Be?: Reducing Money Laundering in the Art Market through Freeport Regulation

## ABSTRACT

*The tax incentives that luxury freeports provide have created opportunities for money laundering and other forms of financial crime through the sale of art. The use of such institutions in combination with the anonymity that art transactions allow can create a series of transactions that are difficult to track, making the market ripe for corrupt behavior. Legislation like the Anti-Money Laundering Act, the Bank Secrecy Act, and the Money Laundering Control Act have helped reduce financial crime, but an approach more narrowly tailored to the art market and the freeports that enable its high value sales would further the goals of those statutes.*

*This Note suggests that the United States should adopt a regulatory framework that requires luxury freeport operators to keep lists of freeport contents and contact information that are accessible to law enforcement officers during domestic investigations. Such a policy would reduce financial crime and increase transparency in the art market. The Note also offers suggestions for tax incentives that would increase the public display of privately owned art.*

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Swiss art dealer Yves Bouvier sold billions of dollars' worth of art over the course of his career.<sup>1</sup> He handled sales of works by major artists, including Pablo Picasso, René Magritte, and, most notably and controversially, Leonardo da Vinci.<sup>2</sup> Bouvier negotiated the sale of da Vinci's *Salvator Mundi*, a painting of Jesus Christ of dubious provenance,<sup>3</sup> to Russian billionaire Dmitry Rybolovlev in 2013 for over \$127 million, apparently relying on the conclusions of art experts who deemed the painting a bona fide Renaissance masterwork.<sup>4</sup> Rybolovlev then sold the work a few years later to an unknown buyer, widely believed to be Prince Mohammed bin Salman of Saudi Arabia, for \$450 million.<sup>5</sup>

Despite this sale, Rybolovlev has spent the past several years filing lawsuits against Bouvier and Sotheby's, a major auction house, in both Singapore and Switzerland.<sup>6</sup> He accused Bouvier of fraud and

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1. Kenneth Rapoza, *Billionaire Dmitry Rybolovlev's Lawsuit with Art Dealer Yves Bouvier Puts Sotheby's in Crosshairs*, FORBES (Aug. 8, 2019, 10:36 AM), <https://www.forbes.com/sites/kenrapoza/2019/08/08/billionaire-dmitry-rybolovlevs-lawsuit-with-art-dealer-yves-bouvier-puts-sothebys-in-crosshairs/?sh=18e0243359e1> [https://perma.cc/PU4S-G5DM].

2. *Id.*; Angel Au-Yeung, *The Legal Fight Surrounding the Most Expensive Painting in the World*, FORBES (Dec. 5, 2017, 7:00 AM), <https://www.forbes.com/sites/angelauyeung/2017/12/05/the-legal-fight-surrounding-the-most-expensive-painting-in-the-world-salvator-mundi-dmitry-rybolovlev-yves-bouvier-affair/?sh=395843ca7fc6> [https://perma.cc/PF3H-T2JQ].

3. Rapoza, *supra* note 1.

4. Nina dos Santos, *\$1B Feud Involving Leonardo's 'Salvator Mundi' Reveals Dark Side of the Art World*, CNN, <https://www.cnn.com/style/article/salvator-mundi-scandal-bouvier-rybolovlev-intl/index.html> [https://perma.cc/59WS-HFPM] (June 3, 2021).

5. *Id.*

6. Eileen Kinsella, *Yves Bouvier Declares 'Complete Victory' After a Prosecutor Dismissed Russian Billionaire Dmitry Rybolovlev's Charges Against Him*, ARTNET (Sept. 17, 2021), <https://news.artnet.com/art-world/yves-bouvier-declares-total-victory-dmitry-rybolovlev-2010315> [https://perma.cc/FF36-EQ6Z].

breach of fiduciary duties.<sup>7</sup> Bouvier also faced criminal charges of money laundering and fraud in Switzerland.<sup>8</sup> In late 2021, Swiss authorities dropped the charges against Bouvier, and presently Rybolovlev faces corruption charges in Switzerland, France, and Monaco<sup>9</sup> related to the series of events that journalists now call the “Bouvier Affair.”<sup>10</sup>

The Bouvier Affair has received more press than most cases involving art and money laundering because of da Vinci’s elevated artistic status and the record-setting sale price of *Salvator Mundi*.<sup>11</sup> However, at large, financial crime related to art costs the global market billions of dollars every year,<sup>12</sup> with the annual illicit trade in cultural goods estimated at \$10 billion.<sup>13</sup> Even outside the criminal sector, high-net-worth-individuals (HNWIs) spend massive amounts of money in art transactions.<sup>14</sup> “Deloitte estimates that \$1.62 trillion of HNWI wealth was allocated to art and collectibles in 2016 and projects that this figure will reach \$2.7 trillion by 2026.”<sup>15</sup>

Yves Bouvier’s business as an art dealer, legitimate or otherwise, relied on freeports.<sup>16</sup> Freeports are designated areas of land or large warehouses that tend to be located near major sites of international trade, like New York, Shanghai, and Geneva.<sup>17</sup> As a “freeport storage magnate,” Bouvier facilitated his sales by storing his works in these tax-efficient areas.<sup>18</sup> The key trait of freeports is that items can be brought into freeports and manufactured, stored, or

7. Hili Perlson, *Dmitry Rybolovlev Granted Temporary Injunction in Yves Bouvier Case*, ARTNET (June 22, 2015), <https://news.artnet.com/art-world/dmitri-rybolovlev-yves-bouvier-injunction-310007> [<https://perma.cc/UFM5-Q75A>].

8. Kinsella, *supra* note 6.

9. *Id.*

10. Dos Santos, *supra* note 4.

11. *See id.*

12. *See DDB Paris: UNESCO Reveals the True Price of Art*, THE STABLE (Oct. 22, 2020), <https://www.thestable.com.au/ddb-paris-unesco-reveals-the-true-price-of-art/> [<https://perma.cc/L4MK-7LCN>].

13. *Id.*

14. Oddný Helgadóttir, *The Art of Offshore: Tax Avoidance and Unseen Artworks in the New Luxury Freeports*, COFFERS: EU HORIZON 2020 PROJECT 9 (Apr. 2019), available at <http://coffers.eu/wp-content/uploads/2019/11/D4.7-Case-Study.pdf> [<https://perma.cc/83NW-LFSN>].

15. *Id.*

16. *See* dos Santos, *supra* note 4.

17. *See* Talia Berniker, *Behind Closed Doors: A Look at Freeports*, CTR. FOR ART L. (Nov. 3, 2020), <https://itsartlaw.org/2020/11/03/behind-closed-doors-a-look-at-freeports/> [<https://perma.cc/8GRT-E9LT>].

18. *See id.*; Anny Shaw, *Swiss Freeport King Yves Bouvier Sells Art Storage Company Natural Le Coultre*, THE ART NEWSPAPER (Oct. 26, 2017), <https://www.theartnewspaper.com/2017/10/26/swiss-freeport-king-yves-bouvier-sells-art-storage-company-natural-le-coultre> [<https://perma.cc/EZ9T-Z8K7>].

otherwise handled without the intervention of local customs agencies.<sup>19</sup> There are no import duties on items brought into freeports, so using one often affords major tax incentives.<sup>20</sup>

This Note addresses the lack of regulation of freeports and how that regulatory freedom allows for the proliferation of financial crime, especially money laundering accomplished through the sale of art. Part I reviews the history of freeports, the rise of luxury freeports used to store art and other valuable items, and the ways that individuals exploit freeports for illicit financial gain. Part II examines potential ways to regulate freeports to prevent such crimes from occurring, including the legal regimes of foreign nations and proposed rulemaking in the United States. Part III proposes that Financial Crimes Enforcement Network (FinCEN) issue regulations requiring freeports to keep more detailed documentation of their clients and the art in storage to assist in the investigation of money laundering claims.

## I. BACKGROUND

### A. *History of Freeports and Goals of Freeports in Commerce*

Freeports ease the flow of international business by allowing importers and exporters to move goods from one place to another without having to pay duties on their goods unless the goods leave the freeport and enter a nation's customs territory.<sup>21</sup> Freeports are a sort of "no man's land"<sup>22</sup> but are not a completely regulation-free zone.<sup>23</sup> The laws of the host country generally still apply, and in the United States, federal and state criminal regimes apply as well.<sup>24</sup> Freeport-related laws often aim to create a "more liberal business environment" with their import and export definitions.<sup>25</sup> They allow businesses to take advantage of financial incentives and more permissive labor standards, often in developing countries, hoping to attract investment or other economic activity, while circumnavigating some of the red tape associated with conducting international business.<sup>26</sup>

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19. Berniker, *supra* note 17.

20. *Id.*

21. Susan Tiefenbrun, *U.S. Foreign Trade Zones, Tax-Free Trade Zones of the World, and Their Impact on the U.S. Economy*, 12 J. INT'L BUS. & L. 149, 152 (2013).

22. *See id.* at 153–54.

23. *See* Susan Tiefenbrun, *U.S. Foreign Trade Zones and Chinese Free Trade Zones: A Comparative Analysis*, 14 J. INT'L BUS. & L. 189, 193 (2015).

24. *See id.*

25. Tiefenbrun, *supra* note 21, at 153.

26. *See id.* at 153.

A freeport may provide a center for manufacturing, distribution, processing, or a slew of other business activities.<sup>27</sup> This Note is primarily interested in freeports that play a warehousing role. Freeports are more commonly known as free-trade zones or foreign-trade zones, but because those who work in the art industry tend to use the term “freeport,” this Note follows the same convention.<sup>28</sup>

Freeports are common institutions; more than 3,500 exist today, spanning 135 countries.<sup>29</sup> The concept of the freeport has existed for thousands of years, as ancient Phoenicians designed the concept to promote their trade in the Mediterranean, and the Roman Empire later used freeports to support the imperial economy.<sup>30</sup> Many countries involved in significant global trade have continuously operated freeports since the eighteenth century.<sup>31</sup> The current mode of freeport usage, however, began in the second half of the twentieth century.<sup>32</sup> In 1959, Ireland created the “first modern industrial free zone,” and the United Nations passed resolutions that supported the proliferation of freeports.<sup>33</sup> The resolutions targeted developing countries that often did not have freeports prior to these programs in the 1960s and 1970s.<sup>34</sup> As of 2013, the United States had nearly three hundred freeports, largely meant to promote the export of US goods.<sup>35</sup>

### *B. Legal Framework for Freeports in the United States*

The United States first began to legally oversee domestic freeports with the US Foreign-Trade Zones Act of 1934 (FTZ Act).<sup>36</sup> The FTZ Act came on the heels of the Smoot-Hawley Tariff Act of 1930, a reaction to the poor economic conditions of the Great Depression.<sup>37</sup> Congress passed the Smoot-Hawley Tariff Act, which created high tariffs on imported goods, to “encourage domestic production and consumption” and help the US economy recover.<sup>38</sup> These tariffs led to a decline in the export of US goods, a secondary problem that the FTZ Act

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27. *Id.*  
28. Berniker, *supra* note 17.  
29. Tiefenbrun, *supra* note 21, at 151.  
30. *Id.*  
31. Tiefenbrun, *supra* note 23.  
32. Tiefenbrun, *supra* note 21, at 151.  
33. *Id.*  
34. *Cf. id.*  
35. *Id.* at 154.  
36. Tiefenbrun, *supra* note 23, at 195.  
37. *Id.*  
38. *Id.*

aimed to address by promoting foreign trade and increasing exports from the United States.<sup>39</sup> The FTZ Act created the US Foreign-Trade Zones Board—comprised of the Secretary of Commerce, the Secretary of the Treasury, and the Secretary of the Army—which wrote regulations for freeports with “broad authority.”<sup>40</sup>

Many of the Act’s core principles remain in effect today.<sup>41</sup> Under the FTZ Act,

foreign and domestic merchandise of every description . . . may, without being subject to the customs laws of the United States, except as otherwise provided . . . be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated.<sup>42</sup>

That merchandise only becomes subject to US law once it enters the customs territory of the United States.<sup>43</sup> The Board reserves the right to exclude anything from a freeport if it is “detrimental to public interest, health, or safety.”<sup>44</sup>

Later legislative amendments modified the original FTZ Act.<sup>45</sup> For example, the 1950 Boggs Amendment to the FTZ Act allowed for manufacturing to occur in US freeports,<sup>46</sup> and the 1984 amendment to the FTZ Act exempted property held in freeports from state and local taxes in addition to federal ones.<sup>47</sup> In 2012, executive power drove a change in freeport regulation.<sup>48</sup> Under the Obama administration, the Board changed its regulations to allow for a simpler application process to create subzones within freeports and widen the definition of “production” allowed in freeports.<sup>49</sup> The administration intended these changes to promote domestic manufacturing and export of goods.<sup>50</sup>

39. *Id.*

40. *Id.*

41. *See* United States Foreign Trade Zones Act, 19 U.S.C. § 81(a)–(u).

42. *Id.* § 81(c).

43. *Id.*

44. *Id.* § 81(o).

45. *See, e.g.*, Foreign Trade Zones Act Amendment of 1970, Pub. L. No. 91–271, § 309, 84 Stat. 274, 292; Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948.

46. William G. Kanellis, *Reining in the Foreign Trade Zones Board: Making Foreign Trade Zone Decisions Reflect the Legislative Intent of the Foreign Trade Zones Act of 1934*, 15 NW. J. INT’L L. & BUS. 606, 613 (1995).

47. Tiefenbrun, *supra* note 23, at 197.

48. *See id.* at 198.

49. *Id.*

50. *See* Press Release, White House Off. of the Press Sec’y, *President Obama Takes Actions to Promote American Manufacturing and Increase U.S. Exports at Boeing* (Feb. 17, 2012), available at <https://obamawhitehouse.archives.gov/the-press-office/2012/02/17/president-obama-takes-actions-promote-american-manufacturing-and-increas> [<https://perma.cc/Z74B-HFEV>].

### C. Rise of Luxury Freeports

In the past decade there has been a rise in the number of a subset of freeports known as luxury freeports.<sup>51</sup> Instead of focusing on the goals of most freeports—promoting business, creating spaces for manufacturing and processing, and providing locations for major shipments of imports and exports—luxury freeports tend to be upscale storage facilities.<sup>52</sup> Individuals and companies use luxury freeports to store and sometimes trade valuable goods like art, cars, jewelry, wine, and other collectibles without having to pay duties on such expensive items.<sup>53</sup>

Using these facilities to avoid high tax rates is not necessarily illegal, but it does allow for financial criminals to use the luxury freeports to their advantage.<sup>54</sup> There is a high level of opacity surrounding the contents of any given luxury freeport and transactions in which those contents may be involved, making the criminal code difficult to enforce on the premises.<sup>55</sup> The lack of tax information about those transactions can lead to money laundering and greater difficulty in tracking stolen goods, like art.<sup>56</sup>

Luxury freeports, like all kinds of general freeports, exist all over the world.<sup>57</sup> The most famous one is likely the Geneva Free Port, prominent because of Switzerland's tax-friendly status and proximity to centers of the art market.<sup>58</sup> The Geneva Free Port reportedly houses over one million works of art, although the exact number is unknown because of the secrecy afforded to clients of the freeport.<sup>59</sup>

The United States has several luxury freeports, largely centered in Delaware, another known tax haven.<sup>60</sup> Delaware does not have a

51. See Oddný Helgadóttir, *The New Luxury Freeports: Offshore Storage, Tax Avoidance and 'Invisible Art'*, ENV'T & PLAN. A 1, 2 (Dec. 2020), available at <https://journals.sagepub.com/doi/10.1177/0308518X20972712> [<https://perma.cc/57QD-Y8V7>].

52. See *id.* at 19.

53. *Id.* at 3.

54. *Id.* at 16, 24.

55. *Id.* at 16.

56. See *id.* at 13, 16.

57. See Berniker, *supra* note 17.

58. See *id.*

59. Will Gompertz, *Geneva Free Port: The Greatest Art Collection No-One Can See*, BBC (Dec. 1, 2016), <https://www.bbc.com/news/entertainment-arts-38167501> [<https://perma.cc/KAS6-SBQV>]. For comparison, the National Gallery in London has about 2,300 works in its collection, while the New York City's Museum of Modern Art, known for having a massive collection for a museum, has close to 200,000 works. *Id.*

60. Margie Fishman & Scott Goss, *Delaware Provides Tax Shelter for Multimillion-Dollar Masterpieces*, DEL. ONLINE, <https://www.delawareonline.com/story/insider/2017/09/27/delaware->



sales tax, recently repealed its estate tax, and is close to New York City, another center of the art market.<sup>61</sup> These features make Delaware's luxury freeports, some of which are optimized specifically for art storage, attractive to clients.<sup>62</sup> Major art storage warehouses in the area include Bayshore Fine Art Storage, Crozier Fine Arts, Atelier, and a handful of others, all contained within the Delaware Freeport.<sup>63</sup> New York City also had a luxury freeport focused on the storage of art and other collective items called Arcis, the Latin word for "fortress."<sup>64</sup> Even though New York does not offer the same tax advantages as Delaware, Arcis offered top-of-the-line client service and security as well as proximity to museums, galleries, and people interested in buying and selling art. It was poised for apparent success.<sup>65</sup> However, Arcis closed suddenly in October of 2020, likely because of its astronomical rates and a slowdown of the art business during the COVID-19 pandemic.<sup>66</sup>

Luxury freeports tout discretion as a draw for their clients.<sup>67</sup> According to a director of the Delaware freeports, their clients are a "mix of dealers, pure investors, museums, inheritors of art both local and abroad, and collectors who own multiple homes with limited wall space."<sup>68</sup> The directors keep names of clients confidential.<sup>69</sup> The buildings themselves are nondescript warehouses that do not suggest the enormous value of their contents.<sup>70</sup> Biometric readers, steel reinforcements, video monitoring, private vaults, and other security measures offer protection.<sup>71</sup>

For example, if a New Yorker buys a painting for \$10 million, the financial incentives that freeports offer can allow the buyer to save nearly \$900,000 in taxes and other fees if the buyer ships the work

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provides-tax-shelter-multi-million-dollar-masterpieces/678385001/ [https://perma.cc/XDU2-DND3] (Sept. 27, 2017, 4:33 PM).

61. *Id.*

62. *See id.*

63. *Id.*

64. Atossa Araxia Abrahamian, *Inside the New "Fortress" in New York City That's Housing Millions of Dollars of Art*, ARTSY (May 29, 2018, 9:01 AM), <https://www.artsy.net/article/artsy-editorial-harlem-warehouse-millions-dollars-worth-art> [https://perma.cc/7BN7-YUME].

65. Ursula Sommer, *Demand for New York's First Freeport Facility Steps Up*, ART NEWSPAPER (Jan. 2, 2020), <https://www.theartnewspaper.com/2020/01/02/demand-for-new-yorks-first-freeport-facility-steps-up> [https://perma.cc/46X2-MV25].

66. *See* Eileen Kinsella, *New York's Ultra-High-Tech Art Warehouse and Freeport ARCIS is Abruptly Closing After Just Two Years*, ARTNET (Sept. 2, 2020), <https://news.artnet.com/art-world/arcis-warehouse-shutting-down-1905756> [https://perma.cc/X5FX-6J87].

67. Fishman & Goss, *supra* note 60.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

immediately to Delaware, because as long as the painting is in the freeport, it is still “in transit.”<sup>72</sup> Duties and taxes do not apply until the painting leaves the freeport.<sup>73</sup> In theory, if that buyer then returns the work to New York from its storage place in Delaware, she must pay the sales tax once the work re-enters the state.<sup>74</sup> That payment, though, depends mostly on an “honor system,” and exploiting that system is a common practice.<sup>75</sup>

#### *D. Role of Freeports in Financial Crime*

Freeports often facilitate tax avoidance with the same features that make them attractive to potential clients: privacy, high security, and already-low tax rates.<sup>76</sup> That environment combined with the art business, which a prominent tax attorney has called the business sector most “ripe with fraud and misconduct,” has led to major opportunities for crime.<sup>77</sup> Freeports allow art dealers to conceal which works they actually own or can access, leading to deceptive sales.<sup>78</sup> Moreover, the art market is already largely unregulated.<sup>79</sup> It allows for anonymous buyers, anonymous sellers, undisclosed sale prices, and other veils of secrecy that, combined with the privacy afforded to freeport clients, create opacity that can be difficult for law enforcement officers to penetrate.<sup>80</sup> Even legitimate auction houses like Christie’s and Sotheby’s can become embroiled in nefarious deals, as the Bouvier Affair demonstrates.<sup>81</sup> In that instance, the plaintiff accused Sotheby’s of knowingly allowing Bouvier to mark up the prices of paintings by millions of dollars.<sup>82</sup> These paintings were stored in freeports and were therefore largely inaccessible to art historians and experts.<sup>83</sup>

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72. *Id.*; see Graham Bowley & Doreen Carvajal, *One of the World’s Greatest Art Collections Hides Behind This Fence*, N.Y. TIMES (May 28, 2016), <https://www.nytimes.com/2016/05/29/arts/design/one-of-the-worlds-greatest-art-collections-hides-behind-this-fence.html> [<https://perma.cc/K6LF-DEVA>].

73. *See* Bowley & Carvajal, *supra* note 72.

74. *See id.*

75. *Id.*

76. *See* Helgadóttir, *supra* note 14, at 3.

77. Erik J. Stapper, *The Art Market, an Industry in Need of Regulation?*, 26 TRS. & TRS. 86, 86 (2020).

78. *See id.*

79. *Id.* at 88.

80. *See id.*

81. *Id.*

82. *Id.*

83. *See* Berniker, *supra* note 17.

Freeports specializing in art storage also inadvertently play a role in money laundering, or the “act of making money that comes from one source look like it comes from another.”<sup>84</sup> Criminals tend to use this practice to “funnel” money earned from illegal activity through legal businesses, adding a layer of removal between the criminal and the crime itself.<sup>85</sup> Often, the money makes several stops along the way in an attempt to make the transactions more difficult to trace.<sup>86</sup> Congress noticed how often the art market plays a role in money laundering schemes and enacted the Anti-Money Laundering Act of 2020 (AML Act), passed on January 1, 2021, over President Trump’s veto.<sup>87</sup> Congress found that individuals from nations against which the United States had imposed sanctions were able to circumnavigate such sanctions via art transactions.<sup>88</sup> The example case study from the Senate Report illustrates the process by describing the illicit activities of several Russian oligarchs within the art market.<sup>89</sup>

The Senate Report notes the difficulty of tracing transactions in the art market because of frequently incomplete provenance records and the voluntary nature of the anti-money laundering policies of major auction houses.<sup>90</sup> The fragmentary provenance record of *Salvator Mundi*, for example, led art historians to debate whether da Vinci himself, his assistants, or someone else inspired by da Vinci’s style created the painting.<sup>91</sup> Regardless of the artist’s identity, experts estimate that the painting dates to around 1500.<sup>92</sup> Various members of the royal families of England and France bought and sold the work for the rest of the sixteenth century, but after that, the chain of ownership

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84. Kathryn Reed Edge, *Bank on It: Money Laundering: It’s a Dirty Business*, TENN. BAR ASS’N: BLOG, Dec. 2013, <https://www.tba.org/index.cfm?pg=LawBlog&blAction=showEntry&blogEntry=15969> [<https://perma.cc/UU5U-A8MX>].

85. *Id.*

86. *Id.*

87. See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 116TH CONG., *THE ART INDUSTRY AND U.S. POLICIES THAT UNDERMINE SANCTIONS* 1 (July 29, 2020) [hereinafter ART INDUSTRY], available at <https://sgp.fas.org/crs/misc/RL33315.pdf> [<https://perma.cc/6ZC8-R7HT>]; Randall Mikkelsen, *US Tightens Anti-Money Laundering Measures in Legislation Approved Over Trump’s Veto*, THOMSON REUTERS (Jan. 8, 2021), <https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/anti-money-laundering-legislation/> [<https://perma.cc/NNY5-VXPN>].

88. ART INDUSTRY, *supra* note 87.

89. *Id.*

90. See *id.* at 3.

91. Dos Santos, *supra* note 4.

92. Isis Davis-Marks, *New Research Suggests ‘Salvator Mundi’ Originally Looked Completely Different*, SMITHSONIAN MAG. (Feb. 4, 2021), <https://www.smithsonianmag.com/smart-news/new-research-suggests-portions-salvator-mundi-were-not-part-leonardo-da-vincis-original-design-180976914/> [<https://perma.cc/DL2M-GHN8>].

is unclear.<sup>93</sup> Even then, exactly which branches of the family owned the works is also unknown.<sup>94</sup> A group of art dealers purchased the work in 2005 for under \$10,000 from the estate sale of a Louisiana man who supposedly bought it in Europe.<sup>95</sup> Several years later, Bouvier bought it, leading to the series of events described in the Introduction above.<sup>96</sup>

Neither the AML Act nor any of the related regulation has addressed the role that freeports play in these transactions. The following Part will address various ways that the United States could better prevent financial crime that occurs through the art market by imposing rules on freeports.

## II. ANALYSIS

### A. Current Approach of the United States

The Money Laundering Control Act (MLCA) is the federal statute that ultimately defines money laundering as a crime.<sup>97</sup> The MLCA defines four categories of money laundering, each of which has a different purpose: promotion of unlawful activity, tax evasion, concealing proceeds of illegal activity, and avoiding a reporting requirement.<sup>98</sup> The most relevant of these categories in relation to art is concealment, using the purchase and sale of art to disguise the fact that the funds were involved in criminal activity.<sup>99</sup> The MLCA has an element of “knowing” that the “property involved in a financial transaction” is related to “unlawful activity.”<sup>100</sup> Courts have considered this notion of “knowing” to cover “wilful [sic] blindness or conscious avoidance.”<sup>101</sup> That language implies that an art dealer or other professional could be implicated in a money laundering scheme if he or she ignores “red flags” that suggest a client is involved in criminal

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93. *See id.*

94. *See id.*

95. Margaret Carrigan, *Salvator Mundi's Patchwork Provenance Now Includes a 50-Year Stop in Louisiana*, ART NEWSPAPER (Sept. 19, 2018), <https://www.theartnewspaper.com/2018/09/19/salvator-mundis-patchwork-provenance-now-includes-a-50-year-stop-in-louisiana> [<https://perma.cc/ZL47-DVAY>].

96. Dos Santos, *supra* note 4.

97. *See* 18 U.S.C. § 1956.

98. *See id.*

99. Alessandra Dagirmanjian, *Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States*, 29 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 687, 692 (2019).

100. 18 U.S.C. § 1956.

101. CHARLES DOYLE, CONG. RSCH. SERV., RL33315, MONEY LAUNDERING: AN OVERVIEW OF 18 U.S.C. § 1956 AND RELATED FEDERAL CRIMINAL LAW 3 n.21 (2017) (quoting *United States v. Antzoulatos*, 962 F.2d 720, 725 (7th Cir. 1992)).

activity, even if the dealer did not actually know of the criminal activity.<sup>102</sup> Courts have not yet clarified what may qualify as red flag knowledge in an art transaction.<sup>103</sup> However, the Responsible Art Market Initiative advises buyers and sellers to pay attention to potential red flags like cash payments in an unusual number of increments, artwork with inconsistent provenance, and new clients who operate in high-risk jurisdictions.<sup>104</sup>

The US government has passed legislation to combat money laundering for decades, focusing on larger market areas than the art trade.<sup>105</sup> In the past, organized criminals often relied on banks and other financial institutions to launder money.<sup>106</sup> Because such institutions handle large amounts of cash regularly, depositing a major sum would arouse less suspicion than at a smaller entity.<sup>107</sup> The Bank Secrecy Act of 1970 (BSA) made laundering money more difficult by requiring banks to institute fraud-combatting policies, like filing transactions involving over \$10,000 with FinCEN and reporting “suspicious activity.”<sup>108</sup>

The real estate market also provides an avenue for money laundering.<sup>109</sup> The real estate market shares several qualities with the art market that make it an attractive method for money laundering: the transactions can involve significant sums of money, cash payments are often accepted, the buyer may have a degree of anonymity, and the actual value of a property or a work of art “depends on how much a buyer is willing to pay.”<sup>110</sup> When passing the Uniting and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism Act of 2001, better known as the USA PATRIOT Act, Congress included a provision that required real estate agents to report any cash payments over \$10,000 in an effort to combat money

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102. Dagirmanjian, *supra* note 99, at 693.

103. See Blake Konkol, *Lifting the Veil: What Are the Due Diligence Requirements for the Art Market in the United States?*, CTR. FOR ART L. (July 26, 2022), <https://itsartlaw.org/2022/07/26/lifting-the-veil-what-are-the-aml-due-diligence-requirements-for-the-art-market-in-the-united-states/> [<https://perma.cc/NV4T-RS4C>].

104. *Red Flags: Money Laundering and Terrorist Financing Risks*, RESPONSIBLE ART MKT. (2017), [http://responsibleartmarket.org/wp/wp-content/uploads/2017/01/RED-FLAG-LISTS\\_web.pdf](http://responsibleartmarket.org/wp/wp-content/uploads/2017/01/RED-FLAG-LISTS_web.pdf) [<https://perma.cc/9RLD-L5LG>].

105. See Hannah Purkey, *The Art of Money Laundering*, 22 FLA. J. INT'L L. 111, 115–16 (2010).

106. *Id.* at 115.

107. *Id.*

108. *Id.*

109. *Id.* at 116.

110. *See id.*

laundering through real estate.<sup>111</sup> While the USA PATRIOT Act had a particular focus on preventing terrorist financing, it has had a wider-ranging impact on money laundering through financial institutions.<sup>112</sup>

While the LCA, BSA, and USA PATRIOT Act have decreased the prevalence of money laundering, they have also provided a guide of “what not to do” to potential money launderers who have found other ways to continue the practice.<sup>113</sup> The lack of regulation in the art market has led many organized criminals to use it for money laundering.<sup>114</sup> The BSA and USA PATRIOT Act have had at least some impact on the art market, in that art dealers handling transactions worth over \$10,000 must make a report to FinCEN.<sup>115</sup> However, many actors in the art market do not qualify as “financial institutions” under the BSA, so dealers do not need to submit the suspicious activity reports that may otherwise be required.<sup>116</sup>

Art is a particularly attractive commodity through which to launder money because in addition to the qualities of the market mentioned above with real estate, works of art like paintings and sculptures can be moved from one country to another and may be stored in a secure and anonymous freeport location, unlike real property.<sup>117</sup> Even if customs agents were to inspect a work of art being imported into a country, those agents are unlikely to have training on the prices for which certain kinds of artwork might sell, so value is relatively easy to misrepresent.<sup>118</sup> That mobility has contributed to a multi-billion-dollar market for stolen art, which criminal organizations often use in their money laundering schemes.<sup>119</sup>

Auction houses also have little incentive to try to detect money laundering within their own institutions.<sup>120</sup> Major houses like Christie’s and Sotheby’s usually have anti-money laundering initiatives.<sup>121</sup> The houses may limit how much cash a buyer can put toward a transaction

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111. *Id.* at 116–17.

112. *See* Dagirmanjian, *supra* note 99, at 695–96.

113. *See* Purkey, *supra* note 105, at 117.

114. *Id.* at 118–19, 121.

115. Dagirmanjian, *supra* note 99, at 696.

116. *Id.*

117. *See* Anti-Money Laundering Regulations for Dealers in Antiquities, 86 Fed. Reg. 53021, 53023 (Sept. 24, 2021).

118. *See* Purkey, *supra* note 105, at 121–22.

119. *See* Cassie Packard, *How Does the FBI Art Crime Team Operate?*, HYPERALLERGIC (Jan. 17, 2022), <https://hyperallergic.com/701155/how-does-the-fbi-art-crime-team-operate/> [<https://perma.cc/8EUQ-GDHU>].

120. *See* Purkey, *supra* note 105, at 135–36.

121. Dagirmanjian, *supra* note 99, at 698.

or refuse to allow a third party to provide payment for a purchase in some instances.<sup>122</sup> Even with those initiatives in place, though, the lack of federal legislation governing the sale of art via auction means that even these major auction houses “accept cash as proper form of payment” and are unlikely to ask questions that may result in stopping a sale of an expensive artwork.<sup>123</sup> The houses can adjust their anti-money laundering policies to benefit business.<sup>124</sup>

The AML Act of 2020 required that FinCEN create regulations within a calendar year that would designate antiquity dealers as “financial institutions” under the BSA.<sup>125</sup> Those regulations would require antiquity dealers, like banks, to report any transactions involving over \$10,000 as well as any “suspicious activity.”<sup>126</sup> The proposed rules were due on December 27, 2021.<sup>127</sup> Although the category of antiquities will likely include vast amounts of art, most of it ancient, it is unclear at this point exactly how old an artifact or artwork must be in order to qualify as an antiquity.<sup>128</sup> Whatever the final definition may be, it will likely leave huge swaths of more recent art still uncovered by the AML Act.

Antiquities dealers have expressed displeasure at the new regulation.<sup>129</sup> In the notice-and-comment process of rulemaking, which ended on October 25, 2021, several dealers added comments to the proposed regulation.<sup>130</sup> They appeared to represent several groups of antiquities dealers, including the Authentic Tribal Art Dealers Association, the American Council for the Preservation of Cultural Property, the International Association of Dealers in Ancient Art, and others, all of which felt that the proposed requirement to report suspicious activity was an overreach.<sup>131</sup> The cost of compliance with the new regulation, up to \$5,000 per year, could be prohibitive for small businesses, and some dealers worried about the possibility of losing

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122. *Id.* at 698–99.

123. *See Purkey, supra* note 105, at 135.

124. *Id.* at 135–36.

125. Jodi Avergun, Todd Blanche, Steven Herman & Christian Larson, *The Anti-Money Laundering Act of 2020: New Challenges for Financial Institutions, Their Employees and Customers, and (Nearly) Everyone Else*, JD SUPRA (Jan. 15, 2021), <https://www.jdsupra.com/legal-news/the-anti-money-laundering-act-of-2020-2020684/> [<https://perma.cc/XF8H-TYTH>].

126. *See id.*

127. Anti-Money Laundering Regulations for Dealers in Antiquities, 86 Fed. Reg. at 53023.

128. *See id.*

129. *See* Financial Crimes Enforcement Network, Comment Letter on Proposed Rule on Anti-Money Laundering Regulations for Dealers in Antiquities (Oct. 24, 2021).

130. *See id.*

131. *See id.*

relationships with clients who deeply value privacy in their dealings.<sup>132</sup> Some art dealers and collectors have also balked at the idea of regulating art like any other valuable commodity, such as stocks or real estate, since art has intangible and cultural value that may be separate from sale price.<sup>133</sup>

The AML Act has also ignored freeports and the role that they play in many illegal transactions involving art.<sup>134</sup> While the United States has relatively few luxury freeports devoted to art storage, the value of the works concentrated in the freeports in the Northeast is enormous.<sup>135</sup> While regulating freeports more strictly in the United States will not perfectly solve the problem of money laundering through art and collectibles, more complete and accessible recordkeeping within those freeports could have a major impact on the number of financial crimes in the country.<sup>136</sup>

### *B. Current Approach of Switzerland*

Switzerland has addressed the money laundering that occurs via the art market by issuing regulations that increase transparency for high-value transactions.<sup>137</sup> Its art market is among the largest in the world, valued at \$75 billion, largely because of its traditionally permissive laws.<sup>138</sup> Switzerland hosts many art fairs and has outposts of major auction houses, but its “most important role on the international art market is probably as an interim depository for art objects.”<sup>139</sup>

Because of the enormous value of the objects stored in Swiss freeports, Swiss law has required since 2009 that freeport managers keep documentation of the objects stored within the freeports and have contact individuals for those objects on record.<sup>140</sup> Later, in 2015, Switzerland increased the stringency of their regulations by instructing freeports to keep track of the contents of packages that enter or exit

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132. Dagirmanjian, *supra* note 99, at 715.

133. *See id.* at 716.

134. *See* John Zarobell, *Sanctions and Freeports: Where to Look for Russia's Hidden Wealth*, GEO. J. INT'L AFFS. (May 16, 2022), <https://gjia.georgetown.edu/2022/05/16/sanctions-and-freeports-where-to-look-for-russias-hidden-wealth/> [<https://perma.cc/C6BY-33M5>].

135. Fishman & Goss, *supra* note 60.

136. *See* Katie L. Steiner, *Dealing with Laundering in the Swiss Art Market: New Legislation and Its Threats to Honest Traders*, 49 CASE W. RES. J. INT'L. L. 351, 363–64 (2017).

137. *Id.* at 352–53.

138. *Id.* at 352–54.

139. DIRK BOLL, ART FOR SALE: A CANDID VIEW OF THE ART MARKET 26 (2010).

140. Steiner, *supra* note 136, at 357.



their premises.<sup>141</sup> However, there are limits to this recordkeeping; while customs officials may request the opportunity to inspect, those officials are not under any obligation to share information from an inspection with any foreign organization.<sup>142</sup> The contact individual for an object may also not be a real owner, but a secondary agent.<sup>143</sup> The United States has no such disclosure requirements for domestic freeport operators.<sup>144</sup>

The same regulations also impose a six-month limit on storage time for items the owner intends to export, which fundamentally changed how art owners used freeports in Switzerland when enacted.<sup>145</sup> The theory behind relieving taxes for items in freeports is that those items are in the midst of a commercial transaction, but in practice, art storage freeports regularly house items for decades.<sup>146</sup> This new rule brings the use of art storage freeports into line with the use of more traditional foreign trade zones.<sup>147</sup> It encourages more movement of art and other collectibles in luxury freeports and therefore supports greater recordkeeping and enhances the ability to track art potentially involved in money laundering schemes.<sup>148</sup> The customs agency will allow for longer-term storage of art and other collectibles, but the owner or related agent must apply for extended time.<sup>149</sup>

Switzerland has also organized its tax laws in a way that encourages more transparency around freeport storage.<sup>150</sup> Part of the allure of keeping art in a freeport is the tax incentive: as long as the art is in the freeport, it is still “in transit” and therefore not subject to any customs duties or taxes until it leaves the warehouse.<sup>151</sup> To capitalize on that incentive, the Swiss government allows owners to continue to defer tax payments on artwork that has been stored in Swiss freeports if the owner removes the work from the freeport, keeps it in the country,

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141. See Caroline Christner, *Regulating the World's “Art Prisons”: Examining the Sinister Side of Freeports*, AM. U. BUS. L. REV., <https://aublr.org/2021/10/regulating-the-worlds-art-prisons-examining-the-sinister-side-of-freeports/> [<https://perma.cc/T8PX-W6GP>] (last visited Oct. 22, 2022).

142. Steiner, *supra* note 136, at 357.

143. *See id.* at 363.

144. *See id.*

145. Christner, *supra* note 141.

146. Steiner, *supra* note 136, at 367.

147. *See id.*

148. *See id.* at 368.

149. *See id.*

150. *See id.* at 359–60.

151. See Bowley & Carvajal, *supra* note 72; Samuel Weeks, *A Freeport Comes to Luxembourg, or, Why Those Wishing to Hide Assets Purchase Fine Art*, 9 ARTS 1, 4 (2020).

and puts it on public display.<sup>152</sup> If a work is on public display for at least ten out of twenty years, that work also becomes free from inheritance tax, which, depending on the value of the work, can be substantial.<sup>153</sup> The law also promotes arts tourism in Switzerland.<sup>154</sup>

These aspects of the Swiss legal regime make it easier for the authorities to track artwork and artifacts likely to be involved in money laundering schemes.<sup>155</sup> For example, just a year after the passage of the 2009 law, Swiss authorities were able to recover a Roman sarcophagus and other artifacts stolen from Turkey that were hidden in the Geneva Free Port.<sup>156</sup> Customs officials had allowed that art shipment into the country, perhaps because they did not recognize the age or value of the artifacts, or perhaps because of a bribe.<sup>157</sup> Without intervention, those involved in the scheme likely would have kept the artifacts in the freeport for several years before selling them with false provenance, as occurred with a collection of several thousand Italian antiquities in 1995.<sup>158</sup> However, the authorities traced the sarcophagus by locating its description in the new freeport disclosure reports.<sup>159</sup>

### C. Current Approach of the European Union

Switzerland has some of the most stringent freeport regulations in the world, but the European Union is also conscious of the prevalence of money laundering in the art market.<sup>160</sup> In response to that problem, the European Union passed the Fifth Anti-Money Laundering Directive (5AML Directive) in 2018.<sup>161</sup> The 5AML Directive may have inspired

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152. Steiner, *supra* note 136, at 359.

153. *See id.*

154. *See id.*

155. *See id.* at 362.

156. *Id.*

157. *Id.*

158. *See* Neil Brodie, *Giacomo Medici*, TRAFFICKING CULTURE, <https://traffickingculture.org/encyclopedia/case-studies/giacomo-medici/> [<https://perma.cc/5526-VXRK>] (Apr. 10, 2015).

159. *See* Simon Bradley, *Priceless Roman Sarcophagus Heads Home After Legal Saga*, SWISSINFO.CH (Sept. 11, 2017, 12:08 PM), [https://www.swissinfo.ch/eng/culture/geneva-to-turkey\\_priceless-roman-sarcophagus-heads-home-after-legal-saga/43495484](https://www.swissinfo.ch/eng/culture/geneva-to-turkey_priceless-roman-sarcophagus-heads-home-after-legal-saga/43495484) [<https://perma.cc/WBW9-VJEE>].

160. *See* Henri Neuendorf, *Switzerland's Tough New Stance on Freeports Will Shake the Art World*, ARTNET NEWS (Nov. 19, 2015), <https://news.artnet.com/market/switzerland-freeport-regulations-367361> [<https://perma.cc/NZ7X-BHDM>]; Timothy E. Burroughs, *US and EU Efforts to Combat International Money Laundering in the Art Market Are No Masterpiece*, 52 VAND. J. TRANSNAT'L L. 1061, 1064 (2019).

161. Burroughs, *supra* note 160.

the US Congress to consider introducing its own anti-money laundering legislation in the form of the AML Act of 2020, discussed above.<sup>162</sup>

The European Union's directive aimed to reduce money laundering by tackling the problem of "opaque structures" and shell companies that disguise who is actually involved in a high-value transaction.<sup>163</sup> It also reduced purchasers' ability to pay anonymously online for any purchase over a set value.<sup>164</sup> These parts of the directive are known as the "Know Your Customer," or KYC, requirements.<sup>165</sup> In addition to the KYC requirements, the directive includes reporting requirements for suspicious activity, not unlike those in the comparable US legislation.<sup>166</sup> Finally, the 5AML Directive identifies certain countries as "high risk" and includes methods to more closely track transactions involving parties from those countries, largely as a way to deter financing terrorist organizations.<sup>167</sup> The European Union allowed for some flexibility for member states to adapt certain KYC requirements as they see fit by the required adoption date for the legislation in January 2020.<sup>168</sup>

The directive also specifically names "persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses" in the legislation, unlike the US AML Act, which appears to be considering the inclusion of art dealers in subsequent agency regulation.<sup>169</sup> However, like the US AML Act, the EU 5AML Directive ignores freeports completely in its text and has not issued subsequent regulations or guidance relating to them.<sup>170</sup>

#### *D. Weighing Privacy Concerns Against Potential Unlawful Activity*

Regulation of the art market faces a balancing question regarding privacy.<sup>171</sup> Many law-abiding collectors value privacy to protect their collections from prying eyes, requests from museums for lending, or inquiries about selling works before the works appreciate as

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162. *See id.*; *supra* notes 125–28 and accompanying text.

163. *See* Věra Jourová, *Strengthened EU Rules to Prevent Money Laundering and Terrorist Financing*, EU COMM'N: DIRECTORATE-GEN. FOR JUST. & CONSUMERS (July 9, 2018).

164. *See id.*

165. Burroughs, *supra* note 160.

166. *See id.* at 1066.

167. *See* Jourová, *supra* note 163.

168. Burroughs, *supra* note 160, at 1077–78.

169. Council Directive 2018/843, art. 1, 2018 O.J. (L 156/53) (EU); *see* Avergun et al., *supra* note 125.

170. *See* Council Directive 2018/843, *supra* note 169.

171. *See* Steiner, *supra* note 136, at 357.

much as collectors would like.<sup>172</sup> Affording collectors such privacy, though, comes at the cost of others using freeport facilities for more nefarious purposes.<sup>173</sup>

Introducing legislation that promotes transparency within freeports and in the art market at large may lead to a downturn in legitimate art sales, which may have negative economic consequences, especially for countries like the United States and Switzerland that have large art markets and major accompanying tourism industries.<sup>174</sup> The legislation will also increase the burden on honest dealers in art transactions, who may turn to other art markets with fewer regulations to operate with greater ease.<sup>175</sup> Money launderers may do the same, as other countries participate in a “race to the bottom” to create an art market with as few regulations as possible to attract greater business.<sup>176</sup> China, for example, makes up around 21 percent of the global art market and has few to no regulations pertaining to anti-money laundering measures or freeport usage.<sup>177</sup> Its market share may grow if other countries’ markets become more regulated.<sup>178</sup>

Switzerland and the rest of the European Union have had several success stories resulting from their legislation: records show that their authorities have been able to halt several major money laundering schemes.<sup>179</sup> The AML Act and subsequent regulations in the United States are too new to gauge their success at this point, but given the size of the US art market and the results in European countries, they may well lead to a significant decrease in financial crime if applied correctly.<sup>180</sup>

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172. See *id.* at 358–59.

173. See *id.*

174. See *id.* at 366.

175. See *id.* at 368.

176. See *id.* at 368–69.

177. *Global Art Market Reaches USD 63.7 billion in 2017, with Dealers Taking the Lion’s Share*, ART BASEL, <https://www.artbasel.com/news/global-art-market-reaches-usd-63-7-billion-in-2017—with-dealers-taking-the-lion-s-share> [<https://perma.cc/53H5-QY8U>] (last visited Oct. 22, 2022).

178. See Zach Dai, *Unroll the Scroll Painting: Inside the Chinese Art Market and Its Regulatory Landscape*, SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP (April 15, 2022), <https://www.natlawreview.com/article/unroll-scroll-painting-inside-chinese-art-market-and-its-regulatory-landscape> [<https://perma.cc/89WJ-GW62>].

179. See Steiner, *supra* note 136, at 361; Brodie, *supra* note 158.

180. See Kyle R. Freeny, Marina Olman-Pal & Claudio J. Arruda, *The Anti-Money Laundering Act of 2020: Congress Enacts the Most Sweeping AML Legislation Since Passage of the USA PATRIOT Act*, GREENBERG TRAUER (Jan. 19, 2021), <https://www.gtlaw.com/en/insights/2021/1/the-anti-money-laundering-act-2020-congress-sweeping-aml-legislation-since-passage-usa-patriot-act> [<https://perma.cc/P8B6-8RDH>].

## III. SOLUTION

The United States took a major step towards discouraging money laundering through the art market with the passage of the AML Act.<sup>181</sup> For the Act to be most effective, though, FinCEN should use the authority that the AML Act has granted it to establish regulations for freeports. Because luxury freeports are integral to so many high-value transactions in the art market, imposing recordkeeping requirements upon them would allow US law enforcement to better track works of art involved in money laundering schemes.<sup>182</sup> Those regulations will erode some of the anonymity that the clients of luxury freeports enjoy. Nevertheless, proper guideposts for the regulations can preserve the privacy that they desire, leading to no more disclosure than is already required under the proposed regulation to consider antiquity dealers to be financial institutions.<sup>183</sup> The United States should also consider adopting tax incentives through the Internal Revenue Service (IRS) that would promote the public display of art in freeports for the dual benefits of greater knowledge of what collectors keep in storage and increased public access to art.<sup>184</sup>

While the proposed regulations would not be a perfect corrective for the increasing global problem of money laundering, they would combat the problem domestically while giving the United States the opportunity to be one of just a few leading nations in the field of freeport regulation as it pertains to art.<sup>185</sup>

*A. Benefits of a Regulatory Approach*

FinCEN is uniquely poised to address this issue. The AML Act already designated FinCEN as the agency to handle the potential change in status for antiquities dealers, so continuing to regulate other aspects of the art and antiquities trade, including freeports, under the AML Act would be a natural progression of its work.<sup>186</sup> Because these

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181. Judd B. Grossman, Eric Volkman, Kate Lucas & Gustavo Ruiz, *New U.S. Anti-Money Laundering Laws and Sanctions Advisory Impose Compliance Obligations on Art Market*, ART NEWS (Mar. 30, 2021, 3:59 PM), <https://www.artnews.com/art-news/market/new-u-s-anti-money-laundering-laws-and-sanctions-art-market-impact-1234588194/> [<https://perma.cc/RP6Y-5DPP>].

182. See Helgadóttir, *supra* note 14, at 13; Alexandra Herrera, “Free”ports: *The Role of Autonomous Zones in the Exploitation of the Global Art Market*, BROWN UNDERGRADUATE L. REV. (May 5, 2022), <https://www.brownulr.org/blogposts/freeports-the-role-of-autonomous-zones-in-the-exploitation-of-the-global-art-market> [<https://perma.cc/5BTY-DMFP>].

183. See Dagirmanjian, *supra* note 99, at 713–15.

184. See Steiner, *supra* note 136, at 367; *supra* Section III.B.

185. See Helgadóttir, *supra* note 14, at 13; Council Directive 2018/843, *supra* note 169.

186. See Avergun et al., *supra* note 125.

changes to the art market are so new, agency regulation is a better option than statutory intervention. Agency regulation can be more flexible and change more quickly than statutes.<sup>187</sup> These attributes may be helpful because no US government body has had experience in formally regulating the art market, so there may be some necessary adjustments in the early stages to have appropriate and effective rules.<sup>188</sup> Luxury freeports may also find ways to operate around the rules and share those loopholes among one another because the industry is so tightly knit.<sup>189</sup> The flexibility of agency regulation and guidance would allow for the governmental arm to keep up with the freeports' ability to adapt to changing rules, while a statutory scheme may quickly become obsolete.<sup>190</sup>

The notice-and-comment process would also be well suited for art market regulation.<sup>191</sup> The art world is notoriously insular, and many participants will likely have strong opinions about the potential regulation.<sup>192</sup> Auction houses, art dealers, and collectors do have a degree of lobbying power, but that amount of power is minute in comparison to the lobbies of larger industries, like pharmaceuticals, insurance, and oil.<sup>193</sup> The art industry may have less ability to influence Congress, but a concerted effort in the notice-and-comment process would allow those with an interest in the regulation to ensure that the agency has considered their position.<sup>194</sup>

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187. David B. Spence, *The Benefits of Agency Policy-making: Perspectives from Positive Theory*, in *POLITICS, POLICY AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY* 104, 125 (George A. Krause & Kenneth J. Meier, eds., 1990).

188. See Stapper, *supra* note 77, at 87–88.

189. See Fishman & Goss, *supra* note 60.

190. See Spence, *supra* note 187.

191. See 5 U.S.C. § 553(c).

192. See CCP Staff, *Update: Art Trade Reacts to Threatened Bank Secrecy Act*, CULTURAL PROP. NEWS, <https://culturalpropertynews.org/congressman-wants-bank-secrecy-act-to-regulate-art-trade/> [<https://perma.cc/FTD7-Q2WC>] (June 25, 2018); Tom Mashberg, *The Art of Money Laundering*, FIN. & DEV., Sept. 2019, at 33–34.

193. See Tim Schneider, *Who Knew the Art Industry Spends Millions of Dollars on Washington Lobbyists? (and Other Insights)*, ARTNET NEWS (Feb. 16, 2022), <https://news.artnet.com/news-pro/gray-market-art-lobbying-millions-2073386#:~:text=Despite%20its%20unique%20quirks%2C%20however,review%20of%20federal%20disclosure%20documents> [<https://perma.cc/2SVU-XRR9>]; Jake Frankenfield, *Which Industry Spends the Most on Lobbying?*, INVESTOPEDIA, <https://www.investopedia.com/investing/which-industry-spends-most-lobbying-antm-so/> [<https://perma.cc/24HR-V98Z>] (Sept. 29, 2022).

194. See Rachel Augustine Potter, *More than Spam? Lobbying the EPA Through Public Comment Campaigns*, BROOKINGS (Nov. 29, 2017), <https://www.brookings.edu/research/more-than-spam-lobbying-the-epa-through-public-comment-campaigns/> [<https://perma.cc/8N3N-FDY4>].

*B. Suggestions for a Regulatory Strategy through FinCEN*

The first step that FinCEN should take to creating a more transparent and less risky art market is to expand the definition of “financial institution” to include art dealers in addition to antiquity dealers.<sup>195</sup> Doing so would allow FinCEN to hold art dealers to the same standards as real estate companies and banks.<sup>196</sup> The art dealers would become subject to requirements similar to those that other industries have adopted: reporting transactions worth over \$10,000 as well as any suspicious activity.<sup>197</sup> However, the structure of the art industry may mean that some adjustments to those requirements are necessary in order to reduce crime without crippling the trade.<sup>198</sup>

First, the base value for reporting a transaction should be higher than \$10,000 for art and antiquity dealers. Fewer than 20 percent of art sales are worth more than \$50,000, and out of the remaining 80 percent, many sales are worth less than \$10,000.<sup>199</sup> Most money laundering schemes enacted through the art market have included sales worth hundreds of thousands of dollars, if not millions.<sup>200</sup> To avoid unnecessary bureaucratic involvement, it would be more effective to set the reporting requirement for sales at \$50,000 instead of \$10,000 in order to capture only the higher-value art sales.<sup>201</sup>

Second, many art and antiquity dealers have small businesses and only participate in a few sales per year.<sup>202</sup> To avoid burdening too many dealers, it may be helpful to establish a threshold amount of revenue based on annual sales. If a dealer sells less than the given amount per year, then she would not be subject to the reporting requirements and would not need to pay for the costs of compliance with the new regulations.

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195. See Peter D. Hardy & Izabella Babchinetskaya, *Treasury Report: No Immediate Need for BSA Regulations for the Art Industry*, BALLARD SPAHR LLP (Feb. 10, 2022), <https://www.moneylaunderingnews.com/2022/02/treasury-report-no-immediate-need-for-bsa-regulations-for-the-art-industry/#more-7524> [<https://perma.cc/JAB7-RZ3E>].

196. See *id.*

197. See *Notice to Customers: A CTR Reference Guide*, U.S. DEP'T OF TREASURY: FIN. CRIMES ENFT NETWORK, available at <https://www.fincen.gov/sites/default/files/shared/CTRPamphlet.pdf> [<https://perma.cc/BXR3-NGNY>].

198. See Hardy & Babchinetskaya, *supra* note 195.

199. See *id.*

200. See ART INDUSTRY, *supra* note 87, at 1–2, 4.

201. See Hardy & Babchinetskaya, *supra* note 195.

202. See Zachary Small & Eileen Kinsella, *Full Report: How Much Does an Art Dealer Really Make? We Asked a Few Hundred of Them – Here's What We Found*, ARTNET NEWS (June 1, 2021), <https://news.artnet.com/news-pro/gallery-economic-survey-artnet-news-pro-1974504> [<https://perma.cc/9EHE-AVU8>].

What constitutes suspicious activity in the art world may also be different than what would qualify in other industries. The art industry is historically secretive, and the practices of working with anonymous buyers and sellers, refusing to publish sale prices, and brokering private sales are par for the course.<sup>203</sup> Preserving the art world's traditional way of business as much as possible may lessen resentment towards the new regulations among participants and encourage compliance. Buyers and sellers who prefer to remain anonymous could be required to appoint representatives whose names could be included on official records and reports of the sale for smaller transactions. The actual participants need only be called in if the transaction is flagged for another kind of suspicious activity.

The most important change that FinCEN should consider implementing is requiring more thorough recordkeeping at freeports.<sup>204</sup> FinCEN should require luxury freeports to keep lists of the goods that they store. Having these lists would make it easier to track criminal activity and follow goods as they are bought and sold.<sup>205</sup> Ideally, these lists would be as specific as possible, listing all of the identifying features of a work of art, most importantly: the title, artist, time period, medium, dimensions, and subject matter. Not every feature would be applicable for every work of art; for example, many older works do not have known artists or titles. However, having a detailed description on file would allow for FinCEN to keep track of high value works and match the location of these works to details regarding the transaction that led to the work's changing of hands.<sup>206</sup> If suspicious activity arose, outside inspectors could procure a warrant to inspect the freeport storage area and, if necessary, appraise the work to see if the sale value correlates to the work to gauge the probability of involvement with money laundering.<sup>207</sup> While the Swiss government decided not to make their freeport records readily available to foreign law enforcement agencies, it would be prudent for the United States to allow for the sharing of their lists on a case-by-case, discretionary basis because of the international scope of many money laundering sales.<sup>208</sup>

This plan erodes some of the privacy that freeport clients have enjoyed.<sup>209</sup> To alleviate the concerns that many collectors would have, FinCEN could allow freeport clients to request that the title of a work

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203. See Purkey, *supra* note 105, at 121.

204. See Steiner, *supra* note 136, at 361.

205. See *id.*

206. See Brodie, *supra* note 158.

207. See *id.*

208. See, e.g., Kinsella, *supra* note 6.

209. See *supra* Section II.D.



be omitted from the required description. The other recorded factors would likely be sufficient to identify a work, especially if the artist's name was included or if the work was already noted on Interpol's Stolen Works of Art database or another public compilation of stolen art.<sup>210</sup> Freeport owners could keep the list private until needed in an official capacity. Domestic freeport owners may also be concerned about the implementation of these new measures because many freeport clients have the financial means to move their collections to other luxury freeports overseas.<sup>211</sup> FinCEN should be careful to ensure that the regulations are helpful for investigative purposes without being so restrictive that they drive collectors to move their collections to other countries where criminal activity is harder to track.<sup>212</sup> Even with the new regulations, though, many clients would likely continue to use domestic freeports, especially if the clients are US citizens.<sup>213</sup> They likely prefer to have their collections physically closer to them and may appreciate the sense of security that comes from having their collections stored domestically.<sup>214</sup>

The six-month minimum storage period that the Swiss government enacted for freeport storage likely would not be as beneficial in the United States.<sup>215</sup> While the minimum time limit could encourage increased transaction frequency, many high-value works of art only come up for sale after an owner has held them for several years, a tactic that can increase excitement around the sale and lead to a higher price.<sup>216</sup> The collectors would be incentivized to store their art outside of freeports and thus outside of any reporting requirements that FinCEN would enact and that freeports would then execute, defeating the purpose of the reports. Keeping art in freeports that have reporting requirements is also better for the preservation of the art itself.<sup>217</sup> Luxury freeports have the most advanced preservation features, and it

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210. See *INTERPOL Launches App to Better Protect Cultural Heritage*, INTERPOL (May 6, 2021), <https://www.interpol.int/en/News-and-Events/News/2021/INTERPOL-launches-app-to-better-protect-cultural-heritage> [<https://perma.cc/K35G-6YHM>].

211. See, e.g., Fishman & Goss, *supra* note 60.

212. See Steiner, *supra* note 136, at 357.

213. See, e.g., Fishman & Goss, *supra* note 60.

214. See Eileen Kinsella, *New Delaware Freeport Offers Collectors an Art Tax Haven Close to Home*, ARTNET NEWS (Oct. 16, 2015), <https://news.artnet.com/market/delaware-freeport-tax-haven-341366> [<https://perma.cc/6XK7-Q9L3>].

215. See Steiner, *supra* note 136, at 367; *supra* Section III.B.

216. See Shannon Lee, *Determining the Best Time to Sell Art from Your Collection*, ARTSY (May 4, 2020, 10:46 AM), <https://www.artsy.net/article/artsy-editorial-determining-best-time-sell-art-collection> [<https://perma.cc/W8XT-5TYK>].

217. See Fishman & Goss, *supra* note 60.

is best for the conservation of cultural heritage to ensure that valuable art receives proper care even when it is not in the public eye.<sup>218</sup>

As of February of 2022, the Department of the Treasury has decided that “the art market should not be an immediate focus for the imposition of comprehensive AML/CFT [Combating the Financing of Terrorism] requirements.”<sup>219</sup> This decision is unusual because the same report notes the dangers of the antiquity market, which is significantly smaller than the art market as a whole.<sup>220</sup> The report suggests that FinCEN will be paying greater attention to the regulations that already exist for the financial and real estate industries.<sup>221</sup> It is likely that the benefits to better regulating freeports and the art market as a whole, in addition to the antiquity market, would far outweigh the resources necessary to enact the program.

### C. Suggestions for Tax Incentives through the IRS

Although separate from the goal of preventing money laundering, adopting rules that promote the exhibition of artworks stored in freeports would have a significant social benefit while also providing collectors the opportunity to take advantage of the financial incentives that freeports provide.<sup>222</sup> Such rules may resemble those that Switzerland has enacted.<sup>223</sup> Having art available to the public, rather than in storage for long periods of time, has several advantages. Viewing and interacting with art can improve people’s physical and mental health by reducing blood pressure and stress, among other benefits.<sup>224</sup> It also strengthens communities by bringing people together physically, in galleries and museums, and culturally, through shared appreciation and reflection.<sup>225</sup> Finally, more art exhibitions can increase tourism and bring capital into a city.<sup>226</sup>

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218. See *id.*

219. DEP’T OF THE TREASURY, STUDY OF THE FACILITATION OF MONEY LAUNDERING AND TERROR FINANCE THROUGH THE TRADE IN WORKS OF ART 5 (Feb. 2022), available at [https://home.treasury.gov/system/files/136/Treasury\\_Study\\_WoA.pdf](https://home.treasury.gov/system/files/136/Treasury_Study_WoA.pdf) [https://perma.cc/A4ZU-NG2A].

220. See Hardy & Babchinetskaya, *supra* note 195.

221. See *id.*

222. See Steiner, *supra* note 136, at 356; *supra* Section III.B.

223. See Steiner, *supra* note 136, at 359.

224. Mikaela Law, Nikita Karulkar & Elizabeth Broadbent, *Evidence for the Effect of Viewing Visual Artworks on Stress Outcomes: A Scoping Review*, 11 *BMJ* 1, 13 (2021).

225. See GALLUP & KNIGHT FOUNDATION, KNIGHT SOUL OF THE COMMUNITY: WHY PEOPLE LOVE WHERE THEY LIVE AND WHY IT MATTERS: A NATIONAL PERSPECTIVE 12–13 (2010).

226. Steiner, *supra* note 136, at 359.

The IRS could create a new tax incentive for collectors to publicly display their art and send notice to freeports to alert their clients of the change. If a collector decides to place a work of art on public display, she could enjoy the same tax breaks on the asset as if it were still stored in the tax haven of the freeport.<sup>227</sup> The IRS may want to impose certain requirements, like requiring that the work be on display for a certain amount of time before the tax break becomes effective or ensuring that the work is displayed domestically. Because there would not be any tax on the works anyway if they stayed in freeport storage, though, it would be in the best interest of the IRS to cater to the collector.<sup>228</sup>

As a secondary benefit, this plan would establish more transparency, revealing which works have been inside freeports and potentially who owns them if collectors wish to take credit for their collections. Exempting works from inheritance tax after being on public display for a certain amount of time may also encourage people with extensive collections, often HNWI's, to make their collections available to the public, further increasing access to fine arts and promoting transparency of art ownership.<sup>229</sup>

Some may protest this model because it allows people who have gained their fortunes in controversial ways to sanitize their reputations and market themselves as patrons of the arts, a practice sometimes called "reputation laundering."<sup>230</sup> Recent protests about the inclusion of certain members on the boards of influential museums like the Whitney Museum of American Art, the Metropolitan Museum of Art, and the Solomon R. Guggenheim Museum have shown that many people passionate about the arts also have strong feelings about who provides financial support for the industry and its institutions.<sup>231</sup> However, if collectors worry about the public reception of their names in a gallery or museum setting, they may have the option to lend their works anonymously.

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227. *See id.*

228. *See id.*

229. *See id.*

230. TEFAF, *Art Patronage and Ethics*, in ART PATRONAGE IN THE 21ST CENTURY, 28, 28 (2020), available at [https://assets.website-files.com/5e9fa1c7e4ed1f87592e2314/5eb17c4ec64d8e2278a9a4d1\\_TEFAP\\_Art\\_Market\\_Report\\_2020-compressed.pdf](https://assets.website-files.com/5e9fa1c7e4ed1f87592e2314/5eb17c4ec64d8e2278a9a4d1_TEFAP_Art_Market_Report_2020-compressed.pdf) [<https://perma.cc/VFD2-4S96>].

231. Holland Cotter, *Money, Ethics, Art: Can Museums Police Themselves?*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/arts/design/museums-ethics.html> [<https://perma.cc/2D55-FYLX>].

*D. Anticipated Problems*

Because there are so few luxury freeports in the United States, any regulations targeting them will be narrow in scope.<sup>232</sup> Creating such regulations or even guidance documents would require financial resources, time, and reserves of agency power that some may see as excessive for an industry that has fewer than ten players in the native market.<sup>233</sup> However, the massive value of the art stored in these freeports and the amount of money that can be laundered through a single transaction mean that even though there are few domestic luxury freeports, their financial crime footprint is high relative to the number of firms.<sup>234</sup> The Department of the Treasury stated in a report released in February of 2022 that money laundering sales account for around \$3 billion of the art market per year.<sup>235</sup> Considering that the United States makes up about 42 percent of that market, more stringent regulation may be well worth the price according to a cost-benefit analysis.<sup>236</sup> The relatively small number of luxury freeports in the country may also make future enforcement of the regulations less burdensome.

Participants in the art market, including auction houses, independent dealers, and collectors, will also likely object to stronger regulations of freeports as well as broader restrictions on their trade. In the case of the proposed regulation for antiquities dealers, they already have.<sup>237</sup> Because art market players are so used to engaging in high-value transactions with little-to-no oversight, even relatively lenient regulations may feel like an attack on their traditional mode of business.<sup>238</sup> A lobbyist on behalf of art dealers, formerly a special agent for the Department of Homeland Security, claimed that the low conviction numbers for money laundering through art mean that it is not a significant threat.<sup>239</sup> Moreover, the Committee for Cultural Policy, an art-focused think tank, stated that laundering money through art is impractical because “art sells slowly.”<sup>240</sup> However, reports from national and foreign law enforcement agencies, private companies, and even some members of the art world suggest otherwise.<sup>241</sup> The proposed

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232. See Fishman & Goss, *supra* note 60.

233. See *id.*

234. See, e.g., DEP'T OF THE TREASURY, *supra* note 219.

235. *Id.*

236. *Id.*

237. For a discussion of comments from antiquities dealers, see *supra* Section III.A.

238. See *id.*; Mashberg, *supra* note 192, at 33.

239. Mashberg, *supra* note 192, at 33.

240. *Id.*

241. See *supra* Section II.D.

regulatory framework would put the art market on par with financial institutions and the real estate market in terms of suspicious activity reporting and give it more latitude with privacy than other industries with endemic money laundering.

#### IV. CONCLUSION

The art world's lack of regulation and the secrecy sewn into the culture of art sales have allowed financial crime to become common in the industry.<sup>242</sup> Passing the AML Act has given the United States the opportunity to take a more targeted approach to combatting money laundering through art.<sup>243</sup> Freeports are largely unregulated and frequently used to store valuable works of art that are often entangled in money laundering schemes.<sup>244</sup> FinCEN already handles the enforcement of anti-money laundering measures for the financial and real estate industries, so they are best situated to also oversee the art market.<sup>245</sup> By requiring freeports to keep detailed lists of their contents and contact information for their clients, FinCEN would have much more information available to it when investigating potential money laundering.<sup>246</sup>

Proper regulation would also allow for a degree of privacy to remain for freeport clients who depend on anonymity while preventing freeports from being hotspots for financial crime.<sup>247</sup> The art world still needs to take substantial steps toward encouraging a culture of transparency, but promoting clarity in transactions involving freeports would be a step in the right direction.

*Cates Grier Saleeby\**

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242. See Stapper, *supra* note 77.

243. See Avergun et al., *supra* note 125.

244. See, e.g., DEP'T OF THE TREASURY, *supra* note 219.

245. See Purkey, *supra* note 105, at 115–17.

246. See Steiner, *supra* note 136, at 361.

247. *Id.* at 357.

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