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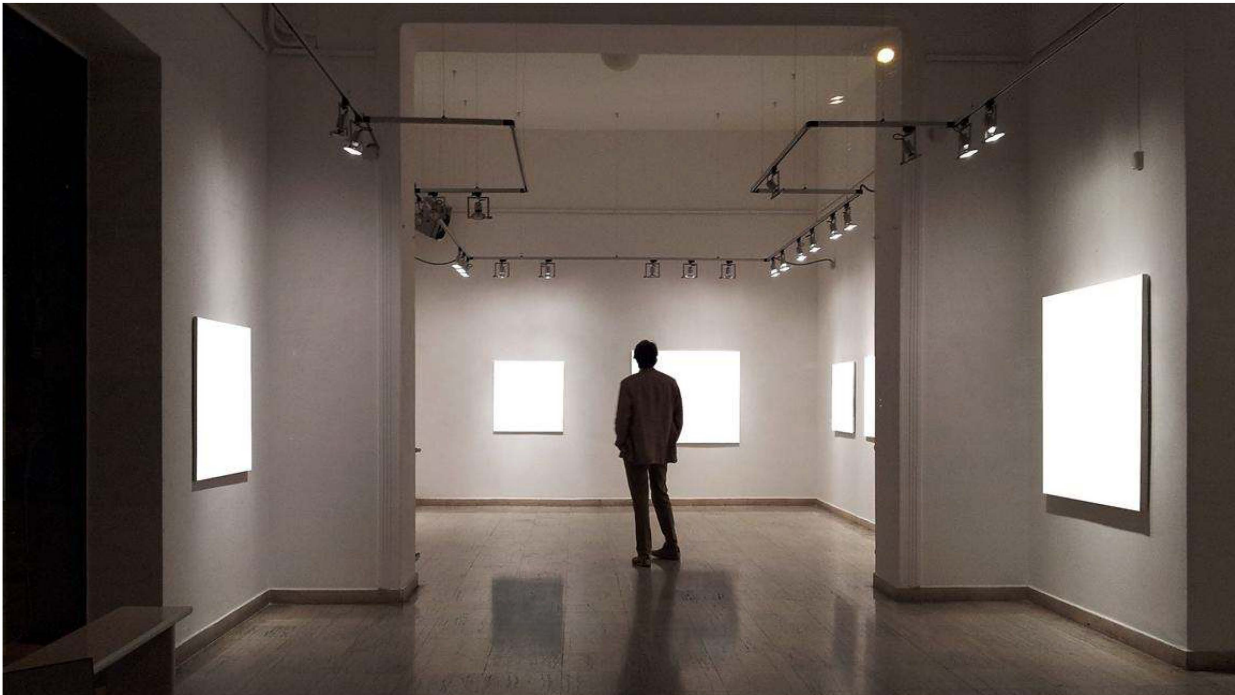
Whistleblowing in the art market

With tighter legislation against money laundering being introduced in the UK and US, the art market must take reform seriously. A failure to do so poses significant risks

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'Secretive', 'opaque', 'unscrupulous', 'shady' and 'tailor-made for money laundering': these are just some of the ways in which the art market has been described in the press.

Such unfortunate descriptions stem from the fact that until recently, art market professionals concluded high-value transactions without any meaningful scrutiny or reporting requirements. With the recent introduction of anti-money laundering legislation targeting the market on both sides of the Atlantic, and more to come, the tide is slowly turning.

The art market is coming to terms with this, but the implications of non-compliance, while clearly laid out in new regulations, remain abstract in practice. The COVID-19 pandemic has not helped matters, single-handedly forcing an entire trade built on personal relationships and old-school ways of conducting business to move into a digital environment within the course of a few weeks.

Ethical awakening

Thanks to the Me Too, Time's Up and Black Lives Matter movements, many sectors have experienced their moment of reckoning. The art trade is not immune.

One only needs to look on social media, where art businesses and dealers are being named, shamed and 'cancelled' for alleged discriminatory, exploitative and abusive practices. This is just the tip of the iceberg. As new and tougher legislation is introduced, it will become increasingly difficult for the art trade to thrive while maintaining its culture of secrecy.

Art businesses must make genuine efforts to reform, if not for the sake of their reputation and the morale of their employees then to avoid criminal liability and prevent their business going bust. Ticking compliance boxes and commissioning artfully written policies and procedures is hardly a strategy for long-term success and sustainability unless there is a change in culture – and that change must come from the top.

Anti-money laundering regulations

In the UK, the **Money Laundering and Terrorist Financing (Amendment) Regulations 2019** came into force on 10 January 2020. These transposed the EU's Fifth Anti-Money Laundering Directive into national law and brought art market participants, including but not limited to qualifying dealers, auction houses, intermediaries and free ports, within the scope of regulation.

This measure has also **extended the application** of anti-money laundering regulations in the UK to art market participants defined as a company or sole practitioner trading in or acting as an intermediary in the sale or purchase of works of art where the value of the transaction, or a series of linked transactions, amounts to €10,000 or more.

Meanwhile, the **National Defense Authorization Act** for Fiscal Year 2021 came into effect in the US on 1 January. This covers a wide range of issues, including the passing of the Anti-Money Laundering Act 2020. The 2020 Act expands, among other things, the definition of 'financial institutions' in the Bank Secrecy Act to include dealers in antiquities, who are defined as 'person[s] engaged in the trade of antiquities, including an adviser, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities'.

Pursuant to the 2020 Act, dealers who trade antiquities will be required to carry out anti-money laundering checks and report any suspicious activity.

The precise rules and reach of the 2020 Act will be proposed to Congress by the Financial Crimes Enforcement Network (FinCEN) after consulting the public, the private sector and law enforcement. More specifically, the Act calls for FinCEN to determine:

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- the appropriate scope of rule, including who should be subject to them according to size and type of business, geographical location and other factors
- the degree to which the regulations should focus on high-value trade in antiquities
- the need to identify actual purchasers of such antiquities, in addition to the agents or intermediaries acting for them or on their behalf
- the need, if any, to identify persons who are dealers, advisers, consultants or any other professionals who are engaged as a business in the trade of antiquities
- whether thresholds should apply in determining which persons to regulate
- any exemptions that should apply to the regulations; A breach of the 2020 Act can result in civil and criminal liability.

The 2020 Act also contains provisions requiring limited liability companies registered to conduct business in the US to report personal identifying information for their individual beneficial owners to FinCEN. The purpose of this amendment is to improve the US government's access to information and to discourage the creation of shell companies.

There is little doubt that the US government has its eyes firmly on regulating the art trade. In fact, a [Senate investigation](#) last year revealed that Russian citizens on the US sanctions list were able to skirt financial restrictions against them and purchase millions of dollars' worth of art there.

While it is true the organisations that sold art to these individuals complied with appropriate checks, it did highlight the need for stricter regulations. A report by the Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations recommended measures to increase transparency and tighten oversight of the art market, including amending the Bank Secrecy Act to apply to businesses handling high-value art, and providing official guidance for auction houses and art dealers.

Incentives to blow the whistle

The 2020 Act contains a provision entitled 'Updating whistleblower incentives and protection', which revised an existing programme to encourage reporting of violations of anti-money laundering regulations to the US government. Any individual who provides new information on a violation to an employer, the US Treasury or the US Attorney General that leads to a successful enforcement action with sanctions of more than \$1m may now be eligible for an award of up to 30% of that sanction.

Under the 2020 Act, a whistleblower is defined as any individual who reports violations, including those discovered 'as part of the[ir] job duties'. In other words, employees can report anti-money laundering violations committed by their employers that they discover during the course of their work. The act does not exclude compliance officers, auditors and lawyers – who often learn of violations while on the job – from benefiting from these whistleblowing provisions.

The act also prohibits employers from retaliating or discriminating against whistleblowers, whether by dismissal, demotion, suspension, threats, blacklisting or harassing an employee. These protections extend to a whistleblower who reports internally to their employer or the US government. Under the act, a whistleblower who has been retaliated against can file a complaint with the US Secretary of Labor, and if the Secretary does not issue a decision within 180 days then the whistleblower can file a complaint against the employer in a federal court.

Implications for the art market

It is no coincidence that a formidable whistleblower incentive programme was introduced in the same legislation that extends anti-money laundering obligations to antiquities dealers and, depending on the FinCEN report, potentially to the art trade as a whole. The art market is particularly vulnerable because it has its fair share of disgruntled employees.

If employees in the sector feel comfortable blowing the whistle over discriminatory and abusive practices that affect them personally, they will feel fairly comfortable reporting violation of anti-money laundering laws to the US government – especially if it results in a monetary reward for them personally.

Should the art trade want to get ahead of these risks, it needs to be serious about reform. In addition to anti-money laundering policies and procedures, art businesses should prepare and implement whistleblower policies and procedures, training their staff in these rules and processes.

By encouraging employees to report violations internally and ensuring a meaningful response to any concerns raised – including, where appropriate, taking disciplinary action against wrongdoers – art businesses will be better positioned to stave off reputational and financial damage and to protect themselves against criminal sanctions.

Early intervention, fair and thorough processes and a culture of transparency will go a long way towards protecting the art trade. While some small to medium-sized art businesses might be tempted to dismiss these recommendations on the basis that they are onerous or expensive to implement, the cost of ignoring them could be far greater in the long run. Regulatory changes are on the horizon, irrespective of whether the art trade is ready to accept them.

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