

**ASSOCIATION OF ART MUSEUM DIRECTORS**

**COMMENTS REGARDING ENDANGERED AND THREATENED WILDLIFE AND  
PLANTS; REVISION OF THE SECTION 4(d) RULE FOR THE AFRICAN  
ELEPHANT (LOXODONTA AFRICANA)**

**50 CFR PART 17**

**[DOCKET NO. FWS-HQ-IA-2013-0091; 96300-1671-0000-R4]**

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**I. INTRODUCTION**

The Association of Art Museum Directors (the “AAMD”) respectfully submits comments to the proposed rule revising the Endangered Species Act (“ESA”) section 4(d) rule for the African elephant (the “Proposed Rule”) issued by the U.S. Fish and Wildlife Service (“FWS”). AAMD is a professional organization consisting of approximately 240 directors of major art museums in North America. The purpose of the AAMD is to support its members in increasing the contribution of art museums to society.

The AAMD supports and commends the efforts of the Presidential Task Force, Advisory Council and FWS to address threats to wildlife, including elephants, in a responsible and measured approach. AAMD has worked extensively with FWS regarding restrictions on African elephant ivory. AAMD would like to thank FWS for its collaboration and consideration of the impact of these actions on art museums within the United States (each, a “U.S. Art Museum”). AAMD further appreciates FWS’s recognition of the unique role that U.S. Art Museums play in society by curating objects that are of historical and cultural significance. These proposed comments intend to allow U.S. Art Museums to continue to play this critical role.

U.S. Art Museums have a responsibility to preserve, study, interpret and share works of art<sup>1</sup> from all ages in all mediums for the benefit of the public. The AAMD is concerned that efforts to protect the current population of African elephants today may be written so large as to restrict the public's access to works of artistic expression of the past. Ivory has for centuries been a medium of such artistic expression and the artistic results of human creativity should continue to be available to the public served by U.S. Art Museums. In order to safeguard the ability of the American public to be able to study, enjoy and be educated by these works of art, revisions to the Proposed Rule are necessary.

The AAMD's concerns fall broadly into two categories:

- Acquisition: The ability of U.S. Art Museums to continue to collect works of art through donations, bequests and purchases from donors, testators and sellers regardless of their location; and
- Loans: The ability of U.S. Art Museums to borrow works of art from lenders, both public and private, regardless of their locations and the ability of U.S. Art Museums to lend works of art from their own collections throughout the world with assurance that loaned works will be returned.

The AAMD's comments are consistent with the FWS's stated goal to allow continued commercialization of African elephant ivory that does not contribute to the poaching of elephants. Given the expertise of U.S. Art Museum professionals, the risk of museums acquiring, lending or borrowing works of art derived from the illegal trade is low. Furthermore, acquisitions by museums "decommercialize" ivory objects because once acquired by a museum, they are usually out of commercial circulation.

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<sup>1</sup> As used in this text, works of art means works of art or any objects of museum quality that art museums exhibit or collect.

## II. SPECIFIC CONCERNS OF U.S. ART MUSEUMS

### A. Add Special Museum Definition.

Especially because the AAMD is proposing specific exceptions to some of the prohibitions contained in the Proposed Rule, the AAMD suggests a specific definition for museums as follows:

*Museum* means an entity that meets eligibility criteria established by the Institute of Museum and Library Services, 2 CFR § 3187.3, and (a) is part of or owned by the Federal or a state or local government or (b) is or is a part of a nonprofit corporation, trust or other entity that is exempt from Federal taxation in accordance with Internal Revenue Code § 501(c)(3) or (c) is a part of a church, monastery or synagogue.

This definition is also responsive to the request of FWS to consider a special definition.<sup>2</sup>

### B. Clarify Donation and Exhibition Exceptions to ESA.

The AAMD appreciates the statement in the comments preceding the Proposed Rule that donations are not considered commercial activities, even if the donor qualifies for a tax benefit where the benefit is not income.<sup>3</sup> The AAMD understands that this comment is made in the context of amendments to Rule 4(d) and therefore could be construed to apply only to donations of objects containing African elephant ivory. The AAMD believes that this clarification of what is not commercial activity applies to any work of art containing parts or comprised of species subject to the ESA. The AAMD hopes that FWS will consider clarifying that donations are not commercial activity for ESA purposes generally, perhaps by adding appropriate language to 50 C.F.R. § 17.3.<sup>4</sup>

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<sup>2</sup> Proposed Rule, p. 45163.

<sup>3</sup> The AAMD would appreciate clarification on what is meant by the phrase “where the benefit is not income.”

<sup>4</sup> AAMD appreciates that revisions to the ESA generally are outside the scope of the Proposed Rule and therefore, are not appropriate to be addressed in this comment, however, AAMD would like to call FWS’s attention to the following issues and requests that: 1) FWS accept family-level identification of antique worked ivory, as species identification is often impossible; 2) FWS accept a sworn statement or affidavit from an art museum curator or other museum professional setting forth provenance or other relevant information as sufficient documentation to prove age of an item and that the item was legally acquired; 3) FWS clarify that donations are not commercial activities (as stated herein); 4) FWS clarify that the status of the lender (individual, museum, for-profit entity) is irrelevant for qualification as a traveling exhibition (as stated herein).

In its comments to the Proposed Rule, FWS noted that “Exhibitions of ivory items or sport-hunted trophies involving gain or profit would remain exempt under the ESA definition of ‘commercial activity,’ provided that all entities involved in the transaction qualified as ‘museums or similar cultural or historical organizations.’”<sup>5</sup> Unfortunately, this no doubt well-intentioned sentence raises more questions than it answers. The ESA exempts from commercial activity “exhibitions of commodities by museums or similar cultural or historical organizations.”<sup>6</sup> That definition says nothing about the status of the lender and for good reason. Museums often borrow objects, whether from foreign or domestic lenders, who are individuals or for-profit entities. Nothing in the traveling exhibition permit requires the lender to be a museum or similar cultural or historical organization. Furthermore, museums sometimes do charge for exhibitions as a way to cover a portion of the substantial costs involved (though not for “gain or profit”). FWS should clarify in the Proposed Rule, interpretive guidance or Questions and Answers that transportation or possession of items containing ivory for exhibition by museums or similar cultural or historical exhibitions, regardless of the status of the lender, is permitted.

### **C. Modify and Clarify the *De Minimis* Exception.**

The Proposed Rule extends the complete ban on commercial trade in African elephant ivory to interstate and foreign commerce, except antiques and certain manufactured items containing *de minimis* quantities of ivory.<sup>7</sup> The *de minimis* exception provides an important avenue to allow the sale and offer for sale (along with delivery, receipt, carrying, transport, or shipment) of ivory objects in interstate or foreign commerce in the course of commercial activity that would not contribute to the illegal wildlife trade. Unfortunately, the Proposed Rule requirements as written may not exempt many objects considered works of art by U.S. Art

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<sup>5</sup> Proposed Rule, p. 45162.

<sup>6</sup> Proposed Rule, p. 45161, citing ESA, 16 U.S.C. § 1532(2).

<sup>7</sup> “Ivory” is generally used in these comments to mean African elephant ivory.

Museums. The AAMD appreciates FWS's request for public comment regarding the *de minimis* exception and hopes that the below suggestions will help to ensure that the *de minimis* exception serves its purpose of allowing "continued commercialization in interstate and foreign commerce" where these activities are not "contributing to the poaching of elephants and ...the risk of illegal trade is low."<sup>8</sup> In order to accomplish these goals, the AAMD makes the following suggestions:

1. Add "Handcrafted" to "Manufactured". The term "manufactured" as it is generally defined might exclude many works of art, as such objects are generally made by hand and not in bulk. Therefore, AAMD requests that the *de minimis* exception be revised to include "manufactured or handcrafted items." "Handcrafted" would be further clarified to mean works that are unique and made primarily by hand. Because they are unique – and, as defined, the value is in the work of the artist, not the medium – this exemption should be a limited one.

2. Include Handcrafted Works Made Wholly of Ivory. Some artworks that would otherwise qualify for the *de minimis* exception are made wholly or primarily of ivory (e.g., portrait miniatures and other paintings painted on ivory). Therefore, AAMD proposes modifying the criteria for the handcrafted *de minimis* exception. This modification would allow handcrafted objects to meet the *de minimis* exception, even if ivory were a major component, so long as the ivory is not the primary source of value. Again, portrait miniatures are excellent examples of works that should meet the requirement that "the ivory ... is not in its current form the primary source of the value of the item." The value of a portrait miniature or other painting on ivory is in the painting, not the ivory. This proposed standard should ensure that only objects of substantial artistic merit or historical significance meet this exception. In addition, the AAMD proposed requirement that a handcrafted item was created before February 26, 1976 should ensure that new ivory cannot qualify for this exception.

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<sup>8</sup> Proposed Rule, p. 45163.

3. Clarify “raw” Ivory. The AAMD is concerned that an expansive reading of the definition of raw ivory could sweep in works of art, *e.g.*, polished ivory in the form of inlay or ornamental knobs or decoration. The AAMD suggests that in the Proposed Rule, interpretive guidance or Questions and Answers, FWS clarify that “raw” means whole ivory tusks or large pieces of tusks that are not worked in any way. If this clarification is not made, the raw ivory prohibition could remain in the *de minimis* exception for manufactured items, provided that an exception is added for any such raw ivory, for example antique furniture, “incorporated into or added as decoration onto the larger item” which should ensure that this exception is a narrow one.

4. Add Additional Criteria. The AAMD recommends adding one new criteria to the amount of permitted ivory in a manufactured or handcrafted item and two new measurements to determine the amount of ivory that is *de minimis* in handcrafted items if the weight of the ivory is impossible or impractical to determine without actions detrimental to the object. For manufactured items and handcrafted items, AAMD recommends an alternative weight measurement of “less than ...1 percent of the total weight of the item, whichever is greater.” This alternative weight measurement will allow larger items, *e.g.*, organs, that contain ivory weighing more than 200 grams, in the aggregate, but which ivory comprises only a small portion of the total weight of the item to be included in the exception.

For handcrafted items, the suggestion is driven in part because the 200 gram weight limit may be difficult, if not impossible, to measure.<sup>9</sup> The two alternative measures for handcrafted items, if the 200 gram or 1 percent tests are impossible or impractical, would serve the same purpose of ensuring this exception only applies to objects containing small quantities of ivory where the ivory component or components is not the primary source of the value of the item.

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<sup>9</sup> The same may be true for manufactured items as well and FWS might consider adding the alternative measurement methodologies recommended for handcrafted items for manufactured items.

The additional exceptions suggested are: “constitutes, in the aggregate, less than 20 percent by: 1) volume of the item or 2) by surface measurement of the item.” These measurements would provide flexibility in the measurement method while still serving the goal of the *de minimis* exception.

5. Impact of Revision. These revisions should not harm the conservation effort or the fight against the illegal trade in African elephant; however, without these revisions, the ability of U.S. Art Museums to exhibit works of artistic merit or historic significance will be greatly impaired. These proposed revisions are aligned with FWS’s intent to craft this exception “to allow commercial activity in a very narrow class of items”<sup>10</sup> and would not measurably broaden the class of items allowed under this exception. Yet, such revisions will allow the exception to include works of art that fall within the spirit of the exception as proposed by FWS, but that could be excluded on a technicality, *i.e.*, the inability to measure the weight of the ivory.<sup>11</sup>

**D. Allow U.S. Art Museums to Import *De Minimis* Objects.**

Although foreign and interstate commerce are allowed pursuant to the *de minimis* exception, under the Proposed Rule, *de minimis* objects could not be imported into the United States to be added to the permanent collections of U.S. Art Museums. The AAMD requests that a corresponding exception for import by U.S. Art Museums of works of art satisfying the stringent *de minimis* criteria (as amended pursuant to the above) be allowed. This proposed exception for U.S. Art Museums would not contribute to illegal wildlife trafficking or harm conservation efforts.

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<sup>10</sup> Proposed Rule, p. 45163.

<sup>11</sup> The Proposed Rule specifically states that the 200 gram limit was chosen with consideration of musical instruments (e.g. 200 grams is the weight of the ivory veneer on a piano with a full set of ivory keys) and other “decorative and utilitarian objects containing small amounts of ivory (insulators on old tea pots, decorative trim on baskets, and knife handles for example).” Unfortunately, the choices do not appear to have taken into account the specific needs of the U.S. Art Museum community, for example, portrait miniatures, other paintings on ivory and organs. Proposed Rule, p. 45162 - 45163.

**E. Clarify the Traveling Exhibition Exception.<sup>12</sup>**

The AAMD appreciates the revisions contained in the Proposed Rule that explicitly extend the traveling exhibition exception to both import and export and remove the requirement that the object could not have been transferred from one person to another person for financial gain or profit since February 25, 2014. There are still key elements of the traveling exhibition exception that need clarification.

1. Traveling Exhibition Certificates May Not Cover All Circumstances.

Loans involving U.S. Art Museums cover a variety of circumstances. They can be divided into two very broad classifications: exhibition loans and long-term loans. Exhibition loans are loans that form part of a special exhibition hosted by one or more museums and generally contain many works of art, usually primarily from other museums and private lenders. Exhibition loans are frequently of relatively short duration, often just a few months at each exhibiting museum, but they can be longer, sometimes for years and at multiple venues.

Long-term loans, usually measured in years, while they can be part of an exhibition, are more often of a single object and many times are placed alongside objects of the borrowing museum's permanent collection to provide greater depth to a museum's permanent collection and to allow for scholarly projects. To provide maximum benefit, long-term loans usually last much longer than exhibition loans, sometimes for decades.<sup>13</sup>

Exhibitions hosted by U.S. Art Museums generally involve two types of loan activity. Many times, there will be a museum abroad that organizes the exhibition, borrows the works from other museums and private lenders and, as the exhibition organizer, "loans" the works to

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<sup>12</sup> As discussed above in Section II(B), AAMD requests that FWS include a statement in the supporting text of the Proposed Rule, interpretive guidance, or related Questions and Answers clarifying that an exhibition organized by a museum is not commercial.

<sup>13</sup> See, for example, the recent fifteen-year loan from the Keir Collection to the Dallas Museum of Art, [www.dma.org/press-release/dallas-museum-art-receives-one-world-s-leading-private-collections-islamic-art](http://www.dma.org/press-release/dallas-museum-art-receives-one-world-s-leading-private-collections-islamic-art).

the U.S. Art Museum that will be hosting the exhibition. Alternatively, a U.S. Art Museum can organize an exhibition and, in that circumstance, can borrow works directly from foreign museums and foreign private lenders.

The traveling exhibition certificate, but for the duration limitation, theoretically can work for the exhibition that is organized by a foreign museum, with the foreign museum entering into loan agreements with lenders and then acting as the lender for all works to the U.S. Art Museum. Unfortunately, as U.S. Art Museums have discussed with FWS in the past, a number of countries simply do not issue traveling exhibition certificates. While FWS has been very helpful in trying to obtain traveling exhibition certificates from these countries, a workaround solution also needs to be created.

A traveling exhibition certificate does not work quite so well for exhibitions organized by a U.S. Art Museum with loans coming directly from foreign museums and foreign private lenders, because each one of those loans constitutes an individual loan for which a traveling exhibition certificate would be necessary.

A traveling exhibition certificate is also problematic for long-term loans. Because long-term loans are loans of individual objects directly to a borrowing museum, the foreign issuing authority may not recognize them as “traveling exhibitions” for purposes of the traveling exhibition certificate.

Additionally, both exhibition loans and long-term loans may last for many years. This presents a problem as the maximum duration of a traveling exhibition certificate is only three years. As the three year limitation on the traveling exhibition certificate is often not sufficient, the AAMD requests that FWS consider ways to extend the maximum duration (or remove the time limitation) for traveling exhibition certificates or allow them to be extended once issued without the necessity of bringing the object(s) back to the issuing country. AAMD acknowledges

that this may not be within the sole purview of FWS, but hopes that steps can be taken to revise the traveling exhibition certificate if FWS determines to continue to mandate its use.

As an alternative to the traveling exhibition certificate or for use when that certificate is not appropriate or will not be issued by the foreign issuing authority involved, the AAMD proposes using a Pre-Convention certificate or other CITES import permit with a notation directly on the certificate that the object is for loan from or to a U.S. Art Museum and, if being imported into the United States, will be re-exported after import and no other use after import is permitted (including an explicit ban on sale outside of its country of residence). This solution will avoid many of the instances in which a traveling exhibition certificate will not work, including the three year time limitation, or presents significant difficulties in delay with the foreign issuing authority.

2. Art Works for Exhibitions May Include Raw Ivory. If the suggested clarification through interpretive guidance or Questions and Answers as discussed above is not implemented, then an additional problem exists for loans involving works of art that might include ivory that could be classified as raw ivory, *e.g.* portrait miniatures and other paintings on ivory, furniture inlaid with ivory or medieval horns encased in metalwork. If these are classified as raw ivory, then raw ivory forming part of a work of art should be able to come in as part of a traveling exhibition or as a long-term loan to a U.S. Art Museum, provided there is a clear restriction that the work must be exported at the end of the loan period.

3. Marking is Not Always Practical. The Proposed Rule requires marking or uniquely identifying an object so that “authorities at U.S. and foreign ports can verify that the item presented for import or export is actually the specimen for which the CITES document was issued.”<sup>14</sup> While theoretically an excellent idea, in practice for works of art the provision can be

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<sup>14</sup> Proposed Rule, p. 45168.

problematic. Any form of permanent marking of or “unique” identification of an art work is often not feasible. Furthermore, lenders are unlikely to permit their objects to be marked. Imagine if every country required marking or some other “unique” form of identification with prescribed modalities? A work of art on frequent loan could soon become covered with marks or other “unique” identifiers. AAMD requests revising the Proposed Rule to clarify that documentation describing the work may include photographs as an alternative to marking or uniquely identifying, or providing interpretive guidance when the final rule is issued stating that photographs satisfy the marking or tagging requirement.

**F. Household Move or Inheritance - Museum Exception.**

Individual collectors are important contributors to the permanent collections of U.S. Art Museums. In the future, such collectors can import artwork containing African elephant ivory into the United States as part of a household move or inheritance under the Proposed Rule. While the AAMD understands the desire to limit the use after import of objects imported pursuant to the household move or inheritance exception, allowing these items to be acquired by U.S. Art Museums will not commercialize these items, nor will it negatively impact efforts to combat the illegal wildlife trade. AAMD suggests adding an exception to the household move or inheritance exception prohibiting an individual to “sell or offer for sale in interstate or foreign commerce or to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory imported into the United States as part of a household move or inheritance” to allow for sale (and gift or bequest if not clarified as not being “commercial”) to a “museum” (as defined in the proposed revision to 17.40 (e)(1)). Allowing works of art originally imported or exported as part of a household move or inheritance to be acquired by U.S. Art Museums pursuant to a sale, gift, or bequest will maintain the same

non-commercial character of the original import or export by removing them from the commercial market to join the permanent collection of U.S. Art Museums.

**G. Museum Import Exception.**

The ability to acquire works of art containing or composed of African elephant ivory, including antiques, forms an integral part of the missions of U.S. Art Museums. In response to the FWS's request for public comment for additional guidance regarding the implementation of the ESA antique exception,<sup>15</sup> the AAMD submits that an exception should be added for commercial or noncommercial import of antique worked African elephant ivory or objects of worked and raw ivory that qualify for the *de minimis* exception of section 17.40(e)(3) as revised herein to be acquired by U.S. Art Museums. The ability to acquire abroad, by purchase, exchange, gift, or bequest, and import these limited works of art containing African elephant ivory is an important component of U.S. Art Museums' ability to present a comprehensive picture of the history of art to the public. All of these works would pre-date the current crisis for African elephants. Furthermore, the acquisition by U.S. Art Museums essentially removes those works from commerce. Finally, these works represent first and foremost the creative genius of past artists. To prohibit their entry into public collections results in a ban on the countless significant historic artworks that could otherwise be on display in U.S. Art Museums. Just by way of example, set forth in Exhibit A are works of art acquired in recent years by U.S. Art Museums that could not be acquired abroad and imported by U.S. Art Museums under the Proposed Rule. The absence of these objects and other similar ivory objects from the collections of U.S. Art Museums is inconceivable. Exhibit B contains works that have come onto the market abroad that U.S. Art Museums cannot acquire under the current Director's Order, could

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<sup>15</sup> Proposed Rule, p. 45172.

not acquire under the Proposed Rule, but could acquire with the revisions recommended by the AAMD.

The requirement that objects imported for acquisition must qualify as antiques (as defined in section 17.40(e)(1)) or meet the *de minimis* exception of proposed section 17.40(e)(3) and can only be imported by “museums” (as defined in AAMD’s proposed revision to section 17.40(e)(1) discussed herein) limits the applicability of this exception and forecloses the opportunity for abuse. Regarding the qualification for the antique exception, museums are in a unique position to certify that these items are in fact antique and meet the rigorous requirements of the ESA antique exception as a detailed provenance and authenticity examination are routinely performed by U.S. Art Museums prior to acquisition.<sup>16</sup> Requiring museums to certify in a statement to a government office (with all that entails as a legal matter) that ivory items to be imported are in fact antiques or *de minimis* and that these objects would be added to the permanent collection of these museums would provide an additional safeguard and limitation on this exception. Furthermore, adding these works to the permanent collection of U.S. museums will remove these items from the commercial market and will benefit the efforts to combat the illegal wildlife trade.

### **III. SPECIFIC PROPOSED REVISIONS<sup>17</sup>**

#### **A. Addition of “museum” to defined terms (section (e)(1)).**

In response to the request for public comment regarding the definition of museum, AAMD proposes adding the following definition of “museum” to section (e)(1):

**Museum means an entity that meets eligibility criteria established by the Institute of Museum and Library Services, 2 CFR § 3187.3, and (a) is part of or owned by the Federal or a state or local government or (b) is or is a part of a nonprofit corporation, trust or other entity**

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<sup>16</sup> AAMD submits that the museum which is acquiring the work of art containing ivory should be able to certify that the work meets the requirements of the ESA antique exception without the necessity of an appraisal or other independent proof. This certification can be based on attribution and scholarship.

<sup>17</sup> In addition to the revisions set forth in this Section III, a redline of the Proposed Rule showing the proposed revisions is attached hereto as Exhibit C.

**that is exempt from Federal taxation in accordance with Internal Revenue Code § 501(c)(3) or (c) is a part of a church, monastery or synagogue.**

**B. Revision of *de minimis* exception (section (e)(3)).**

Artworks may not always be “manufactured” in the way that the term manufactured might be generally understood; therefore, AAMD proposes revising the *de minimis* exception to include “manufactured or handcrafted” items and to add a separate set of criteria for handcrafted items as follows:

- (3) Interstate and foreign commerce of ivory. Except for antiques, certain manufactured **or handcrafted** items containing *de minimis* quantities of ivory **and items qualifying under paragraph (e)(3)(v)**, sale or offer for sale of ivory in interstate or foreign commerce and delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity is prohibited.<sup>18</sup> Except as provided in paragraphs (e)(5)(iii) and (e)(6) through (8) of this section, manufactured **or handcrafted** items containing *de minimis* quantities of ivory **and items qualifying under paragraph (e)(3)(v)** may be sold or offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity, without a threatened species permit issued under § 17.32, provided they meet all of the following criteria:
- (i) If the item is located within the United States, the ivory was imported into the United States prior to January 18, 1990, or was imported into the United States under a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) pre-Convention certificate with no limitation on its commercial use;
  - (ii) If the item is located outside the United States, the ivory was removed from the wild prior to February 26, 1976;
  - (iii) If the item is a manufactured item and:**
    - (A) The ivory is a fixed component or components of a larger manufactured item and is not in its current form the primary source of the value of the item;
    - (B) The ivory is not raw;<sup>19</sup>

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<sup>18</sup> If the ESA regulations are not amended to add this clarification, add “**The gift or bequest to a museum, as defined in paragraph (e)(1) of this section, is not commercial activity for purposes of this section (e)(3).**”

<sup>19</sup> If interpretive guidance is not provided, add: “**, except that raw ivory may be incorporated into or added as decoration onto a larger item**”

- (C) The manufactured item is not made wholly or primarily of ivory;
- (D) The total weight of the ivory component or components is less than 200 grams **or 1 percent of the total weight of the item, whichever is greater**; and
- (E) The item was manufactured before [EFFECTIVE DATE OF THE FINAL RULE];

**(iv) If the item is a handcrafted item and:**

- (A) **The ivory is or is a component or components of a handcrafted item and is not in its current form the primary source of the value of the item;**
- (B) **The ivory or ivory component or components weigh, in the aggregate, less than 200 grams or 1 percent of the total weight of the item, whichever is greater, or in the event that determining the weight is impossible or impractical without damage to the item, the ivory or ivory component constitutes, in the aggregate, less than 20 percent:**
  1. **by volume of the item; or**
  2. **by surface measurement of the item;**
- (C) **The item was created before February 26, 1976; and**
- (D) **The item is a product of skilled workmanship, primarily by hand and is a unique work of art or part of a series of works of art;**

**(v) If the item is to be acquired by purchase by a museum, the item is legally in the United States and the seller has the legal right to possess the item.**

**C. Traveling Exhibition Exception (section (e)(5)(ii)).**

AAMD proposes revising the traveling exhibition exception contained in section (e)(5)(ii) to include worked or (if not otherwise clarified) raw ivory. In addition to the traveling exhibition certificate, a modified CITES Pre-Convention certificate would also be available, with suitable notations, to address those loans that do not qualify for the traveling exhibition certificate or in the event the foreign issuing authority will not issue a traveling exhibition certificate and to resolve issues with loans of longer durations. Finally, AAMD proposes revising the requirement in (e)(5)(ii)(C) that an ivory item is securely marked or uniquely identified to include the language “including by photographs” to clarify that artworks need not be

marked or tagged and to provide an alternative means of identification and verification.

Specifically, the Proposed Rule regarding traveling exhibitions should be revised as follows:

- (5) Import/export of worked ivory. Except as provided in paragraphs (e)(5) through (10)<sup>20</sup> of this section, worked ivory may not be imported into or exported from the United States unless it is contained in a musical instrument, or is part of a traveling exhibition, household move, or inheritance, and meets the following criteria:
- (ii) Traveling exhibition. Worked **or raw** ivory that is part of a traveling exhibition **or as a loan to or from a museum** may be imported into and exported from the United States without a threatened species permit issued under § 17.32 provided:
- (A) The ivory was legally acquired prior to February 26, 1976;
- (B) The item containing worked **or raw** ivory is accompanied by a valid CITES traveling exhibition certificate<sup>21</sup> (See the requirements for traveling exhibition certificates at 50 CFR 23.49) **or is accompanied by a valid CITES import or export permit provided that the import permit contains a specific notation that the item is imported only for loan to a museum and must be re-exported at the end of the loan term plus any permitted extensions thereof;**
- (C) The item containing **worked or raw** ivory is securely marked or uniquely identified, **including by photographs**, so that authorities can verify that the certificate corresponds to the item in question; and
- (D) The item containing worked **or raw** ivory is not sold, traded, or otherwise disposed of while outside the certificate holder's country of usual residence.

#### **D. Household Move or Inheritance Exception (section (e)(5)(iii)).**

Private collectors are an important source of additions to the permanent collections of U.S. Art Museums. Allowing objects originally imported or exported as part of a household move or inheritance to be acquired by U.S. Art Museums pursuant to a sale, gift, or bequest will not commercialize these objects or impact conservation efforts, but will maintain the same non-

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<sup>20</sup> (e)(5): Changes would also include deleting “(6)” after (e) in line 1 and adding “(5)” after (e) in line 1; deleting “(9)” after “through” and adding “(10)” after “through”.

<sup>21</sup> Not all countries have CITES traveling exhibition certificates, which presents a problem for some imports pursuant to this traveling exhibition exception and CITES traveling exhibition certificates have a three year limit which presents a problem for loans of longer durations.

commercial character of the original import or export by removing them from the commercial market to join the permanent collection of U.S. Art Museums.

- (iii) *Household move or inheritance.* Worked ivory may be imported into or exported from the United States without a threatened species permit issued under § 17.32 for personal use as part of a household move or as part of an inheritance if the ivory was legally acquired prior to February 26, 1976, and the item is accompanied by a valid CITES pre-Convention certificate. It is unlawful to sell or offer for sale, **except to a museum**, in interstate or foreign commerce or to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity, **except to a museum**, any African elephant ivory imported into the United States as part of a household move or inheritance.<sup>22</sup> The exception in paragraph (e)(3) of this section regarding manufactured **or handcrafted items** containing *de minimis* quantities of ivory does not apply to items imported or exported under this paragraph (e)(5)(iii) as part of a household move or inheritance.

**E. Museum import exception (section (e)(9)).**

Integral to the operations of U.S. Art Museums is the continued ability to acquire significant works of art from abroad containing African elephant ivory. Therefore, a limited exception should be added allowing U.S. Art Museums to import objects that meet the *de minimis* exception of section (e)(3) and antiques containing worked ivory with proper certification. AAMD proposes that a new section setting forth this exception should be added after section (e)(8) as section (e)(9) as follows:

- (9) Import of ivory by museums. Commercial and noncommercial import by museums:**
- (i) by purchase or exchange of objects containing *de minimis* amounts of ivory as set forth in section 17.40(e)(3) and antiques containing worked ivory is allowed if the importing museum certifies that: the object meets the definition of antique set forth in section (e)(1) of this section or the definition of *de minimis* set forth in section (e)(3) of this section and (A) will be added to the permanent collection of the museum or (B) is imported for consideration for purchase or exchange and will either be (1) re-exported after consideration or (2) acquired and added to the permanent collection of the museum; or**

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<sup>22</sup> If the ESA regulations are not amended to add this clarification, add **“The gift or bequest to a museum (as defined in paragraph (e)(1) of this section) is not commercial activity for purposes of this section (e)(5).”**

**(ii) by gift or bequest of objects containing *de minimis* amounts of ivory as set forth in section 17.40(e)(3) and antiques containing worked ivory is allowed if the importing museum certifies that: the object meets the definition of antique set forth in section (e)(1) of this section or the definition of *de minimis* set forth in section (e)(3) of this section and (A) will be added to the permanent collection of the museum or (B) is imported for consideration for gift or bequest and will either be (1) re-exported after consideration or (2) acquired and added to the permanent collection of the museum.**

**F. Antique exception (section (e)(10)).**

As a result of the above addition of a new section 9, the final section (e)(9) should be renumbered as (e)(10). In addition, the current language of (e)(10) could perhaps be clarified to call attention to the fact that while the ESA antique exception does permit antiques containing African elephant ivory to be imported or exported, the AECA does not, and therefore these activities are prohibited pursuant to the AECA.

**(10)** *Antique ivory.* Antiques (as defined in paragraph (e)(1) of this section) are not subject to the provisions of this rule. Antiques containing or consisting of ivory may therefore be imported into or exported from the United States without a threatened species permit issued under § 17.32, provided the requirements of 50 CFR parts 13, 14, and 23 have been met; **nevertheless**, the provisions and prohibitions under the African Elephant Conservation Act (16 U.S.C. 4201 et. seq.) apply, regardless of the age of the item. Antiques that consist of or contain raw or worked ivory may similarly be sold or offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32.

**IV. CONCLUSION**

The AAMD supports the efforts to curtail the illegal wildlife trade and protect endangered species and appreciates the consideration that FWS has given to the impact these efforts have on U.S. Art Museums. The AAMD looks forward to continuing to work with FWS to ensure that these actions to restrict the trade in illegally acquired species do not impair the ability of U.S. Art Museums, in compliance with the law, to fulfill their mission.

**EXHIBIT A**

**Works of Art Recently Acquired Abroad By U.S. Art Museums That  
Could Not Be Acquired And Imported Into The United States Under The Proposed Rule**

**Gaspar Núñez Delgado (Spanish, 1551–1617)**

***Crucifix, 1599***

**Ivory, ebony, mahogany, silver, polychromy**

**26-3/4 x 14 x 3-1/4 in.**

**Indianapolis Museum of Art, Gift of Walter E. and Tekla B. Wolf by exchange, 1995.24.**



**Balthasar Griessmann,  
*Ivory Goblet*, 1680  
Digital image courtesy of the Getty's Open Content Program**



*Saint Sebastian, Master of the Furies (Austrian)*

The Metropolitan Museum of Art

Purchase, European Sculpture and Decorative Arts Fund, Walter and Leonore Annenberg Acquisitions Endowment Fund, and Mr. and Mrs. J. Tomilson Hill and Hester Diamond Gifts, 2013, 2013.36



**Henry William Batley, James Shoolbred & Co. (case), Collard & Collard (movement)**  
*Piano, c. 1878*

**Satinwood, ivory, ebony, metal, and cloth**

**47 11/16 x 62 15/16 x 30 1/8 in.**

**Minneapolis Institute of Art, The Walter C. and Mary C. Briggs Charitable Trust**



**Giovanni Battista Gatti**

***Coffer, 1873***

**Ebony inlaid with ivory; agate, lapis lazuli and bloodstone cabochons with burlwood interior and brass mounts**

**12 5/8 x 21 3/8 x 16 1/2 in. (closed)**

**Minneapolis Institute of Art, The Ethel Morrison Van Derlip Fund**



**EXHIBIT B**

**Works Of Art Recently Available For Acquisition Abroad That  
U.S. Museums Could Not Acquire – Unless The Proposed Rule Is Revised**

Piano designed by C.R. Ashbee, 1904



**Treble Recorder with Ivory Bands, Johann Heinrich Eichentopf, 1730**



## EXHIBIT C

### Part 17 Amended

1. The authority citation for part 17 continues to read as follows:

#### Authority

16 U.S.C. 1361-1407; 1531-1544; and 4201-4245, unless otherwise noted.

2. Section 17.40 is amended by revising paragraph (e) to read as follows:

#### § 17.40

Special rules—mammals.

\* \* \* \* \*

(e) African elephant (*Loxodonta africana*). This paragraph (e) applies to any specimen of the species *Loxodonta africana* whether live or dead, including any part or product thereof. Except as provided in paragraphs (e)(2) through (910) of this section, all of the prohibitions and exceptions in §§ 17.31 and 17.32 apply to the African elephant. Persons seeking to benefit from the exceptions provided in this paragraph (e) must demonstrate that they meet the criteria to qualify for the exceptions.

(1) *Definitions*. In this paragraph (e), *antique* means any item that meets all four criteria under section 10(h) of the Endangered Species Act (16 U.S.C. 1539(h)). *Ivory* means any African elephant tusk and any piece of an African elephant tusk. *Museum* means an entity that meets eligibility criteria established by the Institute of Museum and Library Services, 2 CFR 3187.3, and (a) is part of or owned by the Federal or a state or local government or (b) is or is a part of a nonprofit corporation, trust or other entity that is exempt from Federal taxation in accordance with Internal Revenue Code § 501(c)(3) or (c) is a part of a church, monastery or synagogue. *Raw ivory* means any African elephant tusk, and any piece thereof, the surface of which, polished or unpolished, is unaltered or minimally carved. *Worked ivory* means any African elephant tusk, and any piece thereof, that is not raw ivory.

(2) *Live animals and parts and products other than ivory and sport-hunted trophies*. Live African elephants and African elephant parts and products other than ivory and sport-hunted trophies may be imported into or exported from the United States; sold or offered for sale in interstate or foreign commerce; and delivered, received, carried, transported, or shipped in interstate or foreign

commerce in the course of a commercial activity without a threatened species permit issued under § 17.32, provided the requirements in 50 CFR parts 13, 14, and 23 have been met.

(3) *Interstate and foreign commerce of ivory.* Except for antiques ~~and~~, certain manufactured or handcrafted items containing *de minimis* quantities of ivory; and items qualifying under paragraph (e)(3)(v), sale or offer for sale of ivory in interstate or foreign commerce and delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity is prohibited.<sup>1</sup> Except as provided in paragraphs (e)(5)(iii) and (e)(6) through (8) of this section, manufactured or handcrafted items containing *de minimis* quantities of ivory and items qualifying under paragraph (e)(3)(v) may be sold or offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32, provided they meet all of the following criteria:

(i) If the item is located within the United States, the ivory was imported into the United States prior to January 18, 1990, or was imported into the United States under a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) pre-Convention certificate with no limitation on its commercial use;

(ii) If the item is located outside the United States, the ivory was removed from the wild prior to February 26, 1976;

~~(iii)~~ (iii) If the item is a manufactured item and:

(A) The ivory is a fixed component or components of a larger manufactured item and is not in its current form the primary source of the value of the item;

~~(iv)~~ (B) The ivory is not raw;<sup>2</sup>

~~(v)~~ (C) The manufactured item is not made wholly or primarily of ivory;

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<sup>1</sup> If the ESA regulations are not amended to add this clarification, add “The gift or bequest to a museum, as defined in paragraph (e)(1) of this section, is not commercial activity for purposes of this section (e)(3).”

<sup>2</sup> If interpretive guidance is not provided, add: “, except that raw ivory may be incorporated into or added as decoration onto a larger item”

(~~vi~~D) The total weight of the ivory component or components is less than 200 grams or 1 percent of the total weight of the item, whichever is greater; and

(~~vii~~E) The item was manufactured before [*EFFECTIVE DATE OF THE FINAL RULE*].

(iv) If the item is a handcrafted item and:

(A) The ivory is or is a component or components of a handcrafted item and is not in its current form the primary source of the value of the item;

(B) The ivory or ivory component or components weigh, in the aggregate, less than 200 grams or 1 percent of the total weight of the item, whichever is greater, or in the event that determining the weight is impossible or impractical without damage to the item, the ivory or ivory component constitutes, in the aggregate, less than 20 percent:

1. by volume of the item; or

2. by surface measurement of the item;

(C) The item was created before February 26, 1976; and

(D) The item is a product of skilled workmanship, primarily by hand and is a unique work of art or part of a series of works of art;

(v) If the item is to be acquired by purchase by a museum, the item is legally in the United States and the seller has the legal right to possess the item.

(4) *Import/export of raw ivory.* Except as provided in paragraphs (e)(~~65~~) through (~~910~~) of this section, raw ivory may not be imported into or exported from the United States.

(5) *Import/export of worked ivory.* Except as provided in paragraphs (e)(~~65~~) through (~~910~~) of this section, worked ivory may not be imported into or exported from the United States unless it is contained in a musical instrument, or is part of a traveling exhibition, household move, or inheritance, and meets the following criteria:

(i) *Musical instrument.* Musical instruments that contain worked ivory may be imported into and exported from the United States without a threatened species permit issued under § 17.32 provided:

(A) The ivory was legally acquired prior to February 26, 1976;

(B) The instrument containing worked ivory is accompanied by a valid CITES musical instrument certificate or equivalent CITES document;

(C) The instrument is securely marked or uniquely identified so that authorities can verify that the certificate corresponds to the musical instrument in question; and

(D) The instrument is not sold, traded, or otherwise disposed of while outside the certificate holder's country of usual residence.

(ii) *Traveling exhibition.* Worked [or raw](#) ivory that is part of a traveling exhibition [or as a loan to or from a museum](#) may be imported into and exported from the United States without a threatened species permit issued under § 17.32 provided:

(A) The ivory was legally acquired prior to February 26, 1976;

(B) The item containing worked [or raw](#) ivory is accompanied by a valid CITES traveling exhibition certificate (See the requirements for traveling exhibition certificates at 50 CFR 23.49); [or is accompanied by a valid CITES import or export permit provided that the import permit contains a specific notation that the item is imported only for loan to a museum and must be re-exported at the end of the loan term plus any permitted extensions thereof;](#)

(C) The item containing [worked or raw](#) ivory is securely marked or uniquely identified, [including by photographs](#), so that authorities can verify that the certificate corresponds to the item in question; and

(D) The item containing worked [or raw](#) ivory is not sold, traded, or otherwise disposed of while outside the certificate holder's country of usual residence.

(iii) *Household move or inheritance.* Worked ivory may be imported into or exported from the United States without a threatened species permit issued under § 17.32 for personal use as part of a household move or as part of an inheritance if the ivory was legally acquired prior to February 26, 1976, and the item is accompanied by a valid CITES pre-Convention certificate. It is unlawful to sell or offer for sale, [except to a museum](#), in interstate or foreign commerce or to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity, [except to a museum](#), any African elephant ivory imported into the United States as part of a household

move or inheritance.<sup>3</sup> The exception in paragraph (e)(3) of this section regarding manufactured or handcrafted items containing *de minimis* quantities of ivory does not apply to items imported or exported under this paragraph (e)(5)(iii) as part of a household move or inheritance.

(6) *Sport-hunted trophies.* (i) African elephant sport-hunted trophies may be imported into the United States provided:

(A) The trophy was legally taken in an African elephant range country that declared an ivory export quota to the CITES Secretariat for the year in which the trophy animal was killed;

(B) A determination is made that the killing of the trophy animal will enhance the survival of the species and the trophy is accompanied by a threatened species permit issued under § 17.32;

(C) The trophy is legibly marked in accordance with 50 CFR part 23;

(D) The requirements in 50 CFR parts 13, 14, and 23 have been met; and

(E) No more than two African elephant sport-hunted trophies are imported by any hunter in a calendar year.

(ii) It is unlawful to sell or offer for sale in interstate or foreign commerce or to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any sport-hunted African elephant trophy. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(6) as part of a sport-hunted trophy.

(iii) Except as provided in paragraph (e)(~~9~~10) of this section, raw ivory that was imported as part of a sport-hunted trophy may not be exported from the United States. Except as provided in paragraphs (e)(5), (7), (8), and (9) of this section, worked ivory imported as a sport-hunted trophy may not be exported from the United States. Parts of a sport-hunted trophy other than ivory may be exported from the United States without a threatened species permit issued under § 17.32 of this part, provided the requirements of 50 CFR parts 13, 14, and 23 have been met.

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<sup>3</sup> If the ESA regulations are not amended to add this clarification, add “The gift or bequest to a museum (as defined in paragraph (e)(1) of this section) is not commercial activity for purposes of this section (e)(5).”

(7) *Import/export of ivory for law enforcement purposes.* Raw or worked ivory may be imported into and worked ivory may be exported from the United States by an employee or agent of a Federal, State, or tribal government agency for law enforcement purposes, without a threatened species permit issued under § 17.32, provided the requirements of 50 CFR parts 13, 14, and 23 have been met. It is unlawful to sell or offer for sale in interstate or foreign commerce and to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory that was imported into or exported from the United States for law enforcement purposes. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(7) for law enforcement purposes.

(8) *Import/export of ivory for genuine scientific purposes.* (i) Raw or worked ivory may be imported into and worked ivory may be exported from the United States for genuine scientific purposes that will contribute to the conservation of the African elephant, provided:

(A) It is accompanied by a threatened species permit issued under § 17.32; and

(B) The requirements of 50 CFR parts 13, 14, and 23 have been met.

(ii) It is unlawful to sell or offer for sale in interstate or foreign commerce and to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory that was imported into or exported from the United States for genuine scientific purposes. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(8) for genuine scientific purposes.

~~(9)~~ [\(9\) Import of ivory by museums. Commercial and noncommercial import by museums:](#)

[\(i\) by purchase or exchange of objects containing \*de minimis\* amounts of ivory as set forth in section 17.40\(e\)\(3\) and antiques containing worked ivory is allowed if the importing museum certifies that: the object meets the definition of antique set forth in section \(e\)\(1\) of this section or the definition of \*de minimis\* set forth in section \(e\)\(3\) of this section and \(A\) will be added to the permanent collection of the museum or \(B\) is imported for consideration for purchase or exchange and will either be \(1\) re-exported after consideration or \(2\) acquired and added to the permanent collection of the museum; or](#)

(ii) by gift or bequest of objects containing *de minimis* amounts of ivory as set forth in section 17.40(e)(3) and antiques containing worked ivory is allowed if the importing museum certifies that: the object meets the definition of antique set forth in section (e)(1) of this section or the definition of *de minimis* set forth in section (e)(3) of this section and (A) will be added to the permanent collection of the museum or (B) is imported for consideration for gift or bequest and will either be (1) re-exported after consideration or (2) acquired and added to the permanent collection of the museum.

(10) *Antique ivory.* Antiques (as defined in paragraph (e)(1) of this section) are not subject to the provisions of this rule. Antiques containing or consisting of ivory may therefore be imported into or exported from the United States without a threatened species permit issued under § 17.32, provided the requirements of 50 CFR parts 13, 14, and 23 have been met. ~~Also;~~ nevertheless, the provisions and prohibitions under the African Elephant Conservation Act (16 U.S.C. 4201 *et. seq.*) apply, regardless of the age of the item. Antiques that consist of or contain raw or worked ivory may similarly be sold or offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32.

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