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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–IA–2013–0091]

[96300–1671–0000–R4]

RIN 1018–AX84

Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are revising the rule for the African elephant promulgated under section 4(d) of the Endangered Species Act of 1973, as amended (ESA), to increase protection for African elephants in response to the alarming rise in poaching to fuel the growing illegal trade in ivory. The African elephant (*Loxodonta africana*)

was listed as threatened under the ESA effective June 11, 1978, and at the same time a rule was promulgated under section 4(d) of the ESA (a "4(d) rule") to regulate import and use of specimens of the species in the United States. This final rule updates the current 4(d) rule with measures that are appropriate for the current conservation needs of the species. We adopted measures that are necessary and advisable to provide for the conservation of the African elephant as well as appropriate prohibitions from section 9(a)(1) of the ESA.

DATES: This rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Craig Hoover, Chief, Division of Management Authority; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: IA; Falls Church, VA 22041 (telephone, (703) 358–2093).

SUPPLEMENTARY INFORMATION:

Executive Summary

Why We Need to Publish a Final Rule

When a species is listed as threatened, section 4(d) of the ESA gives discretion to the Secretary of the Interior to issue regulations that he or she "deems necessary and advisable to provide for the conservation of such species." In response to an unprecedented increase in poaching of elephants across Africa and the escalation of the illegal trade in ivory, we reevaluated the provisions of the existing ESA 4(d) rule for the African elephant, and, on July 29, 2015, we published a proposed rule to revise the 4(d) rule (80 FR 45154). We are revising the 4(d) rule by adopting measures that are necessary and advisable for the current conservation

needs of the species, based on our evaluation of the current threats to the African elephant and the comments received from the public. The poaching crisis is driven by demand for elephant ivory. This final rule will allow us to more strictly regulate trade in African elephant ivory and help to ensure that the U.S. ivory market is not contributing to the poaching of elephants in Africa. This action is consistent with recommendations adopted by the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or the Convention) in March 2013 to help curb the illegal killing of elephants and illegal trade in ivory, issuance of Executive Order 13648 on Combating Wildlife Trafficking in July 2013, and the stated priorities in the National Strategy for Combating Wildlife Trafficking, issued by President Obama in February 2014.

What is the effect of this final rule?

We are revising the 4(d) rule for the African elephant to increase protection and benefit the conservation of African elephants by more strictly controlling U.S. trade in ivory, without unnecessarily restricting activities that have no conservation effect or are strictly regulated under other law. The final rule prohibits import and export of African elephant ivory with limited exceptions for: musical instruments, items that are part of a traveling exhibition, and items that are part of a household move or inheritance when specific criteria are met; and ivory for law enforcement or genuine scientific purposes. With regard to import, these exceptions remain prohibited under the African Elephant Conservation Act (AfECA) import moratorium (54 FR 24758, June 9, 1989). However, under Director's Order 210, as amended on May 15, 2014, as a matter of law enforcement discretion, the Service will not enforce the AfECA moratorium with respect to these limited exceptions. Antiques (as defined under section 10(h) of the ESA) 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. However, import of most African elephant ivory, including antique ivory, remains prohibited under the AfECA import moratorium. This final rule allows for import of sport-hunted trophies but limits the number of sport-hunted African elephant trophies imported into the United States to two per hunter per year. The prohibition on export of raw ivory in the current 4(d) rule is maintained in the final rule. Interstate and foreign commerce in African elephant ivory is prohibited by the final rule except for items that qualify as ESA antiques and certain manufactured or handcrafted items that contain a small (*de minimis*) amount of ivory and meet specific criteria.

The final rule prohibits take of live African elephants in the United States, which will help to ensure that elephants held in captivity receive an appropriate standard of care. As stated in the proposed rule (80 FR 45154, July 29, 2015), while the taking of live African elephants held in captivity within the United States or being transported is not a threat to the species, including a prohibition against take, even for species that are not native to the United States, is a standard protection for threatened species and ensures an adequate level of care for wildlife held in captivity. (This prohibition is the same as the prohibition on take of Asian elephants, which has been in place since 1976 when the Asian elephant was listed under the ESA.) Trade in live African elephants and African elephant parts and products other than ivory is allowed under the final rule provided the requirements in 50 CFR parts 13, 14, and 23 have been met.

The Basis for Our Action

The Service reevaluated U.S. domestic controls, given the current poaching crisis in Africa and the associated increase in illegal trade in ivory, recent CITES recommendations, and

evidence that substantial quantities of illegal ivory are making their way into U.S. markets. We determined that it is appropriate to take certain regulatory actions, including revision of the 4(d) rule as necessary and advisable for the conservation of the species and to include certain prohibitions from section 9(a)(1) of the ESA, to more strictly regulate U.S. trade in ivory. The final rule will regulate import, export, and commercial use of African elephant ivory and sport-hunted trophies and appropriately protect live elephants within the United States, while including certain limited exceptions for items and activities that we do not believe, based on all available evidence, are contributing to the poaching of elephants in Africa, including for certain manufactured or handcrafted items containing ivory that meet specific criteria. The final rule will facilitate enforcement efforts within the United States and improve regulation of both domestic and foreign trade in elephant ivory by U.S. citizens. Improved domestic controls will make it more difficult to launder illegal elephant ivory through U.S. markets, which will contribute to a reduction in poaching of African elephants.

This final rule is consistent with Executive Order 13648 on Combating Wildlife Trafficking signed by President Obama on July 1, 2013, to "address the significant effects of wildlife trafficking on the national interests of the United States." The Executive Order calls on executive departments and agencies to take all appropriate actions within their authority to "enhance domestic efforts to combat wildlife trafficking, to assist foreign nations in building capacity to combat wildlife trafficking, and to assist in combating transnational organized crime." Increased control of the U.S. market for elephant ivory is also among the administrative actions called for in the National Strategy for Combating Wildlife Trafficking, issued by President Obama on February 11, 2014. Director's Order No. 210, issued by the Director of the U.S. Fish and Wildlife Service, established policy and procedures for the Service to follow in

implementing the National Strategy with regard to trade in African elephant ivory and parts and products of other ESA-listed species.

Background

In the United States, the African elephant is primarily protected and managed under the ESA (16 U.S.C. 1531 *et seq*.); CITES (27 U.S.T. 1087), as implemented in the United States through the ESA; and the AfECA (16 U.S.C. 4201 *et seq*.). The ESA designates responsibility for CITES implementation to the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service.

Endangered Species Act. Under the ESA, species may be listed either as "threatened" or as "endangered." When a species is listed as endangered under the ESA, certain actions are prohibited under section 9 (16 U.S.C. 1538), as specified at 50 CFR 17.21. These include prohibitions on take within the United States, within the territorial seas of the United States, or upon the high seas; import; export; sale and offer for sale in interstate or foreign commerce; and delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce in the course of a commercial activity.

The ESA does not specify particular prohibitions and exceptions to those prohibitions for threatened species. Instead, under section 4(d) of the ESA, the Secretary of the Interior is given the discretion to issue such regulations as deemed necessary and advisable to provide for the conservation of the species. The Secretary also has the discretion to prohibit by regulation with respect to any threatened species any act prohibited under section 9(a)(1) of the ESA for endangered species. Exercising this discretion under section 4(d), the Service has developed general prohibitions (50 CFR 17.31) and established a permitting process for specified exceptions to those prohibitions (50 CFR 17.32) that apply to most threatened species. Permits

issued under 50 CFR 17.32 must be for "Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the [ESA]."

Under section 4(d) of the ESA, the Service may also develop specific prohibitions and exceptions tailored to the particular conservation needs of a threatened species. In such cases, the Service issues a 4(d) rule that may include some of the prohibitions and authorizations set out at 50 CFR 17.31 and 17.32, but that also may be more or less restrictive than the general provisions at 50 CFR 17.31 and 17.32.

Convention on International Trade in Endangered Species of Wild Fauna and Flora. CITES entered into force in 1975, and currently has 182 Parties (countries or regional economic integration organizations that have ratified the Convention), including the United States. The aim of CITES is to regulate international trade in listed animal and plant species, including their parts and products, to ensure the trade is legal and does not threaten the survival of species. CITES regulates both commercial and noncommercial international trade through a system of permits and certificates that must be presented when leaving and entering a country with CITES specimens. Species are listed in one of three appendices, which provide different levels of protection. In some circumstances, different populations of a species are listed at different levels. Appendix I includes species that are threatened with extinction and are or may be affected by trade. The Convention states that Appendix-I species must be subject to "particularly strict regulation" and trade in specimens of these species should only be authorized "in exceptional circumstances." Appendix II includes species that are not necessarily threatened with extinction now, but may become so if international trade is not regulated. Appendix III includes species that a range country has identified as being subject to regulation within its

jurisdiction and as needing cooperation of other Parties in the control of international trade.

Import and export of CITES species is prohibited unless accompanied by any required CITES documents. Documentation requirements vary depending on the appendix in which the species or population is listed and other factors. CITES documents cannot be issued until specific biological and legal findings have been made. CITES does not regulate take or domestic trade of listed species. It contributes to the conservation of listed species by regulating international trade and, in order to make the findings necessary for issuance of CITES permits, encouraging assessment and analysis of the population status of species in trade and the effects of international trade on wild populations.

African Elephant Conservation Act. The AfECA was enacted in 1988 to "perpetuate healthy populations of African elephants" by regulating the import and export of certain African elephant ivory to and from the United States. Building from and supporting existing programs under CITES, the AfECA called on the Service to establish moratoria on the import of raw and worked ivory from both African elephant range countries and intermediary countries (those that export ivory that does not originate in that country) that failed to meet certain statutory criteria. The statute also states that it does not provide authority for the Service to establish a moratorium that prohibits the import of sport-hunted trophies that meet certain standards.

In addition to authorizing establishment of the moratoria and prohibiting any import in violation of the terms of any moratorium, the AfECA prohibits: The import of raw African elephant ivory from any country that is not a range country; the import of raw or worked ivory exported from a range country in violation of that country's laws or applicable CITES programs; the import of worked ivory, other than certain personal effects, unless the exporting country has determined that the ivory was legally acquired; and the export of all raw (but not worked)

African elephant ivory. While the AfECA comprehensively addresses the import of ivory into the United States, it does not address other uses of ivory or African elephant specimens other than ivory and sport-hunted trophies. The AfECA does not regulate the use of ivory within the United States and, other than the prohibition on the export of raw ivory, does not regulate export of ivory from the United States. The AfECA also does not regulate the import or export of live African elephants.

Regulatory Background

Ghana first listed the African elephant in CITES Appendix III on February 26, 1976. Later that year, the CITES Parties agreed to add African elephants to Appendix II, effective February 4, 1977. In October 1989, all populations of African elephants were transferred from CITES Appendix II to Appendix I (effective in January 1990), which ended much of the legal commercial trade in African elephant ivory.

In 1997, based on proposals submitted by Botswana, Namibia, and Zimbabwe and the report of a Panel of Experts (which concluded, among other things, that populations in these countries were stable or increasing and that poaching pressure was low), the CITES Parties agreed to transfer the African elephant populations in these three countries to CITES Appendix II. The Appendix-II listing included an annotation that allowed noncommercial export of hunting trophies, export of live animals to appropriate and acceptable destinations, export of hides from Zimbabwe, and noncommercial export of leather goods and some ivory carvings from Zimbabwe. It also allowed for a one-time export of raw ivory to Japan (which took place in 1999), once certain conditions had been met. All other African elephant specimens from these three countries were deemed to be specimens of a species listed in Appendix I and regulated accordingly.

The African elephant population of South Africa was transferred from CITES Appendix I to Appendix II in 2000, with an annotation that allowed trade in hunting trophies for noncommercial purposes, trade in live animals for reintroduction purposes, and trade in hides and leather goods. At that time, the Panel of Experts reviewing South Africa's proposal concluded, among other things, that South Africa's elephant population was increasing, that there were no apparent threats to the status of the population, and that the country's anti-poaching measures were "extremely effective." Since then, the CITES Parties have revised the Appendix-II listing annotation three times. The current annotation, in place since 2007, covers the Appendix-II populations of Botswana, Namibia, South Africa, and Zimbabwe and allows export of: Sport-hunted trophies for noncommercial purposes; live animals to appropriate and acceptable destinations; hides; hair; certain ivory carvings from Namibia and Zimbabwe for noncommercial purposes; and a one-time export of specific quantities of raw ivory, once certain conditions had been met (this export, to China and Japan, took place in 2009). As in previous versions of the annotation, all other African elephant specimens from these four populations are deemed to be specimens of species included in Appendix I and the trade in them is regulated accordingly.

The African elephant was listed as threatened under the ESA, effective June 11, 1978 (43 FR 20499, May 12, 1978). A review of the status of the species at that time showed that the African elephant was declining in many parts of its range and that habitat loss, illegal killing of elephants for their ivory, and inadequacy of existing regulatory mechanisms were factors contributing to the decline. At the same time the African elephant was designated as a threatened species, the Service promulgated a 4(d) rule to regulate import and certain interstate commerce of the species in the United States (43 FR 20499, May 12, 1978).

The 1978 4(d) rule for the African elephant stated that the prohibitions at 50 CFR 17.31 applied to any African elephant, alive or dead, and to any part, product, or offspring thereof, with certain exceptions. Specifically, under the 1978 rule, the prohibition at 50 CFR 17.31 against importation did not apply to African elephant specimens that had originated in the wild in a country that was a Party to CITES if the specimens had been exported or re-exported in accordance with Article IV of the Convention, and had remained in customs control in any country not party to the Convention that they transited *en route* to the United States. (At that time, the only African elephant range States that were Parties to CITES were Botswana, Ghana, Niger, Nigeria, Senegal, South Africa, and Zaire [now the Democratic Republic of the Congo].) The 1978 rule allowed for a special purpose permit to be issued in accordance with the provisions of 50 CFR 17.32 to authorize any activity otherwise prohibited with regard to the African elephant, upon submission of proof that the specimens were already in the United States on June 11, 1978, or that the specimens were imported under the exception described above.

The 4(d) rule has been amended twice in response to changes in the status of African elephants and the illegal trade in elephant ivory, and to more closely align U.S. requirements with actions taken by the CITES Parties. On July 20, 1982, the Service amended the 4(d) rule for the African elephant (47 FR 31384) to ease restrictions on domestic activities and to more closely align its requirements with provisions in CITES Resolution Conf. 3.12, *Trade in African elephant ivory*, adopted by the CITES Parties at the third meeting of the Conference of the Parties (CoP3, 1981). The 1982 rule applied only to import and export of ivory (and not other elephant specimens) and eliminated the prohibitions under the ESA against taking, possession of unlawfully taken specimens, and certain activities for the purpose of engaging in interstate and foreign commerce, including the sale and offer for sale in interstate commerce of African

elephant specimens. At that time, the Service concluded that the restrictions on interstate commerce contained in the 1978 rule were unnecessary and that the most effective means of utilizing limited resources to control ivory trade was through enforcement efforts focused on imports.

Following enactment of the AfECA (in October 1988), the Service established, on December 27, 1988, a moratorium on the import into the United States of African elephant ivory from countries that were not parties to CITES (53 FR 52242). On February 24, 1989, the Service established a second moratorium on all ivory imports into the United States from Somalia (54 FR 8008). On June 9, 1989, the Service put in place the current moratorium, which bans the import of ivory other than sport-hunted trophies from both range and intermediary countries (54 FR 24758).

The 4(d) rule was revised on August 10, 1992 (57 FR 35473), following establishment of the 1989 moratorium under the AfECA on the import of African elephant ivory into the United States, and again on June 26, 2014 (79 FR 30400, May 27, 2014), associated with the update of U.S. CITES implementing regulations. In the 2014 revision of the 4(d) rule, we removed the CITES marking requirements for African elephant sport-hunted trophies. At the same time, these marking requirements were updated and incorporated into our CITES regulations at 50 CFR 23.74. The purpose of this change was to make clear what is required under CITES (at 50 CFR part 23) for trade in sport-hunted trophies and what is required under the ESA (at 50 CFR part 17).

Proposed rule and comments received. On July 29, 2015, we published a proposed rule (80 FR 45154) to revise the rule for the African elephant promulgated under section 4(d) of the ESA. We accepted public comments on the proposed rule for 60 days, until September 28, 2015.

We received more than 1,349,000 comments in response to the proposed rule, including eight petitions with more than 1,342,000 signatures (one petition also included drawings by children). All eight petitions were in strong support of strengthening elephant ivory regulatory controls. Counting each of the petitions as one substantive comment, about 500 of the comments received were substantive. We received comments from individuals, organizations, and one State natural resource agency, including substantive comments from: musicians, musical instrument manufacturers, and music organizations; antiques dealers (including auction houses) and collectors; museums and museum groups; hunting groups and knife and gun rights organizations; scrimshanders and other artisans working with ivory; a State natural resource agency; conservation/environmental nongovernmental organizations; organizations dedicated to promoting trade in ivory; and concerned citizens.

Requests for extension of the comment period. Some commenters requested that we extend the comment period for the proposed rule beyond 60 days. Since we signaled our intent to revise the 4(d) rule in 2014, the Service has been transparent about what we expected to propose. We met with a number of individuals and groups representing a range of interests, including musicians, orchestras, instrument manufacturers, antique dealers and collectors, auction houses, museums, small businesses, and conservation, hunting, and shooting interests. We also participated in listening sessions on this proposal, hosted by the Office of Management and Budget. Because of the extensive consultation and public outreach that had already occurred, we decided not to extend the 60-day comment period.

General comments. It is clear from the comments we received that there are strongly held views in the United States on the conservation of elephants and trade in elephant ivory. Regardless of perspectives and positions on trade in ivory, there is overwhelming concern for

elephant populations and a belief that the U.S. Government should take steps to protect elephants in Africa. Many commenters urged us to adopt strong regulations and to "shut down" the ivory trade to protect elephants; others argued that the U.S. ivory market is not the problem and that we should focus our efforts on combating poaching and illegal trade in Africa and Asia. Some commenters provided information in support of their positions, some offered specific suggestions and amendments to the proposed regulatory text, and others simply urged us to "do the right thing" to protect elephants. Some commenters commended the Service and the Obama Administration for taking steps to more strictly regulate trade in elephant ivory and for showing leadership in the fight against elephant poaching and wildlife trafficking; others asserted that the revisions proposed are unduly burdensome, that we have exceeded our statutory authority, and that there is no evidence that these restrictions will have any substantial effect on elephant poaching. In developing this final rule, we evaluated the comments and information received. We appreciate the careful consideration given to this proposal by so many groups and individuals. A summary and analysis of specific comments follows:

Comments on other types of ivory. We received a number of comments from individuals, including scrimshanders, who were concerned about the impact of this rule on trade in ivory other than African elephant ivory, including mammoth ivory. This final rule will regulate only African elephants and African elephant ivory. Asian elephants and parts or products from Asian elephants, including ivory, are regulated separately under the ESA. Ivory from marine species, such as walrus, is regulated separately under the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*). Ivory from extinct species, such as mammoth, is not regulated under statutes implemented by the Service. The only type of ivory regulated under this final rule is African elephant ivory.

Comments on legal possession of ivory. Some commenters seemed to think that this final rule would make it illegal to own ivory and would make the ivory that they currently legally own or possess subject to seizure or forfeiture. This is simply not true. Nothing in this final rule impacts a person's ability to own or possess legally acquired African elephant ivory.

Comments on the listing status of the African elephant. A number of commenters stated their belief that the African elephant should be reclassified under the ESA from a threatened species to an endangered species. Some also urged us to recognize savanna and forest elephants as two different species of African elephant. We consider these comments to be beyond the scope of this final rule. The Service has been petitioned to reclassify the African elephant as endangered and to recognize two species of African elephants and classify them both as endangered. Review of those petitions, through a process separate from this rulemaking, is ongoing.

Comments on trade in African elephant parts and products other than ivory and sport-hunted trophies. Under the final rule, African elephant parts and products other than ivory and sport-hunted trophies may be imported into or exported from the United States, and sold or offered for sale in interstate and foreign commerce, without an ESA threatened species permit, provided our CITES and general permitting and import/export requirements in 50 CFR parts 13, 14, and 23 are met. When establishing regulations for threatened species under the ESA, the Service has generally adopted restrictions on the import and export of live as well as dead animals and their parts and products, either through a 4(d) rule or through the provisions of 50 CFR 17.31. In this case, we elected not to extend the relevant section 9(a)(1) prohibitions to these activities involving live elephants and elephant parts and products other than ivory and sport-hunted trophies, and thus no separate ESA threatened species permit is required. Requiring

individuals to obtain an ESA threatened species permit in addition to the required CITES documents prior to import or export of live animals and parts or products other than ivory and sport-hunted trophies would add no meaningful protection for the species and would be an unnecessary overlay of authorization on top of existing documentation that already ensures that the import or export is legal and is not detrimental to the species.

(1) *Comment*: Some commenters objected to the provisions in the proposed rule for trade in parts and products other than ivory. They argued for a ban on commercial sale of all elephant items, including non-ivory parts and products, asserting that allowing any elephant parts to remain in the market creates confusion.

Response: We disagree. The poaching crisis is driven by demand for elephant ivory. As we indicated in the preamble to the proposed rule, there is no information to indicate that commercial use of elephant parts and products other than ivory has had any effect on the rates or patterns of illegal killing of elephants and the illegal trade in ivory. Thus, we determined it is not necessary and advisable to propose additional restrictions on commercial activities related to African elephant parts and products other than ivory and sport-hunted trophies. We will continue to monitor such activities and may reevaluate these provisions in the future if needed.

Comments on import of ivory into the United States. Under the final rule, import of African elephant ivory will be limited to sport-hunted trophies (no more than two per hunter per year), ivory for law enforcement or genuine scientific purposes, and certain worked ivory that meets specific conditions and is contained in a musical instrument, is part of a traveling exhibition, or is part of a household move or inheritance.

(2) *Comment*: Many commenters believe that the provisions in the proposed rule are not strict enough and that all import of ivory should be prohibited, including sport-hunted trophies.

Response: We are strictly regulating import of African elephant ivory. However, there are circumstances under which import of African elephant ivory into the United States may benefit conservation of African elephants, including import for law enforcement purposes and for genuine scientific purposes, or have no conservation effect. We have elected to establish exceptions for those activities that we do not believe have an impact on conservation. The final rule allows the import of ivory for law enforcement and genuine scientific purposes that would benefit the conservation of elephants, as well as import of sport-hunted trophies (when the proper determinations have been made) and import of ivory that meets specific conditions and is contained in a musical instrument, is part of a museum or other exhibition, or is part of a household move or inheritance. This rule allows us to strictly limit import of ivory in the vast majority of scenarios that may be contributing to the illegal killing of elephants and the illegal trade in ivory, while allowing import in only certain narrow circumstances or purposes that have no conservation effect or that may benefit conservation. These exceptions remain prohibited under the AfECA import moratorium. However, under Director's Order 210, as amended on May 15, 2014, as a matter of law enforcement discretion, the Service will not enforce the AfECA moratorium with respect to these limited exceptions. (For further discussion on sport-hunted trophies, see *Comments on import of sport-hunted trophies*, below.)

(3) *Comment*: Commenters stated their support of the Service's proposal to ban the import of antique ivory under its AfECA authority, noting the import of these items is already banned pursuant to the AfECA. The Service proposes to allow noncommercial import of certain items, including law enforcement and scientific items, musical instruments, items as part of a household move or inheritance, and exhibition items, where it can be demonstrated that the ivory was removed from the wild prior to 1976. Technically, the import of these items is already

banned pursuant to the AfECA. Understanding the Service's desire to make narrow exceptions, particularly for scientific and law enforcement purposes, if these import exemptions are maintained in the final rule, the Service should also maintain all other proposed limitations on imports (including the ban on post-1989 antique imports under AfECA and the ban on sale of antiques imported before 1982) "to constrain import and sale and much as possible."

Response: We wish to clarify that we are not invoking authority under AfECA to ban the import of antique ivory. Rather, as commenters note, this activity is already banned pursuant to AfECA. The AfECA moratorium on import of ivory other than sport-hunted trophies remains in place. Thus, noncommercial import of certain items, including law enforcement and scientific items, musical instruments, items as part of a household move or inheritance, and exhibition items, where it can be demonstrated for each such item that the ivory was removed from the wild prior to 1976, remains prohibited under the AfECA import moratorium. However, under Director's Order 210, as amended on May 15, 2014, as a matter of law enforcement discretion, the Service will not enforce the AfECA moratorium with respect to these limited exceptions.

Additionally, we have clarified in § 17.40(e)(9) that ESA antiques are exempt from the provisions of this 4(d) rule. In that same paragraph, we have also pointed to the provisions and prohibitions of the AfECA, which apply regardless of the age of the item. So, although we cannot and have not in this 4(d) rule prohibited import of African elephant ivory that qualifies as an antique under the ESA, the import of antique ivory is prohibited under the AfECA moratorium as established in our notice issued on June 9, 1989 (54 FR 24758). With regard to sale of antique ivory within the United States, Appendix 1 to Director's Order 210 clarifies how the Service implements the ESA antiques exception. Appendix 1 reminds the reader that the ESA allows the import and other activities without an ESA permit of an item that: (a) is not less

than 100 years of age; (b) is composed in whole or in part of any endangered species or threatened species listed under section 1533 of the Act; (c) has not been repaired or modified with any part of any such species on or after December 28, 1973; and (d) is entered at a port designated for the import of ESA antiques. The Appendix further clarifies that the Service will not take enforcement action against items that meet the first three elements (a, b, and c) above and were imported prior to September 22, 1982 (when the ESA antique ports were designated) or were created in the United States and never imported. Appendix 1 also reminds the reader that anyone claiming the benefit of an exemption from ESA prohibitions has the burden of proving that the exemption is applicable.

(4) *Comment*: Import of antiques should be allowed. The Service has exceeded its statutory authority by banning all ivory imports. Congress never intended to prevent legitimate antiques from entering or exiting the country, which is why it established an antique exception as part of the 1978 amendments to the ESA.

Response: See the response to (3) above.

(5) *Comment:* Import of ivory by U.S. museums should be allowed.

Response: The final rule allows the import by museums of African elephant ivory as part of a traveling exhibition when certain requirements are met (See § 17.40(e)(5)(ii).). This activity remains prohibited under the AfECA import moratorium. However, under Director's Order 210, as amended on May 15, 2014, as a matter of law enforcement discretion, the Service will not enforce the AfECA moratorium where the criteria contained in Director's Order 210 are met. See also *Comments on treatment of museums*, below.

Comments on import of sport-hunted trophies. Although some who commented on the provisions for import of sport-hunted trophies were opposed to the proposed limit on the number

that can be imported by a hunter in a given year and the requirement for an ESA import permit for trophies from Appendix-II populations, most who commented on this issue expressed strong opposition to allowing import into the United States of any African elephant sport-hunted trophies.

(6) *Comment*: Many commenters stated that, while limiting import of sport-hunted African elephant trophies to two per hunter per year is an improvement over the current situation, import of sport-hunted trophies should be eliminated entirely. Others asserted that sport hunting is barbaric and that the time has come to eliminate the taking of African elephants by Americans for sport. Some commenters argued that we need to provide further explanation for our proposal to allow a hunter to import two African elephant trophies per year and that one trophy would and should suffice. Some asserted that allowing import of two sport-hunted African elephant trophies per hunter per year is unsustainable for a species on the brink of extinction.

Response: The ESA does not prohibit U.S. hunters from traveling to other countries and taking threatened species (although authorization may be required under the ESA to import the sport-hunted trophy into the United States). AfECA specifically allows for import of sport-hunted trophies of elephants legally taken in a country that has submitted an ivory quota, and CITES provides guidance (in Resolution Conf. 10.10 (Rev. CoP16), *Trade in elephant specimens*) for trade in sport-hunted African elephant trophies, including on the establishment by range countries of an annual export quota, as part of the management of the population. Well-regulated trophy hunting is not a significant factor in the decline of elephant populations. We continue to believe that sport hunting, as part of a sound management program, can provide benefits to the conservation of the species. Before allowing import of African elephant sport-hunted trophies, we decide whether we can make the determinations necessary for import under

CITES and the ESA by evaluating information provided by range countries. The Service determined in April 2014 that, based on the information available to us, import of sport-hunted trophies from Tanzania and Zimbabwe could not be allowed because the killing of African elephants for trophies in those countries does not meet the enhancement standard under the 4(d) rule. We reached the same determination based on the information available in 2015. We continue to evaluate requests for import of sport-hunted trophies carefully under CITES requirements and the ESA enhancement finding required under this and the previous 4(d) rule.

As we indicated in the preamble to the proposed rule, we are limiting the number of sport-hunted African elephant trophies that may be imported into the United States to address a small number of circumstances in which U.S. hunters have participated in elephant culling operations and imported, as sport-hunted trophies, a large number of elephant tusks from animals taken as part of the cull. This practice has resulted, in some cases, in the import of commercial quantities of ivory as sport-hunted trophies. Sport hunting is meant to be a personal, noncommercial activity, and engaging in hunting that results in acquiring quantities of ivory that exceed what would reasonably be expected for personal use and enjoyment is inconsistent with sport hunting as a noncommercial activity. In evaluating an appropriate limit for personal use, we considered actions taken by the CITES Parties in recognition of the need to ensure that imports of certain other hunting trophies are for personal use only. In three different resolutions, the CITES Parties have agreed to limit annual imports of hunting trophies of leopards (no more than two), markhor (no more than one), and black rhinoceros (no more than one). All three of the resolutions containing these annual import limits (Resolution Conf. 10.14 (Rev. CoP16), *Quotas for trade in leopard hunting trophies and skins for personal use*, Resolution Conf. 10.15 (Rev. CoP14), *Establishment of quotas for markhor hunting trophies*, and Resolution Conf. 13.5

(Rev. CoP14), *Establishment of export quotas for black rhinoceros hunting trophies*), recommend (among other things) that the Management Authority of the State of import be satisfied that the trophies are not to be used for primarily commercial purposes if they are being imported as personal items that will not be sold in the country of import and the owner imports no more than one or two (depending on the species) trophies in any calendar year. Based on past practice under CITES and the number of elephant trophies imported each year by the vast majority of U.S. hunters who engage in elephant hunts, we consider two trophies per hunter per year to be an appropriate upper limit for the personal use of the hunter and we believe that this limit addresses our concern. We do not have information to indicate that allowing the import of two trophies per hunter per year would result in import of commercial quantities of ivory or would not be appropriate for personal use. Although some commenters asserted that one trophy should be enough, they did not provide further information in support of this position (aside from the general comments that hunting is not conservation). We anticipate this change will impact fewer than 10 hunters per year. We believe it is necessary to use our authority under section 4(d) of the ESA to ensure that ivory imported into the United States as sport-hunted trophies is consistent with sport hunting as a personal, noncommercial activity and that commercial quantities of ivory are not imported under the guise of sport hunting.

(7) *Comment*: Some commenters stated that allowing continued import of ivory when it is a trophy, instead of "raw or worked" ivory, makes little sense. Some asserted that trophies consisting entirely or partially of tusks are one of the few legal methods still available for bringing ivory into the United States and that limiting the number of trophy imports does not adequately address the problem as there is nothing to stop multiple hunters from colluding to bring in just as much ivory by working in concert. One commenter stated that, with the proposed

prohibitions, the value of ivory imported as part of a sport-hunted trophy will significantly increase, which could lead to an increase in trophy hunting with the intent to illegally sell the trophy after import. Setting a zero import quota on African elephant trophies is the most efficient and effective way to ensure that the system is not gamed as a cover for the illegal ivory trade.

Response: Please see the response to (6) above. Although the scenario described by these commenters is possible, we have seen no evidence that this practice is occurring and consider the risk of such collusion to be low. In addition, as the commenters correctly state, selling the trophy ivory after import into the United States would be illegal under both our CITES regulations (50 CFR 23.55) and this final rule. We believe the limitations imposed on the import of sport-hunted trophies in this rule and other laws and regulations are sufficient to ensure that the commenters' concerns are not realized. As we continue to monitor the import of sport-hunted trophies, we may reevaluate these provisions in the future, if necessary.

(8) *Comment*: The world is a different place than it was when Congress passed the AfECA, including its exemption for import of sport-hunted trophies. Political turmoil, war, terrorism, and corruption all contribute to the ability of buyers to acquire raw ivory in the form of trophies. While section 4222(e) of AfECA includes an exemption for legally taken sport-hunted trophies, section 4241 of AfECA expressly states that the Service's authority is in addition to and does not affect its legal authority under the ESA. The U.S. Fish and Wildlife Service has broad authority to regulate trophy imports.

Response: We agree that the Service has broad authority to regulate import of sport-hunted trophies of listed species, and we do regulate such imports, including through the provisions in this final rule. We believe that the restrictions on import of sport-hunted elephant

trophies in this final rule are those that are necessary and advisable for the conservation of the African elephant.

(9) *Comment*: The U.S. Fish and Wildlife Service has banned the sale of sport-hunted trophy ivory for many years, but it is still available at auction, indicating that the ban is neither respected nor enforced.

Response: There is not, in fact, currently a ban on the sale of all sport-hunted African elephant ivory. The current 4(d) rule for the African elephant prohibits sale or offer for sale of "any sport-hunted trophy imported into the United States *in violation of permit conditions*" [emphasis added], and our CITES regulations (at 50 CFR 23.55) prohibit sale of sport-hunted African elephant trophies imported after January 18, 1990 (when the African elephant was listed in CITES Appendix I). With this final rule, we are prohibiting any sale of African elephant trophies in interstate or foreign commerce, with the exception of those that qualify as ESA antiques (see paragraphs (e)(6) and (e)(9) of the final rule).

(10) *Comment*: Appreciate that the Service is finally requiring an ESA import permit to import any African elephant sport-hunted trophy. It is imperative that the Service undertake an ESA enhancement analysis for sport-hunted trophies and that the public notice and comment requirements in section 10 of the ESA and the requirement that the Service make application information available to the public be retained in any 4(d) rule for African elephants.

Response: The commenter is correct that, under this final rule, an ESA import permit will be required for import of any African elephant sport-hunted trophy and that we will not issue such a permit unless we have made a positive enhancement finding. While section 10(c) of the ESA requires that we publish notice in the **Federal Register** of each application involving an exemption or permit made under section 10, this is not the case for applications involving

threatened species, which are not subject to the section 9 prohibitions and thus, the notice and comment requirements in section 10(c). Nothing in this final rule changes those requirements.

(11) *Comment*: The requirements for "enhancement findings" are not the same as the requirements for CITES "non-detriment findings."

Response: We agree. The current 4(d) rule for the African elephant, at 50 CFR 17.40(e)(3)(iii), allows the import of sport-hunted trophies provided that, among other things, "a determination is made that the killing of the animal whose trophy is intended for import would enhance survival of the species." This provision has been in place since 1992 and will remain in place with this final rule. It requires that we make an ESA enhancement determination for import of any African elephant sport-hunted trophy, including those from CITES Appendix-II populations. Information on factors considered in making an ESA enhancement finding is found in 50 CFR 17.32(a). In addition to this ESA finding, for trophies from CITES Appendix-I populations we must also issue a CITES import permit. Before we can issue a CITES import permit we must be able to determine that the import is for purposes that are not detrimental to the survival of the species and that the specimen is not to be used for primarily commercial purposes. Information on factors considered in making a CITES non-detriment finding is contained in 50 CFR 23.61. Information on factors considered in determining whether a specimen is to be used for primarily commercial purposes is found in 50 CFR 23.62. The commenter is correct that the determinations needed for issuance of a CITES import permit are different from, and in addition to, the ESA enhancement finding.

(12) *Comment*: The Service has previously asserted that trophy hunting of imperiled species can have a positive overall impact on species conservation. There is minimal data showing this to be the case, particularly for elephants. Proponents of sport hunting as a

conservation tool often cite two interrelated documents as alleged "proof" that sport-hunting can be a useful tool for conservation—the IUCN SSC Guiding Principles on Trophy Hunting as a Tool for Creating Conservation Incentives and CITES Resolution Conf. 2.11, regarding trade in hunting trophies of Appendix-I species. The primary theory behind these documents is that hunting can directly raise funding for conservation efforts in countries with otherwise limited resources; however, this possible outcome does not overcome the long-term negative effect of hunting—allowing legalized killing of these animals continues to decrease their overall chance of survivability as a species in the wild.

Response: We continue to believe that well-managed trophy hunting can benefit conservation and disagree that there is little basis for this assertion. Trophy hunting can generate funds to be used for conservation, including for habitat protection, population monitoring, wildlife management programs, and law enforcement efforts. The IUCN Guiding Principles on Trophy Hunting as a Tool for Creating Conservation Incentives (Ver.1.0, August 2012) state that well-managed trophy hunting can "assist in furthering conservation objectives by creating the revenue and economic incentives for the management and conservation of the target species and its habitat, as well as supporting local livelihoods" and, further, that well-managed trophy hunting is "often a higher value, lower impact land use than alternatives such as agriculture or tourism." When a trophy hunting program incorporates the following Guiding Principles, IUCN considers that trophy hunting can serve as a conservation tool: biological sustainability; net conservation benefit; socio-economic-cultural benefit; adaptive management—planning, monitoring, and reporting; and accountable and effective governance. We support this approach.

Lindsey et al. (2007), in their paper on the economic and conservation significance of the trophy hunting industry in sub-Saharan Africa, state their belief that, from a conservation

perspective, "the provision of incentives which promote wildlife as a land use is the single most important contribution of the trophy hunting industry." In addition, they note that trophy hunting generates revenues in areas where alternatives, such as ecotourism, may not be viable. More recently, Di Minin et al. (2016) assert that trophy hunting "strongly contributes" to conservation in sub-Saharan Africa, where large areas currently allocated to use for trophy hunting support important biodiversity. They also note that, if revenue cannot be generated from trophy hunting, these natural habitats will be converted to other forms of land use. While recognizing that the degree to which trophy hunting contributes to conservation is a subject of debate, Mallon (2013), in his report on trophy hunting of CITES-listed species in Central Asia, states that "well-run hunting concessions have an economic interest in maintaining the resource (i.e., conserving the species) so will also aim to manage the area to conserve high-quality habitat that supports high numbers of the hunting species, and also to prevent unregulated use by others (poaching, overgrazing)." Naidoo et al. (2015) describe the complementary benefits of tourism and hunting to communal conservancies in Namibia.

We are, of course, aware that not all trophy hunting is part of a well-managed, well-run program, and we evaluate import of sport-hunted trophies carefully to ensure that all CITES and ESA requirements are met. As noted previously, the Service currently does not allow import of sport-hunted African elephant trophies from Tanzania and Zimbabwe because, based on the information available, we were unable to make the necessary determinations under CITES and the ESA in 2014 and 2015. Under this final rule, we will continue to require an ESA enhancement finding for import of all African elephant sport-hunted trophies and will require issuance of a threatened species permit for all such trophies, which will allow us to carefully evaluate trophy imports in accordance with legal standards and the conservation needs of the

species.

(13) *Comment*: Trophy hunting is a very big industry, and trophy imports are unquestionably commercial. Trophy hunters pay tens of thousands of dollars for hunting licenses, lodges, guides, etc., yet trophy hunting continues to be categorized as noncommercial.

Response: We recognize that trophy hunters spend money on licenses, guides, travel, lodging, etc., and agree that sport hunts are a source of income for guides, outfitters, governments, and others in many range countries (and that a portion of the money generated by these hunts is often directed to elephant conservation efforts). However, the import of sport-hunted trophies for the personal use of the hunter is, and has long been, considered a noncommercial activity both under the ESA and by the CITES Parties. With this final rule, we are prohibiting any sale of African elephant trophies in interstate or foreign commerce, with the exception of those that qualify as ESA antiques, which will ensure that these imports are not commercialized.

(14) *Comment*: Some commenters were opposed to the restriction on import of sport-hunted trophies and to the requirement for ESA import permits for African elephant sport-hunted trophies from Appendix-II populations. One commenter asserted that those populations were expressly transferred from Appendix I to Appendix II to reduce import permitting costs, burden, and delays. The same commenter expressed particular opposition to limiting the number of trophies that could be imported from Appendix-I populations, as Appendix-I import permit conditions state that the ivory may not be sold. Some commenters stated that we had not indicated that U.S. sport hunters are a source of the poaching or trafficking problems so there is no reasonable justification for our assertion that individual permit requirements will help reduce poaching and trafficking of elephants.

Response: The African elephant populations in Botswana, Namibia, South Africa, and Zimbabwe were moved from Appendix I to Appendix II because they met the criteria for downlisting to Appendix II. These criteria do not include or contemplate reduction of permitting costs or burdens. The decisions to downlist these populations occurred at a time (1997 for Botswana, Namibia, and Zimbabwe; 2000 for South Africa) when the African elephant populations in these countries were increasing and poaching was generally not a concern. As stated previously, we are imposing limits on annual imports of sport-hunted trophies to ensure that U.S. hunters are not importing commercial quantities of ivory, as has happened in the recent past. We are aware of circumstances under which U.S. hunters have participated in elephant culling operations and imported the ivory from those culls as sport-hunted trophies. We consider this practice to be inconsistent with sport hunting, which is meant to be a personal, noncommercial activity. While the commenters are correct that we do not believe that U.S. sport hunters are involved in poaching and trafficking of ivory, we are concerned about commercial quantities of ivory imported through sport-hunting contributing to the problem, particularly in light of our concerns about the status of African elephant populations and the inadequacies of conservation management programs in place in many African elephant range countries. Authorizing import of all sport-hunted trophies through threatened species enhancement permits will allow us to more carefully evaluate trophy imports in accordance with legal standards and the conservation needs of the species.

(15) *Comment*: The permit requirement will not benefit hunters, contrary to what the Service has suggested. The ability to import will become subject to the discretion of U.S. officials responsible for reviewing the paperwork involved in the permit process, and any minor, nonsubstantive inaccuracy or error could result in delays, confiscation of the trophy, bureaucratic

and legal obstacles, and penalties.

Response: We disagree. See the response to (14) above. Although we are changing the process for obtaining authorization for import, we are not changing the standards for the decision or the enhancement finding. In addition, under current regulations, the import of elephant sport-hunted trophies requires the Service to make a determination regarding whether the killing of the elephant whose trophy is intended for import would enhance the survival of the species, the trophy must be declared to the Service at the time of import, and the trophy must be made available for inspection. Issuance of a permit confirming that an enhancement determination has been made is unlikely to result in any fundamental change in how trophies are treated upon import.

(16) *Comment*: The current enhancement requirement is not lawful. It is wholly based on a perceived enhancement requirement under CITES Resolution Conf. 2.11 for Appendix I sport-hunted trophies, not Appendix II as is proposed.

Response: The requirement that we make a determination regarding whether the killing of the elephant whose trophy is intended for import would enhance the survival of the species is based on our ESA implementing regulations (50 CFR 17.32), and is in addition to CITES requirements. It is not based on the recommendations in Resolution Conf. 2.11, which addresses the making of CITES non-detriment findings for trade in hunting trophies of Appendix-I species. (See the response to (11) above.)

(17) *Comment*: Sufficient reason has not been given for overriding the purpose and intent of section 9(c)(2) of the ESA, which exempts hunting trophies of threatened Appendix-II species from import permit requirements, and the provisions of the AfECA confirming specifically the favored treatment of elephant hunting trophies.

Response: We disagree. Section 9(c)(2) (16 U.S.C. 1538(c)(2)) of the ESA and our ESA implementing regulations at 50 CFR 17.8 provide a limited exemption for the import of some threatened species, which can be used by hunters to import sport-hunted trophies. Import of threatened species that are also listed under CITES Appendix II is presumed not to be in violation of the ESA if the import is not made in the course of a commercial activity, all CITES requirements have been met, and all general wildlife import requirements under 50 CFR part 14 have been met. This presumption can be rebutted, however, when information shows that the species' conservation and survival would benefit from the granting of ESA authorization prior to import.

In 1997 and 2000, when the four populations of African elephants were transferred from CITES Appendix I to CITES Appendix II, we retained the requirement for ESA enhancement findings prior to the import of sport-hunted trophies. We amended the African elephant 4(d) rule in June of 2014, again maintaining the requirement for an ESA enhancement finding prior to allowing the import of African elephant sport-hunted trophies. Requiring issuance of threatened species enhancement permits under 50 CFR 17.32 for the import of any African elephant hunting trophy is a change to the procedure for issuing ESA authorization but not a change to the requirement that an enhancement finding be made prior to import into the United States, as this finding was also required under the previous 4(d) rule.

The overall conservation status of African elephants has deteriorated in the years following the transfer of the four populations of African elephants to CITES Appendix II. The Service made a similar determination regarding the need for import permits for sport-hunted trophies of Appendix-II argali (*Ovis ammon*). In the final rule announcing the listing of the argali under the ESA (57 FR 28014, June 23, 1992), the Service determined the need for

threatened species permits for import of sport-hunted trophies, noting that the "history of excessive exploitation of the argali" and "the uncertainty concerning its management" rebut the presumption that an export permit issued by the exporting country is all that is necessary to provide for the conservation of the argali in those countries. The district court upheld the Service's determination, finding no provision of the ESA indicates that "the Secretary's duty and authority to issue protective regulations is preempted, circumscribed, or modified by section 9(c)(2)." *Safari Club Int'l v. Babbitt*, 1993 U.S. Dist. LEXIS 21795 (W.D. Tex. Aug. 12, 1993).

As stated previously, authorizing import of all sport-hunted trophies through threatened species enhancement permits will allow us to more carefully evaluate trophy imports in accordance with legal standards and the conservation needs of the species. For example, as we noted in the preamble to the proposed rule, the issuance of threatened species enhancement permits under 50 CFR 17.32 would mean that the standards under 50 CFR part 13 would also be in effect, such as the requirement that an applicant submit complete and accurate information during the application process and the ability of the Service to deny permits in situations where the applicant has been assessed a civil or criminal penalty under certain circumstances, failed to disclose material information, or made false statements. Therefore, we have determined that the additional safeguard of requiring the issuance of threatened species enhancement permits under 50 CFR 17.32 prior to the import of sport-hunted African elephant trophies is warranted, and we are consciously supplanting the provisions of section 9(c)(2) of the ESA that would otherwise apply.

(18) *Comment:* The proposed rule violates the ESA. The Service proposes to restrict the number of sport-hunted trophies to two per hunter per year. In addition, the proposed rule requires issuance of a threatened species permit for all African elephant sport-hunted trophies,

whereas now such permits are required only for trophies from CITES Appendix-I populations. The positive impact of sport hunting on wildlife management and economic development in Africa has been well documented, and the proposed rule does not detail the negative consequences the proposed revisions could have on sport hunting in Africa, nor does it offer evidence of how these negative consequences may impact conservation of elephants throughout their range. Because of this failing, the public has not been provided an opportunity to comment meaningfully, and, if finalized in its current form, this rule would constitute an arbitrary and capricious abuse of discretion.

Response: We disagree. While we have consistently acknowledged the positive impact sport hunting can have on wildlife management and economic development, we also articulated our concerns in the proposed rule with respect to the potential for commercial quantities of ivory to be imported as a result of sport hunting and provided opportunity for public comment. This rule does not limit the opportunity to hunt, only the number of trophies that an individual could import in a given year. Based on the small number (fewer than 10) of U.S. hunters who have imported more than two trophies per year over the last several years, we do not expect this to be a significant change for the vast majority of hunters. Range countries that allow sport hunting of African elephants establish annual quotas for export. Unless otherwise proscribed, a quota for 50 elephants could be filled by one hunter or 50 hunters. We do not believe, based on the information we have, that there is a shortage of hunters or that placing limits on the number of trophies that U.S. hunters can import in a given year would impact the overall number of elephants hunted. We are placing a limit on the number of trophies that can be imported to increase control of the U.S. domestic ivory market and to ensure that we are not allowing the import of commercial quantities of ivory as sport-hunted trophies. (See also the response to (12),

above.)

Requiring issuance of a threatened species permit for import of all African elephant sport-hunted trophies (instead of only those from Appendix-I populations) will help us to more carefully evaluate trophy imports in accordance with legal standards and the conservation needs of the species and to ensure a conservation benefit. (See the response to (17), above.)

Comments on interstate and foreign commerce in ivory: the de minimis exception. The final rule will prohibit sale and offer for sale of ivory in interstate and foreign commerce except for antiques and certain manufactured items that contain a small (*de minimis*) amount of ivory and meet specific criteria. We received many comments on this proposed *de minimis* exception, including on the seven criteria set forth in paragraph (e)(3) to qualify for the exception. In the preamble to the proposed rule, we included a specific request for comment on the criteria proposed in paragraph (e)(3), particularly the criteria set forth in subparagraphs (iii) (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) and (v) (the manufactured item is not made wholly or primarily of ivory), including the impact of not including these criteria and whether these criteria are clearly understandable.

Some, including some conservation organizations, expressed their preference for a complete ban on domestic commerce, but recognized our rationale for this proposed exception and asserted that the requirements to qualify should not be weakened in any way. Many others appreciated a *de minimis* exception but suggested a variety of changes to meet their particular needs, e.g., bagpipers and organists believe the 200-gram weight limit should be increased to cover all types of bagpipes and keyboard instruments with multiple keyboards; others believe the weight limit should be different for different types of objects (furniture, musical instruments,

etc.); some urged us to adopt a volume limit, instead of a weight limit; some suggested that the text in criterion (iii) be amended to include ivory parts that are "integral" to a manufactured item, not just "fixed components" of the item. We also received a request to amend criterion (iii) to include handcrafted items in addition to manufactured items. Some commenters urged us to extend the *de minimis* exception to commercial import and export.

(19) *Comment*: It is critical that, in the final rule, this provision remains truly an exception only for items with minimal amounts of ivory. The criteria required for meeting the *de minimis* exception are well thought out and when taken as a whole will ensure that only a narrow category of ivory product that does not contribute to illegal trade will be permitted. Strongly discourage the removal or rollback of any of the seven criteria.

Response: We agree with the commenters.

(20) *Comment*: The broad *de minimis* exemption should be removed or significantly tightened (i.e., limited to musical instruments only).

Response: While we appreciate the concern expressed, we decline to accept this suggestion. We have given considerable thought to the *de minimis* exception and the development of the criteria that must be met to qualify for the exception. It is our intent only to allow continued interstate and foreign commercial trade in products that contain a small amount of old ivory; items that we do not believe are contributing to elephant poaching or the illegal ivory trade. That group of products includes certain musical instruments but also includes, for example, household items such as baskets with ivory trim and teapots with ivory insulators, knives and guns with ivory grips, and some canes, walking sticks, and measuring tools with ivory trim or decoration, etc.

Our law enforcement experience over the last 25 years has shown that the vast majority

of items in the illegal ivory trade are either raw ivory (tusks and pieces of tusks) or manufactured pieces (mostly carvings) that are composed entirely or primarily of ivory. In the preamble to the proposed rule, we described the November 2013 "ivory crush" during which the Service destroyed six tons of seized ivory that represented over 25 years of law enforcement efforts to control illegal ivory trade in the United States. The six tons of contraband ivory that was destroyed did not include any items that would be covered by this exception. Ivory traffickers are not manufacturing items with small amounts of pre-Convention ivory or dealing in such items. Rather, because the incentive to deal in illegal ivory is economic, the trade focuses on raw ivory and large pieces of carved ivory from which the highest profits can be made. We also described, in the preamble to the proposed rule, the case involving a Philadelphia-based African art dealer, which included the seizure of approximately one ton of ivory. All of the seized ivory (which was subsequently destroyed in our 2015 ivory crush in Times Square) was in the form of whole ivory carvings and did not include any items that would qualify under the *de minimis* exception in the final rule. Thus, we believe the criteria necessary to meet the *de minimis* exception will ensure that only a narrow category of ivory product that does not contribute to illegal trade will be permitted.

(21) *Comment*: Replace the word "fixed" with the phrase "fixed or integral" in criterion (iii) to cover items that have small ivory pieces that can be easily removed (like nuts or pegs on some wooden tools or musical instruments). "Integral" connotes an item that is "essential to the completeness" of a larger structure (Merriam-Webster online dictionary) and should satisfy the purpose of the criterion without artificially distinguishing between components based on how easily they can be detached.

Response: We believe this is a reasonable and useful suggestion and have revised the

final rule accordingly.

(22) *Comment*: The *de minimis* exception provides an important avenue to allow sale and offer for sale of ivory objects in interstate or foreign commerce that would not contribute to illegal wildlife trade. However, the requirements as written may not exempt many objects considered works of art by U.S. art museums. The commenters suggest adding "handcrafted" to "manufactured" in the *de minimis* exception. Handcrafted would cover works that are unique and made primarily by hand that might not be considered "manufactured."

Response: We would have considered "handcrafted" items to fall under "manufactured" items, but we understand the distinction made by the commenters and have added handcrafted items to the criteria in paragraphs (e)(3)(iii), (v), and (vii) for clarity.

(23) *Comment*: Allow handcrafted objects created before February 26, 1976, to meet the *de minimis* exception, even if the ivory is a major component, so long as the ivory is not the primary source of value (e.g., portrait miniatures).

Response: We appreciate that there are some items that meet most, but not all, of the criteria in the *de minimis* exception, and that some of these items may not be among those contributing to the poaching of elephants and illegal ivory trade. However, it is the criteria as a whole that we believe will minimize the possibility of the ivory contributing to either global or U.S. illegal ivory markets or that the *de minimis* exception could be exploited as a cover for illegal trade. We have crafted the *de minimis* exception to allow continued commercial trade in items that contain only a small amount of older ivory and that are not valued primarily because of the ivory they contain. We consider an item to be made wholly or primarily of ivory if the ivory component or components account for more than 50 percent of the volume of the item. Likewise, if more than 50 percent of the value of an item is attributed to the ivory component or

components, we consider the ivory to be the primary source of the value of that item. Any person claiming the benefit of this exception has the burden of proving that the exception is applicable and showing that an item meets all of the criteria under the exception. Allowing interstate and foreign commerce of items for which ivory is a major component is contrary to the intent of the *de minimis* exception and would complicate implementation and enforcement of the exception. Therefore, we have not included this suggestion in the final rule. However, we note that many (possibly most) portrait miniatures, the example provided by the commenter, would likely qualify as ESA antiques and, therefore, would not need to meet the *de minimis* exception to be sold in interstate or foreign commerce.

(24) *Comment*: Allow a corresponding exception for import by U.S. art museums of works of art satisfying the stringent *de minimis* criteria.

Response: See *Comments on treatment of museums*, below.

(25) *Comment*: The Service should further restrict the date of import requirement in paragraph (e)(3)(i) so that it is consistent with the date in paragraph (e)(3)(ii), i.e., February 26, 1976.

Response: The first two criteria paragraph (e)(3) to qualify for the *de minimis* exception set limits on when the ivory was either imported into the United States (if it is located in the United States) or when it was removed from the wild (if it is located outside the United States). We have chosen a different date for ivory that has been imported into the United States than for ivory located outside the United States to be consistent with our CITES regulations and standard CITES practices regarding pre-Convention specimens. Criterion (i) provides that, for items located in the United States, the ivory must either have been imported prior to January 18, 1990 (the date the African elephant was listed in CITES Appendix I), or imported under a CITES pre-

Convention certificate (certifying that the ivory was removed from the wild prior to the date the African elephant was first listed under CITES, which is February 26, 1976). This requirement is consistent with our CITES regulations at 50 CFR 23.55, which provide that CITES Appendix-I specimens may be used only for noncommercial purposes after import into the United States unless it can be demonstrated that they were imported prior to the Appendix-I listing or they were imported under a CITES pre-Convention certificate, which is issued to certify that the CITES specimen was taken from the wild prior to the date that the species was listed under CITES.

Criterion (ii) states that, for items located outside the United States, the ivory must have been removed from the wild prior to February 26, 1976. In this situation, our CITES use-after-import provisions in 50 CFR 23.55 would not apply (since the ivory has not been imported into the United States). Any African elephant specimen removed from the wild prior to February 26, 1976, is considered to be "pre-Convention" as it was acquired before it was subject to the provisions of CITES. The concept of pre-Convention CITES specimens and the process for authorizing international trade of CITES pre-Convention specimens is familiar to and widely understood by the 182 Parties to CITES. Therefore, we consider that use of the pre-Convention date as a qualifying factor for items located outside the United States is appropriate.

(26) *Comment*: Some commenters urged us to maintain the language in paragraph (e)(3) in criterion (v) that ensures that a qualifying item is not made wholly or primarily of ivory and the language in criterion (iii) stating that ivory is not the primary source of the value of the item. They also asserted that the other criteria are all reasonable elements that, if enforced, would be an improvement on the regulatory status quo. Some commenters urged us to strengthen and clarify the *de minimis* requirements, specifically criterion (v). They expressed their belief that

"wholly or primarily" is subject to interpretation and could be construed to allow the sale of items made of up to 50 percent ivory. They urged us to consider a more stringent standard and noted that the State of New York requires antiques to be less than 20 percent ivory and California requires antiques to be less than 5 percent ivory and musical instruments to be less than 20 percent ivory to qualify for legal sale. These commenters encouraged the use of an equally well-defined numeric standard and low threshold amount of ivory to meet the requirements of criterion (v) of the *de minimis* exception. Some commenters suggested that, for some items, particularly furniture, we should consider a volume limit, as it allows for large antiques that use a proportionally small amount of ivory to be legally traded. Other commenters expressed uncertainty over how the primary source of value would be determined.

Response: We agree that it is important to maintain all seven of the criteria for meeting the *de minimis* exemption and that all of these criteria taken together ensure that only items containing truly small quantities of ivory will qualify for the exemption. We disagree with the assertion that using only a percentage of the total volume or weight of an item instead of a total allowable weight for the ivory contained in an item will necessarily result in a more stringent or more easily enforceable standard. Less than 20 percent, by weight or volume, of a very large or heavy piece could equal far more than 200 grams of ivory. Because all of the criteria must be met to qualify for the *de minimis* exception, both criterion (v) and criterion (vi), the two criteria that address quantity, must be met. This means that a qualifying item may not be made wholly or primarily of ivory <u>and</u> the total weight of the ivory component or components in the item must be less than 200 grams. We consider an item to be made wholly or primarily of ivory if the ivory component or components account for more than 50 percent of the volume of the item. Likewise, if more than 50 percent of the value of an item is attributed to the ivory component or

components, we consider the ivory to be the primary source of the value of that item. We believe that these criteria taken together appropriately limit the amount of ivory an item may contain and still qualify for the *de minimis* exception. We will provide additional guidance on the implementation of these criteria via our website, including how we will estimate the weight of the ivory contained in a manufactured or handcrafted item, prior to the effective date of this rule. However, as stated above, any person claiming the benefit of this exception has the burden of proving that the exception is applicable and showing that an item meets all of the criteria under the exception. See *Comments on documentation requirements* (below).

(27) *Comment*: The 200-gram limit on the amount of ivory contained in antique objects seems unnecessarily stringent, driven by the weight of the ivory veneers on piano keys rather than a close review of the wide spectrum of antique objects that contain ivory. It is unclear how the Service would attempt to enforce the 200-gram limit (if the ivory is an integral part of the antique object, how could it be weighed separately?). If a *de minimis* limit is adopted, some commenters proposed that it be done by category of object; while 200 grams may be appropriate for musical instruments, with respect to other antique objects, particularly furniture, the Service should consider a volume limit, such as the 20 percent rule adopted in New York.

Response: To be clear, the proposed *de minimis* exemption does not apply to antiques. Items made of ivory or containing ivory that qualify as ESA antiques may be sold or offered for sale in interstate or foreign commerce regardless of the quantity of ivory they contain. The *de minimis* provision applies to activities in interstate and foreign commerce involving handcrafted or manufactured items containing small amounts of pre-Convention ivory or ivory that was imported into the United States prior to 1990 that does not qualify as antique under the ESA. The intent of the *de minimis* provision is only to allow the sale of certain older items, containing

small amounts of ivory, which we do not believe are contributing to the poaching of elephants in Africa.

The commenters are correct that we chose the 200-gram limit because we believed it was large enough to accommodate most pianos and other musical instruments, as well as many other household and utilitarian items (such as baskets with ivory trim, teapots with ivory insulators, knives and guns with ivory grips, some canes and walking sticks with ivory inlay or other decoration, and measuring tools with ivory trim or decoration), but also because it was small enough to ensure that we were not allowing commercialization of substantial volumes of ivory. Because we proposed the 200-gram limit with a particular suite of existing items in mind, including certain musical instruments, we already have a good understanding of the types of items that qualify for the *de minimis* exception. We will provide additional guidance on the implementation and enforcement of the 200-gram limit. See also *Comments on documentation requirements* (below).

(28) *Comment*: For the *de minimis* exemption to function as intended, it is important that the 4(d) rule apply documentation requirements that are flexible enough to be realistic and achievable. The Service has already articulated such requirements in the "use after import" rule, and this same standard should be used for items subject to the *de minimis* exemption; specificity can only lead to confusion.

Response: See *Comments on documentation requirements* (below).

(29) *Comment*: The New York State Department of Environmental Conservation (DEC) commends the U.S. Fish and Wildlife Service for its efforts to combat illegal wildlife trade and states that it has been proud to work alongside the Service to eliminate the illegal trade in wildlife. New York State has recently passed robust legislation banning the sale of elephant and

mammoth ivory and rhinoceros horn, with limited exceptions for products such as antiques containing only a small amount of ivory. This legislation significantly curtailed the amount of elephant ivory that can be legally sold, traded, or distributed in New York State. The *de minimis* exemption in the Service's proposed rule is a significant flaw that would weaken New York State's ivory prohibitions on interstate sale. Current New York State law generally prohibits interstate sale of elephant ivory unless a person can demonstrate that the item is an antique greater than 100 years old and the person secures a permit from DEC to sell the ivory. The ESA generally preempts a State law that applies to import or export, or interstate or foreign sale of endangered or threatened species, where the State law prohibits what is authorized pursuant to an ESA exemption, permit, or implementing regulation. If the *de minimis* exemption is adopted, the State of New York must permit interstate sale of manufactured items containing *de minimis* amounts of ivory even if they are not antiques. The Service should reconsider this exemption.

Response: We agree that the revised 4(d) rule for the African elephant would likely require that the State of New York allow sale and offer for sale of ivory in interstate or foreign commerce along with delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce without a threatened species permit for manufactured items containing *de minimis* amounts of ivory, provided they meet specific criteria. While the commenters have expressed their concern that this portion of their rule may be preempted, they have not attempted to show why allowing interstate commerce of *de minimis* amounts of ivory would not adequately curtail the sale of elephant ivory or why a more restrictive approach may be necessary and advisable for the species. It is always a goal of the Service to balance the burden of regulation with conservation. Based on our more than 25 years of law enforcement efforts and input from the public, this rule strives to strike that balance. We will, of course, continue to monitor the

situation, and if the balance tips, may revisit the rule as necessary.

Additional comments on interstate and foreign commerce in ivory. As noted above, the final rule will prohibit sale and offer for sale of ivory in interstate and foreign commerce except for antiques and certain manufactured items that contain a small (*de minimis*) amount of ivory and meet specific criteria. In addition to the comments on the *de minimis* exception, we received comments on other aspects of the provisions for interstate and foreign commerce.

(30) *Comment*: Some commenters, including the New York Department of Environmental Conservation, assert that the Service should require a permit for the sale, offer for sale, purchase, trade, barter, or distribution of articles containing African elephant ivory and products and parts from other endangered and threatened species in interstate or foreign commerce.

Response: This comment, as it relates to other endangered and threatened species in interstate or foreign commerce, is beyond the scope of this rulemaking. However, the Service's goal here, and in its approach to regulating wildlife trade more broadly, is to balance the burden of regulation with the impact on conservation. Where our experience indicates that this activity is not contributing to the poaching of elephants and the risk of illegal trade is low, we do not wish to impose unnecessary regulatory burden on the public or additional workload on the Service, particularly in an area where the workload is already substantial.

(31) *Comment*: The U.S. Fish and Wildlife Service should create a registry and license all ivory dealers as recommended in CITES Resolution Conf. 10.10 (Rev. CoP16). Section 9(d) of the ESA creates a mandate for the Service to track the disposition of ivory products once they enter the United States.

Response: We disagree that section 9(d) of the ESA creates a mandate for the Service to

track the disposition of ivory products once they enter the United States. Section 9(d) of the ESA requires people engaged in business as importers or exporters of wildlife, including any amount of African elephant ivory, to first obtain permission from the Service. These importers and exporters are also required to keep records of their imports and exports and any subsequent disposition by them of the wildlife and to allow the Service to examine those records. Those provisions remain firmly in place. The Service requires that anyone engaged in commercial import or export of wildlife obtain an Import/Export License from our Office of Law Enforcement and provide an opportunity for us to examine inventories and required records "at all reasonable times upon notice by a duly authorized representative." We believe that the prohibitions and exceptions laid out in this rule are adequate to effectively regulate ivory trade in the United States and to ensure that the U.S. market for ivory is not contributing to elephant poaching and illegal ivory trade. A registry and licensing scheme would be unduly burdensome on both the regulated public and the Service, with little, if any, added conservation benefit beyond the restrictions already in place and those added here.

(32) *Comment*: Some commenters stated that the economic impact of the proposed rule on American craftsmen and artisans will be significant. One commenter estimated that there are about seven individuals in the United States who purchase tusks (from individuals who imported them prior to 1989) and cut them into a variety of forms, or "blanks," for U.S. craftsmen to finish. These craftsmen work the ivory pieces into finished products, including pool cues, knife handles, and piano keys. He estimated that there are about 15 individuals making pool cues with ivory ferrules and that there are a total of about 300 people in the United States creating finished products using ivory. The commenter stated that under the proposed rule all of these people would lose their livelihoods. We also received comments from craftsmen who restore ivory

pieces (see (48), below).

Response: We agree that this rule will impact craftsmen working with ivory in the United States. We note, however, that the final rule does not impact intrastate (within a State) commerce so those buying and selling within the State in which they reside will be able to continue to do so (where such activity is allowed under State law). In addition, we note that these craftsmen can make use of alternative materials, including mammoth ivory or deer antlers, for example. Martin and Stiles noted in their 2008 report that the exact number of ivory craftsmen in the United States is unknown but they estimated that there were 120 to 200 craftsmen at that time, with the number decreasing over time. The authors also noted that most craftsmen work part-time with ivory and use other materials as well. The impact on individual craftsmen will depend on the diversity of materials they use (wood, bone, mammoth tusks, etc.) and may range from minimal revenue decrease to closure.

(33) *Comment*: The U.S. Fish and Wildlife Service definition of "commercial activity" is substantially narrower than the statutory definition and is, therefore, unlawful and should be amended. Section 3 of the ESA broadly defines "commercial activity" to mean "all activities of industry or trade, including, but not limited to, the buying or selling of commodities." The Service's regulations at 50 CFR 17.3 further define "industry or trade" to mean only "the actual or intended transfer of wildlife from one person to another person in the pursuit of gain or profit." The Service's definition essentially restricts covered "commercial activities" to the buying and selling of items. This definition contravenes the statutory definition, which covers both buying and selling items, as well as other commercial activities. The Service should rethink and broaden its regulatory definition [of commercial activity] and its application in the 4(d) rule.

Response: The regulatory definition of "industry or trade" with regard to commercial

activity has been in place for many years and was promulgated through rulemaking conducted in accordance with the Administrative Procedure Act (APA), where the public received opportunity for notice and comment. As we know the commenter is aware, this definition has broader application than this 4(d) rule. We do not consider it appropriate to amend the definition for this specific rulemaking. In addition, as explained in the preamble to the proposed rule, we believe that taking an article across State lines for repair, for example, rightfully falls outside what is considered "commercial activity." We may revisit this issue in the future if the existing definition appears to allow activities that may be contrary to the spirit or plain language of the ESA.

Comments on documentation requirements. We received a number of comments requesting that we provide clearly understandable guidance on how to determine whether an item qualifies for the antiques or *de minimis* exemptions and what type of documentation can be used to demonstrate that an item qualifies for one of these exemptions. Many musicians asked that we clarify the documentation needed to show the provenance of ivory contained in instruments. Some commenters asked for a rigorous and clearly defined method for documenting the age and provenance of an item so that both buyers and sellers understand their duties under the law. Others asked that we clarify how to determine the weight of ivory in a manufactured or handcrafted piece (where it cannot be removed and weighed) or how to determine whether the ivory is the primary source of value of an item. Some commenters noted that, for the *de minimis* exemption to function as intended, it is important that the Service apply documentation requirements that are flexible enough to be realistic and achievable. They pointed to the requirements articulated in the "use after import" provisions of our CITES regulations at 50 CFR 23.55 as a good example and argued that the same standard should be used for items subject to

the *de minimis* exemption. We appreciate this input and understand the concerns. We are developing clear guidance for the public that we will make available before the effective date of this final rule.

One commenter asked whether the Service intends to require scientific testing of all ivory. Another commenter stated that many types of forensic testing are expensive, often destructive to the object, and sometimes unavailable due to an object's small size. They noted, however, that an object whose ivory cannot be identified forensically may be identified through expert analysis of trade patterns for objects of that type, the maker of the object, and geomapping of the object. They urged us to make clear that both of these types of evidence (forensic and other expert analysis) are acceptable. Another commenter asked us to clarify that, with respect to manufactured items, contemporary evidence contained in catalogs, price lists, and similar materials showing that a particular item was not offered for sale after a given date would constitute evidence that the item was manufactured prior to that date. Some commenters provided information on nondestructive methods for determining age and species of ivory objects, including both scientific methods and methodologies employed by art historians.

Response: We agree that forensic testing is not necessarily required. Provenance may be determined through a detailed history of the item, including but not limited to, family photos, ethnographic fieldwork, art history publications, or other information that authenticates the article and assigns the work to a known period of time or, where possible, to a known artist or craftsman. A qualified appraisal or another method, including using information in catalogs, price lists, and other similar materials that document the age by establishing the origin of the item, can also be used.

With regard to the criteria for meeting the *de minimis* exception, we consider an item to

be made wholly or primarily of ivory if the ivory component or components account for more than 50 percent of the volume of the item. Likewise, if more than 50 percent of the value of an item is attributed to the ivory component or components, we consider the ivory to be the primary source of the value of that item. Value can be ascertained by comparing a similar item that does not contain ivory to one that does (for example, comparing the price of a basket with ivory trim/decoration to the price of a similar basket without ivory components). Though not required, a qualified appraisal or another method of documenting the value of the item and the relative value of the ivory component, including, as noted above, information in catalogs, price lists, and other similar materials, can also be used.

We will not require ivory components to be removed from an item to be weighed. Because we proposed the 200-gram limit with a particular suite of existing items in mind, including certain musical instruments, knife and gun grips, and certain household and decorative items, we already have a good understanding of the types of items that qualify for the *de minimis* exception. Examples of items that we do not expect would qualify for the *de minimis* exception include chess sets with ivory chess pieces (both because we would not consider the pieces to be fixed or integral components of a larger manufactured item and because the ivory would likely be the primary source of value of the chess set), an ivory carving on a wooden base (both because it would likely be primarily made of ivory and the ivory would likely be the primary source of its value), and ivory earrings or a pendant with metal fittings (again both because they would likely be primarily made of ivory and the ivory would likely be the primary source of its value).

We realize that determining whether an object containing ivory complies with these requirements may sometimes be difficult for persons who are not ordinarily engaged in

commercial trade of such articles. Our law enforcement focus under this rule will be to help eliminate elephant poaching by targeting persons engaged in or facilitating illegal ivory trade. While it is the responsibility of each citizen to understand and comply with the law, and that is our expectation with regard to this regulation, we do not foresee taking enforcement action against a person who has exercised due care and reasonably determined, in good faith, that an article complies with the *de minimis* requirements.

We will provide additional guidance on the implementation of these criteria via our website, including how we will estimate the weight of the ivory contained in a manufactured or handcrafted item and how we will determine that an item is made "wholly or primarily" of ivory, prior to the effective date of this rule.

We have already provided guidance, in the appendix to Director's Order 210, regarding documentation to demonstrate that an item meets the definition of "antique" under the ESA. We will provide additional guidance to the regulated public regarding documentation and other evidence that may be used to demonstrate that an item meets the specific exceptions to the prohibitions in this rule. We will make that information available on our website in advance of the effective date of this rule.

(34) *Comment*: Some commenters noted that the Internal Revenue Service has established an Art Advisory Panel that determines age and value for all sorts of art and antiques. They suggested that the Service may want to set up a similar panel of experts who can make declarations that objects are in compliance with the ESA antiques exemption.

Response: We do not believe that a third party panel or body is necessary for the effective implementation of this rule, although we encourage the regulated public to utilize available experts to provide technical advice regarding the qualifications of an item that may

qualify for an exception to this rule. We will provide additional guidance to the regulated public regarding documentation and other evidence that may be used to demonstrate that an item meets the specific exceptions to the prohibitions in this rule. We will make that information available on our website in advance of the effective date of this rule.

(35) *Comment*: The Service must provide a safe harbor, whereby an affidavit from a qualified art, antiques, or ivory expert that the item satisfies the ESA antiques exemption is deemed sufficient. The Service could itself certify experts or require that such experts be certified by a third party.

Response: We disagree. Anyone claiming the benefit of an exemption from ESA prohibitions has the burden of proving that the exemption is applicable. There are a variety of methods and forms of documentation that can be used to demonstrate that the exemption applies. The Service has a long history of implementing and enforcing the ESA, including the antiques exemption. We do not believe that a safe harbor, as described by the commenters, is appropriate for the effective implementation of this rule. We do, however, encourage the public to utilize available experts to provide technical advice regarding the qualifications of an item that may qualify for an exception to this rule. See the other responses under *Comments on documentation requirements*, including to (34) above.

(36) *Comment*: The American Society of Appraisers asked whether and to what extent the Service plans to pursue legal or administrative recourse against appraisers who perform "best efforts" appraisals only to discover after some time that key assumptions or determinations that underpinned the appraisal are determined to be inaccurate.

Response: In Appendix 1 to Director's Order 210, we have provided explicit information on what the Service will accept as a qualified appraisal and facts we examine in determining the

reliability of the appraisal. An appraisal using appropriate professional expertise based on the best available information at that time that is later determined to be incorrect would not subject that appraiser to legal action under this rule. We expect an appraiser or other individual to be able to act in good faith in his or her professional capacity.

Comments on the U.S. role in the illegal ivory market. We received a number of comments on the U.S. role in the illegal ivory market and steps the Service should take to address ivory trafficking.

(37) Many commenters asserted that ivory trafficking is primarily a problem in Asia and Africa, not here in the United States, and that the best way to protect African elephants is to step up enforcement and conservation efforts in Africa and in China. Some commenters cited analyses of CITES Elephant Trade Information System (ETIS) data as evidence that the United States is not part of the problem.

Response: Based on all available information, we believe that ivory trafficking is a global problem, and that the United States has a duty and responsibility to work with other countries around the world to combat illegal trade in ivory and other wildlife parts and products. To that end, we are actively engaged in combating poaching in African elephant range states and wildlife trafficking in transit and consumer states. We are supporting anti-poaching efforts in parks and other protected areas, providing training to rangers, working collaboratively on international investigations, supporting demand-reduction campaigns in consumer countries, and pushing other countries to strengthen their ivory trade controls. We disagree with the assertion that the United States does not play a role in the market for illegal ivory and that we do not have a duty and responsibility to take steps to control our own domestic ivory market. Trafficking of ivory is a complex, global problem, and it will take coordinated, focused efforts by all countries

involved as source, transit, or destination countries to bring it to an end. Although the primary markets are in Asia, particularly in China and Thailand, the United States continues to play a role as a destination and transit country for illegally traded elephant ivory. We made this point in the proposed rule, and it is apparent in the ETIS reports cited by some commenters. We gave an overview in the proposed rule of the seizures by Service wildlife inspectors of unlawfully imported and exported elephant specimens over the years, and we described multiple smuggling operations, investigated by Service special agents, involving the trafficking of elephant ivory for U.S. markets. We reported that, since 1990, the annual number of seizure cases involving elephant specimens at U.S. ports has ranged from over 450 (in 1990) to 60 (in 2008); in most other years the number falls between 75 and 250 cases. In 2012, the most recent year for which we have complete data, there were about 225 seizure cases involving elephant specimens, which resulted in seizure of more than 1,500 items that contained or consisted of elephant parts or products. Nearly 1,000 of those items contained or consisted of elephant ivory. In his 2013 articles "It's Not Just China, New York is Gateway for Illegal Ivory" and "The Big Ivory Apple," Daniel Stiles described a 2013 visit to New York City during which he saw what appeared to be a "massive decline" in the ivory market, compared to his visit a little more than 5 years earlier, with a 60 percent decrease in the number of outlets selling ivory and an approximately 50 percent decrease in the number of ivory items for sale. However, the author still found cause for concern and concluded that "New York and San Francisco appear to be gateway cities for illegal ivory import in the U.S…China is not the only culprit promoting elephant poaching through its illegal ivory markets. The U.S. is right up there with them." In a very recent (March 9, 2016) case, the senior auction administrator of a gallery and auction house in Beverly Hills, California, pled guilty in Federal court to conspiring to smuggle wildlife

products made from rhinoceros horn, elephant ivory, and coral with a market value of approximately $1 million. He personally falsified customs forms by stating that rhinoceros horn and elephant ivory items were made of bone, wood, or plastic. We are revising the 4(d) rule for the African elephant to more strictly regulate trade in African elephant ivory and help to ensure that the U.S. ivory market is not contributing to the poaching of elephants in Africa.

(38) *Comment*: The relative importance of the United States as a destination for illegal ivory has been greatly exaggerated. This misconception is attributed to the misreading of a table in Martin and Stiles 2008 report, Ivory Markets in the USA, which identifies the United States as having the second largest retail market for ivory in the world.

Response: The United States has among the largest economies in the world and has a large market for wildlife products, including ivory. Some commenters provided information estimating the size of the legal market for ivory in the United States. Although, by their nature, illegal markets are difficult to quantify, we agree that it is not accurate to characterize the United States as having the second-largest *illegal* ivory market in the world, and to be clear, we have not done so. We are aware, as the commenter notes, that others have made this assertion. (See also the response to (56), below.)

(39) *Comment*: In describing the U.S. market in the preamble to the proposed rule, the Service cited surveys done by Daniel Stiles and stated that "Stiles estimated, in his 2014 follow-up study, that as much as one half of the ivory for sale in two California cities during his survey had been imported illegally." In his comments on the proposed rule, Mr. Stiles objected to that characterization and noted that the report in question said nothing about "imported illegally"; it only stated that there is a much higher incidence of what appears to be ivory of recent manufacture in California, roughly doubling from about 25 percent in 2006 to about half in 2014,

and that no conclusions should be drawn about what percentage of ivory in the United States is legal or illegal based on visual examination.

Response: It was certainly not our intention to mischaracterize Mr. Stiles' work. In an effort to avoid any mischaracterization, we will instead present excerpts from his surveys describing the U.S. role in the illegal ivory trade. The report referred to here is titled "Elephant Ivory Trafficking in California, USA" (Stiles, 2015), and the stated purpose (on p. 1) of the study was to "ascertain the current ivory trade in California and estimate what proportion might be illegal." The author describes his methodology for determining the date of manufacture and/or import of an item and notes that it is fraught with difficulty and that it is subjective, based on the investigator's experience, knowledge of worked ivory from different regions, and clues gathered in conversations with informants or descriptions and photographs on tear sheets on websites. He states that the results should be considered a "rough estimate."

A summary of his results, in the abstract section, includes the following: "In Los Angeles, between 77% and 90% of the ivory seen was likely illegal under California law (i.e., post-1977), and between 47% and 60% could have been illegal under federal law. There is a much higher incidence of what appears to be ivory of recent manufacture in California, roughly doubling from approximately 25% in 2006 to about half in 2014. In addition, many of the ivory items seen for sale in California advertised as antiques (i.e., more than 100 years old) appear to be more likely from recently killed elephants. Most of the ivory products surveyed appear to have originated in East Asia." He also states, on p. 15, that "Based on the style of the possibly illegal worked ivory, the investigator concluded that it originated, in order of proportion, from East Asia, Africa, and Europe…most of it was probably smuggled in sea or air shipments mixed in with mammoth ivory, carved bone and resin pieces; shipped concealed and mislabeled with

other products (e.g., crafts, furniture); or carried in personal luggage. The fact that the majority of illegal ivory in the United States is coming from China makes sense, as a great deal of raw ivory is transported from Africa to China where it is carved mainly in factories in the Guangdong and Fujian provinces and then smuggled to the United States."

We recognize Mr. Stiles' experience and expertise in investigating ivory markets around the world, and we recognize the difficulties associated with estimating the age or date of manufacture or import based on visual inspection. We do, in fact, recognize his conclusions to be rough estimates. That said, his studies provide additional evidence of the role of the United States in the illegal ivory trade.

(40) *Comment*: The Service must do more than focus on large-scale smuggling of ivory and must address the rampant interstate trade in ivory, which has a substantial negative cumulative impact on elephant conservation.

Response: We agree that more holistic regulation of ivory trade is necessary to address the U.S. role in this trade. The previous 4(d) rule did not regulate sale or offer for sale in interstate commerce of African elephant ivory, unless it was illegally imported into the United States or unless it was a sport-hunted trophy imported in violation of a permit condition. This rule goes further to prohibit 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 with some limited exceptions. The final rule will improve controls on the domestic market, which will make it more difficult to launder illegal elephant ivory through the U.S. marketplace. Our target in this action is illegal ivory trade that is contributing to pushing African elephants toward extinction. Our goal is to thwart those engaged in trafficking of African elephant ivory. We will focus our enforcement efforts on people

engaged in illegal activities that contribute to the poaching of elephants in Africa. We will not focus our enforcement efforts on people who legally possess and want to sell African elephant ivory under the exceptions provided and who, in the exercise of due care, have reasonably determined in good faith that an article complies with one of the available exceptions.

We believe that the restrictions and exceptions in this rule are necessary and advisable for the conservation of the African elephant while not unnecessarily regulating or prohibiting certain activities that do not contribute to elephant poaching and illegal ivory trade.

(41) *Comment*: The domestic ivory trade is not supplied by tusks taken from elephants dying in Africa today; it runs entirely on ivory that was legally imported before 1989. There is no demand for new raw ivory in the United States. There is a "glut of estate raw tusks in the U.S." that sell for about 10–15 percent of the cost of those that can be obtained in China. No informed trafficker would try to smuggle tusks into the United States.

Response: We disagree. We cited numerous examples in the proposed rule of ongoing illegal trade in ivory to the United States. Additional examples have been documented since publication of the proposed rule. Our wildlife inspectors consistently interdict and seize illegal elephant ivory. As recently as February 17, 2016, a New York antique dealer pleaded guilty to trafficking in prohibited wildlife that included raw and carved elephant ivory. He pleaded guilty to a felony Lacey Act charge for the unlawful import of a pair of elephant tusks and subsequent sale of those and four other elephant tusks to a Massachusetts collector. He purchased the ivory in Canada and smuggled it into the United States. The total value of the seized items is in the thousands of dollars. Thus, recent law enforcement efforts demonstrate that the United States plays a role in the illegal trade and associated illegal killing of African elephants.

(42) *Comment*: U.S. demand can be adequately addressed by pre-2014 law, as the

successful prosecutions demonstrate.

Response: Although we have successfully investigated and prosecuted some cases in the last several years, our law enforcement personnel have indicated that the current regulatory regime makes it extremely difficult to effectively control illegal ivory trade in the United States. See response to (39) above regarding the apparent availability of illegal ivory in U.S. markets.

(43) *Comment:* The U.S. Fish and Wildlife Service should not be fighting this battle with mostly law-abiding American citizens when Chinese speculators are buying tons of poached ivory every year. Those who wish to prohibit legal ivory trade are creating the conditions for speculators to cash in; they are cutting off supply and creating artificial scarcity. Strongly urge the Service to devote its energies to solving the real problem—speculator demand for raw ivory in eastern Asia.

Response: We agree that solving this problem requires a suite of actions both domestically and internationally. This is a global challenge requiring global solutions. The United States is working with foreign governments, international organizations, nongovernmental organizations, and the private sector to maximize impacts together. These efforts aim to strengthen enforcement, reduce demand, and increase cooperation to address these challenges. See the response to (59) on other activities and initiatives in which we are engaged to help stop the poaching of elephants and end the illegal trade in ivory.

Comments on trade in antique ivory. In the final rule, we define antique (in paragraph (e)(1)) to mean any item that meets all four criteria under section 10(h) of the ESA, and we clarify (in paragraph (e)(9)) that antiques meeting this definition are not subject to the provisions of this rule. In that same paragraph, we point to the AfECA and remind readers that the provisions and prohibitions under AfECA also apply to trade in African elephant ivory,

regardless of the age of the item.

(44) *Comment*: One commenter suggested adding the word "nevertheless" into the antiques paragraph, (e)(9), at the beginning of the sentence on the African Elephant Conservation Act to clarify that, while the ESA antiques exception does allow import of antiques, the AfECA does not.

Response: We believe this is a useful suggestion and have amended paragraph (e)(9) of the final rule accordingly. Additional text has been added to make clear that nothing in this rule interprets or changes any provisions or prohibitions that may apply under AfECA.

(45) *Comment*: Close the antiques loophole. By allowing sale of antiques made largely or entirely of ivory you will leave open one of the major loopholes used by smugglers today.

Response: The ESA antiques exception is statutory language enacted by Congress. We do not have the authority to eliminate this exception.

(46) *Comment*: Some recent ivory carvings are artificially aged to make them appear to be antiques. This practice underscores the need for a greater burden of proof for genuine antiques.

Response: We believe that the prohibitions and exceptions in this final rule are appropriate and necessary for the conservation of the African elephant. With regard to elephant ivory, we agree that there have been attempts to disguise the age of elephant ivory. However, we have not, to date, had a comprehensive regulatory regime in place for African elephant ivory. We believe that the prohibitions on interstate commerce, the specific criteria to meet the exception for ESA antiques, including clarification that the person claiming the benefit of the antiques exception has the burden of demonstrating that it applies, along with specific guidance such as that contained in Director's Order 210, are adequate to ensure that the antique exception

is not exploited to engage in illegal trade in non-antique ivory items.

(47) *Comment*: The Service is taking the approach that it cannot distinguish legitimate antiques from new ivory. The legislative history of the ESA demonstrates that Congress agreed that legitimate antiques were distinguishable from newly harvested items.

Response: We fully agree that antiques can be distinguished from non-antiques, and our experience in implementing the ESA has demonstrated that fact. See *Comments on documentation requirements*, above. What we are making clear in this final rule is that the burden of demonstrating that an item qualifies for the ESA antiques exemption is firmly on the person claiming the benefit of that exemption.

(48) *Comment*: One ivory restorer commented that, under this rule, ivory that has been repaired after 1973 cannot be considered an antique and, therefore, cannot be sold. He noted that he has rarely seen any quality antique ivory that has not already been repaired and that he considers this provision to be an intentional roadblock to commerce. He added that much of his repair work requires no new ivory, just rebuilding and removal of old glue and dirt.

Response: To qualify as an antique, an item must meet all four criteria under section 10(h) of the ESA, including that it has not been repaired or modified with any part of an ESA-listed species on or after the date of enactment of the ESA (December 28, 1973). This provision is contained in the statute and applies to all ESA-listed species; it is not unique to this final rule or to African elephant ivory. We note, however, that removing old glue and dirt, as described by the commenter, would not be considered a repair or modification under the ESA unless it involved the use of additional ivory or other material from other ESA-listed species.

(49) *Comment*: Some commenters provided estimates of the value of antique ivory in personal household collections in the United States and the number of Americans who own

antique ivory. One study, based on information from public sources, including auction sales reports, and interviews with "over 30 important dealers, auction houses, individual collectors and antique experts" evaluated the value of "high-end, antique ivory objects" in private collections. The author stated that 8.1 percent of U.S. households (9.5 million households) have a net worth of $1 million or more, excluding their home, and that if 5 percent of these households own ivory, there are 475,000 households "likely to possess antique ivory objects." The author assigned an average value of $25,000 to the ivory in each of these households and arrived at an estimated value of $11.9 billion for the antique ivory in private collections in the United States.

Another paper on the scope of the antique ivory market in the United States stated that "5–10% of all antique decorative arts objects are made of or contain ivory or other endangered species materials." The author provided "a very rough estimate" of 400 million or more objects in the United States that contain or are made entirely of ivory. (While he stated that the majority of these objects were made "prior to World War II" it is not clear how many of these items may be antiques.) He also estimated that the total number of high-value items worth more than $10,000 each is relatively small (probably hundreds of thousands) whereas the number of more common decorative items is huge (400 million). The author also estimated that between 1.5 million and 2.5 million items made from ivory enter into commerce annually. Some commenters provided the results of a survey. The author of the survey asserted that "(i)f 13 million people own 2.4 objects that have an average real value in today's market of $240 each, then we can say that it is probable that incidental ivory possessions – excluding pianos and major ivory collections – have an aggregate value of $7.488 billion." Not all of these items would qualify as antiques, however, as the average age of these objects was estimated to be 76 years (see also the response to (57), below).

One commenter asserted that "the vast majority of ivory antiques transactions are relatively small in value (less than $500)" and argued that requiring "onerous and prohibitively expensive documentation" would effectively prevent people from taking part in such transactions. These commenters, and others, asserted that the proposed rule would impose extremely onerous and unnecessary requirements on owners of ivory to demonstrate that an object satisfies the antiques exemption, which would largely destroy the exemption and render the vast majority of legitimate ivory antiques in the United States worthless.

Response: We disagree. This rule does not impose any requirements to demonstrate the antiques exemption that do not already exist for other ESA-listed species. We regularly issue permits for ESA antiques, and there remains an active trade in antiques that contain ESA-listed species in the United States. The ESA states explicitly (in section 10(g)) that an individual seeking the benefit of an exception bears the burden of demonstrating that an item meets that exception. We note that a number of commenters provided information on nondestructive methods for determining age and species of ivory objects, including both scientific methods and methodologies employed by art historians. They stated that the arts and antiques market is grounded in the ability to determine the authenticity of items, and experts in the field are capable of distinguishing legitimate antiques from forgeries. As noted above, we encourage the regulated public to utilize available experts to provide technical advice regarding the qualifications of an item that may qualify for an exception to this rule. Appendix 1 to Director's Order 210 provides guidance on the antique exception under the ESA, including guidance on documentation that may be used to demonstrate that an item meets the exception. We will develop and communicate additional guidance on documentation and other information that may be used to demonstrate how to meet the exception for ESA antiques. See *Comments on*

documentation requirements, above.

While some commenters estimated the value and age of ivory in private household collections, this rule has no impact on private household collections unless and until they are sold. We agree that the majority of ivory antiques are small in value as stated by some commenters (less than $500 per item or $240 per item).

For the purposes of estimating the impacts of the rule, we assume that ivory (antique and non-antique) will continue to enter the legal market at the same rate as prior to this rule. Therefore, we disagree that between 1.5 million and 2.5 million ivory items enter commerce annually, as estimated by one commenter. Based on our review of data sources, the number of ivory items that are sold annually in the United States is closer to 89,000 items (see economic analysis for more information).

In our economic analysis, we estimate that sales in the domestic market average $88.8 million to $1.2 billion annually. For a conservative estimate of the domestic market analysis, we employ a lower bound of $992 per item (consistent with the online auction market average value) and an upper bound of $18,000 per item (which was the highest lot sold price in live auctions).

Based on the assumption that the proportion of the value of antique ivory items in domestic commerce resembles the export market (two percent), we estimate the rule to impact from $1.8 million to $23.4 million in interstate commerce of non-antiques. Therefore, this rule will not have an impact of billions of dollars, as some commenters have asserted.

Comments on treatment of museums. After announcing our intention to revise the 4(d) rule for the African elephant and prohibit sale and offer for sale of African elephant ivory in interstate commerce, we received input from representatives of the U.S. museum community.

They expressed their concern that prohibitions on interstate commerce will impact their ability to acquire items for museum collections. In the preamble to the proposed rule, we recognized that museums can play a unique role in society by curating objects that are of historical and cultural significance and sought input from the public regarding whether we should incorporate an exception to the prohibitions on interstate commerce for museums, either through this rulemaking process or through a separate rulemaking process under the ESA. Additionally, we sought comment on how best to define museums in this regard, given the diverse interests that they serve.

We received a number of suggestions for the definition of "museum," including the definition developed by the Institute of Museum and Library Services (found at 2 CFR 3187.3), the Institute of Museum and Library Services definition with some added provisions, and the definition used by the International Council of Museums, with an additional requirement that a museum must have been established for at least 10 years prior to its first attempt at interstate procurement of ivory. Some commenters urged us to defer this issue to a separate rulemaking and comment period; others believe such an exception should be included in this final rule.

(50) *Comments*: One commenter asked how museums, if there is an exception made for them, would be able to engage in interstate commerce when the proposed rule contains no such exception for other market participants. The commenter urged the Service to consider expanding the museum exception to include other reputable members of the arts and antiquities community to facilitate this commerce and ensure that pieces of cultural and historical significance are preserved for future generations.

Some commenters supported an exception for museums and urged us to consider such an exception to be expanded to include any entity that holds a Federal income tax exception under

section 501(c)(3) of the Internal Revenue Code, as amended, which would allow museums to acquire culturally significant items, churches to purchase used pipe organs from other churches, and orchestras to obtain instruments for their musicians.

Some commenters urged us to allow an exception not only for interstate commerce but also for import by U.S. art museums of works of art satisfying the *de minimis* criteria.

Other commenters expressed concern about a possible exemption for museums and noted that the range of entities considered to be "museums" is quite broad and includes a wide range of interests and purposes. Other commenters were strongly opposed to an exception to the prohibition on interstate commerce for museums. They stated their belief that it is unnecessary, given the antiques exception contained in the ESA and the *de minimis* exception included in the proposed rule. Some asserted that entities purporting to be museums could abuse a museum exception to perpetuate the trade in elephant ivory in a manner that undermines elephant conservation.

Response: We believe that this is an important issue that warrants further consideration. We received a range of ideas and opinions on how to define a "museum" and whether or not entities so defined should be treated differently than other groups under the ESA. This is a complex issue that warrants careful consideration as any such decision will have ramifications beyond trade in African elephant ivory and the scope of this rulemaking. Therefore, we will explore the treatment of museums under the ESA in a separate rulemaking process and seek comment from a broader constituency regarding the potential benefits and risks of an exemption from certain ESA prohibitions for museums. Until such time, our regulations do not contain an exception to the prohibitions on interstate and foreign commerce for museums.

Comments regarding import or export of ivory as part of a traveling exhibition. Some

commenters sought clarification regarding the exception for items containing ivory that are part of a traveling exhibition. Requirements for import or export of worked ivory as part of a traveling exhibition are found in 50 CFR 17.40(e)(5)(ii).

(51) *Comment*: One commenter pointed to the requirement that items that are part of a traveling exhibition must be marked or uniquely identified and noted that marking of objects is not always practical. The commenter stated that some museums and other lenders are unlikely to permit their objects to be marked and requested that we clarify that photographs may be used, as an alternative to marking, to uniquely identify an item imported or exported as part of a traveling exhibition.

Response: As the commenter noted, the requirement is that an item be marked *or uniquely identified* (emphasis added). We agree that a photograph may be used to identify an item, in place of a mark, as long as the photograph allows a border official to verify that the certificate and the item correspond.

(52) *Comment*: Some museum directors stated that, although the CITES traveling exhibition certificate can, theoretically, work for an exhibition organized by a foreign museum, not all countries issue traveling exhibition certificates. While noting that the Service has been helpful in trying to obtain traveling exhibition certificates from these countries, the commenters identified the need for a more permanent solution. In addition, some museum directors stated that the traveling exhibition certificate is problematic for long-term loans, as the maximum duration of a traveling exhibition certificate is 3 years, which is often not sufficient. They acknowledged that this is not the sole purview of the Service, but asked that we consider ways to extend the maximum duration, remove the time limit, or allow certificates to be extended without the necessity of bringing the object back to the issuing country. It was suggested that, as an

alternative, a pre-Convention certificate could be used, conditioned to state that the item is on loan from or to a U.S. museum, that it will be used for exhibition only and will not be sold or otherwise transferred while traveling internationally, and will be returned to the country that issued the certificate.

Response: It is true that not all countries issue CITES traveling exhibition certificates. As the commenters noted, we work with these countries, as the need arises, to encourage them to issue such a certificate or to find a suitable alternative. Alternatives may include the use of a CITES pre-Convention certificate with conditions specifying that international trade of the item must be under similar conditions as those for trade under a traveling exhibition certificate. We continue to work with other CITES Parties to promote the use of traveling exhibition certificates and to streamline exchanges between museums to the extent possible.

Comments on regulatory process. Some commenters expressed concern about the process the Service has undertaken to revise the 4(d) rule.

(53) *Comment*: Some commenters asserted that the proposed rule violates the APA notice-and-comment provisions because the Service failed to provide evidence supporting its rationale for the revisions and failed to estimate negative consequences to the domestic ivory market; therefore, the public is not afforded a meaningful opportunity to comment. They further assert that we have failed to establish a linkage between the U.S. market and illegal ivory trade or poaching of African elephants in the wild and have admitted that it is not possible to predict how many elephants will be saved by revising the 4(d) rule. Without being provided such evidence, they do not believe the public has the opportunity to meaningfully comment. If finalized in its current form, they believe this would also be a violation of the APA's arbitrary and capricious standards.

Response: We disagree. An agency need not justify the rules it selects in every detail, but it is required to explain the general bases for the rules chosen. See *Connecticut Light and Power* v. *NRC*, 673 F. 2d 525 (D.C. Cir. 1982). We have thoroughly explained the bases for the actions we proposed to take. In the preamble to the proposed rule, we described the unprecedented increase in the illegal killing of elephants, the alarming growth in illegal trade of elephant ivory, and U.S. involvement in the illegal ivory trade. (See *Comments on the U.S. role in the illegal ivory market*, above.)

It seems these commenters would require the Service to predict exactly how many African elephants would be conserved before they believe they can meaningfully comment pursuant to the APA. A quantitative estimate of benefits is not necessary to satisfy the purposes of the ESA. The Service finds that provisions in this 4(d) rule are necessary and advisable to provide for the conservation of the African elephant and has also included appropriate prohibitions from section 9(a)(1) of the ESA. Thus, the final rule meets the standards under section 4(d). Moreover, E.O. 12866 recognizes that some costs and benefits are difficult to quantify and instructs agencies to adopt regulations based on a reasoned determination that the benefits of the intended regulation justify the costs. We have made a reasoned determination based on a qualitative assessment of the rule's benefits.

(54) *Comment*: Some commenters asserted that Director's Order 210 (DO 210) establishes binding agency rules for enforcement of the AfECA and the ESA and is thus a legislative rule, which requires notice and comment under the APA.

Response: Although we have reflected certain provisions of DO 210 in the 4(d) rule, this final rule does not interpret or implement DO 210 or the AfECA, and we note that this rulemaking *is* being promulgated in accordance with the APA.

DO 210 is a policy statement and not subject to the notice-and-comment procedures of the APA. Notice-and-comment procedures are required only under the APA (5 U.S.C. 553) for legislative rules with the force and effect of law; "interpretive rules, general statements of policy, or rules of agency organization procedure, or practice" are exempted. 5 U.S.C. 553(b)(A) ; see also *Nat'l Ass'n of Broadcasters* v. *FCC*, 569 F.3d 416, 425-26, 386 U.S. App. D.C. 259 (D.C. Cir. 2009). The *Attorney General's Manual on the Administrative Procedure Act* (1947) offers "the following working definitions":

Substantive rules—rules, other than organizational or procedural rules under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to section 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78n). Such rules have the force and effect of law.

Interpretative rules—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.

General statements of policy—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

DO 210 "establishes policy and procedure for [Service] employees to implement the National Strategy as it relates to the trade in elephant ivory . . ." and, thus, falls squarely within the "General statements of policy" as defined in the *Attorney General's Manual on the Administrative Procedure Act*. DO 210 is a general statement of policy, informing employees and the public as to how the Service will enforce the moratorium. Language in the DO 210 emphasizing employees' discretionary power with regard to implementation supports this position.

Further, under the Supreme Court's holding in *Heckler* v. *Chaney*, DO 210 is a statement of the Service's decision not to enforce the moratorium to the fullest extent possible. See Daniel T. Shedd & Todd Garvey, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion*, CRS REPORT, 4 (Sept. 4, 2014) (quoting *Heckler*, 470 U.S. at 832) (arguing that this statement is applicable to the Director's Order). In *Heckler*, an agency's "decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." DO 210 is not a final agency action subject to judicial review.

(55) *Comment:* The proposed rule would prohibit interstate and foreign sale of currently legal ivory products, unless the item falls under the antiques exemption or the *de minimis* exception. Meeting these standards will prove burdensome and difficult. If the proposal is finalized in its present form, it would violate the dictates of justice and fairness and would result in an unconstitutional taking of legally imported ivory under the 5th Amendment.

Response: Under E.O. 12630, "significant [Constitutional] takings implications should . . . be identified and discussed" in notices of proposed rulemakings. The Service has concluded that the proposed rule does not have significant takings implications.

This 4(d) rule applies to all African elephants and their parts, including live and dead elephants, parts other than ivory, and products made from elephant parts other than ivory. Compared to the restrictions provided by statute and regulation for other ESA threatened species, this rule places relatively few restrictions on live elephants and parts and products other than ivory.

While the rule does restrict certain activities with elephant ivory, people who lawfully possesses African elephant ivory can continue to engage in many activities with their ivory. They can continue to possess their ivory. They can gift it or bequeath it to another person. They

can sell it and engage in other commercial activities with the ivory within their State provided the commercial activity is allowed under other law. They can also import or export ivory, sell or offer for sale ivory in interstate or foreign commerce, and engage in other commercial activities in interstate or foreign commerce provided they meet the requirements of the rule, in most cases without first obtaining an ESA threatened species permit. The many unregulated activities that may continue under the rule with elephants and their parts and products, including ivory, as well as activities that would be allowed, provided that regulatory requirements are met, indicate that the rule proposes no significant takings implications.

Overall, this rule is comparable to provisions applicable to other commercially valuable threatened species. For nearly all other endangered and threatened species, practically all import, export, sale or offer for sale in interstate or foreign commerce, and certain activities in interstate or foreign commerce in the course of a commercial activity are prohibited, unless the activity qualifies as a particular purpose and the person obtains an ESA permit. These standard, more stringent prohibitions under the ESA have never been successfully challenged as a Constitutional taking.

For example, in *Andrus v. Allard*, 444 U. S. 51 (1979), an analogous scenario challenging the prohibition of commercial transaction in parts of birds legally killed before they came under the protection of the Eagle Protection Act and the Migratory Bird Treaty Act, the Supreme Court held the simple prohibition of the sale of lawfully acquired property does not effect a taking in violation of the Fifth Amendment. It noted the challenged regulations do not compel the surrender of the artifacts in question, and there is no physical invasion or restraint upon them. It found the denial of one traditional property right does not always amount to a taking, nor is the fact that the regulations prevent the most profitable use of appellees' property dispositive, since a

reduction in the value of property is not necessarily equated with a taking.

(56) *Comment:* Mischaracterization by the Service of the Stiles data not only violates the APA but also the Data Quality Act (DQA). One commenter stated that "Although the FWS characterized the U.S. as the world's second largest market for illegal ivory, it bases this claim largely on a report that Stiles compiled with Esmond Martin in 2008 ... [which] is likely due to the misreading of a table in his report…." The commenter goes on to assert that, because this "evidence" is utilized by the Service in the proposed rule, the public has not been provided a true picture of the U.S. ivory market or its relation to the illegal ivory trade.

Response: Nowhere in the proposed rule did we claim that the United States is the second largest market for illegal ivory (or for legal ivory) in the world. We quoted (on p. 45159) a 2004 report by Douglas Williamson of TRAFFIC who stated that "as one of the world's largest markets for wildlife products, the [United States] has long played a significant role in the international ivory trade." In his comments on the proposed rule, Mr. Stiles states that he "would like to dispel the false claim that the U.S. is the second largest market for illegal ivory consumption in the world—repeated in NGO campaigns and media stories constantly." He attributes this misconception to an incorrect interpretation of a table in the 2008 Martin and Stiles report. The executive summary of that 2008 report states that "The USA appeared to have the second largest ivory retail market in the world after China/Hong Kong, as determined by numbers of items seen for sale." Although we did not refer to Mr. Stiles' characterization of the size of the U.S. market (which he repeated in his 2015 report), others who commented on the proposed rule did. The commenter has incorrectly conflated the comments of others on this subject with the text of the proposed rule. See our response to Mr. Stiles' comments under (39), above.

(57) *Comment:* The Regulatory Flexibility Act (RFA) requires an agency either to certify that a proposed rule will not have a significant economic impact on a substantial number of small entities or to conduct a full analysis that describes the effect of the rule on small entities. The Service has certified that the proposed rule will not have a significant impact on a substantial number of small entities, but there is nothing in the record that supports this certification. The Service estimates a two percent decrease in domestic sales by assuming that the domestic market operates in much the same way as the export market. There is no evidence to support this assumption. The Service also states that they are proposing to take this action to increase protection for African elephants and that increased control of the domestic ivory market would benefit the conservation of the African elephant. Both of these claims cannot be true. If the proposed rule reduces domestic and export markets by two percent, the revision cannot possibly have a measureable impact on the illegal trade of African elephant ivory. Either the Service is grossly underestimating the impact of the proposed rule or is grossly overestimating the impact of the U.S. ivory market on illegal trade.

Response: We disagree. The provisions in the final rule, including the clarification that anyone claiming the benefit of an exemption under the ESA has the burden of proving that the exemption applies, allow us to more strictly regulate the U.S. ivory market, which will benefit the conservation of the African elephant by prohibiting those activities that we believe are contributing to the poaching of elephants and for which we believe the risk of illegal trade may be high. We believe the major impact will be to ongoing illegal trade, of which there remains ample evidence in the United States. As we noted in the proposed rule, there are limited data available on the domestic ivory market.

Some commenters provided estimates of the value of antique ivory in personal

collections (nearly $12 billion according to one document) and the number of Americans who own antique ivory (hundreds of thousands of households). (See *Comments on trade in antique ivory*, above). Some commenters provided a study, based on an email survey sent to 167 individuals, which estimated the number of Americans who possess objects containing ivory. The author of the study states that the results of the survey indicate that there are 13 million Americans who own an average of 2.4 objects that they believe to be made from or with ivory. Most were considered family heirlooms. The average age of those objects was estimated to be 76 years, and the average value was estimated to be $240 each. These estimates were extrapolated to arrive at an aggregate value of over $7 billion for "incidental ivory possessions" (excluding pianos). We understand that there are many Americans who own ivory, including African elephant ivory. These rough estimates of the quantity, age, and value of ivory in the United States help to provide a general picture of private household collections in the United States, but this rule has no impact on private household collections unless and until they are sold. Furthermore, because most of the objects are considered family heirlooms, we expect that these items would most likely be passed from one generation to another. We assume for the purposes of our analysis that ivory (both antique and non-antique) will continue to enter the legal market at the same rate as prior to this rule. In our economic analysis, we estimate that domestic ivory sales average $88.8 million to $1.2 billion annually, with non-antique sales representing about $1.8 million to $23.4 million annually.

Some commenters provided information on the economic impact of the proposed rule on American craftsmen and artisans (See (32) above). We have used this information in the Regulatory Flexibility Analysis to describe the types of establishments that will be impacted by this rule. We used the data available to us, including the export data from our Office of Law

Enforcement, to make reasonable assumptions to approximate the potential economic impact of the proposed rule, including impacts on interstate commerce. We evaluated the declared value of worked ivory exports during a recent 5-year period, which varied from $32.1 million to $175.7 million. The declared value of items containing African elephant ivory that were less than 100 years old (and, therefore, could not qualify as ESA antiques) ranged from $607,000 to $3.7 million annually during the same time period. As this rule will no longer allow the commercial export of non-antique ivory, we expect, based on the information available, that, on average, commercial export of worked ivory will decrease by about two percent.

With regard to the domestic market, while the final rule will result in prohibitions on certain activities in interstate and foreign commerce, it will have no impact on commercial activities within a State (intrastate commerce). Businesses will not be prohibited by the final rule from selling raw or worked ivory within the State in which they are located, unless prohibited under State law.

Under the final rule, certain commercial activities, such as sale in interstate or foreign commerce of raw ivory and non-antique worked ivory, with the exception of those items that qualify for the *de minimis* exception, will no longer be permitted. In our economic analysis, we estimate that domestic ivory sales range from $88.8 million to $1.2 billion annually. Using the best data available, the percentage of non-antiques in the export market (two percent) is extrapolated to the domestic market, as an upper-bound estimate of impacts, based on the assumption that the domestic market would be similar to the export market. Thus, the decrease in sales of non-antique ivory in the domestic market ranges from $1.8 million to $23.4 million annually. If those items that do not qualify as antiques constitute a greater proportion of commercial activities, the impacts could be greater. However, because we are allowing

commercial activities in interstate and foreign commerce with certain items containing *de minimis* amounts of ivory, and many of these items would be precluded from export, we believe that an even smaller percentage of the legal domestic market would be impacted compared to the export market.

Contrary to the commenter's claim that it cannot be true that we are taking this action to increase protection for African elephants, but that these actions will not have a significant impact on current legal trade, we believe that these actions will substantially impact our ability to effectively control trade and that will contribute to a reduction in illegal killing of elephants. As we described in the proposed rule, there is ample evidence that the United States continues to be a market for illegal trade and that a substantial amount of ivory currently available in the United States was illegally imported. These increased controls will lead to conservation benefits for African elephants by making it more difficult for unscrupulous actors to launder illegal ivory through the legal market.

(58) *Comment*: One commenter asserted that certification of this rule under the RFA was inappropriate and that the Service should conduct an Initial Regulatory Flexibility Analysis. They stated that the Service proposes to prohibit all commercial sale of ivory in interstate or foreign commerce with the exception of those items that could meet the *de minimis* exemption and that "there are 24,730 businesses that are either art dealers or used merchandise dealers that could be affected by the rule. These commercial vendors comprise 70% of the potentially affected businesses and over 84% of these businesses are small entities." They went on to conclude that "over 84% of small businesses in the affected industries will be impacted."

Response: The commenter's concerns are based on an incorrect assessment of what the rule would do and an unrealistic estimate of the number of small businesses that would be

impacted. Under the provisions of the final rule, in addition to the exception for manufactured items that contain a small (*de minimis)* amount of ivory, interstate and foreign commerce in antiques will also still be allowed (see paragraphs (e)(3) and (e)(9) in the final rule). Table 2 in the preamble to the proposed rule (expanded and reprinted below, as Table 3, in this document) provides the number of businesses within affected industries and the percentage of those businesses that are considered small businesses, based on the North American Industry Classification System (NAICS). The table includes 7 industries and a total of 35,350 businesses within those industries. Eighty-four percent of those businesses are considered small businesses. However, it is very misleading to suggest that most of these businesses, small or otherwise, would be impacted by this rule.

The commenter has pointed to the 24,730 businesses classified under the NAICS as either used merchandise stores or art dealers. This total number includes 19,793 used merchandise stores (NAICS code 453310), 74 percent of which are considered small businesses, and 4,937 art dealers (NAICS code 453920), 95 percent of which are considered small businesses. The NAICS defines these categories as follows:

453310 Used Merchandise Stores: *This industry comprises establishments primarily engaged in retailing used merchandise, antiques, and secondhand goods (except motor vehicles, such as automobiles, RVs, motorcycles, and boats; motor vehicle parts; tires; and mobile homes). Examples include: Antique shops; Used household-type appliance stores; Used book stores; Used merchandise thrift shops; Used clothing stores; and Used sporting goods stores*. This category obviously contains a wide range of businesses selling a wide range of products.

453920 Art Dealers: *This industry comprises establishments primarily engaged in retailing original and limited edition art works. Included in this industry are establishments*

primarily engaged in displaying works of art for retail sale in art galleries. This category also includes art auctions.

Extrapolating data from market surveys conducted by Martin and Stiles in 2006 and Stiles in 2014, we estimate that this rule would impact 3,200 retail outlets selling ivory products nationwide (see economic analysis) and represent 12 percent of all used merchandise stores and art dealers. Under this rule, these retail outlets would incur costs of one percent or less of total sales (see Regulatory Flexibility Act section for more detail). The other five categories of businesses in Table 2 in the preamble to the proposed rule are: Musical instrument manufacturing; sporting and recreational goods and supplies merchant wholesalers; metal kitchen cookware, utensil, cutlery, and flatware (except precious) manufacturing; jewelry and silverware manufacturing; and all other miscellaneous wood product manufacturing. Another commenter estimated that there are about 300 people in the United States creating finished products using ivory components. Of these, the commenter estimated that about 15 individuals make 10 pool cues per year with ivory ferrules. This would translate to less than one percent of the industry "All other miscellaneous wood product manufacturing" (NAICS 321999). While the commenter did not provide data regarding the industries under which the remainder of the 300 establishments would be categorized, we can estimate that the potential number of establishments represents two percent of establishments in the affected industries (excluding Used Merchandise Stores) or three percent of establishments in the affected industries (excluding Used Merchandise Stores and Sporting and Recreational Goods Stores). The 2008 Martin and Stiles report estimated that there were 120 to 200 ivory craftsmen in the United States, which would represent one to two percent of establishments in the affected industries.

We recognize that we are unable to conclusively quantify the number of small businesses

within the individual industries that would be affected by the rule. The final rule prohibits 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, except for qualifying antiques and manufactured items that contain a small (*de minimis*) amount of ivory and meet certain criteria. Our evaluation of the current market, particularly our estimate of the proportion of the trade that will continue to be allowed as antiques, indicates only about a two percent decrease in commercial exports of African elephant ivory ($2.1 million annually) and a similar two percent decrease in interstate commerce ($1.8 million to $23.4 million).

(59) *Comment*: The Service has ignored obvious alternatives to a domestic ivory ban that would be much more effective at saving elephants without depriving Americans of property rights. Among the alternatives to a ban on ivory trade that the Service failed to evaluate or consider: increasing support for conservation and local community programs in Africa; increasing support for local African law enforcement; enforcing Pelly sanctions against China and other Asian and African countries for illegal ivory trade; bolstering embassy support in African range countries and destination countries for poached ivory to increase diplomatic pressure on governments; and rewarding African countries with effective conservation programs by allowing an international trade of ivory from those countries.

Response: The Service is actively engaged in the types of activities described by the commenter. We are supporting anti-poaching efforts in parks and other protected areas, providing training to rangers, working collaboratively on international investigations, supporting demand-reduction campaigns in consumer countries, and pushing other countries to strengthen their ivory trade controls. This final rule is in addition to other actions taken by the Service and

other U.S. Government agencies to combat illegal trade in elephant ivory and other protected wildlife.

As noted in the proposed rule, on July 1, 2013, President Obama signed Executive Order 13648 on Combating Wildlife Trafficking. The Executive Order calls on executive departments and agencies to take all appropriate actions within their authority to "enhance domestic efforts to combat wildlife trafficking, to assist foreign nations in building capacity to combat wildlife trafficking, and to assist in combating transnational organized crime." On February 11, 2014, President Obama issued the National Strategy for Combating Wildlife Trafficking, which identifies three strategic priorities for a whole-of-government approach to tackling wildlife trafficking: strengthening enforcement; reducing demand for illegally traded wildlife; and expanding international cooperation and commitment. On February 11, 2015, the U.S. Departments of the Interior, Justice, and State, as co-chairs of the President's Task Force on Wildlife Trafficking, released the implementation plan for the National Strategy. Building upon the Strategy's three strategic priorities, the plan lays out next steps, identifies lead and participating agencies for each objective, and defines how progress will be measured. The implementation plan reaffirms our Nation's commitment to work in partnership with governments, local communities, nongovernmental organizations, and the private sector to stem the illegal trade in wildlife.

Multiple U.S. Government agencies are involved in the fight against wildlife trafficking and are engaged in activities under all three of the strategic priorities identified in the National Strategy. U.S. Government grants and initiatives in support of efforts to combat poaching of elephants and trafficking of elephant ivory include projects that provide for: training, operating expenses, and equipment for anti-poaching patrols; purchase and maintenance of vehicles and

other equipment for rangers; expenses for aerial surveillance; and training of dogs for detection and investigation of wildlife crime and protection of rangers and wildlife. U.S. Government law enforcement professionals provide training and expertise to foreign partners in Africa through the International Law Enforcement Academy (ILEA) in Botswana (created through a bilateral agreement between the governments of Botswana and the United States to provide training for representatives from countries in sub-Saharan Africa). The U.S. Government also promotes and supports the development and operation of regional Wildlife Enforcement Networks and provides training to develop capacities to investigate, prosecute, and adjudicate wildlife crimes. The U.S. Fish and Wildlife Service Office of Law Enforcement has placed special agents in U.S. embassies in key regions (including in China, Botswana, Tanzania, and Thailand) to build wildlife law enforcement capacity, coordinate investigations, and facilitate information sharing and training. The Service and other U.S. Government agencies also support research, monitoring and assessment of elephant populations, landscape and community conservation efforts, and projects to mitigate human-elephant conflict and to reduce demand for elephant ivory. All of these U.S. Government initiatives contribute to the conservation of the African elephant.

Eliminating poaching of elephants and trafficking of ivory can be achieved only through a concerted, multifaceted international effort. In issuing the National Strategy for Combating Wildlife Trafficking, President Obama recognized that "this is a global challenge requiring global solutions" and stated that we will work with foreign governments, international organizations, nongovernmental organizations, and the private sector to maximize our impacts in addressing this challenge. In addition, the National Strategy asserts that "the United States must curtail its own role in the illegal trade in wildlife and must lead in addressing this issue on the global stage." The United States is committed to doing its part to fight wildlife trafficking and to

ensure the conservation of African elephants in the wild. This final rule is one component of this multifaceted effort.

Changes From the Proposed Rule to the Final Rule

All changes from the proposed rule of July 29, 2015 (80 FR 45154), to this final rule were discussed above in the responses to comments received. In summary, the provisions of this final rule are largely unchanged from those of the proposed rule, with the exception of words that have been added in response to requests in the comments:

- We added a sentence in paragraph (e) to remind readers that the provisions under AfECA also apply.
- We added the words "or handcrafted" following the word "manufactured" in paragraphs (e)(3), (5), (6), (7), and (8) to cover works that are unique and made primarily by hand that might not be considered "manufactured." We added the words "or integral" to the criterion in paragraph (e)(3) that describes the ivory being a fixed component of a larger manufactured or handcrafted item to cover items that have small ivory pieces that can be easily removed (like nuts or pegs on some wooden tools or instruments).
- We added text to the criteria in paragraphs (e)(3)(iii) and (v) to clarify that when we say "primary" or "primarily" we mean more than 50 percent.
- We added text to paragraph (e)(5)(ii)(B) to clarify that, for items that are part of a traveling exhibition, either a CITES traveling exhibition certificate or an equivalent CITES document may be used.
- We rephrased our reference to the African Elephant Conservation Act in paragraph (e)(9) where we clarify that, while the ESA antiques exception allows import of antiques, the

moratorium under the AfECA does not.

The effects of this final rule on trade are set forth below in Table 1. This table is only for guidance on the revisions to the existing ESA 4(d) rule for the African elephant; see the rule text for details. All imports and exports must be accompanied by appropriate CITES documents and meet other FWS import/export requirements.

Table 1. How will changes to the African elephant 4(d) rule affect trade in African elephant ivory?

	What activities are currently allowed/prohibited under statute, regulation, or law enforcement discretion?	**What will change when the final rule goes into effect?**
	In 2014, the Service revised Director's Order No. 210 (effective May 15, 2014) and U.S. CITES implementing regulations [50 CFR part 23] (effective June 26, 2014). These actions created new rules and guidance for trade in elephant ivory.	This column describes the contents of the final rule in general terms. Please refer to the final rule text for details. These provisions will go into effect 30 days after the final rule is published in the **Federal Register**.
Import	**<u>Commercial</u>** What's allowed: • No commercial imports allowed. **<u>Noncommercial</u>** What's allowed: • Sport-hunted trophies (no limit). • Requires issuance of a threatened species permit under 50 CFR 17.32 for import of African elephant sport-hunted trophies from Appendix-I populations. • Law enforcement and bona fide scientific specimens. • Worked elephant ivory that was legally acquired and removed from the wild prior to February 26, 1976, and has not been sold since February 25, 2014, and is either:	**<u>Commercial</u>** The final rule does not include any changes for commercial imports. **<u>Noncommercial</u>** The final rule includes the following changes for noncommercial imports: • Limits import of sport-hunted trophies to two per hunter per year. • Requires issuance of a threatened species permit under 50 CFR 17.32 for import of all African elephant sport-hunted trophies. • Removes the requirement that worked elephant ivory has not been sold since February 25, 2014. All other requirements for worked elephant ivory (listed in the previous column) must be met.

	○ Part of a household move or inheritance (see Director's Order No. 210 for details); ○ Part of a musical instrument (see Director's Order No. 210 for details); or ○ Part of a traveling exhibition (see Director's Order No. 210 for details). **What's prohibited:** • Worked ivory that does not meet the conditions described above. • Raw ivory (except for sport-hunted trophies).	
Export	**<u>Commercial</u>** **What's allowed:** • CITES pre-Convention worked ivory, including antiques. **What's prohibited:** • Raw ivory. **<u>Noncommercial</u>** **What's allowed:** • Worked ivory. **What's prohibited:** • Raw ivory.	**<u>Commercial</u>** The final rule **further restricts** commercial exports to only those items that meet the criteria of the ESA antiques exemption.* Raw ivory remains prohibited regardless of age. **<u>Noncommercial</u>** The final rule **further restricts** noncommercial exports to the following categories: • Only those items that meet the criteria of the ESA antiques exemption.* • Worked elephant ivory that was legally acquired and removed from the wild prior to February 26, 1976, and is either: ○ Part of a household move or inheritance; ○ Part of a musical instrument; or ○ Part of a traveling exhibition. • Worked ivory that qualifies as pre-Act. • Law enforcement and *bona fide*

		scientific specimens. Raw ivory remains prohibited regardless of age.
Foreign commerce	There are no restrictions on foreign commerce.	The final rule includes the following changes for foreign commerce: • **Restricts** foreign commerce to: ○ items that meet the criteria of the ESA antiques exemption,* and ○ certain manufactured or handcrafted items that contain a small (*de minimis*) amount of ivory. • **Prohibits** foreign commerce in: ○ sport-hunted trophies, and ○ ivory imported/exported as part of a household move or inheritance.
Sales across State lines (interstate commerce)	**What's allowed:** • Ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix I (January 18, 1990) [seller must demonstrate]. • Ivory imported under a CITES pre-Convention certificate [seller must demonstrate].	The final rule includes the following changes for interstate commerce: • **Further restricts** interstate commerce to only: ○ items that meet the criteria of the ESA antiques exemption,* and ○ certain manufactured or handcrafted items that contain a small (*de minimis*) amount of ivory. ** • **Prohibits** interstate commerce in: ○ ivory imported under the exceptions for a household move or inheritance, or for law enforcement or genuine scientific purposes, and ○ sport-hunted trophies.
Sales within a State (intrastate commerce)	What's allowed: • Ivory lawfully imported prior to the date the African elephant was listed in CITES Appendix	The final rule does not include any changes for intrastate commerce.

	I (January 18, 1990)—[seller must demonstrate]. • Ivory imported under a CITES pre-Convention certificate—[seller must demonstrate].	
Noncommercial movement within the United States	Noncommercial use, including interstate and intrastate movement within the United States, of legally acquired ivory is allowed.	The final rule does not include any changes for noncommercial movement within the United States.
Personal possession	Possession and noncommercial use of legally acquired ivory is allowed.	The final rule does not include any changes for personal possession.

*To qualify for the ESA antiques exemption, an item must meet all of the following criteria [seller/importer/exporter must demonstrate]:

A. It is 100 years or older.
B. It is composed in whole or in part of an ESA-listed species;
C. It has not been repaired or modified with any such species after December 27, 1973; and
D. It is being or was imported through an endangered species "antique port."

Under Director's Order No. 210, as a matter of enforcement discretion, items imported prior to September 22, 1982, and items created in the United States and never imported must comply with elements A, B, and C above, but not element D.

** To qualify for the *de minimis* exception, manufactured or handcrafted items must 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) The ivory is a fixed or integral component or components of a larger manufactured or handcrafted item and is not in its current form the primary source of the value of the item, that is, the ivory does not account for more than 50% of the value of the item;
(iv) The ivory is not raw;
(v) The manufactured or handcrafted item is not made wholly or primarily of ivory, that is, the ivory component or components do not account for more than 50% of the item by volume;
(vi) The total weight of the ivory component or components is less than 200 grams; and
(vii) The item was manufactured or handcrafted before the effective date of this rule.

Required Determinations

Regulatory Planning and Review: Executive Order 12866 provides that the Office of

Information and Regulatory Affairs in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is significant because it may raise novel legal or policy issues.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

A brief assessment to identify the economic costs and benefits associated with this rule follows. The Service has prepared an economic analysis, as part of our review under the National Environmental Policy Act (NEPA), which we made available for review and comment (see the paragraph in this **Required Determinations** section on the *National Environmental Policy Act*). This final rule revises the 4(d) rule, which regulates trade of African elephants *(Loxodonta africana)*, including African elephant parts and products. We are revising the 4(d) rule to more strictly control U.S. trade in African elephant ivory. Revision of the 4(d) rule means that African elephants are subject to some of the standard provisions for species classified as threatened under the ESA. This means that the taking of live elephants and (with certain exceptions) import, export, and commercial activities in interstate or foreign commerce of African elephant parts and products containing ivory will generally be prohibited without a

permit issued under 50 CFR 17.32 for "Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the [ESA]." The final rule contains specific exceptions for certain activities with specimens containing *de minimis* quantities of ivory; ivory contained in musical instruments, traveling exhibitions, inherited items, and items that are part of a household move that meet specific conditions; ivory imported or exported for scientific or law enforcement purposes; certain live elephants; and ivory items that qualify as "pre-Act" or as antiques under the ESA. Some of these exceptions remain prohibited under the AfECA import moratorium. However, under Director's Order 210, as amended on May 15, 2014, as a matter of law enforcement discretion, the Service will not enforce the AfECA moratorium with respect to these limited exceptions meeting specific criteria.

This rule regulates only African elephants and African elephant ivory. Asian elephants and parts or products from Asian elephants, including ivory, are regulated separately under the ESA. Ivory from marine species such as walrus is also regulated separately under the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*). Ivory from extinct species such as mammoths is not regulated under statutes implemented by the Service.

Impacted markets include those involving U.S. citizens or other persons subject to the jurisdiction of the United States that buy, sell, or otherwise commercialize African elephant ivory products across State lines and those that buy, sell, or otherwise commercialize such specimens in international trade. Examples of products in trade containing African elephant ivory include cue sticks, pool balls, knife handles, gun grips, furniture inlay, jewelry, artwork, and musical instruments.

The market for African elephant products, including ivory, is not large enough to have

major data collections or reporting requirements, which results in a limited amount of available data for economic analysis. Some import and export data are available from the Service's Office of Law Enforcement and Division of Management Authority, and from reports produced by other organizations. On the whole, the available data provide a general overview of the African elephant ivory market. Using this information, we can make reasonable assumptions to approximate the potential economic impact of revision of the 4(d) rule for the African elephant. In our proposed rule, we solicited public input on impacts to sales, percentage of revenue impacted, and the number of businesses affected, particularly with regard to interstate and foreign commerce, for which we had the least amount of information, to help quantify these costs and benefits.

Imports. A moratorium on the import of African elephant ivory other than sport-hunted trophies was established under the AfECA and has been in place since 1989. In recent years, the Service has allowed, as a matter of law enforcement discretion, the import of certain antique African elephant ivory. Director's Order No. 210, issued in February 2014, clarified that Service employees must strictly implement and enforce the AfECA moratorium on the importation of raw and worked African elephant ivory, regardless of age, while, as a matter of law enforcement discretion, allowing noncommercial import of certain items, including law enforcement and scientific items, musical instruments, items as part of a household move or inheritance, and exhibition items, where it can be demonstrated that the ivory was removed from the wild prior to 1976. We are reflecting this provision of Director's Order No. 210 in the 4(d) rule (except for antiques, which are exempt from this 4(d) rule, but remain subject to the AfECA moratorium). Import of live African elephants and non-ivory African elephant parts and products will continue to be allowed under the revisions, provided the requirements at 50 CFR parts 13, 14, and 23 are

met. Import of African elephant sport-hunted trophies will be limited to two trophies per hunter per year. This may impact about seven hunters, representing about three percent to four percent of hunters importing African elephant trophies, annually.

Exports. Under the current 4(d) rule, raw ivory may not be exported from the United States for commercial purposes under any circumstances. In addition, export of raw ivory from the United States is prohibited under the AfECA. Therefore, the revisions to the 4(d) rule will have no impact on exports of raw ivory. Revision of the 4(d) rule means that export of worked African elephant ivory will be prohibited without an ESA permit issued under 50 CFR 17.32, except for specimens that qualify as "pre-Act" or as ESA antiques and certain musical instruments; items in a traveling exhibition; items that are part of a household move or inheritance; items exported for scientific purposes; and items exported for law enforcement purposes that meet specific conditions and, therefore, may be exported without an ESA permit. Export of live African elephants and non-ivory products made from African elephants will continue to be allowed, provided the requirements at 50 CFR parts 13, 14, and 23 are met.

From 2007 to 2011, the total declared value of worked African elephant ivory exported from the United States varied widely from $32.1 million to $175.7 million. The declared value of items containing African elephant ivory that were less than 100 years old (and, therefore, could not qualify as ESA antiques) ranged from $607,000 to $3.7 million annually during the same time period. As this rule will no longer permit the commercial export of non-antique ivory, we expect, based on the information currently available, that, on average, commercial export of worked ivory will decrease by about $2.1 million annually (two percent, by value, of worked ivory exports).

Domestic and Foreign Commerce. The final rule prohibits certain commercial activities

such as sale in interstate or foreign commerce of African elephant ivory and delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity (except for qualifying ESA antiques and certain handcrafted or manufactured items containing *de minimis* amounts of ivory) without an ESA permit issued under 50 CFR 17.32. As noted above, permits issued under 50 CFR 17.32 must be for "Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the [ESA]." Otherwise, commercial activities in interstate and foreign commerce with live African elephants and African elephant parts and products other than ivory will continue to be allowed under the revisions to the 4(d) rule. While revisions to the 4(d) rule will generally result in prohibitions on sale or offer for sale in interstate or foreign commerce as well as prohibitions on delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce in the course of a commercial activity of both raw and worked African elephant ivory, the rule will not have an impact on intrastate commerce. Businesses will not be prohibited by the 4(d) rule from buying and selling raw or worked ivory within the State in which they are located. (There are, however, restrictions under our CITES regulations at 50 CFR 23.55 for intrastate sale of elephant ivory.)

As noted earlier, comprehensive data for the African elephant ivory market do not exist. Thus we estimate the value of the domestic market (including retail establishments, online auctions, and live auctions) using the best available data, which include reports that describe subsets of the domestic market along with public comments.

To extrapolate retail outlet data nationwide, assumptions are made using the best available data. Although the States of New York, New Jersey, California, and Washington have

enacted stringent legislation prohibiting most ivory sales and Hawaii has new legislation ready to be signed by the governor, we have not excluded establishments in these states in order to estimate the largest potential impact. In 2006, Martin and Stiles surveyed 16 major cities across the United States to identify retail establishments trading in worked ivory (including ivory from African elephants). Using this information, along with more recent data, we have estimated that in 2016 there are 423 establishments in those 16 cities averaging 22 ivory items per outlet (see economic analysis). These establishments represent 11 percent of used merchandise stores and art dealers (423 ivory outlets of 3,996 establishments within the 16 cities). Applying this ratio (11 percent) to all used merchandise and art dealer establishments nationwide yields approximately 2,700 establishments selling 60,000 ivory items.

For online auctions, the International Fund for Animal Welfare (IFAW) reported that there are two major online auction aggregators (LiveAuctioneers.com and AuctionZip.com) but reported sales data for only LiveAuctioneers.com. By extrapolating data from a 9-week period, the authors estimated that LiveAuctioneers.com sell about 13,200 ivory lots that average $992 per lot and are worth $13.0 million annually. To extrapolate online auction data nationwide, we considered the annual revenue of LiveAuctioneers.com ($2.5 million to $5 million) and AuctionZip.com ($500,000 to $1 million) (Manta 2016). Since AuctionZip.com is about 80 percent smaller than LiveAuctioneers.com, we assume that AuctionZip.com may have about 80 percent less of the ivory sales as well ($2.6 million). To determine the national annual online ivory sales and account for ivory sales on AuctionZip.com and any other smaller online auctions, the estimate is doubled to $26.1 million, of which non-antiques represent $574,000.

For live auctions, IFAW investigated 14 auctions and found 833 ivory lots were sold over a 3-month period. Extrapolating to an annual estimate would result in 14 auction houses selling

3,332 ivory lots annually and averaging 238 ivory lots per auction house. The highest sold lot price ranged from $1,220 to $18,000. IFAW only investigated auctions that were identified as selling ivory during the scoping process and did not tabulate how many ivory lots were ultimately sold. Therefore, the percentage of live auctions selling ivory items and the number of ivory items sold is unknown. While we recognize that the impact on non-antique ivory sales in live auctions may be greater than the range of $72,600 to $1.3 million, we do not have information regarding the underlying distribution of potentially impacted auctions. However, based on publicly available information, we can estimate that there are as many as 8,097 auction houses in the United States that may sell ivory. Therefore, we expect that more than 14 auction houses sell ivory lots in a given year, but we have no basis to estimate the number of auction houses actually selling ivory or the quantity of ivory offered for sale. Due to the data limitations for live auctions and the methodology used in the 2014 IFAW report noted above, we are unable to extrapolate the 2014 IFAW report to a national estimate.

Table 2 summarizes the estimated domestic ivory sales from online auctions, live auctions, retail stores, and exports. IFAW reported that online auction sales and live auction sales should not be summed due to potential double counting because 50 percent of the live auctions also sold items online. However, for the purpose of this analysis, because live auctions were not extrapolated nationwide, data from both online and live auctions are summed. For live auction sales, the lower bound was estimated using the average price per lot in online auction sales ($992), while the upper bound was estimated using the highest lot sold price in live auction sales ($18,000). For retail stores, the lower bound was estimated using the average price per lot in online auction sales ($992), while the upper bound was estimated using the highest lot sold price in live auctions ($18,000). By extrapolating data from a variety of sources, we estimate

that domestic ivory sales are between $88.8 million and $1.2 billion annually.

Assuming that the domestic market is similar to the export market, we estimate non-antique worked ivory domestic sales will decrease by about $1.8 million to $23.4 million annually (two percent of domestic sales) under this rule. We are not aware of any other data (in published reports or public comments) that estimate a larger percentage by value of non-antiques in the marketplace. Without data for a plausible range of impacts, we cannot improve the robustness of the analysis with a sensitivity analysis (Economists Incorporated 2016). Thus, non-antique sales in the domestic market would decrease by $1.8 million and $23.4 million annually.

Because we will allow intrastate sales and domestic and foreign commercial activities with certain items containing *de minimis* amounts of ivory, and many of these items will be precluded from export, it is possible that an even smaller percentage of the domestic market will be impacted compared to the export market. Our proposed rule requested information from the public about the potential impact to the domestic market. One commenter estimated the antique ivory in private American collections is worth $11.9 billion; however, trade in items that qualify as ESA antiques will not be affected by this rule.

The total annual decrease in non-antique ivory sales from exports, U.S. auctions, and retail stores, will represent two percent of all ivory sales. Thus, we expect that total ivory sales, including exports and sales in the domestic market, will decrease by $3.9 million to $25.5 million annually under this rule (see Table 2).

Table 2. Potential Total Impact to Annual Ivory Sales

Type of Seller	Number of Ivory Items: 2016	Lower Bound Estimate			Upper Bound Estimate		
		Avg. Price per Item	Total Sales ($,000)	Non-Antique Sales ($,000)	Avg. Price per Item	Total Sales ($,000)	Non-Antique Sales ($,000)

	Estimate						
Online Auctions	26,312	$992	$26,097.0	$574.1	$992	$26,097.0	$574.1
Live Auctions	3,332	$992	$3,302.0	$72.6	$18,000	$59,976.0	$1,319.5
Retail Stores	59,847	$992	$59,367.8	$1,187.4	$18,000	$1,077,238.8	$21,544.8
Total Domestic Sales	89,491	*$992*	$88,766.9	$1,834.1	$15,069	$1,163,311.8	$23,438.4
Total Export Sales	1,040	$79,000	$92,963.5	$2,062.0	$79,000	$92,963.5	$2,062.0
Total	90,531		$181,730.4	$3,896.1		$1,256,275.3	$25,500.4

Revising the 4(d) rule for the African elephant will improve domestic regulation of the U.S. market, as well as foreign markets where commercial activities involving elephant ivory are conducted by U.S. citizens, and facilitate enforcement efforts within the United States. We are taking this action to increase protection for African elephants in response to the alarming rise in poaching of African elephants, which is fueling the rapidly expanding illegal trade in ivory. As noted in the preamble to this final rule, the United States continues to play a role as a destination and transit country for illegally traded elephant ivory. Increased control of the U.S. domestic market and foreign markets where commercial activities involving elephant ivory are conducted by U.S. citizens will benefit the conservation of the African elephant.

Regulatory Flexibility Act: Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small

government jurisdictions) (5 U.S.C. 601 *et seq*.). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for "significant impact" and a threshold for a "substantial number of small entities." See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

The U.S. Small Business Administration (SBA) defines a small business as one with annual revenue or employment that meets or is below an established size standard. To assess the effects of the rule on small entities, we focused on businesses that buy or sell elephant ivory. Businesses produce a variety of products from elephant ivory, including cue sticks, pool balls, knife handles, gun grips, furniture inlay, jewelry, and instrument parts. Depending on the type of product produced, these businesses could be included in a number of different industries, including (1) Musical Instrument Manufacturing (North American Industry Classification System (NAICS) 339992), where small businesses have less than $10.0 million in average annual receipts; (2) Sporting and Recreational Goods and Supplies Merchant Wholesalers (NAICS 423910), where small businesses have fewer than 100 employees; (3) All Other Miscellaneous Wood Product Manufacturing (NAICS 321999), where small businesses have fewer than 500 employees; (4) Metal Kitchen Cookware, Utensil, Cutlery, and Flatware (except Precious) Manufacturing (NAICS 332215), where small businesses have fewer than 500 employees; (5) Jewelry and Silverware Manufacturing, (NAICS 339910), where small businesses have fewer than 500 employees; (6) Used Merchandise Stores (NAICS 453310),

where small businesses have less than $7.5 million in average annual receipts; (7) Art Dealers (NAICS 453920), where small businesses have less than $7.5 million in average annual receipts; (8) All other miscellaneous store retailers except tobacco (NAICS 453998), where small businesses have less than $7.5 million in average annual receipts; (9) All other support services, which includes independent auctioneers (NAICS 561990), where small businesses have less than $11.0 million in average annual receipts; and (10) Electronic Auctions (NAICS 454112), where small businesses have less than $35.5 million in average annual receipts. **Table 3** describes the number of businesses within each industry and the estimated percentage of small businesses. The U.S. Economic Census does not capture the detail necessary to determine the number of small businesses that are engaged in commerce with African elephant ivory products within these industries. Therefore, we utilized various sources and public comments to estimate the potential number of businesses impacted. Based on the distribution of small businesses with these industries as shown in **Table 3**, we expect that the majority of the entities involved with trade in African elephant ivory would be considered small as defined by the SBA.

Table 3. Distribution of businesses within affected industries.

NAICS Code	Description	Total Number of Businesses	Percentage of Small Businesses	Percentage of Businesses Impacted
339992	Musical instrument manufacturing	597	73%	<3%
423910	Sporting and recreational goods and supplies merchant wholesalers	5,953	97%	<3%
321999	All other miscellaneous wood product manufacturing	1,763	100%	<3%
332215	Metal kitchen cookware, utensil, cutlery, and flatware (except precious) manufacturing	188	99%	<3%
339910	Jewelry and silverware manufacturing	2,119	100%	<3%
453310	Used merchandise stores	19,793	74%	10%
453920	Art dealers	4,937	95%	10%

454112	Electronic Auctions	431	99%	1%
453998	All other miscellaneous store retailers except tobacco (includes auction houses)	15,475	83%	
561990	All other support services (includes independent auctioneers)	12,940	84%	

Source: U.S. Census Bureau, 2012 County Business Patterns.

The impact on individual businesses is dependent on the percentage of interstate and export sales that involve non-antique African elephant ivory that would not fall under the *de minimis* exception. That is, the impact depends on where businesses are located, where their customers are located, and the kinds of items containing ivory that they sell. Thus, we expect that individual businesses may face a range of impacts from closure to minimal revenue decrease. We do not have sufficient information on business profiles to determine with certainty the percent of revenues affected by the rule, but we do estimate the potential impacts using the best available data.

For auctions (NAICS 453998 and NAICS 561990), IFAW reported that "In general, ivory constituted a small part of all the respondents' overall inventories - somewhere between 1 and 5 percent." Since sale of antique ivory will still be allowed under this rule, we expect that a smaller percentage of inventories will be impacted. Thus, this rule will not have a significant impact on auctions.

For electronic auctions (NAICS 454112), IFAW reported that about five online auction aggregator websites may sell ivory products while noting that eBay and Etsy no longer permit the sale of ivory products. Five establishments out of 420 small electronic auctions does not constitute a significant number of small businesses.

Table 4 shows the distribution of impacted retail outlets by size category. We assume that the impacted retail outlets will have the same size category distribution as the population of establishments. Small businesses for these industries have annual receipts less than $7.5 million.

For the purpose of this analysis, we include impacted businesses that earn less than $10 million or do not operate the entire year. Under these criteria, 2,354 businesses (10 percent) would be categorized as small.

Table 4. Distribution of Impacted Retail Outlets by Size Category (NAICS 453310 and NAICS 453920)

Size Category by Sales/Receipts/Revenue	Total Establishments	Percentage of Establishments	Percentage of sales by revenue category	Number of businesses impacted (2,720 nationwide)
Less than $250,000	7,304	30%	4%	804
$250,000 to $499,999	3,223	13%	6%	355
$500,000 to $999,999	2,459	10%	8%	271
$1,000,000 to $2,499,999	1,922	8%	12%	212
$2,500,000 to $4,999,999	926	4%	9%	102
$5,000,000 to $9,999,999	705	3%	7%	78
$10,000,000 to $24,999,999	1,443	6%	15%	159
$25,000,000 to $49,999,999	931	4%	10%	400
Firms not operated for the entire year	3,635	15%	3%	102
$50,000,000 to $99,999,999	459	2%	(D)	51
$100,000,000 to $249,999,999	366	1%	(D)	40
$250,000,000 or more	1,339	5%	(D)	147

(D) Data withheld by U.S. Census Bureau to avoid disclosing data for individual companies

Table 5 shows the potential impact to retail outlets. We assume that non-antique ivory sales are distributed at the same percentage of total sales within each size category. Thus, businesses with annual receipts less than $250,000 would be allocated four percent of non-

antique ivory sales (**Table 4**). Under the lower bound estimate, small businesses would incur losses of 0.02 percent to 0.06 percent of sales. Under the upper bound estimate, small businesses would incur losses of 0.3 percent to 1.1 percent of sales. Therefore, this rule does not have a significant economic impact on retail outlets.

Table 5. Potential Impact to Retail Outlets (NAICS 453310 and 453920) ($,000)

Size Category by Sales/Receipts/Revenue[1]	Number of businesses impacted (2,720 nationwide)	Lower Bound			Upper Bound		
		Total Non-Antique Ivory sales	Ivory Sales Per Business	Percent of Sales per Business	Total Non-Antique Ivory sales	Ivory Sales Per Business	Percent of Sales per Business
Less than $250,000	804	$52.0	$0.1	0.05%	$943.2	$1.2	0.94%
$250,000 to $499,999	355	$68.2	$0.2	0.06%	$1,237.0	$3.5	1.07%
$500,000 to $999,999	271	$97.9	$0.4	0.05%	$1,775.6	$6.6	0.87%
$1,000,000 to $2,499,999	212	$145.0	$0.7	0.04%	$2,631.1	$12.4	0.71%
$2,500,000 to $4,999,999	102	$102.0	$1.0	0.03%	$1,850.1	$18.2	0.48%
$5,000,000 to $9,999,999	78	$88.4	$1.1	0.02%	$1,604.8	$20.7	0.28%
$10,000,000 to $24,999,999	159	$181.5	$1.1	0.01%	$3.294.2	$20.7	0.12%
Firms not operated for the entire year	400	$37.5	$0.1	0.07%	$680.0	$1.7	1.36%
$25,000,000 to $49,999,999	102	$116.8	$1.1	<0.01%	$2,120.0	$20.7	0.06%
$50,000,000 to $99,999,999	51	(D)					
$100,000,000 to $249,999,999	40						
$250,000,000 or more	147						

(D) Data withheld by U.S. Census Bureau to avoid disclosing data for individual companies

[1]Source: U.S. Census Bureau 2012.

One commenter estimated that there are about seven people in the United States who purchase tusks (from individuals who imported them prior to 1989) and cut them into a variety of

forms for U.S. craftsmen to finish. These craftsmen work the ivory pieces into finished products, including pool cues, knife handles, and piano keys. He estimated that there are about 15 individuals making pool cues with ivory ferrules and that there are a total of about 300 people in the United States creating finished products using ivory components. This rule will impact craftsmen working with ivory in the United States. While the commenter does not provide data regarding the industries under which these 300 establishments would be categorized, we can estimate that the potential number of establishments represents two percent of establishments in the affected industries (NAICS 339992, 423910, 321999, 332215, and 339910) or three percent of establishments in the affected industries (NAICS 339992, 321999, 332215, and 339910). Therefore, this rule does not impact a significant number in the affected industries. The final rule does not impact intrastate (within a State), commerce so those buying and selling within the State in which they reside will be able to continue to do so (where such activity is allowed under State law). In addition, there are alternative materials available to craftsmen, including mammoth ivory and ivory substitutes, which may decrease some impacts.

This rule has an economic impact on U.S. craftsmen working with elephant ivory because it prohibits the interstate sale of items containing African elephant ivory manufactured after the effective date. Martin and Stiles estimated in their 2008 report that there are "a minimum of 120 craftsmen, including restorers, working in ivory at least several weeks a year" and that the "general feeling [at that time] was that the number has been decreasing over past years, with older people retiring and fewer young people replacing them." One commenter estimated that domestic ivory carvers sell $1.5 million per year in ivory blanks to other craftsmen. We did not receive from commenters, and we are not able to provide, an estimate of the total value of products produced by such craftsmen. One commenter estimated that yearly sales of cue sticks

containing ivory amount to $1.7 million per year. To the extent that these craftsmen are unable to utilize alternate materials (including, for example, mammoth ivory, cow bone, or deer antler) and that their business is conducted across State lines, they will be impacted by this rule.

Overall, we estimate that worked ivory exports will decrease about $2.1 million annually, which represents about two percent of the total declared value of worked ivory exported from 2007 to 2011. This estimate is based on the total declared value of worked African elephant ivory exported from the United States. The declared value of items containing African elephant ivory that were less than 100 years old (and, therefore, could not qualify as antiques) ranged from $607,000 to $3.7 million annually. The best available information does not provide any indication that there are differences in the proportion, by value, of antiques in domestic and foreign commerce. Therefore, we also estimate that domestic sales will decrease by up to two percent annually. Based on our estimate of the domestic ivory market to be about $88.8 million to $1.2 billion, we estimate that domestic sales will decrease by $1.8 million to $23.4 million annually. This sales decrease of two percent will be incurred among the various businesses and industries, which would face a range of impacts from minimal revenue decrease to closure. Because we are allowing domestic commercial activities with certain items containing *de minimis* amounts of ivory, and many of these items will be precluded from export, it is possible that an even smaller percentage of the domestic market will be impacted compared to the export market.

Based on the available information, we do not expect these changes to have a substantial economic impact. Thus, we do not expect the rule to have a significant economic impact on a substantial number of small entities. We, therefore, certify that this rule will not have a significant economic effect on a substantial number of small entities as defined under the

Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.). A Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

This rule creates no substantial fee or paperwork changes in the permitting process. The regulatory changes require issuance of ESA permits for import of all sport-hunted African elephant trophies. We estimate that we will issue 300 ESA permits per year for these sport-hunted trophies, with a fee of $100 per permit. These changes are not major in scope and would create only a modest financial or paperwork burden on the affected members of the general public. The authority to regulate activities involving ESA-listed species already exists under the ESA and is carried out through regulations contained in 50 CFR part 17.

Small Business Regulatory Enforcement Fairness Act: This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Will not have an annual effect on the economy of $100 million or more. This rule revises the 4(d) rule for African elephant, which makes the African elephant subject to the same provisions applied to other threatened species not covered by a 4(d) rule, with certain exceptions. It will allow us to effectively regulate ivory trade in the United States and to ensure that the U.S. market for ivory is not contributing to poaching of elephants in Africa and the illegal ivory trade, without unnecessarily restricting activities that have no conservation effect or are strictly regulated under other law. This rule will not have a negative effect on this part of the economy. It will affect all importers, exporters, re-exporters, and domestic and certain traders in foreign commerce of African elephant ivory equally, and the impacts will be evenly spread among all businesses, whether large or small.

b. Will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, tribal, or local government agencies; or geographic regions.

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act: Under the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

This rule does not impose an unfunded mandate on State, local, or tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. The final rule imposes no unfunded mandates. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings: This rule does not effect a taking of private property or otherwise have taking implications under Executive Order 12630. While certain activities that were previously unregulated will now be regulated, possession and other activities with African elephant ivory such as sale in intrastate commerce will remain unregulated under Federal law. A takings implication assessment is not required.

Federalism: Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. These revisions to 50 CFR part 17 do not contain significant federalism implications. A federalism summary impact statement is not required.

Civil Justice Reform: This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation with Indian tribes: The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Indian tribes and that consultation under the Department's tribal consultation policy is not required. Individual tribal members must meet the same regulatory requirements as other individuals who trade in African elephants, including African elephant parts and products.

Paperwork Reduction Act: This rule contains a new information collection requirement associated with applications for permits to import sport-hunted African elephant trophies (FWS Form 3-200-19). This new requirement requires approval of the Office of Management and Budget (OMB) under the PRA.

Under current regulations, permits are required for import of sport-hunted African elephant trophies only from certain countries. OMB has reviewed and approved the collection of information under the current regulations and assigned OMB Control Number 1018-0093, which expires May 31, 2017.

This final rule increases protection for and benefits the conservation of African elephants by more strictly controlling U.S. trade in ivory, without unnecessarily restricting activities that have no conservation effect or are strictly regulated under other law. We are taking this action in response to an unprecedented increase in poaching of elephants across Africa to supply an escalating illegal trade in ivory. This rule requires permits for import of all African elephant

sport-hunted trophies; i.e., from both Appendix-I and Appendix-II populations. We requested that OMB approve, on an emergency basis, our request to collect information associated with permits to import African elephant sport-hunted trophies from Appendix-II populations. We asked for emergency approval because of the potential negative effects of delaying publication of this final rule. OMB approved our request and assigned OMB Control No. 1018-0164, which expires November 30, 2016.

Title: Import of Sport-Hunted African Elephant Trophies, 50 CFR 17.

OMB Control Number: 1018-0164.

Service Form Number: 3-200-19.

Type of Request: Request for a new OMB control number.

Description of Respondents: Individuals.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Estimated Number of Respondents: 300.

Estimated Number of Annual Responses: 300.

Estimated Completion Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 100.

Estimated Total Nonhour Burden Cost: $30,000 associated with application fees.

We will publish a notice in the **Federal Register** announcing our intent to seek regular (3-year) approval for this information collection requirement and soliciting public comment for 60 days. At any time, interested members of the public and affected agencies may comment on the information collection requirements contained in this rule. Please send comments to the

Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS BPHC, 5275 Leesburg Pike, Falls Church, VA 22041-3803 (mail); or hope_grey@fws.gov (email).

National Environmental Policy Act (NEPA): This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because we conducted an environmental assessment and reached a Finding of No Significant Impact. This finding and the accompanying environmental assessment are available online at *http://www.regulations.gov* at Docket Number FWS–HQ–IA–2013–0091.

Energy Supply, Distribution, or Use: This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required. This final rule revises the current regulations in 50 CFR part 17 regarding trade in African elephants and African elephant parts and products. This final rule will not significantly affect energy supplies, distribution, or use.

References Cited

A list of references cited is available online at *http://www.regulations.gov* at Docket Number FWS–HQ–IA–2013–0091.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

For the reasons given in the preamble, we amend title 50, chapter I, subchapter B of the Code of Federal Regulations as follows:

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. The African Elephant Conservation Act (16 U.S.C. 4201 *et. seq*.), and any moratorium under that act, also applies. Except as provided in paragraphs (e)(2) through (9) 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. *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, 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. 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 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) The ivory is a fixed or integral component or components of a larger manufactured or handcrafted item and is not in its current form the primary source of the value of the item, that is, the ivory does not account for more than 50 percent of the value of the item;

(iv) The ivory is not raw;

(v) The manufactured or handcrafted item is not made wholly or primarily of ivory, that is, the ivory component or components do not account for more than 50 percent of the item by

volume;

(vi) The total weight of the ivory component or components is less than 200 grams; and

(vii) The item was manufactured or handcrafted before [insert date 30 days after date of publication in the FEDERAL REGISTER].

(4) *Import/export of raw ivory*. Except as provided in paragraphs (e)(6) through (9) 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)(6) through (9) 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 of this part 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 ivory that is part of a traveling exhibition 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 ivory is accompanied by a valid CITES traveling exhibition certificate (see the requirements for traveling exhibition certificates at 50 CFR 23.49) or equivalent CITES document;

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

(D) The item containing worked 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 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. 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 or handcrafted 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) 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), (e)(7), (e)(8), and (e)(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, provided the requirements of 50 CFR parts 13, 14, and 23 have been met.

(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 or handcrafted 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 or handcrafted 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) *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, nothing in this rule interprets or changes any provisions or prohibitions that may apply under the African Elephant Conservation Act (16 U.S.C. 4201 *et. seq*.), 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.

* * * * *

Dated: May 27, 2016.

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Michael J. Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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