

Key Q&A Items From FWS final Ivory Rule

Can I donate or give away ivory? Yes. This ESA 4(d) rule and other federal wildlife laws and regulations such as CITES, the ESA, and the AfECA do not prohibit donating or giving away your ivory specimen, or receiving an ivory item as a donation or a gift, provided it was lawfully acquired and there is no exchange for other goods or services involved. We recommend that you provide the recipient with any records or documentation you have that demonstrates the origin and chain of ownership of the items. Check to make sure that you are also in compliance with local and state laws.

What is the de minimis exemption? The final rule provides an exemption from prohibitions on selling or offering for sale in interstate and foreign commerce for certain manufactured items that contain a small (de minimis) amount of ivory that meet the following conditions: A. If the item is located in the United States, the ivory must have been imported prior to January 18, 1990, or imported under a CITES pre-Convention certificate with no limitation on its commercial use. B. If the item is located outside of the United States, the ivory must have been removed from the wild prior to February 26, 1976. C. The ivory is a fixed or integral component or components of a larger manufactured item and is not 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. D. The ivory is not raw. E. The manufactured 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. F. The total weight of the ivory component or components is less than 200 grams. G. The item must have been manufactured before the effective date of the final rule.

What types of items are likely to qualify for the de minimis exception? When we proposed the 200-gram limit we had a particular suite of items in mind. The following types of items may qualify for the de minimis exception: many musical instruments (including many keyboard instruments, with ivory keys, most stringed instruments and bows with ivory parts or decorations, and many bagpipes, bassoons and other wind instruments with ivory trim); most knives and guns with ivory grips; and certain household and decorative items (including teapots with ivory insulators, measuring tools with ivory parts or trim, baskets with ivory trim, walking sticks and canes with ivory decorations, and many furniture pieces with ivory inlay, etc.). However, to qualify for the de minimis exception, all of the above criteria must be met (either A or B and CG).

What types of items are not likely to 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).

How do I demonstrate that my item meets the criteria to qualify for the de minimis exception? To qualify for the de minimis exception, an item must meet the criteria provided above. 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 item by volume. 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, 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.

What is meant by the ESA antiques exemption? Under the ESA, an antique is an item that meets all of the following criteria*: A. It is 100 years or older. B. It is composed in whole or in part of an ESA-listed



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species. C. It has not been repaired or modified with an ESA-listed species after December 27, 1973. D. It is being or was brought in to the United States through a port designated for the import of endangered species antiques. *Under Director's Order 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. Antiques that meet these criteria (ESA antiques) are exempt from ESA prohibitions and the provisions in the final rule. ESA antiques may be sold in interstate and foreign commerce and may be imported or exported without the need for an ESA permit. However, CITES and other import/export requirements must still be met. In addition, the moratorium on import of African elephant ivory under the African Elephant Conservation Act remains in effect for antiques and other African elephant ivory (other than sport-hunted trophies).

How do I demonstrate that my item meets the criteria to qualify as an antique under the ESA? Under the ESA, a person claiming the benefit of the antiques exemption has the burden of demonstrating that the item qualifies for the exemption. This is true for all ESA-listed species, including African elephants. We have provided guidance, in the Appendix to Director's Order 210, on ways to demonstrate that an item qualifies as an ESA antique. We want to clarify that forensic testing is not necessarily required. Provenance and age 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.

Example scenarios:

I have a violin bow that contains a small amount of ivory. Under the final rule, will I be able to sell the bow in the United States, export it for sale, or take it overseas for a concert? If the bow meets the requirements for the de minimis exception, including that the ivory was removed from the wild prior to February 26, 1976, and that the total weight of the ivory is less than 200 grams you will be able to sell it in the United States. If the bow qualifies as an ESA antique you will be able to export it for sale. If the bow meets the requirements for import/export of a musical instrument, including that the ivory was removed from the wild prior to February 26, 1976, it is accompanied by a CITES musical instrument certificate or equivalent CITES document, the bow is securely marked or uniquely identified, and it will not be sold or otherwise transferred while outside the United States (see paragraph (e)(4) in the proposed rule text for details) you can travel with it internationally for personal use, including to perform in concerts.

I have an antique ivory figurine. Under the final rule, will I be able to sell it online? If you can demonstrate that it qualifies as an ESA antique, you will be able to sell it. However, state laws and online retailer policies may further restrict or prohibit ivory sales. Always consult with your state and the retailer to determine their requirements.

FWS Qualified Appraisal Standards:

What will the Service accept as a qualified appraisal?

An appraisal submitted as documentary evidence of an article's eligibility under the ESA antique exception must meet the following criteria:

- The person executing the appraisal either has earned an appraisal designation from a recognized professional appraiser organization for demonstrated competency in appraising the type of property being appraised or can demonstrate verifiable education and experience in assessing the type of property being appraised.
- The person executing the appraisal is not the importer, exporter, buyer, recipient or seller of the article; does not benefit from the results of the appraisal (other than for the cost of the appraisal); is not a party to any of the transactions associated with the article (including any person acting as an agent for the transaction); is not an employee of any business that is a party to the transaction;

and is not related to the person claiming the exception.

- Facts we will examine in determining the reliability of the appraisal:
 - A description of the article in sufficient detail for a person who is not generally familiar with the type of article to determine that the appraisal is about the article in question.
 - The name and address of the qualified appraiser; or if the appraiser is a partner, an employee, or an independent contractor engaged by a person other than the person claiming the exception, the name and address of the partnership or the person who employs or engages the appraiser.
 - The qualifications of the appraiser who signs the appraisal, including the background, experience, education and any membership in professional appraiser associations.
 - The date on which the article was appraised.
 - The scientific method in detail used to determine the age or species.
 - Descriptive information on the article including but not limited to: the size of the article; the medium; the artist or culture; approximate date the article was created; and a professional quality image of the article.
 - A detailed history of the article including proof of authenticity.
 - The facts on which the appraisal was based including analyses of similar works by the artist on or around the creation date.

Key comments and responses from the final rule:

(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.

(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 exemption, 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 and 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 exemption. We will provide additional guidance on the implementation of these criteria via our Web site, 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).

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 Web site, 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 Web site 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.



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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 Web site 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.