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Restrictions on Trade in Elephant Ivory

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Summary

For decades, illegal trade in elephant ivory has threatened the viability of wild populations of the Asian elephant (*Elephas maximus*) and the African elephant (*Loxodonta africana*). To reduce the United States' contribution to the demand for illegal elephant ivory, President Obama announced in February 2014 that his Administration would “strengthen enforcement” of U.S. laws governing the trade as part of his *National Strategy for Combating Wildlife Trafficking*. Shortly thereafter, the Department of the Interior's (DOI's) Fish and Wildlife Service (FWS or Service) took administrative actions designed to restrict trade in elephant ivory further while allowing some trade that the agency does not believe would undermine elephant conservation efforts.

At the federal level, two statutes, the Endangered Species Act (ESA) and the African Elephant Conservation Act (AECA), and an international treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), potentially restrict the trade, possession, and use of elephant ivory by persons subject to U.S. jurisdiction. In addition to the statutes that regulate trade in ivory, FWS has promulgated or issued rules, orders, and policies that generally dictate what persons subject to U.S. jurisdiction can do with elephant ivory. In July 2015, FWS proposed certain revisions to its ESA Section 4(d) rule on African elephants that would further restrict trade in African elephant ivory.

This report briefly discusses the federal statutes and the treaty that govern international and domestic trade in elephant ivory by persons subject to U.S. jurisdiction. It then provides an overview of the President's strategic plan to combat wildlife trafficking, as well as related administrative actions by FWS. It examines the restrictions on trade in Asian and African elephant ivory contained in federal laws, as well as FWS regulations and policies. It also explains potential exceptions to these restrictions, including exceptions for antiques, certain musical instruments, and ivory that is part of a household move. The report concludes with a brief overview of legislation introduced in the 114th Congress and FWS's proposed revisions to its special rule addressing African elephant ivory trade.

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Introduction

For decades, illegal trade in elephant ivory has threatened the viability of wild populations of the Asian elephant (*Elephas maximus*) and the African elephant (*Loxodonta africana*).¹ Illegal trade in elephant ivory has doubled since 2007, with poachers killing about 35,000 elephants in 2012, according to the U.S. Department of the Interior (DOI).² To reduce the United States' contribution to the demand for illegal elephant ivory, President Obama announced in February 2014 that his Administration would “strengthen enforcement” of U.S. laws governing the trade as part of his *National Strategy for Combating Wildlife Trafficking*.³ Shortly thereafter, DOI's Fish and Wildlife Service (FWS or Service) took administrative actions designed to restrict further trade in elephant ivory while allowing some trade that the agency does not believe would undermine elephant conservation efforts.⁴ These actions included the issuance of Director's Order No. 210 (Director's Order).⁵ In July 2015, FWS proposed certain revisions to its ESA Section 4(d) rule on African elephants that would further restrict trade in African elephant ivory.⁶

This report briefly discusses the federal statutes and the treaty that govern international and domestic trade in elephant ivory by persons subject to U.S. jurisdiction. It then provides an overview of the President's strategic plan to combat wildlife trafficking, as well as related administrative actions by FWS. It examines the restrictions on trade in Asian and African elephant ivory contained in federal laws, as well as FWS regulations and policies.⁷ The report concludes with a brief overview of legislation in the 114th Congress and FWS's proposed revisions to its special rule addressing African elephant ivory trade.

Convention on International Trade in Endangered Species of Wild Fauna and Flora

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or Convention) is an agreement among 180 countries (Parties) that establishes a permitting and certificate system to protect wildlife and plant species from harm caused by illegal or

¹ U.S. Fish and Wildlife Service (FWS), Fact Sheet, U.S. Efforts to Control Illegal Elephant Ivory Trade and Internal Markets (2012), available at <http://www.fws.gov/international/pdf/factsheet-us-efforts-to-control-illegal-ivory-trade.pdf>.

² DOI, News Release (February 11, 2014), available at <http://www.doi.gov/news/pressreleases/interior-announces-ban-on-commercial-trade-of-ivory-as-part-of-overall-effort-to-combat-poaching-wildlife-trafficking.cfm>.

³ Executive Office of the President, National Strategy for Combating Wildlife Trafficking 2-3 (February 11, 2014), available at <http://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf>.

⁴ FWS, *What can I do with my African elephant ivory?* (updated May 15, 2014), <http://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html>.

⁵ FWS, Director's Order No. 210 §2(b) (February 25, 2014), as amended (May 15, 2014) [hereinafter Order 210], available at <http://www.fws.gov/policy/do210.pdf>. Order 210 was originally issued on February 25, 2014. To reduce confusion, this report will refer only to the amended version of the Director's Order, as that is the version that is currently operative. FWS provided a redline copy of the Director's Order to show how the amendments changed the original order; that document is available at <http://www.fws.gov/policy/a1do210.pdf>.

⁶ FWS, Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 80 Fed. Reg. 45154 (July 29, 2015).

⁷ This report does not discuss trade in live elephants; the transit or transshipment of ivory through places subject to U.S. jurisdiction; or trade in specimens from animals bred in captivity. It also does not examine whether actions by FWS related to trade in ivory are consistent with the United States' international obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or other international agreements.

unsustainable international trade in the species or their parts and products.⁸ Parties to CITES, including the United States, have undertaken certain international obligations with respect to trade in specimens of species listed in the CITES appendices.⁹ CITES strictly regulates trade in specimens of Appendix I species because they are threatened with extinction.¹⁰ For these species, CITES generally requires an export permit, showing that the animals, plants, or parts thereof were legally obtained and that export will not be detrimental to the species' survival; and an import permit, which includes a statement that the specimen is not being used primarily for commercial purposes and that import is not detrimental to the species' survival.¹¹

Appendix II species receive a medium level of protection because they could potentially become endangered in the future in the absence of trade restrictions.¹² Export of specimens of Appendix II species generally requires a permit issued by the exporting country's Management Authority after a finding that the specimens were legally acquired and that export will not be detrimental to the species' survival.¹³ Finally, a Party to CITES may designate unilaterally a native species as an Appendix III species if the Party requires the assistance of other CITES parties to control international trade in that species.¹⁴ Export of an Appendix III species from a Party that has included the species in Appendix III requires an export permit.¹⁵ CITES, as implemented by FWS, also bans commercial use of a specimen after import in some circumstances.¹⁶

CITES contains a few exceptions to its permitting requirements that are particularly relevant to trade in elephant ivory. For example, when a Party's Management Authority (e.g., FWS) "is satisfied" that a specimen was removed from the wild prior to its listing in a CITES appendix, the core permitting provisions of CITES do not apply to that specimen, but the authority must issue a pre-Convention certificate to accompany the export or re-export of the specimen.¹⁷ CITES also contains exceptions for the import and export of certain personal or household effects;¹⁸ noncommercial loan, donation, or exchange of certain specimens between scientists or registered scientific institutions;¹⁹ import or export of pre-Convention specimens in traveling exhibitions;²⁰

⁸ 27 U.S.T. 108; CITES, Preamble; 50 C.F.R. §23.1(b). CITES was signed by the United States on March 3, 1973; ratified by the United States later that year; and entered into force on July 1, 1975. The text of the Convention is available at <http://www.cites.org/eng/disc/text.php>.

⁹ CITES, Art. II. For the purposes of U.S. domestic law, CITES would not appear to be a self-executing treaty. *See* CITES, Art. XIV ("The provisions of the present Convention shall in no way affect the provisions of any domestic measures ..."); 50 C.F.R. §23.1(c) ("We, the U.S. Fish and Wildlife Service ... implement CITES through the Endangered Species Act."); *United States v. One Etched Ivory Tusk of African Elephant*, 871 F. Supp. 2d 128, 133 (2012) ("No provision of CITES indicates that the treaty is 'self-executing.'"). Thus, CITES obligations become part of U.S. law only when implemented by Congress or another appropriate domestic lawmaking or regulatory body acting within the scope of its authority. As described below, Congress implemented CITES in part by amending the ESA to ban persons subject to U.S. jurisdiction from engaging in the trade of specimens in violation of CITES or possessing specimens previously traded contrary to CITES. 16 U.S.C. §1538(c).

¹⁰ CITES, Art. II(1).

¹¹ CITES, Art. III.

¹² CITES, Art. II(2).

¹³ CITES, Art. IV. However, import of these specimens does not require a separate permit under CITES. *See id.*

¹⁴ CITES, Art. II(3).

¹⁵ CITES, Art. V. Import after export (but not re-export) may require presentation of an export permit or, if the specimen originated in a country that did not list the species in Appendix III, a certificate of origin. *Id.*

¹⁶ *See* 50 C.F.R. §23.55.

¹⁷ CITES, Art. VII(2); *see also* 50 C.F.R. §23.45; Resolution Conf. 13.6 (Rev. CoP16), Implementation of Article VII, Paragraph 2, Concerning "Pre-Convention" Specimens.

¹⁸ CITES, Art. VII(3).

¹⁹ CITES, Art. VII(6); 50 C.F.R. §23.48.

and musical instruments containing pre-Convention specimens that cross borders for personal use or performance.²¹

Notably, CITES allows parties to the Convention to adopt “stricter domestic measures” governing trade in specimens of species listed in the appendices.²² Thus, a person exporting or re-exporting ivory from—or importing ivory into—the United States should consult with the Management Authority of the foreign importing or exporting country to determine whether stricter measures (e.g., additional permitting requirements) apply.²³

Endangered Species Act

Congress enacted the Endangered Species Act (ESA)²⁴ in 1973 (and later amended it) in an effort, among other things, to conserve endangered or threatened species of wildlife and implement U.S. international obligations under CITES and other treaties.²⁵ The act authorizes DOI and the Department of Commerce to promulgate regulations listing certain species as “endangered”²⁶ or “threatened”²⁷ after following certain procedures.²⁸ FWS performs the listing function for DOI under the ESA.

General Prohibitions

After FWS has listed a species (e.g., the Asian elephant) as “endangered,” the ESA prohibits any person²⁹ subject to U.S. jurisdiction from engaging in certain actions with respect to that species unless the person can prove that an exception applies.³⁰ These prohibited actions include the

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²⁰ CITES, Art. VII(7); 50 C.F.R. §23.49.

²¹ See CITES, Resolution Conf. 16.8, Frequent Cross-border Non-commercial Movements of Musical Instruments.

²² CITES, Art. XIV(1). For example, a CITES party may choose not to recognize the personal and household effects exemption. Resolution Conf. 13.7 (Rev. CoP16), Control of Trade in Personal and Household Effects; 50 C.F.R. §23.15.

²³ 50 C.F.R. §23.20(b); FWS, Fact Sheet, CITES Permits and Certificates (December 2012), <http://www.fws.gov/international/pdf/factsheet-cites-permits-and-certificates-2013.pdf>. CITES also contains provisions addressing trade with countries not party to the Convention or trade with states that have made a reservation with respect to a particular species. CITES, Art. X; 50 C.F.R. §§23.21(d), 23.22(e), 23.25. Malawi has maintained a reservation with respect to the African elephant since 1990. CITES, Reservations Entered by Parties, <http://www.cites.org/eng/app/reserve.php>.

²⁴ 16 U.S.C. §§1531-1544.

²⁵ 16 U.S.C. §1531(a)-(b).

²⁶ Under the ESA, an “endangered species” is one which “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. §1532(6).

²⁷ The ESA defines “threatened species” as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. §1532(20).

²⁸ 16 U.S.C. §1533. One circumstance under which FWS may list a species is when the species is being overused for commercial purposes. *Id.*

²⁹ The ESA defines “person” as “an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.” 16 U.S.C. §1532(13).

³⁰ 16 U.S.C. §§1538(a)(1), 1539(g). For example, a person might demonstrate that FWS granted the person an ESA permit. 16 U.S.C. §1539(a)(1)(A). Generally, FWS may grant a permit for endangered species for “scientific purposes or to enhance the propagation or survival of the affected species.” *Id.* Approval by FWS of a permit may be conditioned on the holder adhering to certain conditions. *Id.* §1539(a). There is also a possible exception for bona fide antiques. 16 U.S.C. §1539(h). These exceptions are discussed further below.

import³¹ into, or export from, the United States³² of the endangered species; the delivery, receipt, or transport in interstate or foreign commerce of the species in the course of a “commercial activity”;³³ the sale or offer for sale in interstate or foreign commerce of the species; or the violation of a regulation promulgated under the ESA pertaining to an endangered or threatened species.³⁴

With respect to “threatened species,” such as the African elephant, which are considered to be at less risk of extinction than endangered species, the ESA authorizes DOI to promulgate regulations to protect that species.³⁵ Such regulations may prohibit any act that is prohibited for endangered species under 16 U.S.C. §1538(a)(1).³⁶ The Service has promulgated a regulation entitled “Special rules—mammals” that contains, in part, some restrictions with respect to trade in African elephant ivory.³⁷ As discussed below, FWS has proposed certain revisions to this rule that would further restrict trade in African elephant ivory.³⁸

Implementation of CITES and Other Trade Provisions

The ESA also serves as the United States’ implementing legislation for CITES.³⁹ The act designates DOI as the Management and Scientific authorities under CITES and directs the agency to take all actions “necessary and appropriate” to perform the functions of these authorities under the Convention.⁴⁰ The act also prohibits persons subject to U.S. jurisdiction from engaging in the

³¹ Under the ESA, “import” means “to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.” 16 U.S.C. §1532(10).

³² The ESA generally defines “United States” as “any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.” 16 U.S.C. §1532(17), (21).

³³ The ESA defines “commercial activity” as “all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations.” 16 U.S.C. §1532(2). FWS regulations define “industry or trade” in this context as “the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit.” 50 C.F.R. §17.3.

³⁴ 16 U.S.C. §1538(a); 50 C.F.R. §17.21(a)-(b), (e)-(f). The prohibitions on the import and export of endangered species, as well as the violation of rules promulgated under the ESA pertaining to species listed as endangered or threatened, do not apply when wildlife “was held in captivity or in a controlled environment” on (1) December 28, 1973 (the date of the enactment of the ESA); or (2) the date of publication in the Federal Register of a final rule listing a species as endangered or threatened when the holding or subsequent holding or use of the species was not done in the course of a commercial activity.” 16 U.S.C. §1538(b). If the import, export, or rule violation occurred more than 180 days after the passage of the ESA or the listing of the species as endangered or threatened, there is a rebuttable presumption that the “wildlife involved in such act is not entitled to the exemption.” *Id.*

³⁵ 16 U.S.C. §1533(d).

³⁶ *Id.*

³⁷ The current version of the rule is located at 50 C.F.R. §17.40(e). It is commonly referred to as a “special rule.”

³⁸ FWS, Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 80 Fed. Reg. 45154 (July 29, 2015). For a discussion of the proposed rule, see “FWS’s Proposed Revisions to the African Elephant ESA Section 4(d) Rule” below.

³⁹ 16 U.S.C. §1537a.

⁴⁰ 16 U.S.C. §1537a(a). Offices within FWS perform the functions of these authorities. 16 U.S.C. §1537a(a). In addition, the ESA authorizes DOI, the Secretary of the Treasury, and the Secretary of the Department of Homeland Security to promulgate “such regulations as may be appropriate to enforce” the ESA. 16 U.S.C. §1540(f).

“trade”⁴¹ of “specimens”⁴² in violation of CITES or possessing specimens previously traded contrary to CITES.⁴³

Persons “in the business of” importing wildlife into, or exporting it from, the United States must also obtain authorization from FWS to engage in these activities, including with respect to “raw or worked African elephant ivory,” and must follow certain recordkeeping, inspection, and reporting requirements.⁴⁴ Persons subject to U.S. jurisdiction may import or export wildlife only at certain designated U.S. ports unless DOI grants an exemption.⁴⁵

Exception for Antiques

Under 16 U.S.C. §1539(h), prohibitions applying to endangered species (16 U.S.C. §1538(a)); threatened species (16 U.S.C. §1533(d)); and trade undertaken in violation of CITES (16 U.S.C. §1538(c)) do not apply when the article is an “antique” under the ESA.⁴⁶ In order to qualify as an antique, an item must:

- A) Not be less than 100 years old;
- B) Be composed in whole or in part of any endangered species or threatened species listed under the ESA (16 U.S.C. § 1533);
- C) Have not been repaired or modified with any part of any such species on or after December 28, 1973 (the date of enactment of the ESA); and
- D) Enter at a port designated for the import of ESA antiques.⁴⁷

As noted below, the FWS Director’s Order announced FWS’s plan to enforce these requirements strictly.⁴⁸ However, FWS notes that items imported into the United States prior to the establishment of a designated ESA antique port (established on September 22, 1982) and items that were created inside the United States, and were therefore never imported, only have to satisfy the first three of the above listed criteria.⁴⁹

⁴¹ The ESA incorporates the definition of “trade” contained in Article I of CITES, which is “export, re-export, import and introduction from the sea.” CITES, Art. I(c). “Re-export” refers to “export of any specimen that has previously been imported.” CITES, Art. I(d).

⁴² The ESA incorporates the definition of “specimen” from Article I of CITES, which, in relevant part, refers to any animal, whether dead or alive, as well as any readily recognizable part or derivative of such animal if its species is included in CITES appendices I or II—or a part or derivative of the species is specified in Appendix III. CITES, Art. I(b).

⁴³ 16 U.S.C. §1538(c); 50 C.F.R. §23.13(a), (c).

⁴⁴ 16 U.S.C. §1538(d)-(e). FWS regulations state that to “engage in business means to import or export wildlife for commercial purposes.” 50 C.F.R. §14.91. The regulations define “commercial” as “related to the offering for sale or resale, purchase, trade, barter, or the actual or intended transfer in the pursuit of gain or profit, of any item of wildlife and includes the use of any wildlife article as an exhibit for the purpose of soliciting sales, without regard to quantity or weight. There is a presumption that eight or more similar unused items are for commercial use. The Service or the importer/exporter/owner may rebut this presumption based upon the particular facts and circumstances of each case.” 50 C.F.R. §14.4.

⁴⁵ 16 U.S.C. §1538(f).

⁴⁶ 16 U.S.C. §1539(h).

⁴⁷ 16 U.S.C. §1539(h)(1). Ports of entry for antiques made of ESA-listed species are Boston, Massachusetts; New York, New York; Baltimore, Maryland; Philadelphia, Pennsylvania; Miami, Florida; San Juan, Puerto Rico; New Orleans, Louisiana; Houston, Texas; Los Angeles, California; San Francisco, California; Anchorage, Alaska; Honolulu, Hawaii; and Chicago, Illinois. 19 C.F.R. §12.26(g)(2).

⁴⁸ Order 210 §2(b).

⁴⁹ Order 210, App. A §1.

A person claiming the exception has the “burden of proving that the exemption ... is applicable, has been granted, and was valid and in force at the time of the alleged violation.”⁵⁰ This generally requires the person to document the species and age of the specimen to show that it qualifies for the exception.⁵¹ According to FWS, at least for an import, “qualified appraisal, documents that provide detailed provenance, and/or scientific testing” is required, and “notarized statements or affidavits by the importer or a CITES pre-Convention certificate alone are not necessarily adequate proof that the article meets the ESA exception.”⁵²

Penalties

Violations of the ESA, including violations of certain provisions in ESA permits, certificates, or regulations, may result in civil and/or criminal penalties.⁵³ The ESA provides that certain criminal violations of the act are misdemeanors, punishable by a fine and/or one year in jail.⁵⁴ Forfeiture of the illegal item is also authorized.⁵⁵

In addition, the Lacey Act⁵⁶ generally prohibits the import, export, transport, sale, receipt, acquisition, or purchase of wildlife that has been “taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law”; or the import, export, transport, sale, receipt, acquisition, or purchase in interstate or foreign commerce of wildlife “taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.”⁵⁷ A person may also potentially violate the Lacey Act and 18 U.S.C. §1001 when falsely claiming, for example, that a specimen is an ESA antique.⁵⁸

African Elephant Conservation Act

Congress passed the African Elephant Conservation Act (AECA)⁵⁹ in 1988 in an effort to prevent further decline in populations of African elephants by restricting certain international trade in African elephant ivory.⁶⁰ AECA required the Secretary of the Interior to place a moratorium on the import into the United States⁶¹ of raw⁶² and worked⁶³ ivory from ivory producing countries

⁵⁰ 16 U.S.C. §1539(g).

⁵¹ 16 U.S.C. §1539(g); Order 210, Appendix A §§2-3.

⁵² Order 210, Appendix A §2.

⁵³ 16 U.S.C. §1540.

⁵⁴ 16 U.S.C. §1540(b)(1).

⁵⁵ 16 U.S.C. §1540(e)(4).

⁵⁶ 16 U.S.C. §§3371-3378.

⁵⁷ 16 U.S.C. §3372(a)(1)-(2); FWS, Lacey Act, <http://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/lacey-act.html>.

⁵⁸ 16 U.S.C. §3372(d); 18 U.S.C. §1001.

⁵⁹ 16 U.S.C. §§4201-4246.

⁶⁰ 16 U.S.C. §§4201-4202. For more on the conservation aspects of AECA and the Asian Elephant Conservation Act, see CRS Report RS21157, *International Species Conservation Funds*, by (name redacted) and (name redacted)

⁶¹ AECA defines “United States” as “the fifty States, the District of Columbia, Guam, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.” 16 U.S.C. §4244(12).

⁶² AECA defines “raw ivory” as “any African elephant tusk, and any piece thereof, the surface of which, polished or unpolished, is unaltered or minimally carved.” 16 U.S.C. §4244(10).

⁶³ AECA defines “worked ivory” as “any African elephant tusk, and any piece thereof, which is not raw ivory.” 16 (continued...)

whose African elephant conservation programs did not satisfy certain criteria.⁶⁴ However, AECA prevents the Secretary from banning individuals from importing into the United States “sport-hunted elephant trophies” that they or their principals legally took from ivory producing countries that have submitted an ivory quota to the CITES Secretariat in accordance with the CITES Ivory Control System.⁶⁵

In 1989, FWS found that no ivory producing and intermediary nations were able to comply with the AECA importation requirements.⁶⁶ Consequently, AECA and the moratorium promulgated thereunder prohibit the import⁶⁷ of raw African elephant ivory unless it is a qualifying sport-

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U.S.C. §4244(13).

⁶⁴ 16 U.S.C. §§4222(a), 4244(6). The act directed the Secretary to evaluate the African elephant conservation program of each African country containing any part of the range of an African elephant population and determine whether the program met certain criteria. 16 U.S.C. §§4221, 4244(7). These criteria are:

- (A) The country is a party to CITES and adheres to the CITES Ivory Control System.
- (B) The country’s elephant conservation program is based on the best available information, and the country is making expeditious progress in compiling information on the elephant habitat condition and carrying capacity, total population and population trends, and the annual reproduction and mortality of the elephant populations within the country.
- (C) The taking of elephants in the country is effectively controlled and monitored.
- (D) The country’s ivory quota is determined on the basis of information referred to in [subparagraph (B)] and reflects the amount of ivory which is confiscated or consumed domestically by the country.
- (E) The country has not authorized or allowed the export of amounts of raw ivory which exceed its ivory quota under the CITES Ivory Control System.

16 U.S.C. §4221(b)(1). Subject to certain conditions, ivory from intermediary countries that imported the goods from countries under an AECA moratorium must also be prohibited. 16 U.S.C. §4222(b). AECA requires the Secretary to impose a moratorium on import of ivory from intermediary countries upon finding that a country:

- (1) is not a party to CITES;
- (2) does not adhere to the CITES Ivory Control System;
- (3) imports raw ivory from a country that is not an ivory producing country;
- (4) imports raw or worked ivory from a country that is not a party to CITES;
- (5) imports raw or worked ivory that originates in an ivory producing country in violation of the laws of that ivory producing country;
- (6) substantially increases its imports of raw or worked ivory from a country that is subject to a moratorium under this chapter during the first three months of that moratorium; or
- (7) imports raw or worked ivory from a country that is subject to a moratorium under this chapter after the first three months of that moratorium, unless the ivory is imported by vessel during the first six months of that moratorium and is accompanied by shipping documents which show that it was exported before the establishment of the moratorium.

16 U.S.C. §4222(b).

⁶⁵ 16 U.S.C. §§4222(e), 4244(8) (defining “ivory quota”). AECA does not define “sport-hunted elephant trophies,” but at least one court has held that trophies with even minimal carving may be “worked ivory” that does not qualify as an exempt trophy under U.S. law. *United States v. One Etched Ivory Tusk of African Elephant*, 871 F. Supp. 2d 128, 136-39 (2012).

⁶⁶ FWS, *Moratorium on Importation of Raw and Worked Ivory from All Ivory Producing and Intermediary Nations*, 54 Fed. Reg. 24758 (June 9, 1989).

⁶⁷ AECA adopts the ESA’s definition of “import,” which is “to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.” *See* 16 U.S.C. §§1532(10), 4244(5).

hunted trophy.⁶⁸ AECA forbids the export of raw African elephant ivory from the United States.⁶⁹ AECA and the moratorium promulgated thereunder ban the import of worked African elephant ivory, and at least one court has held that, under current regulations, this ban applies even to the import of worked ivory that is part of a sport-hunted trophy.⁷⁰ AECA does not address the export of worked ivory from the United States.⁷¹ Violations of AECA may subject a person to civil and/or criminal penalties.⁷²

Recent Executive Branch Actions

On February 11, 2014, President Obama released his *National Strategy for Combating Wildlife Trafficking*.⁷³ As part of this initiative, the President announced a plan to “strengthen enforcement” through the “use [of] administrative tools to address the dramatic increase in illegal elephant ivory ... trade.”⁷⁴ Later that same day, DOI issued a press release announcing the agency’s intent to take regulatory action in order to implement the President’s strategy⁷⁵ and, shortly thereafter, issued the Director’s Order and promulgated the final rule revising the CITES use-after-import provisions.

Director’s Order No. 210

In promulgating the Director’s Order,⁷⁶ FWS signaled its intent to enforce strictly the moratorium on imports of raw and worked African elephant ivory established under AECA⁷⁷—and the antique exception to the ESA⁷⁸—and discussed how the agency intended to exercise prosecutorial

⁶⁸ See 16 U.S.C. §§4222-4223; FWS, Moratorium on Importation of Raw and Worked Ivory from All Ivory Producing and Intermediary Nations, 54 Fed. Reg. 24758, 24761 (June 9, 1989). FWS found that some trophies contribute “substantial revenues to the wildlife management programs of” ivory-producing nations. 54 Fed. Reg. 24758, 24761. As discussed below, FWS has stated that as a matter of “law enforcement discretion,” it intends to allow certain noncommercial imports of raw and worked African elephant ivory. Order 210 §2(b).

⁶⁹ 16 U.S.C. §4223(2).

⁷⁰ 16 U.S.C. §4223; FWS, Moratorium on Importation of Raw and Worked Ivory from All Ivory Producing and Intermediary Nations, 54 Fed. Reg. 24758, 24761 (June 9, 1989); *United States v. One Etched Ivory Tusk of African Elephant*, 871 F. Supp. 2d 128, 136-39 (2012). As discussed below, FWS has stated that as a matter of “law enforcement discretion,” it intends to allow certain noncommercial imports of raw and worked African elephant ivory. Order 210 §2(b).

⁷¹ See 16 U.S.C. §4223.

⁷² 16 U.S.C. §4224.

⁷³ Executive Office of the President, National Strategy for Combating Wildlife Trafficking (February 11, 2014). A 2013 executive order provides that “wildlife trafficking” means the “poaching of protected species and the illegal trade in wildlife and their derivative parts and products.” Exec. Order 13648, 78 Fed. Reg. 40621 (July 1, 2013).

⁷⁴ Executive Office of the President, National Strategy for Combating Wildlife Trafficking 2 (February 11, 2014).

⁷⁵ DOI, News Release (February 11, 2014). The news release stated that the agency intended to, among other things: 1) prohibit commercial import of African elephant ivory; 2) prohibit commercial export of elephant ivory; 3) significantly restrict domestic resale of elephant ivory; 4) clarify the definition of “antique”; 5) restore ESA protection for African elephants; and 6) support limited sport-hunting of African elephants.

⁷⁶ Order 210. Order 210 was originally issued on February 25, 2014. To reduce confusion, this memorandum will refer only to the amended version of the Director’s Order No. 210, as that is the version that is currently operative. FWS provided a redline copy of the Director’s Order to show how the amendments changed the original order; that document is available at <http://www.fws.gov/policy/a1do210.pdf>.

⁷⁷ 16 U.S.C. §§4201-4246; FWS, Moratorium on Importation of Raw and Worked Ivory from All Ivory Producing and Intermediary Nations, 54 Fed. Reg. 24758, 24761 (June 9, 1989).

⁷⁸ 16 U.S.C. §1539(h).

discretion with respect to these laws. For AECA, the Director’s Order states that “as a matter of law enforcement discretion” FWS intends to allow “importation of certain parts and products,” which it identifies as African elephant ivory imported for law enforcement purposes or certain scientific purposes; and, under certain conditions, worked ivory imported as part of a household move, a musical instrument, or a traveling exhibition.⁷⁹ For the antique exception, which excludes qualified items from regulation under 16 U.S.C. §§1533(d) (protective regulations for threatened species); 1538(a) (general ESA prohibitions); and 1538(c) (CITES⁸⁰ prohibitions), FWS clarified that a person claiming an ESA exemption “bears the burden of proving that the exemption is applicable” under the ESA.⁸¹

CITES Final Rule

On May 27, 2014, DOI promulgated a final rule that revised certain regulations relating to “use-after-import” restrictions under CITES—those regulations affect whether an item, after being imported, can be sold in interstate or intrastate commerce within the United States.⁸² The CITES revised regulations, which went into effect on June 26, 2014,⁸³ clarified “that the allowed use after import into the United States is determined by the status of the specimen under CITES and the ESA at the time it is imported.”⁸⁴ The rule also added language requiring a party to be able to “clearly demonstrate” that the “specimen was imported prior to the CITES listing, with no restrictions on its use after import” if the party wanted to use the item for commercial purposes in the United States.⁸⁵ In addition to these CITES use-after-import restrictions, as discussed below, FWS has proposed certain revisions to the special rule for African elephants under the ESA that would further restrict commercial interstate trade of African elephant ivory.⁸⁶

Restrictions on Trade

This section summarizes restrictions on, and other requirements for, trade in Asian and African elephant ivory contained in ESA, AECA, CITES, and FWS regulations and policies. This section focuses on restrictions currently in place—revisions to the African elephant special rule under the ESA are discussed in greater detail later in this report.⁸⁷

⁷⁹ Order 210 §2(b).

⁸⁰ As noted above, FWS is charged with the implementation of CITES pursuant to the ESA.

⁸¹ Order 210 §2(a); It is worth noting that the text of the ESA directly provides that a person claiming an exception has the “burden of proving that the exemption ... is applicable, has been granted, and was valid and in force at the time of the alleged violation.” 16 U.S.C. §1539(g).

⁸² FWS, Revision of Regulations Implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); Update Following the Fifteenth Meeting of the Conference of the Parties to CITES, Final Rule, 79 Fed. Reg. 30400 (May 27, 2014).

⁸³ Generally, a rule cannot become legally binding until 30 days after it has been published in the *Federal Register*. 5 U.S.C. §553.

⁸⁴ 79 Fed. Reg. 30410.

⁸⁵ *Id.* at 30427.

⁸⁶ For further discussion, see “FWS’s Proposed Revisions to the African Elephant ESA Section 4(d) Rule.”

⁸⁷ See “FWS’s Proposed Revisions to the African Elephant ESA Section 4(d) Rule” below.

General Requirements

Depending on the type of trade and the species involved, general permitting and licensing requirements may apply. General requirements and procedures governing the application for, and FWS issuance of, CITES and ESA permits—as well as associated rules pertaining to fees and recordkeeping—are located at 50 C.F.R. Part 13. In addition, general rules governing the import and export of wildlife are located at 50 C.F.R. Part 14. This part includes rules regarding ports designated for the importation and exportation of certain wildlife specimens (and exceptions); inspection and clearance of wildlife; import and export declaration requirements; marking requirements and exceptions; and import/export licenses and inspection fees for commercial trade.⁸⁸

Notably, CITES allows parties to the Convention to adopt “stricter domestic measures” governing trade in specimens of CITES-listed species.⁸⁹ Thus, a person exporting or re-exporting ivory from—or importing ivory into—the United States should consult with the Management Authority of the foreign importing or exporting country to determine whether stricter measures (e.g., additional permitting requirements) apply.⁹⁰ Parties seeking to trade in elephant ivory (particularly, intrastate trade) may also have to comply with certain state laws, provided that federal law does not preempt them.⁹¹

Asian Elephant Ivory

Because FWS has listed the Asian elephant as an endangered species under the ESA, and CITES parties have designated it as an Appendix I species under the Convention, international and domestic trade in its ivory is heavily restricted. Unless an exception applies, the ESA prohibits persons subject to U.S. jurisdiction from, among other things, importing or exporting the ivory; delivering, receiving, carrying, transporting, or shipping the ivory in interstate or foreign commerce in the course of a commercial activity; and selling or offering the ivory for sale in interstate or foreign commerce.⁹² In addition, the ESA prohibits international trade in specimens in violation of CITES (e.g., commercial trade in Asian elephant ivory removed from the wild on or after it became an Appendix I species on July 1, 1975), and possession of specimens previously traded in violation of CITES.⁹³

Possible exceptions to these prohibitions under the ESA include (1) that the ivory was traded pursuant to an ESA permit for certain noncommercial purposes⁹⁴ and the terms and conditions of the permit were satisfied,⁹⁵ (2) that the item is a bona fide antique,⁹⁶ which, if traded

⁸⁸ 50 C.F.R. Part 14.

⁸⁹ CITES, Art. XIV(1). For example, a CITES party may choose not to recognize the personal effects exemption. Resolution Conf. 13.7 (Rev. CoP16), Control of Trade in Personal and Household Effects.

⁹⁰ FWS, Fact Sheet, CITES Permits and Certificates (December 2012), <http://www.fws.gov/international/pdf/factsheet-cites-permits-and-certificates-2013.pdf>.

⁹¹ See 16 U.S.C. §1533(f) (stating that, in certain circumstances, federal law preempts conflicting state laws governing the import or export of—or interstate or foreign commerce in—ESA-listed species).

⁹² 16 U.S.C. §1538(a)(A), (E)-(F); 50 C.F.R. §17.21(a)-(b), (e)-(f).

⁹³ 16 U.S.C. §1538(c).

⁹⁴ Such purposes relevant to this discussion include scientific purposes and the enhancement of propagation or survival of the species. 16 U.S.C. §1539(a), (c)-(d), (g). Because the Asian elephant is an Appendix I species, import or export of its ivory for primarily commercial purposes is generally prohibited under CITES. CITES, Art. III.

⁹⁵ 16 U.S.C. §1539(a); 50 C.F.R. §17.22. International trade of the specimen may also have to meet additional CITES requirements incorporated into FWS regulations. See, e.g., 50 C.F.R. §23.20(d)(11).

internationally, is accompanied by a pre-Convention certificate;⁹⁷ or (3) that the ivory is a pre-ESA specimen that was held in a controlled environment or from a specimen held in captivity before FWS listed the Asian elephant as “endangered” under the ESA on June 14, 1976,⁹⁸ and has not been bought or sold since that time⁹⁹ that is being imported or exported for noncommercial purposes and complies with any relevant CITES requirements.¹⁰⁰

In addition, specimens of the Asian elephant, a CITES Appendix I species, that have been imported into the United States may not be used or transferred for commercial purposes in intrastate commerce unless it is a pre-Convention item (removed from the wild prior to July 1, 1975) imported with proper documentation.¹⁰¹ Even if it is such an item, regulations or permit conditions may restrict use to noncommercial purposes.¹⁰²

African Elephant Ivory

Trade in African elephant ivory is restricted, but not as heavily as with trade in Asian elephant ivory. FWS listed the African elephant as threatened under the ESA on June 11, 1978,¹⁰³ and FWS promulgated a special rule for it at that time.¹⁰⁴ The African elephant has been a CITES-listed species since February 26, 1976, and an Appendix I species since January 18, 1990.¹⁰⁵ However, certain populations of African elephants in Botswana, Namibia, South Africa, and Zimbabwe were later moved to Appendix II, subject to annotations governing trade in their specimens.¹⁰⁶

(...continued)

⁹⁶ For more on the requirements of the antique exception, see “Exception for Antiques” above. It appears that such antiques may be traded for commercial or noncommercial purposes.

⁹⁷ 16 U.S.C. §1539(g)-(h). FWS does not interpret the 1978 ESA amendments that added the antique exception as repealing treaty obligations under CITES related to pre-Convention certificates. Order 210, Appendix A n.i.

A person claiming the antique exception for an import or export must document the species and age of the specimen to show that it qualifies for the exception. 16 U.S.C. §1539(g); Order 210, Appendix A §§2-3. According to FWS, at least for imports, “qualified appraisal, documents that provide detailed provenance, and/or scientific testing” is required, and “notarized statements or affidavits by the importer or a CITES pre-Convention certificate alone are not necessarily adequate proof that the article meets the ESA exception.” Order 210, Appendix A §2.

⁹⁸ Endangered Status for 159 Taxa of Animals, 41 Fed. Reg. 24062, 24066 (June 14, 1976).

⁹⁹ It appears that the ivory may have been acquired in a noncommercial transfer (e.g., a gift) at any time so long as it was held in captivity or a controlled environment for noncommercial purposes prior to the date of its listing as an endangered species under the ESA. The Asian elephant has been listed in CITES Appendix I since the Convention entered into force on July 1, 1975. CITES, Asian Elephant, <http://www.cites.org/eng/gallery/species/mammal/asianelephant.html>. Thus, it appears that, in addition to ESA requirements, the specimen would have to be accompanied by a pre-Convention certificate if removed from the wild prior to that date.

¹⁰⁰ 16 U.S.C. §1538(b); 50 C.F.R. §17.4. If the import or export occurred more than 180 days after the passage of the ESA or the listing of the endangered or threatened species, there is a rebuttable presumption that the “wildlife involved in such act is not entitled to the exemption contained in this subsection.” 16 U.S.C. §1538(b).

¹⁰¹ 50 C.F.R. §23.55.

¹⁰² *Id.* State laws could also potentially restrict use of a specimen in intrastate commerce.

¹⁰³ FWS, Listing of the African Elephant as a Threatened Species, 43 Fed. Reg. 20499, 20504 (May 12, 1978).

¹⁰⁴ The rule, as amended, is located at 50 C.F.R. §17.40(e).

¹⁰⁵ See United Nations Environmental Programme and CITES Secretariat, Species+ website, *Loxodonta africana*, at http://speciesplus.net/#/taxon_concepts/4521/legal?taxonomy=cites_eu.

¹⁰⁶ See *id.*

Import Restrictions

AECA, among other restrictions on ivory trade, authorized FWS to impose a moratorium on the import of African elephant ivory from countries that do not meet certain conservation standards.¹⁰⁷ In 1989, FWS issued a moratorium that prohibits the import of African elephant ivory “from ivory producing and intermediary nations.”¹⁰⁸ Under the Director’s Order, FWS has announced that it plans to enforce strictly the prohibition on imports. FWS has stated that the “Service no longer allows *any* commercial importation of African elephant ivory. This prohibition, which was originally established via the 1989 [AECA] moratorium, applies even to items that qualify as antiques.”¹⁰⁹ Under the current African elephant 4(d) rule, import of raw or worked ivory that is not a sport-hunted trophy is limited to (1) antiques more than 100 years old; and (2) ivory imported following export from the United States and registration of the ivory with FWS.¹¹⁰

FWS’s Authority to Ban Commercial Import of Antique African Elephant Ivory

Although it appears that, as a matter of policy, FWS has previously allowed import of antique African elephant ivory for commercial purposes prior to the Director’s Order,¹¹¹ the Director’s Order declares that it “supersedes all previous policies on the June 9, 1989, [AECA] import memorandum.”¹¹² Therefore, because the newly announced policy does not permit the commercial importation of antiques,¹¹³ and this policy statement supersedes previously announced policies, it appears the importation of antiques for commercial purposes will no longer be permitted. It is worth noting, however, that the current regulation of African elephant ivory under the ESA, as published in the *Code of Federal Regulations*, allows for the import of antiques but does not specify that such imports must be for noncommercial purposes.¹¹⁴ It is arguable that this rule would need to be revised, pursuant to notice and comment rulemaking procedures, in order for the ban on antique African elephant imports to be enforceable.¹¹⁵ Therefore, although the FWS fact sheet on permissible activities currently indicates that commercial import of antique ivory is prohibited,¹¹⁶ FWS may need to conduct rulemaking to bring its regulations into

¹⁰⁷ 16 U.S.C. §§4221, 4222.

¹⁰⁸ FWS, Moratorium on Importation of Raw and Worked Ivory From All Ivory Producing and Intermediary Nations, 54 Fed. Reg. 24758, 24761 (June 9, 1989).

¹⁰⁹ FWS, *What can I do with my African elephant ivory?* (updated May 15, 2014). For a more detailed description of the antique exception and its requirements, see “Exception for Antiques” above.

¹¹⁰ 50 C.F.R. §17.40(e).

¹¹¹ “[I]mport of worked ivory into the United States continues to be prohibited under the terms of [AECA], as interpreted by the ESA 4(d) special rule, unless they meet any of the following exceptions: (1) Bona fide antiques more than 100 years old ... ” 62 Fed. Reg. 44627, 44633 (August 22, 1997); “The final revised special rule does contain limited exceptions that allow the import of ivory that is ... a bona fide antique ... ” 57 Fed. Reg. 35473, 35484 (August 10, 1992). Antique CITES-listed specimens must generally be accompanied by a pre-Convention certificate issued by the exporting or re-exporting country. 50 C.F.R. §23.45.

¹¹² Order 210 §1(c).

¹¹³ See *id.* at §2(b).

¹¹⁴ 50 C.F.R. §17.40(e)(3)(ii)(1) (“Raw or worked ivory (other than sport-hunted trophies) may be imported only if: (1) It is a bona fide antique of greater than 100 years of age on the day of import ... ”).

¹¹⁵ See 5 U.S.C. §553. Agencies are obligated to follow their own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-68 (1954), *superseded by statute on other grounds*; *A.D. Transport Express, Inc. v. United States*, 290 F.3d 761, 766 (6th Cir. 2002) (“When an agency promulgates regulations, it is ... bound by those regulations.”).

¹¹⁶ FWS, *What can I do with my African elephant ivory?* (updated May 15, 2014).

compliance with this policy.¹¹⁷ Notably, FWS has promulgated a proposed rule, as discussed below, that would seek to clarify how the antique exception applies. In its proposed revisions to the African elephant special rule, FWS would clarify that antiques “are not subject to the provisions of this rule” but that the “prohibitions under [AECA] apply, regardless of the age of the item.”¹¹⁸

Exceptions for Certain Noncommercial Ivory Imports

Although the Director’s Order announces a plan to enforce strictly the prohibition on importation of African elephant ivory, it provides limited exceptions to the general rule as a matter of law enforcement discretion.¹¹⁹ Raw or worked ivory may be imported into the United States for “law enforcement purposes” and for “genuine scientific purposes that will contribute to conservation of the species.”¹²⁰ Furthermore, worked African elephant ivory may be imported into the United States for “*personal* use as part of a household move or as part of an inheritance,” if the following conditions are met: (1) the ivory must have been legally acquired prior to February 26, 1976 (the date the African elephant was listed under CITES); (2) the ivory must not have been transferred for personal gain or profit since February 25, 2014 (the date of Director’s Order No. 210); and (3) the ivory must be accompanied by a valid CITES pre-Convention certificate.¹²¹

The Director’s Order also allows for the importation, for noncommercial purposes, of worked African elephant ivory that is part of a musical instrument or traveling exhibition (e.g., museum or art show) if certain criteria are met.¹²² Just as above, the ivory must have been legally acquired prior to February 26, 1976, and cannot have been sold for personal gain or profit since February 25, 2014.¹²³ In addition, the person or group seeking permission to import must qualify for, and the item must generally be accompanied by, a valid CITES musical instrument or traveling exhibition certificate.¹²⁴

Sport-hunted Trophies

Finally, under AECA, FWS is prohibited from establishing a complete moratorium on sport-hunted trophies.¹²⁵ Under the African elephant special rule, the importation of a sport-hunted

¹¹⁷ It is unclear whether FWS has the statutory authority to remove the antique exception from the special rule. Because AECA followed the 1978 ESA amendments that established the antique exception for listed species, and because the AECA ivory moratorium is more specific than the general exception within ESA, it could be argued that AECA supersedes general ESA provisions, which exempt qualified antiques made from endangered or threatened species (16 U.S.C. §1539(h)) from otherwise applicable ESA protections, including those provided to threatened species under 16 U.S.C. §1533(d). However, it does not appear that any court has considered the issue.

¹¹⁸ FWS, Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 80 Fed. Reg. 45154, 45180 (July 29, 2015).

¹¹⁹ Order 210 §2(b).

¹²⁰ *Id.* at §2(b)(1), (2).

¹²¹ *Id.* at §2(b)(3).

¹²² *Id.* at §2(b)(4), (5).

¹²³ *Id.*

¹²⁴ *Id.*; 50 C.F.R. §23.20(d)(15); *see also* Resolution Conf. 16.8, Frequent Cross-border Non-commercial Movements of Musical Instruments.

¹²⁵ 16 U.S.C. §4222(e). FWS has defined “sport-hunted trophy” in its CITES implementing regulations as “raw or tanned parts of a specimen that was taken by a hunter, who is also the importer, exporter, or re-exporter, during a sport hunt for personal use. It may include the bones, claws, hair, head, hide, hooves, horns, meat, skull, teeth, tusks, or any taxidermied part, including, but not limited to, a rug or taxidermied head, shoulder, or full mount. It does not include articles made from a trophy, such as worked, manufactured, or handicraft items for use as clothing, curios, (continued...) ”

trophy for noncommercial purposes is still generally permitted if (1) the trophy originates in a country that has submitted an African elephant ivory quota for that year; (2) permit requirements in 50 C.F.R. parts 13 and 23 are met; (3) FWS determines that the killing of the trophy animal would “enhance survival of the species”; and (4) certain marking requirements are met.¹²⁶ However, trophies generally may not be sold after import into the United States.¹²⁷ Currently, there is no limit on the number of African elephant sport-hunted trophies that may be imported; however, FWS has proposed to limit the number of sport-hunted trophies a person can import in a given year to two trophies.¹²⁸

In August 2014, the United States notified other CITES parties that it was suspending imports of certain sport-hunted African elephant trophies taken in the United Republic of Tanzania and Zimbabwe because, according to FWS, it could not make the necessary “enhancement” findings under the special rule.¹²⁹ It is unclear whether FWS has the authority to suspend imports under the special rule when AECA states that the “Secretary shall not establish any moratorium under this section ... which prohibits the importation into the United States of sport-hunted trophies from elephants that are legally taken by the importer or the importer’s principal in an ivory producing country that has submitted an ivory quota.”¹³⁰ It appears that the United Republic of Tanzania and Zimbabwe have each submitted an ivory quota for 2014 and 2015.¹³¹

Export Restrictions

Pursuant to AECA, it is unlawful to export raw African elephant ivory from the United States.¹³² Therefore, the export of African elephant ivory is limited to certain worked ivory. According to FWS, the commercial export of worked African elephant ivory is prohibited except for bona fide antiques and other CITES pre-convention worked ivory.¹³³ Under the ESA, bona fide antiques¹³⁴ are exempted from the export restrictions, but must generally still be accompanied by a CITES pre-Convention certificate.¹³⁵

In addition to antiques, worked ivory that predates the CITES listing of African elephants may be exported for commercial or noncommercial purposes under the African elephant special rule if proper permits are obtained, including, possibly, a CITES pre-Convention certificate.¹³⁶

(...continued)

ornamentation, jewelry, or other utilitarian items.” 50 C.F.R. §23.74(b).

¹²⁶ 50 C.F.R. §17.40(e)(3)(iii).

¹²⁷ See 50 C.F.R. §§23.55, 23.74.

¹²⁸ FWS, Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 80 Fed. Reg. 45154, 45179-80 (July 29, 2015).

¹²⁹ Notification to the CITES Parties by the United States, Suspension of Imports of Sport-hunted Trophies of African Elephant Taken in the United Republic of Tanzania and Zimbabwe (August 11, 2014); 50 C.F.R. §17.40(e)(3)(iii)(C).

¹³⁰ 16 U.S.C. §4222(e).

¹³¹ Information on submitted export quotas is available at <https://cites.org/eng/resources/quotas/index.php>.

¹³² 16 U.S.C. §4223(2).

¹³³ FWS, *What can I do with my African elephant ivory?* (updated May 15, 2014).

¹³⁴ For more on the requirements of the antique exception, see “Exception for Antiques” above.

¹³⁵ 16 U.S.C. §§1538(a), 1539(h)(1).

¹³⁶ 50 C.F.R. §§17.40(e)(3)(ii), 23.15(f).

Domestic Trade

Domestic trade of CITES-listed species, such as the African elephant, is restricted.¹³⁷ Pursuant to the final rule promulgated by FWS on May 27, 2014, African elephant ivory imported into the United States can only be used for noncommercial purposes, with limited exceptions.¹³⁸ Pursuant to revised 50 C.F.R. §23.55, imported African elephant ivory can only be bought or sold in interstate or intrastate commerce if the ivory was lawfully imported prior to January 18, 1990 (the date the African elephant was listed as a CITES Appendix I species), with no restrictions on its use after import on the permit or if the ivory was imported under a CITES pre-Convention certificate, which requires the ivory to be taken from the wild prior to February 26, 1976 (the date the African elephant was listed as protected under CITES).¹³⁹ The party must be able to “clearly demonstrate that this exception applies.”¹⁴⁰ However, FWS proposed a rule that, if finalized, would further restrict interstate commerce in African elephant ivory.¹⁴¹ In addition, as discussed above, ivory that qualifies for the ESA antique exception is not subject to regulation under 16 U.S.C. §§1533(d) or 1538(a) and (c).¹⁴²

Personal possession and noncommercial use of legally acquired African elephant ivory, including movement between states, remains permissible.

Proposed FWS Regulations and Pending Legislation in the 114th Congress

President Obama’s *National Strategy for Combating Wildlife Trafficking* calls for stricter enforcement of U.S. laws governing trade in elephant ivory products.¹⁴³ The Director’s Order appears to be the first step in FWS’s efforts to implement the President’s strategy. As noted above, FWS has proposed to amend the special rule that pertains to African elephant ivory to restrict trade in ivory products further. In addition, several bills that would affect FWS’s authority to regulate trade in elephant ivory have been introduced in Congress.

FWS’s Proposed Revisions to the African Elephant ESA Section 4(d) Rule

In July 2015, FWS proposed revisions to its ESA Section 4(d) rule on the African elephant that would further restrict trade in African elephant ivory.¹⁴⁴ The rule would incorporate, with limited exceptions, all of the trade-related prohibitions that apply to threatened species under FWS regulations at 50 C.F.R. §17.31.¹⁴⁵ These prohibitions include a ban on the import into, or export

¹³⁷ 16 U.S.C. §1538(c).

¹³⁸ 79 Fed. Reg. 30400, 30409-11.

¹³⁹ *Id.* at 30426-427.

¹⁴⁰ *Id.* at 30427.

¹⁴¹ FWS, Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 80 Fed. Reg. 45154, 45179-80 (July 29, 2015).

¹⁴² 16 U.S.C. §1539(h); However, restrictions in place under AECA would still apply regardless of the age of the item.

¹⁴³ Executive Office of the President, *National Strategy for Combating Wildlife Trafficking* 2-3 (February 11, 2014).

¹⁴⁴ FWS, Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 80 Fed. Reg. 45154 (July 29, 2015).

¹⁴⁵ *Id.* at 45179-80.

from, the United States of the threatened species; the delivery, receipt, or transport in interstate or foreign commerce of the species in the course of a “commercial activity”; and the sale or offer for sale in interstate or foreign commerce of the species.¹⁴⁶ Persons seeking to benefit from the exceptions in the proposed rule, which incorporate by reference those exceptions available by threatened species permit under 50 C.F.R. §17.32,¹⁴⁷ would have to demonstrate that they met the criteria for these exceptions.¹⁴⁸

Regulated parties would still be responsible for complying with any permitting requirements under CITES, general ESA regulations such as 50 C.F.R. Part 13, and threatened species permits requirements under 50 C.F.R. §17.32. Comments on the proposed rule are due on September 28, 2015.¹⁴⁹

***De Minimis* Exception for Certain Manufactured Items**

As noted above, the proposed rule broadly prohibits sale or offer for sale of ivory in interstate or foreign commerce, as well as the delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity.¹⁵⁰ However, in general, these prohibitions do not apply to manufactured items containing *de minimis* quantities of ivory unless they are imported or exported (1) as part of a sport-hunted trophy; (2) for law enforcement purposes; (3) for genuine scientific purposes; or (4) as part of a household move or inheritance for personal use.¹⁵¹ To qualify for the *de minimis* exception, a person seeking to trade a manufactured item that does not fall into one of these four categories must demonstrate that the item meets 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 limitations 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 component or components of a larger manufactured item and is not in its current form the primary source of the value of the item;
- (iv) The ivory is not raw;
- (v) The manufactured item is not made wholly or primarily of ivory;
- (vi) The total weight of the ivory component or components is less than 200 grams; and
- (vii) The item was manufactured before [the effective date of the final rule].¹⁵²

¹⁴⁶ 50 C.F.R. §17.21.

¹⁴⁷ This provision of the regulations allows for exceptions from prohibitions pertaining to threatened species for “[s]cientific 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 Act.” 50 C.F.R. §17.32. General permitting conditions in 50 C.F.R. Part 13 may also apply.

¹⁴⁸ Proposed Rule at 45179.

¹⁴⁹ *Id.* at 45154.

¹⁵⁰ *Id.* at 45179-80.

¹⁵¹ *Id.*

¹⁵² *Id.*

Additional Import Restrictions

With respect to import of ivory that is not a sport-hunted trophy, the proposed rule would prohibit trade except for (1) import of raw ivory by a government agency for law enforcement purposes or a genuine scientific purpose contributing to African elephant conservation; and (2) import of worked ivory for law enforcement or scientific purposes or as part of a musical instrument, an item in a traveling exhibition, or a household move or inheritance.¹⁵³ The proposed rule would remove the requirement that, in order to be imported, worked ivory cannot have been sold since February 25, 2014.¹⁵⁴

The proposed rule would limit the number of sport-hunted trophies a person can import in a given year to two trophies.¹⁵⁵

Additional Export Restrictions

The proposed rule would further restrict commercial exports of worked ivory to only those items qualifying as bona fide antiques.¹⁵⁶ It would further limit noncommercial exports of worked ivory to (1) antiques; and (2) ivory legally acquired and removed from the wild prior to February 26, 1976 (the date that the African elephant was first listed under CITES), that is part of a household move or inheritance, part of a musical instrument,¹⁵⁷ or part of a traveling exhibition; and (3) ivory exported for law enforcement and scientific purposes.¹⁵⁸

In addition, ivory that is considered “pre-Act” can be exported for noncommercial purposes, provided it meets CITES and general wildlife import and export requirements.¹⁵⁹ FWS could conceivably issue a threatened species permit to authorize commercial or noncommercial exports of worked ivory that would otherwise be prohibited in certain narrow circumstances.¹⁶⁰

Restrictions on Foreign Commerce

The proposed rule would bar foreign commerce in African elephant ivory unless the item is an antique or qualifies for the *de minimis* exception.¹⁶¹ The ESA states that “foreign commerce” means “among other things, any transaction—(A) between persons within one foreign country;

¹⁵³ *Id.* at 45166, 45179-80.

¹⁵⁴ *Id.* at 45174, 45179-80.

¹⁵⁵ *Id.* at 45179-80.

¹⁵⁶ *Id.* at 45174, 45179-80.

¹⁵⁷ Noncommercial use of musical instruments “could include personal use, performance, display, or competition where the musician is financially compensated for his or her participation, but does not include financial gain through activities such as sale or lease of the instrument itself.” *Id.* at 45169.

¹⁵⁸ *Id.* at 45179-80.

¹⁵⁹ Section 9(b)(1) of the ESA exempts, from any prohibition contained in a 4(d) rule trade in specimens of threatened species held in captivity or in a controlled environment on the date the ESA entered into effect (December 28, 1973) or the date the final rule listing the species under the ESA was published in the Federal Register (May 12, 1978), whichever is later. 16 U.S.C. §1538(b)(1). In order to qualify for the exemption, such holding and any subsequent holding or use of the specimen cannot have been in the course of a commercial activity. *Id.*

FWS has stated that the Pre-Act exemption would apply to noncommercial exports of worked ivory unless the African elephant ivory specimen had been involved in commercial activity on or after May 12, 1978 involving the transfer of the specimen from one person to another person in pursuit of gain or profit, except when such activities involved exhibition of commodities by a museum or other cultural or historical organization. Proposed Rule at 45171.

¹⁶⁰ 50 C.F.R. §17.32.

¹⁶¹ Proposed Rule at 45174, 45179-80.

(B) between persons in two or more foreign countries; (C) between a person within the United States and a person in a foreign country; or (D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.”¹⁶² Foreign commerce in sport-hunted trophies or ivory imported or exported as part of a household move or inheritance would be prohibited.¹⁶³

Additional Restrictions on Domestic Trade

Under the proposed rule, interstate commerce in ivory will be limited to ESA antiques and manufactured items qualifying for the *de minimis* exception.¹⁶⁴ Note that ivory imported under the exception for law enforcement purposes; the exception for genuine scientific purposes; sport-hunted trophies; or the exceptions for household moves or inheritances may not be sold in interstate commerce.¹⁶⁵ In the preamble to the rule, FWS stated that for antiques imported in accordance with the proposed rule that “were imported before the [AECA] import moratorium was put in place in 1989, whether those antiques could be commercialized in interstate or foreign commerce would depend on whether restrictions are based on the ESA or CITES. Any restrictions that are based on CITES or laws other than the ESA would remain in place.”¹⁶⁶

The proposed rule does not change laws on ivory trade regarding intrastate commerce, noncommercial movement within the United States, or personal possession.¹⁶⁷

Antiques

In its proposed revisions to the African elephant special rule, FWS would clarify that antiques “are not subject to the provisions of this rule” but that the “prohibitions under [AECA] apply, regardless of the age of the item.”¹⁶⁸ AECA and the moratorium promulgated thereunder prohibit the import of raw African elephant ivory unless it is a qualifying sport-hunted trophy (which, as noted above, cannot be an antique by definition).¹⁶⁹ AECA forbids the export of raw African elephant ivory from the United States.¹⁷⁰ AECA and the moratorium promulgated thereunder ban the import of worked African elephant ivory, although FWS has stated that as a matter of “law enforcement discretion,” it intends to allow certain noncommercial imports of raw and worked African elephant ivory.¹⁷¹ However, AECA does not address the export of worked ivory from the United States; thus, the antique worked ivory may still be exported from the United States.¹⁷²

¹⁶² 16 U.S.C. §1532(9).

¹⁶³ Proposed Rule at 45179-80.

¹⁶⁴ *Id.* at 45174, 45179-80.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 45171.

¹⁶⁷ *Id.* at 45174, 45179-80.

¹⁶⁸ *Id.* at 45180.

¹⁶⁹ See 16 U.S.C. §§4222-4223; FWS, Moratorium on Importation of Raw and Worked Ivory from All Ivory Producing and Intermediary Nations, 54 Fed. Reg. 24758, 24761 (June 9, 1989). FWS has stated that as a matter of “law enforcement discretion,” it intends to allow certain noncommercial imports of raw and worked African elephant ivory. Order 210 §2(b).

¹⁷⁰ 16 U.S.C. §4223(2).

¹⁷¹ 16 U.S.C. §4223; FWS, Moratorium on Importation of Raw and Worked Ivory from All Ivory Producing and Intermediary Nations, 54 Fed. Reg. 24758, 24761 (June 9, 1989); Order 210 §2(b).

¹⁷² See 16 U.S.C. §4223.

Legislation in the 114th Congress

It is also important to note that Congress can pass legislation changing ivory trade enforcement policies. Congress has authority to change existing law to expand, contract, or clarify FWS authority with respect to wildlife tracking.¹⁷³ Since President Obama released his *National Strategy for Combating Wildlife Trafficking* and FWS issued the Director’s Order, some Members of Congress have expressed concern that the new policies could potentially impact musicians, antique businesses, and other individuals who may no longer be able to buy or sell certain products containing ivory.

African Elephant and Legal Ivory Possession Act of 2015

In July 2015, Senators Steve Daines and Lamar Alexander introduced the African Elephant Conservation and Legal Ivory Possession Act of 2015.¹⁷⁴ The proposed legislation appears to amend AECA to allow the import or export, without permission from FWS, of (1) raw or worked ivory for purposes related to display of the ivory in a museum; (2) raw or worked ivory that “was lawfully importable into the United States on February 24, 2014 [(the day immediately before FWS issued Director’s Order 210)], regardless of the date on which the ivory was acquired”; or (3) “any worked ivory that was previously lawfully possessed in the United States.”¹⁷⁵ The bill would also appear to remove restrictions on international and domestic trade in African elephant ivory (or products containing such ivory) lawfully imported into, or crafted in, the United States.¹⁷⁶ It would require FWS to determine whether an item containing African elephant ivory has been lawfully traded according to the agency’s policy for making these determinations that existed on the day prior to issuance of the Director’s Order.¹⁷⁷ With respect to sport-hunted trophies, the bill would, consistent with CITES and its implementing provisions in the ESA, allow U.S. citizens and legal residents (or their agents) to import a sport-hunted African elephant trophy if the country in which the trophy was taken, “had an elephant population on appendix II of CITES on the date on which the trophy elephant was taken.”¹⁷⁸ Currently, countries with an African elephant population on Appendix II are Botswana, Namibia, South Africa, and Zimbabwe.¹⁷⁹

Additional provisions in the bill would (1) allow the Secretary of the Interior, after consulting with the State Department, to station a FWS law enforcement officer in each African country with a significant population of African elephants to assist in anti-poaching efforts; (2) allow the President to impose trade sanctions on countries serving, directly or indirectly, as a transit or destination point for illegal ivory in certain circumstances; and (3) prioritize funding provided by the Department of the Interior under AECA for projects that will assist anti-poaching efforts in ivory producing countries and reauthorize appropriations for carrying out AECA.¹⁸⁰

¹⁷³ *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act ... unless and until Congress confers power upon it.”).

¹⁷⁴ S. 1769, 114th Cong. (2015).

¹⁷⁵ S. 1769 §2.

¹⁷⁶ S. 1769 §3.

¹⁷⁷ S. 1769 §3.

¹⁷⁸ S. 1769 §4.

¹⁷⁹ See United Nations Environmental Programme and CITES Secretariat, Species+ website, *Loxodonta africana*, at http://speciesplus.net/#/taxon_concepts/4521/legal?taxonomy=cites_eu.

¹⁸⁰ S. 1769 §§5-7.

A companion bill, H.R. 697, was introduced in the House by Representatives Don Young and Collin Peterson in February 2015. In addition, H.R. 2406, the Sportsmen’s Heritage and Recreational Enhancement Act of 2015 (SHARE Act), contains nearly identical provisions in Title X of the bill.

Provision in the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016

An appropriations provision in H.R. 2822, the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2016, would prohibit funds made available under the act from being used to “draft, prepare, implement, or enforce any new or revised regulation or order” that placed certain restrictions on trade in ivory.¹⁸¹

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¹⁸¹ H.R. 2822 §120.

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