



The Fine Tool Journal

Brown Tool Auctions

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Public Comments Processing
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Falls Church, VA 22041

RE: *Proposed Amendment to 50 C.F.R. §17.40(e)*

Dear Sir or Madam:

Thank you for providing us with the opportunity to comment on the Service's proposed amendment to 50 C.F.R. §17.40(e), relating to the sale of items manufactured from African elephant ivory.

Description of Commenters

These comments are submitted on behalf of the following organizations, each of which is involved in the collection and study of antique tools and scientific instruments:

The Early American Industries Association (EAIA). Founded in 1933, the EAIA is the oldest organization dedicated to the study of antique tools and instruments, as well as traditional crafts and industries. It conducts regular meetings, administers a program to provide grants for historical studies into topics related to antique tools, and publishes a quarterly magazine, the *Chronicle*, that includes numerous scholarly articles relating to tools and trades. It currently has 1,450 members. Its website is located at www.eaiainfo.org.

The Mid-West Tool Collectors of America (M-WTCA). The M-WTCA is the world's largest organization devoted to studying, preserving and sharing knowledge of antique tools, with 3,500 members located throughout the United States, Canada, Australia and Europe. It holds two national and approximately 40 area meetings each year at which members attend presentations on the history and use of antique tools, and publishes a quarterly magazine, the *Gristmill*, that includes numerous scholarly articles relating to tools and trades. Its website is located at www.mwtca.org.

Potomac Antique Tools and Industries Association, Inc. (PATINA). PATINA is an educational, tax-exempt organization for people who have an interest in the tools, crafts or manufacturing

processes of the past, founded in 1977 and based in the Washington, D.C. area, and including members from 24 states, the District of Columbia, and several foreign countries. It publishes a bi-monthly newsletter, *PATINAGRAM*, that includes articles relating to antique tools, and holds regular meetings. Its website is located at www.patinatools.org.

Southwest Tool Collectors Association (SWTCA). The SWTCA is a non-profit organization dedicated to the study, collection, restoration and trading of antique tools. It was founded in 1977 and has 400 members, primarily concentrated in the southwest United States but with members throughout the country. It holds two annual and several local meetings each year. Its website is located at www.swtca.org.

The Fine Tool Journal. The Fine Tool Journal is an independently owned quarterly magazine dedicated to the study of antique tools and instruments and traditional crafts and trades, which has been published for 30 years. We also conduct regular auctions of antique tools and instruments, both through the magazine and in live auctions conducted under the name Brown Tool Auctions. Our website is located at www.finetooljournal.net.

We also wish to note our full support for, and agreement with, the comments previously submitted on this topic by CRAFTS of New Jersey.

As members of the tool collecting community, we believe that the study of antique tools and instruments contributes significantly to understanding of American history and the development of American industry. Private collecting is an essential part of this process, as it stimulates interest in antique tools and instruments and makes it possible for private individuals to obtain access to tools and instruments for study. The majority of our members are not only collectors, but active students of the tools collected, who regularly publish books and articles about the history of tools and instruments and participate in displays and exhibits. In addition, a large portion of our membership consists of professional woodworkers and other artisans, whose use of antique tools helps keep alive this vital part of American history.

Accordingly, while we fully support the Service's attempts to combat poaching and the trade in illegal elephant ivory, the new regulations should not unduly burden activities that have cultural and historical significance and do not contribute in any meaningful way to poaching and smuggling.

Application of the De Minimis Exception to Tools and Instruments

Our specific comments relate to the proposed "de minimis" exception contained in 50 C.F.R. §17.40(e)(3). We fully support this exception and congratulate the Service for including it in the proposal. However, we believe that two of the requirements for the exception – specifically, criteria (iii) and (v) – are unnecessarily burdensome and should be either eliminated or revised as described below. Parenthetically, we note that these are the two criteria on which the Service specifically requested public input, indicating that the Service itself has some question as to whether these criteria are necessary for the efficacy of the de minimis exception. See 80 Fed. Reg. at 45163.

Much of the following discussion is centered upon measuring devices colloquially referred to as "rulers" but more accurately called "rules" by collectors and students of antique technology. Rules

are used by a wide variety of professions, including carpenters, cabinetmakers, architects, surveyors, mechanics and engineers. The ability to accurately mark the scales and divisions on a rule is a significant technical achievement, and the development of a rulemaking industry was a major step in the development of the American economy.

In order to be accurate, rules need to be made of a stable material that minimizes warping, expansion and shrinkage. During the nineteenth and early twentieth century, the overwhelming majority of rules were made either of boxwood, a particularly dense and stable wood, or African elephant ivory. Ivory was used for rules because it was dense and relatively stable after curing, could be easily polished and marked, and because its white surface was attractive and made markings easy to read. See P. Stanley, *Boxwood & Ivory: Stanley Traditional Rules, 1855-1975* (1984), at 19. The use of elephant ivory was generally discontinued after commercial plastics became available, but the largest American tool manufacturer, the Stanley Rule & Level Co., continued to produce ivory rules into the 1920s. *Ibid.*, at 12.

Very few tools other than rules were made entirely of ivory. In other tools and instruments, ivory was used primarily as a component of a larger item, either as a handle, a scale included in a surveying or other scientific instrument, or an inlay or similar decorative element. The majority of these items would be covered by the de minimis exception as currently proposed, subject to the discussion below.

Criterion (iii)

Criterion (iii) of the proposed exception requires that 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.” We have three comments on this criterion.

First, we suggest replacing the word “fixed” with the phrase “fixed or integral.” The word “fixed” implies that the ivory component must be fastened to the manufactured item. There is a large category of wooden planes, known as cabinetmaker’s plow planes, that include an adjustable fence used to guide the blade that is held in place and adjusted by threaded arms secured by nuts. In premium planes, these nuts were sometimes made of ivory, and since they can easily be removed, a question could be raised as to whether they are “fixed” components.¹ “Integral”, on the other hand, connotes an item that is “essential to the completeness” of a larger structure (Merriam-Webster online dictionary) and should satisfy the purpose of the criterion without artificially distinguishing between components based on how easily they can be detached.

Second, we suggest deleting the word “larger” entirely. The word “larger” is unnecessary in this context and adds confusion and uncertainty because it overlaps with criterion (v) which requires that the item not be composed “primarily” of ivory. If ivory is incorporated into a manufactured item, and the manufactured item satisfies the requirements of criterion (v), there should not be an additional question raised as to whether the manufactured item contains enough non-ivory components to be considered a “larger” item. If the Service adopts the suggestion of eliminating or

¹ See J. Moody, *The American Cabinetmaker's Plow Plane: Its Design and Improvement, 1700-1900* (1981), at. In addition, the wedge used to hold the blade in some premium planes was sometimes made of ivory. There may also be other types of tools in which an ivory part is detachable, but still an integral component of the tool.

limiting criterion (v), removal of the term “larger” would be necessary to avoid a possible conflict between the criteria.

Finally, and most significantly, we are concerned that the requirement that the ivory “is not in its current form the primary source of the value of the item” adds confusion and uncertainty. We recognize that the Service has used the phrase “in its current form” to indicate that value added by workmanship to the ivory will be taken into account. Nevertheless, the value of antique tools, like that of all antiques, is largely based on rarity. Ivory has always been more expensive and difficult to obtain and process than wood, and tools made of or containing ivory were premium products. Fewer were made and sold, and they are correspondingly rarer and more valuable. If there are two rules that are identical in function, one made of ivory and one of boxwood, then all things being equal the ivory rule will generally be more valuable because it is rarer. Does this mean that the ivory is “the primary source of value”?²

We feel that given the remaining criterion in the exception – particularly criterion (vi) that the total amount of ivory not exceed 200 grams – this value component of criterion (iii) is unnecessary and confusing, and would prefer that it be eliminated entirely. However, if the Service continues to feel that it is necessary, we suggest adding a de minimis rule within this criterion. The criterion could be revised to provide that either the total value of the item not exceed a maximum amount, or that the ivory not be the primary source of value. We suggest \$25,000 as the maximum value. This amount is comfortably above the value of the overwhelming majority of antique tools and instruments, while allowing for future increases, and would insure that almost all tools and instruments could be sold without the persons involved having to wonder if they are violating the law because the rarity of the item sold means that the ivory is the “primary” source of value even though it otherwise satisfies all requirements for the de minimis exception. At the same time, \$25,000 is far below the amount that would be of interest to ivory smugglers, particularly if the maximum amount of ivory contained in the item cannot exceed 200 grams.

In summary, we recommend that criterion (iii) be amended to read, with the bracketed language either being eliminated entirely, or revised as shown:

“(iii) the ivory is a fixed or integral component or components of a manufactured item [and either the total value of the item does not exceed \$25,000, or the ivory is not in its current form the primary source of the value of the item].”

Criterion (v)

Criterion (v) requires that the manufactured item “is not made wholly or primarily of ivory.” This criterion would make the de minimis exception completely inapplicable to ivory rules and other tools composed primarily of ivory. It would, in effect, take many collections of ivory rules, painstakingly accumulated over the years in good faith at a time when the acquisition of ivory artifacts was completely legal, and render them entirely worthless at the stroke of a pen.³ Such a

² Similarly, planes containing ivory components, such as the plow planes discussed at n. 1 *supra*, are much rarer, and therefore more valuable, than non-ivory containing planes.

³ We recognize, of course, that a large number of ivory rules will be covered by the exception for antiques contained in Section 10(h) of the Endangered Species Act and 50 C.F.R. §17.40(e)(9). However, the utility of this exception is

drastic reduction in the value of private property, resulting in significant economic hardship to individuals, should only be taken if justified by the necessity of halting the ivory smuggling trade, which is not the case.

We believe that the purpose of this criterion is to distinguish between decorative items such as jewelry and sculpture which are made of ivory because ivory is desired for its own sake, and utilitarian items manufactured using ivory because of ivory's properties as a material. If a particular item was manufactured using ivory before the availability of plastics because of ivory's working characteristics, it shouldn't matter whether the amount of ivory in the manufactured item is 40% or 90%, or even 100%⁴, particularly since the total amount of ivory cannot exceed 200 grams in any event.


Accordingly, we recommend that criterion (v) either be eliminated, or be amended to read:

“(v) the manufactured item is either a tool, measuring device, scientific instrument, or similar item manufactured for a specific purpose other than decoration, or is not made wholly or primarily of ivory.”

Conclusion

Thank you for your consideration of these comments. We applaud the Service's efforts to combat the poaching of African elephants, and the smuggling of illegally obtained elephant ivory. We believe the de minimis exception contained in the proposed regulation is a reasonable accommodation of competing interests, and we strongly urge its adoption even if none of the changes described above are accepted. However, we also believe that the changes described above would significantly improve the clarity and fairness of the exception, and minimize the adverse impact of the new rule on affected individuals. If any further information is required, please do not hesitate to contact the undersigned.

Very truly yours,



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The Fine Tool Journal

limited by the fact that some manufacturers, particularly Stanley, continued manufacturing ivory rules until the 1920s, and there is no way to distinguish between a rule manufactured 101 years ago and one manufactured 99 years ago. In addition, the Service's new policy regarding the acceptable evidence of antiquity, as set forth in Director's Order No. 210, has raised concern as to what types of evidence of age will be considered acceptable. In this regard, it would be helpful if the Service could clarify that with respect to manufactured items, contemporary evidence contained in catalogs, price lists, and similar material 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.

⁴ The majority of ivory rules are not composed 100% of ivory, as most of them included metal hinges so that they could be folded for easier carrying, and many also have their edges bound in metal for greater durability. However, there are some classes of rules that are composed completely of ivory, and all of them are composed "primarily" of ivory.