September 21, 2015

Daniel Ashe
Director, U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Re: Revision of the Section 4(d) Rule for the African Elephant

Dear Mr. Ashe:

The Office of Advocacy submits these comments to the Fish and Wildlife Service's (the Service) proposed rule entitled "Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant".[1]

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

[1] Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant. 80 F.R. 45154 (July 29, 2015).

Background

The U.S. Fish and Wildlife Service (Service) is proposing to revise the rule for the African elephant promulgated under section 4(d) of the Endangered Species Act. The African elephant was listed as threatened under the ESA in 1978, and at the same time a rule was promulgated which allowed otherwise prohibited import and use of African Elephant Ivory in the U.S. under specified conditions. On July 29, 2015, the Service published this proposed rule which would eliminate these exemptions and end all commercial trade in African Elephant Ivory that does not meet the strict standards set forth in the ESA or one of the limited exemptions.

Small Entities Seek More Clarity

Advocacy has spoken with small entities in several industries with an interest in this rule such as representatives of museums, orchestra's and other owners of musical instruments, and appraisers. Several have indicated that portions of the rule should be clarified for the public and entities subject to the rule.

Several small entities expressed concern that the de minimus rule needed to be more easily applicable. While most did not express disagreement with the 200 gram standard, many expressed concern regarding how they might determine whether a piece contained a de minimus amount of ivory when that ivory is integrated into the piece. It was suggested that the Service use a volume measurement so that items would not have to be dismantled in order to determine whether they met the de minimus standard.

In addition, appraisers suggested that the Service establish a mechanism where appraisers and others may get a binding determination from the Service as to whether a particular piece qualifies for the de minimus exception.

Appraisers were also concerned with the "primary source of value" language in the de minimus exception. They were concerned that the determination of whether or not ivory in a piece was the "primary source of value" could differ among appraisers and with the Service's determination. Entities suggested that a more bright line test be established.

Appraisers were also concerned about whether appraisals done in good faith would become targets at some later date if the artifact was later found not to satisfy the rule. They suggested that without assurance that a good faith appraisal would be honored; the appraisal industry would face significant risk which would chill the appraisal market.

Certification of this Rule is Inappropriate

Advocacy believes that the Service must conduct an Initial Regulatory Flexibility Analysis (IRFA) for this rule. The RFA states that "[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an

interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities."[2] Section 605(b) of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.[3]

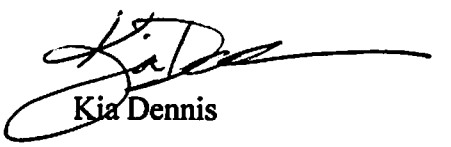
The Service proposes to prohibit all commercial interstate sale of ivory in interstate or foreign commerce with the exception of those items that could meet the de minimus exclusion. The Service has stated that it expects this rule to lead to a 2% decrease in exports. The rule does not state the anticipated decrease in domestic commercial trade. However, based on the number of affected businesses given in the proposed rule, there are 24,730 businesses that are either art dealers or used merchandise dealers that could be affected by this rule.[4] These commercial vendors comprise 70% of the potentially affected businesses and over 84% of these businesses are small entities.[5] Given the Services' statement that the proposed rule intends to prohibit interstate commercial trade of the majority of items containing ivory and the fact that over 84% of small businesses in the affected industries will be impacted, Advocacy believes that the Service has improperly certified this rule and should conduct an IRFA.

Conclusion

Advocacy encourages the Service to provide more clarity on the issues discussed above and to conduct an Initial Regulatory Flexibility Analysis for this rule. Please feel free to contact me or Kia Dennis, Assistant Chief Counsel, at 202-205-6936 if you have any questions.

Sincerely,

Claudia Rodgers
Acting Chief Counsel for Advocacy



Kia Dennis
Assistant Chief Counsel

[2] 5 U.S.C. §603.
[3] 5 U.S.C. §605.
[4] 80 F.R. at 45177.
[5] Id.