

Market Background

Instruments with ivory components, silver services with ivory components, furniture with finials or decorative elements of ivory or rosewood, ceremonial objects or pieces including certain feathers, decorative boxes, items inlaid with certain corals, and handbags or furniture upholstered in exotic skins are some of the most common items that planners should be on the alert for. Some of the more conspicuous objects that may be subject to legal restrictions include tusks, taxidermied animals, loose feathers, scrimshaw, or other decorative items made entirely of bone.

Although there is greater awareness of the legal restrictions on these items, there is still a limited market for them. The legal restrictions on highly regulated materials have had their intended effect, that is, they have dampened the demand for these items and depressed their market value. It is important to note that some items that may initially seem suspect may be legitimate and legal, such as antique scrimshaw found in New England whaling communities or antiquities that include feathers or animal skins from unrestricted species such as hawks or ravens.

Despite the limited market for tangible personal property containing restricted materials, some dealers and galleries maintain an active business trading in them, either because they are ignorant of the governing law or are intentionally uninterested in complying with it. It is essential to counsel clients to conduct appropriate due diligence when purchasing items that may include restricted or illegal materials.

Legal Background

Various laws govern the trade in restricted materials, and multiple agencies are responsible for enforcement.

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

The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) is a global treaty that ensures that international trade in wild plants and animals is legal, traceable, and biologically sustainable.²

The International Affairs program of the US Fish and Wildlife Service (FWS) coordinates domestic and international efforts to focus on domestic and foreign species of international concern. Under the Endangered Species Act (ESA),³ FWS carries out the provisions of CITES.⁴

The Endangered Species Act

The US regulates the importation of endangered species under the ESA. There is no legal importation of certain species, for example, African elephants,⁵ for any commercial purposes. If an item is imported into the US for noncommercial purposes, the importation is legal provided that the endangered material was removed from the wild prior to 1976, was otherwise legally acquired, and meets other enumerated criteria under the ESA.⁶

For an object subject to the ESA to be sold in interstate commerce, the item must satisfy the laws of the states it is moving between and must be either (1) an antique as defined by the ESA or (2) legally imported into the US prior to 1990 and satisfy the de minimis exception.

To fall within the ESA's definition of an antique, the following criteria must be met: (1) the item has not been repaired or modified with ivory or any other part of a federally protected species since 1973; (2) the item is at least 100 years old; and (3) the item was either imported prior to 1982, imported after 1982 through one of the specifically designated ports for antiques, or manufactured in the US from legally imported ivory.⁷

The de minimis exception requires, among other things, that the item must have been legally imported into the US prior to 1990 and contain less than 50 percent ivory by volume or no more than 200 grams of ivory.⁸ For intrastate commerce, federal law permits sale of an item within a state if the item was lawfully imported prior to 1990 or if it was imported with a "CITES pre-convention certificate," provided the sale complies with the relevant state and local laws.⁹

Each state has rules governing restricted materials, particularly ivory, and many states that have enacted laws have written them to closely mirror the federal laws. For example, under New York law, the sale of ivory is prohibited without

2 Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087 [hereinafter CITES], <https://cites.org/eng/disc/text.php>.

3 16 U.S.C. §§ 1531–1544.

4 CITES, *supra* note 1, §23.1(c), <https://www.ecfr.gov/current/title-50/chapter-I/subchapter-B/part-23>.

5 See Director's Order No. 210: Administrative Actions to Strengthen U.S. Trade Controls for Elephant Ivory, Rhinoceros Horn, and Parts and Products of Other Species Listed Under the Endangered Species Act, U.S. Fish & Wildlife Serv. (July 18, 2016), <https://www.fws.gov/policy-library/do210>; 50 C.F.R. § 17.40(e) (2025).

6 50 C.F.R. § 17.40(e) (2025).

7 16 U.S.C. § 1539(h).

8 50 C.F.R. § 17.40(e)(3) (2025).

9 *Id.* § 17.40(e)(3)(i).

a Department of Environmental Conservation permit.¹⁰ To obtain a permit to sell, the item must be at least 100 years old and comprise less than 20 percent ivory for intrastate sale or 50 percent for interstate sale.¹¹ Alternatively, a permit can be issued if the sale or distribution will be for educational or scientific purposes, through an estate, or if it is a musical instrument manufactured no later than 1975.¹²

The Canyon Case

The most common questions planners and advisors face when handling an estate with restricted materials are what to do with them and how to value them. The above discussion of federal and state law provides guidance on the first question. The question of how to value restricted materials is more nuanced.

This issue arose in the Sonnabend estate in relation to a work of art entitled *Canyon*.¹³ Ileana Sonnabend was a storied and important dealer of modern and contemporary art who owned an important work, *Canyon*, from the *Combine* series created in 1959 by 20th-century master Robert Rauschenberg. *Canyon* was part painting and part sculpture, incorporating a taxidermied American golden eagle. Under the Bald and Golden Eagle Protection Act,¹⁴ there are criminal penalties for anyone who knowingly takes possession of a bald or golden eagle or any part thereof (for example, feathers). First-time offenders can face up to one year in prison and a fine of \$5,000.¹⁵ However, Sonnabend's heirs were obliged to sell numerous works to pay onerous taxes, and *Canyon* became the subject of intense debate.

For estate tax valuation purposes, the Internal Revenue Service (IRS) requires a fair market value (FMV) appraisal. The IRS FMV standard is a willing buyer and willing seller, all facts known.¹⁶

Sonnabend's estate argued that the value of *Canyon* was \$0 because the work could not be legally bought or sold due to the inclusion of the eagle. The IRS argued that the work was worth an astonishing \$65 million, considering Rauschenberg's market and the importance of the work.¹⁷ Unfortunately for today's planners, the case was settled when the estate donated the work to the Museum of Modern Art in New York City, and estate planners and executors were left with the unanswered question

of how to value works that include restricted or illegal materials. Some argue that the black-market value of a work should be considered when calculating the FMV of a work with restricted or illegal materials. Nevertheless, it would be difficult to find a reputable appraiser willing to expound on their methodology in establishing a black-market value. And many lawyers are reluctant to include a value that presumes their client would commit a crime.

Planning and Disposal Tips

The reality is that many estates contain items that include restricted materials, although the decedent, executor, planning team, or descendants may not have been aware of them. With the myriad of federal, state, and international laws governing various forms of art and collectibles, it can be dizzying to navigate the regulatory landscape. Additionally, many estates lack detailed or complete inventories listing the materials or media included in each item of tangible personal property.

Handling these issues in any estate begins with understanding the items in the estate. A proper inventory, appraisal, or catalogue of the items should always be the first step. A qualified appraiser should always conduct an appraisal. Estates should consider any additional due diligence needed, including simple provenance research, organizing invoices and paperwork, or completing more complicated tasks such as obtaining scientific reports or testing objects to confirm their materials.

The best estate plans for these items begin during the decedent's lifetime to ensure that all of their knowledge about the items, including where and how they were purchased, is accessible. Addressing these issues during life can avoid many headaches after death. Typically, there are ways to sell items with restricted materials. Estates may receive specific permits to sell items that meet state or federal exceptions. Alternatively, some sale venues may recommend removing restricted components, such as replacing an ivory handle from a silver tea service with a plastic replica. In rare cases, more delicate handling may be required and could necessitate conversations with FWS.

While these items may be found in the estate, being armed with knowledge of what to look out for, how to identify them,

10 N.Y. Env't Conserv. Law § 11-0535-A(3) (2023).

11 *Id.* § 11-0535-A(3)(a); 50 C.F.R. § 17.40(e)(3) (2025).

12 N.Y. Env't Conserv. Law § 11-0535-A(3)(b)–(d) (2023).

13 Patricia Cohen, *Art's Sale Value? Zero. The Tax Bill? \$29 Million*, N.Y. Times (July 22, 2012), <https://www.nytimes.com/2012/07/22/arts/design/a-catch-22-of-art-and-taxes-starring-a-stuffed-eagle.html>.

14 16 U.S.C. §§ 668–668d.

15 *Id.* § 668.

16 See Treas. Reg. § 20.2031-1(b).

17 Cohen, *supra* note 13.

and the general rules surrounding them can help estate planning attorneys assist their clients.

GUNS AND GUN TRUSTS

When an estate includes firearms, a fiduciary must be careful to avoid violating federal, state, and local firearms laws. The legal status of the owner or the person in possession (actual or constructive), the type of firearm, and the state of residence of those involved all govern the regulation of firearms.¹⁸ Disregarding these considerations could lead to the inadvertent commission of a felony.

Regulatory Scheme

First, it is helpful to understand the basic regulatory scheme under federal and state laws governing firearms. Federal firearms laws, codified under the Gun Control Act of 1968 (GCA), categorize weapons as either Title I or Title II firearms.

Title I of the GCA regulates the interstate disposition of rifles, shotguns, and handguns, which make up most of the privately owned guns in the United States.¹⁹ State law generally regulates the intrastate transfer of Title I firearms.²⁰

The National Firearms Act of 1934 (NFA) regulates Title II firearms (also referred to as NFA weapons), which include automatic firearms, silencers, short or short-barreled shotguns, short or short-barreled rifles, destructive devices (such as grenades and bombs), and “any other weapon.”²¹

The NFA Branch of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE or ATF) administers the National Firearms Registration and Transfer Record (NFA Registry). Transferring or possessing an unregistered Title II weapon is a criminal act covered by I.R.C. § 5861(e).

The NFA prohibits possession and transfer of and access to certain weapons and bans certain persons from owning or having access to firearms. Under the NFA, Title II weapons are subject to strict registration, transfer, and tax requirements.²² It is illegal for any person to possess an NFA weapon not registered to that person in the NFA Registry. Possession may be actual or constructive.²³ The US Supreme Court has held that “constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.”²⁴ Failure to comply with these laws may result in criminal liability, fines, and forfeiture of any weapons involved.²⁵

Note that the term *firearm* does not include an antique firearm.²⁶ The classification of a gun as an *antique firearm* depends on several factors, including the date and method of manufacture and the type of ammunition it uses. The burden of proof falls on the owner of the firearm to establish that it is indeed an antique. Finally, remember that even if a firearm may be considered an antique firearm under federal law, it may not be treated the same way under state law.

Fiduciaries: Federal and State

Fiduciaries must determine the registration status of firearms coming into their possession. Transfers of firearms to satisfy bequests could subject a fiduciary, an heir, or both to criminal penalties.²⁷ The situation is more complicated for both the fiduciary and the heir if the fiduciary unlawfully transfers an NFA weapon to an out-of-state heir.²⁸ Federal law makes it unlawful for certain categories of persons to ship, transport, receive, or possess Title II firearms. These excluded individuals, who are described as disqualified persons, include but are not limited to convicted felons, persons either adjudicated as “mentally defective” or committed to a mental institution, persons convicted of misdemeanor domestic violence offenses, users of any illegal

18 For a summary of state and federal rules published by the ATF, see *State Laws and Published Ordinances - Firearms (35th Edition)*, ATF (Nov. 30, 2023), <https://www.atf.gov/firearms/state-laws-and-published-ordinances-firearms-35th-edition>.

19 See Gun Control Act of 1968, 18 U.S.C. §§ 921–931.

20 For a state-by-state summary of gun regulations, see the Giffords Law Center to Prevent Gun Violence, <https://lawcenter.giffords.org/search-gun-law-by-state/>.

21 See I.R.C. § 5845(a)–(h); 27 C.F.R. § 479.11. The definition of *any other weapon* includes smooth-bore rifles, muzzle-loading cannons, and other somewhat exotic firearms.

22 See I.R.C. § 5861(d) (requiring the registration of certain particularly dangerous weapons under the NFA); see also *id.* § 5845(a) (listing those weapons that require registration under 18 U.S.C. § 5861(d)).

23 See I.R.C. § 5861(d). Other federal law prohibits possession of any machine gun not registered with BATFE by May 19, 1986. See 18 U.S.C. § 922(o).

24 *Henderson v. United States*, 575 U.S. 622, 626 (2015). Under the NFA, constructive possession will be treated the same as actual possession. See *United States v. Turnbough*, 114 F.3d 1192 (7th Cir. 1997) (unpublished opinion).

25 See I.R.C. § 5872; 27 C.F.R. § 479.182.

26 See I.R.C. § 5845(a); 18 U.S.C. § 921.

27 See 18 U.S.C. § 922.

28 See I.R.C. § 5861(b), (e).

drug, dishonorably discharged veterans, and persons who have renounced their US citizenship.²⁹

Estate planners should also be aware of the state and local restrictions on the transfer of firearms, as many gun control regulations take place at the state level. The rules and regulations regarding the ownership and transfer of certain firearms typically correlate with the political climate of a particular location.

Appraisals

Appraisals, which are an integral part of any estate administration, can be problematic when dealing with firearms in an estate. Fiduciaries should use only appraisers licensed to take possession of the weapons that need to be appraised.

Gun Trusts

Most estates with Type II firearms would benefit from owning them in a gun trust.

In general, individuals may transfer NFA weapons to, and fiduciaries generally may purchase NFA weapons in, an entity such as a corporation, limited liability company (LLC), revocable trust, or irrevocable trust to avoid some of the rules that otherwise regulate such transfers.

A trust designed specifically for the ownership, transfer, and possession of an NFA weapon is often called a gun trust. While a gun trust can hold both Title I and Title II firearms, doing so can unwittingly subject Title I firearms to rules that otherwise apply only to Title II firearms. The ownership and transfer of Title I firearms can generally be handled through a standard revocable trust.


Drafting Tips for Gun Trusts

According to IRS Information Letter 2015-0039, a gun trust can be considered a “trust” for tax purposes under Treas. Reg. § 301.7701-4 even when there are no ascertainable beneficiaries.³⁰ This analysis provides a valuable starting point for a noncomprehensive list of drafting tips for gun trusts:

1. The trust should explicitly state that its purpose is to own, possess, manage, and dispose of NFA firearms. The trust should provide procedural safeguards to trustees and beneficiaries from accidental violations of applicable laws.
2. Gun trusts may be irrevocable but are generally revocable so that the grantor can retain the power, among other powers, to add or remove trust property and beneficiaries.

3. Gun trusts should name multiple trustees and beneficiaries of the trust. An individually owned NFA firearm may be transported and used only by its registered owner. A gun trust can instead name numerous trustees, each of whom may legally own the weapon without triggering any transfer requirements. After the firearm has been funded into the trust, any beneficiary may use it. The grantor can also be a lifetime beneficiary, but not the sole beneficiary, of the gun trust.
4. The gun trust should provide terms to direct the disposition of an NFA firearm if an owner becomes a disqualified person. For example, if a trust beneficiary commits a felony, that individual will no longer be a trust beneficiary, and the firearm will pass to the remainder beneficiaries in the trust.
5. Gun trusts should account for a trustee or beneficiary who becomes incapacitated for any reason. The trust should provide for a successor trustee to assume legal title for the firearms to ensure that they are safely secured.
6. The trust should include guidance and savings language concerning all filing requirements for the trusts, trustees, and trust beneficiaries, such as complying with the BATFE Rule 41F, to avoid accidental violations.³¹
7. The grantor should create and fund the gun trust first and then have the trustees purchase the firearms to avoid two transfer fees. If the grantor purchases the firearms first and then transfers the firearms into the trust, there will be two transfer fees.
8. The gun trust should limit the trustee’s power to change the gun trust’s legal name. Because a firearm is registered in the trust’s name in the NFA Registry, a change in the trust’s name would require reregistration and payment of a transfer tax for each firearm.

CONCLUSION

The more estate planners know about clients’ assets, and particularly their tangible personal property, the better their planning and preparation can be. The first step in any thoughtful management of an estate with dangerous or difficult tangibles is knowing what they are and which guidance or regulations to consult to effectively advise clients. 

²⁹ See 18 U.S.C. § 922(g).

³⁰ I.R.S. Info. Ltr. 2015-0039 (Dec. 24, 2015), <https://www.irs.gov/pub/irs-wd/15-0039.pdf>.

³¹ 27 C.F.R. pt. 479 (as amended by 81 Fed. Reg. 2658 (Jan. 15, 2016)).