

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

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## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### 45 CFR Part 1160

RIN 3154-AA00

#### Indemnities Under the Arts and Artifacts Indemnity Act

**AGENCY:** Federal Council on the Arts and the Humanities.

**ACTION:** Final rule.

**SUMMARY:** The Federal Council on the Arts and Humanities is adopting as a final rule, without change, the provisions of a proposed rule that revises the regulations implementing the Arts and Artifacts Indemnity Act, as amended (20 U.S.C. 971-977) (the "Act"). The final rule permits the indemnification of eligible items from the United States while on exhibition in this country in connection with an exhibition of eligible items from outside of the United States. The final rule also includes illustrations of exhibitions eligible for indemnification which are intended to provide further guidance to persons considering applying for the indemnification of an international exhibition. The final rule is not intended to bring about a major shift in emphasis of the current policy or practice of the indemnity program.

**EFFECTIVE DATE:** September 15, 1995.

**FOR FURTHER INFORMATION CONTACT:** Alice Whelihan, Indemnity Administrator, National Endowment for the Arts, 1100 Pennsylvania Avenue, N.W., Washington, D.C. 20506, 202-682-5442.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### A. Statutory Background

In 1975, the United States Congress enacted the Arts and Artifacts Indemnity Act which established an indemnity program administered by the Federal Council on the Arts and the Humanities (the "Federal Council"). 20 U.S.C. Sections 971-977. The Federal Council is composed of the heads of nineteen federal agencies and was established by Congress, among other things, to coordinate the policies and

operations of the National Endowment for the Arts, the National Endowment for the Humanities, and the Institute of Museum Services, including the joint support of activities. 20 U.S.C. Section 971.

Under the indemnification program, the United States Government guarantees to pay loss or damage claims, subject to certain limitations, arising out of exhibitions containing items determined by the Federal Council to be of educational, cultural, historical or scientific value the exhibition of which must be certified by the Director of the United States Information Agency as being in the national interest. In order to be eligible for indemnification, the objects must be on exhibition in the United States, or if outside this country preferably as part of an exchange of exhibitions.

###### B. Legislative History

On May 21, 1975, Senators Claiborne Pell (D, RI) and Jacob Javits (R, NY) introduced the Arts and Artifacts Indemnity Act as an amendment to the reauthorization of the National Foundation on the Arts and Humanities Act of 1965. According to the House Committee report, the purpose of the statute was "to provide indemnities for exhibitions of artistic and humanistic endeavors, and for other purposes."<sup>1</sup> The Senate Committee stated that it believed that this purpose could be advanced "through the exchange of cultural activities and sharing by nations of the world of their cultural institutions and national wealth and treasure."<sup>2</sup>

The broad purpose of the Act is echoed throughout the Act's language and legislative history. For example, in testifying at joint hearings before the House Subcommittee on Select Education and the Senate Special Subcommittee on Arts and Humanities, Nancy Hanks, Chairman, National Endowment for the Arts, stated:

Cultural exhibitions and exchanges of high quality should be encouraged by the laws and policies of the United States Government. They are in the national interest because of the personal, aesthetic, intellectual, and cultural benefits accruing to every man, woman and child of this nation who has the opportunity to experience these beautiful and enlightening presentations. We believe that this country should do as much as any nation in the world to insure that these vitally important programs are strengthened.<sup>3</sup>

There was concern in Congress that such exchanges were impeded by

<sup>1</sup> *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> H.R. Rep. No. 680, 94th Cong., 1st Sess., at 5.

prohibitively high insurance costs. The Senate noted that "anywhere from half to two-thirds of the cost of an international exhibition is the cost of insuring the material to be exhibited."<sup>4</sup> Ronald Berman, Chairman of the Federal Council, testified that without indemnification provided in special legislation enacted by the 93rd Congress, the insurance costs in connection with several widely attended exhibitions would have been prohibitive.<sup>5</sup>

###### C. Regulatory Background

The Federal Council is the agency charged by Congress with the responsibility to administer the Arts and Artifacts Indemnity Act. In practice, the Indemnity Program is administered for the Federal Council by the Museum Program of the National Endowment for the Arts under the "Indemnities Under the Arts and Artifacts Indemnity Act" regulations (the "Regulations"), which are set forth at 45 CFR Part 1160.

These Regulations have been promulgated, and amended from time to time, by the Federal Council pursuant to the express and implied rulemaking authorities granted by Congress to make and amend rules needed for the effective administration of the indemnity program. Among other things, Congress expressly granted the Federal Council the authorities to establish the terms and conditions of indemnity agreements; to set application procedures; and to establish claim adjustment procedures. 20 U.S.C. Sections 971(a)(2), 973(a), 975(a).

For a number of years, the Federal Council has considered the desirability of amending the Regulations to permit the indemnification of U.S.-owned loans on exhibition in the United States in connection with certified international exhibitions. As currently drafted, the Regulations do not cover domestic objects on loan to an international exhibition in the United States. The Regulations provide, in pertinent part:

An indemnity agreement made under these regulations shall cover:

- (1) Eligible items from outside the United States while on exhibition in the United States or
- (2) Eligible items from the United States while on exhibition outside this country, preferably when they are part of an exchange of exhibitions. 45 CFR Section 1160.1.

On February 25, 1993, during a lengthy discussion of the application of the National Gallery of Art for the indemnification of the exhibition "Great French Paintings from the Barnes

<sup>4</sup> S. Rep. No. 289, 94th Cong., 1st Sess., at 1.

<sup>5</sup> H.R. Rep. No. 680, 94th Cong., 1st Sess., at 5.

Foundation: Impressionist, Post-Impressionist and Early Modern," the Federal Council concluded that the eligibility criteria set forth in the Regulations were more narrowly drawn than required under the Act. While the Council approved the indemnification of the Barnes exhibition, which consisted of one foreign-owned object and 80 domestically owned objects, a Certificate of Indemnity ultimately did not issue because of legal uncertainties related to the Council's action under its current Regulations. To clarify eligibility issues for future actions, the Federal Council voted to amend its regulations.

After extensive discussion of the issue, the Federal Council resolved that the proposed amendment to the Regulations would significantly enhance its ability to provide the American public with the benefits to a high quality program of international exhibitions while not significantly increasing the exposure of the Federal government to pay loss or damage claims nor significantly adding to the administrative burdens or costs of the program.

The Federal Council concluded that widening the eligibility criteria under the Indemnity Program to include coverage of U.S.-owned objects in exhibitions that also include foreign-owned loans would provide an important benefit to U.S. cultural institutions and to the American public. Under the current guidelines, U.S.-owned loans may be indemnified only when exhibited abroad. The Federal Council concluded that if items from abroad are of educational, cultural, historical or scientific value, and their exhibition has been certified by the Director of the United States Information Agency as being in the national interest, thereby making them eligible for indemnification coverage, the U.S.-owned loans to the exhibition also should be eligible for indemnification.

The Federal Council stressed that the amendment is not intended to bring about a major shift in the emphasis of the current policy or practice of the indemnity program. Under the amended Regulations, indemnity coverage will continue to be available primarily for the exhibition of items coming from outside the United States. In determining whether to indemnify international exhibitions that also include U.S. loans, the Federal Council will continue to apply the same general standard of review—whether the exhibition taken as a whole is of educational, cultural, historical or scientific significance. However, to

guard against potential abuses, the Federal Council will require that the foreign loans be an integral or essential component of the exhibition. Exhibitions consisting solely of domestic items will continue to be ineligible for indemnification.

The Federal Council concluded that because of the overall statutory cap on the program the proposed modification would not significantly increase the exposure of the Federal government to claims for loss or damage while providing important additional relief for U.S. borrowing institutions. Under the statutory cap, the Federal Council may not issue indemnity agreements covering losses of more than an aggregate of \$3,000,000,000 at any one time. The cap—and thereby the total government exposure—remains the same whether the indemnity agreements cover foreign or domestic content. Moreover, the fact that coverage during international transit, the time of greatest risk, would not be required for loans from U.S. lending institutions greatly reduces the risk of additional losses.

The Federal Council further concluded that the proposed amendment would not cause a significant increase in either the number of applications to the program or the administrative burdens associated with applying or reviewing indemnification applications. This is the case because under the current practice, applicants already are required to include information on domestic loans in their applications, and indemnity panels consider the educational, cultural, historical or scientific value of both the domestic and foreign items in determining whether to indemnify an exhibition.

While the need to determine whether indemnification of the domestic content is appropriate will require an additional judgment made by the Federal Council, it is similar in character to the determinations already made by the Federal Council in determining the appropriateness of indemnification of foreign content. Moreover, the same options for technical assistance and resubmission will be available for a rejected applicant as are currently available.

On June 16, 1993, on the basis of these conclusions, the Federal Council reaffirmed its vote of February 25, 1993 to amend the Regulations to permit the coverage of domestic items in connection with international exhibitions in the United States. Specifically, the Federal Council approved a motion to promulgate regulations revising 45 CFR 1160.1

("Purpose and Scope") by adding the following language:

(3) eligible items from the United States while on exhibition in the United States if the exhibition includes other eligible items from outside the United States.

On April 6, 1994, the Federal Council published in the **Federal Register** an advance notice of proposed rulemaking (ANPR) regarding the indemnification of eligible items from the United States while on exhibition in this country in connection with an exhibition of items from outside the United States. 59 FR 16162-64, April 6, 1994. On July 6, 1995, the Federal Council published in the **Federal Register** a notice of proposed rulemaking which included the Federal Council's responses to the comments received in response to the ANPR. 60 FR 35162-66, July 6, 1995.

## II. Discussion of Comments Received

The Federal Council did not receive any comments in response to its notice of proposed rulemaking.

## III. Regulatory Analyses

This rule is not a significant regulatory action for the purposes of Executive Order 12866 of September 20, 1993.

As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

The Catalogue of Federal Domestic Assistance number for the Arts and Artifacts Indemnity Program is 45-201.

For the Federal Council on the Arts and the Humanities.

**Michael S. Shapiro,**

*Counsel to the Federal Council on the Arts and the Humanities.*

For the reasons set forth in the preamble, 45 CFR Part 1160 is amended as follows:

### PART 1160—INDEMNITIES UNDER THE ARTS AND ARTIFACTS INDEMNITY ACT

1. The authority citation for part 1160 continues to read as follows:

**Authority:** 20 U.S.C. 971-977.

2. Section 1160.1 is amended by revising paragraph (a) as follows:

#### § 1160.1 Purpose and scope.

(a) This part sets forth the exhibition indemnity procedures of the Federal Council on the Arts and Humanities under the Arts and Artifacts Indemnity Act (Pub. L. 94-158) as required by section 2(a)(2) of the Act.

\* \* \* \* \*

3. Sections 1160.4 through 1160.11 are redesignated as §§ 1160.5 through

1160.12 and a new Section 1160.4 is added to read as follows:

**§ 1160.4 Eligibility.**

An indemnity agreement made under these regulations shall cover:

(a) Eligible items from outside the United States while on exhibition in the United States;

(b) Eligible items from the United States while on exhibition outside this country, preferably when they are part of an exchange of exhibitions; and

(c) Eligible items from the United States while on exhibition in the United States, in connection with other eligible items from outside the United States which are integral to the exhibition as a whole.

**Example 1**

Museum A, an American art museum, is organizing a retrospective exhibition which will include more than 150 works of art by the Impressionist painter Auguste Renoir. The exhibition will present the full range of Renoir's production for the first time ever in an American museum. Museums B and C, large national museums in Paris and London, have agreed to lend 125 major works of art illustrating every aspect of Renoir's career. Museum A is also planning to include related works from other American public and private collections which have not been seen together since the artist's death in 1919. Museums D and E, major east coast American art museums, have agreed to lend 25 masterworks by Renoir. The exhibition will open in Chicago and travel to San Francisco and Washington.

**Discussion**

Example 1 is a straightforward application of the amended indemnity regulations. Under the old regulations, only the works of art from Museums B and C, the foreign museums, would have been eligible for indemnification. Under the proposed Regulations, the works of art from American museums and other public and private collections also would be eligible for indemnification. In determining whether to indemnify the entire exhibition, the Federal Council will evaluate the exhibition as a whole and whether the foreign loans are integral to the educational, cultural, historical or scientific significance of the exhibition. In this example, the Federal Council would likely approve indemnification of the entire exhibit.

**Example 2**

Museum A in Massachusetts is organizing an exhibition celebrating 250 Years of Decorative Arts in America, to be held in conjunction with the state's celebration of the millennium. Included among the objects to be borrowed from museums and historical societies in the United States are furniture, textiles, metalwork, ceramics, glass and jewelry, illustrating the best examples of American design from colonial times to the present. The curator traveled abroad recently and saw an exhibition of American quilts which have been acquired by a British

decorative arts museums. He intends to borrow several of the quilts for the exhibition.

**Discussion**

Example 2 raises the question as to whether the American museum organizing the exhibition has included the British-owned American quilts merely to obtain insurance relief. In determining whether to indemnify the entire exhibition, the Federal Council will evaluate the exhibition as a whole and whether the foreign loans are integral to achieving its educational, cultural and historical purposes. Here, it is likely that the Federal Council will conclude that the foreign work are not an essential component of the exhibition. The Federal Council also may seek additional information from the applicant to determine whether the objectives of the exhibition could have been accomplished as satisfactorily by borrowing American quilts from U.S. collections. On these facts, the Federal Council in all likelihood would deny indemnification for the entire exhibition.

**Example 3**

Museum A, an American museum, is organizing an exhibition of the works of James Watkins, a nineteenth century American painter, focusing on his studies of human anatomy. Museum A has the foremost collection of preparatory drawings related to Watkins' major painting, "The Surgeon and His Students." The painting is in the permanent collection of Museum B, located in the south of France, which has agreed to lend the painting for the exhibition. The exhibition will be shown at Museum B after the U.S. tour. American Universities, C and D, have also agreed to lend anatomical illustrations and drawings which show Watkins' development as a draughtsman. The exhibition and accompanying catalogue are expected to shed new light on Watkins contributions to art and scientific history.

**Discussion**

Example 3 addresses the issue of whether the Federal Council will indemnify an exhibition even where the U.S. objects outnumber the foreign works. In determining whether to indemnify the entire exhibition, the Federal Council will evaluate the exhibition as a whole and the relationship of the foreign loans to the educational, cultural, historical and scientific significance of the exhibition. In this example, the exhibition promises to make important contributions not only to the history of art but also to the history of science. While there is only a single foreign work of art, it is clearly an essential component of the exhibition as a whole. The case for indemnification of the entire exhibition is further strengthened by the fact that a foreign masterpiece, which is closely related to the preparatory drawings and anatomical illustrations and drawings owned by American institutions, will be made available to the American public. Thus, the mere fact that the U.S. loans outnumber the foreign works will not in itself disqualify the entire exhibition for indemnification.

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