

a "museum" as any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony [25 U.S.C. 3001 (8)]. The definition of museum specifically excludes the Smithsonian Institution or any other Federal agency. The definition of museum is further clarified by regulation [paragraph 10.2 (a)(3) of this part]. The Act does not authorize the Secretary to assess civil penalties on a Federal agency that fails to comply with the Act. Section 15 of the Act does specifically grant the United States district courts jurisdiction over any action brought by any person alleging a violation of the Act, including violations by a Federal agency [25 U.S.C. 3013]. Institutions that do not receive Federal funds are not required to comply with the Act. However, human remains, funerary objects, sacred objects, and objects of cultural patrimony recovered from Federal lands generally fall under provisions of the Act regardless of where they currently are curated.

One commenter recommended amending the definition of the term "you" to exclude "the museum official designated responsible for matters related to implementation of the Act." The term is used in the rule only to advise the museum official designated responsible for matters related to implementation of the Act of actions that they may take in the notification and appeal process. Section 9 of the Act authorizes the Secretary to assess civil penalties on any museum that fails to comply with the requirements of the Act, not on an individual employee of that institution.

Paragraph 10.12 (b)

This paragraph defines the term "failure to comply."

Paragraph 10.12 (b)(1)(i) of this section stipulates that a museum has failed to comply if, after November 16, 1990, the museum sells or otherwise transfers human remains, funerary objects, sacred objects, or objects of cultural patrimony in violation of the Act, including, but not limited to, an unlawful sale or transfer to any individual or institution that is not required to comply with the Act. Six commenters recommended inserting the word "knowingly" before the phrase "sells or otherwise transfers" to be consistent with the criminal provisions in section 4 of the Act [18 U.S.C. 1170]. The criminal provisions in section 4 of the Act require mens rea or criminal

intent. The civil penalty provisions in section 9 of the Act do not include such a requirement. Nothing precluded Congress from specifically requiring an element of knowledge or intent to the civil penalty provisions, but this was not done. The text has not been changed.

One commenter recommended deleting the phrase "or otherwise transfers," as this concept does not appear in the Act. Another commenter recommended clarifying that this phrase applies to transfers where the intent was avoiding compliance with the Act. This phrase is intended to identify instances where human remains, funerary objects, sacred objects, or objects of cultural patrimony are conveyed from one party to another, without reciprocal financial consideration, to avoid compliance with provisions of the Act. The phrase has been retained.

One commenter considered use of the term "in violation of" to be tautological, that is, defining a term with reference to itself. The term has been replaced with "contrary to provisions of."

One commenter recommended deleting the word "unlawful" referring to the sale or transfer of human remains, funerary objects, sacred objects, or objects of cultural patrimony. Since museums may sell or otherwise transfer such items if they can prove a right of possession, the term has been retained to distinguish sales or transfers that violate provisions of the Act from sales or transfers of items for which the museum has right of possession.

One commenter recommended adding provisions to specifically prohibit the sale or transfer of human remains, funerary objects, sacred objects, or objects of cultural patrimony across State lines. The criminal provisions of the Act already apply to the sale, purchase, use for profit, or transport for sale or profit of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony within the United States. Transfer across a State boundary is not a necessary element of this crime.

One commenter questioned whether assessing civil penalties on museums that acquire items that are otherwise widely available for sale to the general public might actually encourage the growth of private collections and restrict Federally funded institutions from adding to their collections. Section 4 of the Act makes it a crime under certain conditions to knowingly sell, purchase, use for profit, or transport for sale or profit Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. The rule in part provides an alternative

administrative mechanism to prosecute museums that violate these criminal provisions.

No comments were received regarding paragraphs 10.12 (b)(1)(ii), (b)(1)(iii), or (b)(1)(iv) of this section.

Paragraph 10.12 (b)(1)(v) of this section stipulates that a museum has failed to comply if it refuses to repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization pursuant to the requirements of the Act. Two commenters requested clarification of the relevant requirements of the Act, particularly as it applies to disputes. The section has been rewritten to apply to any museum that, absent any of the exemptions specified at paragraph 10.10 (c) of this part, refuses to repatriate human remains, funerary objects, sacred objects, or objects of cultural patrimony to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization.

Paragraph 10.12 (b)(1)(vi) of this section stipulates that a museum has failed to comply if it repatriates human remains, funerary objects, sacred objects, or objects of cultural patrimony before publication of a notice in the Federal Register as required by the Act. One commenter pointed out that the regulations require publication of two separate types of notice, depending on the type of cultural item. Publication of a notice of intent to repatriate is required prior to repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony [paragraph 10.10 (a)(3) of this part]. Publication of a notice of inventory completion is required prior to repatriation of human remains or an associated funerary object [paragraph 10.10 (b)(2) of this part]. The text has been rewritten to refer to publication of the required notice in the Federal Register. Another commenter suggested deleting this section since the Secretary ultimately is responsible for publication of notices in the Federal Register, not the submitting museum. The Secretary is responsible for publishing the museum's notice in the Federal Register. However, as the regulations make clear, repatriation may not occur until at least 30 days after the notice is published [paragraphs 10.10 (a)(3) and (b)(2) of this part]. The section has been retained.

One commenter recommended that failure to adequately consult with the relevant lineal descendants, Indian tribe officials, and traditional religious leaders also should constitute a "failure to comply." Other sections of the