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Docket No. APHIS-2008-0119
Regulatory Analysis and Development
PPD, APHIS, Station 3A-03.8
4700 River Road Unit 118
Riverdale, MD 20737-1238

Re: Implementation of Revised Lacey Act Provisions, 73 Fed. Reg. 58925 (October 8, 2008)

The Retail Industry Leaders Association (RILA) appreciates this opportunity to provide comments on implementation of revised Lacey Act provisions in response to the above Federal Register notice published by the Animal Plant Health Inspection Service (APHIS) on October 8, 2008. Illegal logging is a global problem that has serious environmental and economic consequences, and effectively addressing this problem is a laudable goal that retailers support. Nevertheless, the declaration requirements of the Lacey Act could pose an unworkable burden on importers and raise a significant barrier to trade. RILA supports pragmatic and effective solutions to the significant implementation challenges presented by the declaration requirement of the Act.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry--retailers, product manufacturers, and service suppliers--which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Section 8204 of the Food, Conservation and Energy Act of 2008 (FCEA) clearly provides the Administration with discretion to implement the new requirements in a practical manner. Specifically, the amended section 7 of the Lacey Act states that “[t]he Secretary [of Agriculture], after consultation with the Secretary of the Treasury, is authorized to issue such regulations...as may be necessary to carry out the provisions of section 3(f)...” Additionally, section 3(f)(6) of

the Lacey Act, as amended, states: Not later than 180 days after the date on which the Secretary completes the review under paragraph (4), the Secretary may promulgate regulations— (A) to limit the applicability of any requirement imposed by paragraph (2) to specific plant products; (B) to make any other necessary modification to any requirement imposed by paragraph (2), as determined by the Secretary based on the review; and (C) to limit the scope of the exclusion provided by paragraph (3), if the limitations in scope are warranted as a result of the review.

Congressional Guidance on Implementation of the Declaration Requirement

RILA welcomes and strongly supports the October 10, 2008 guidance letter from Congressional leaders on implementation of the declaration requirement. RILA worked closely with Congress and other stakeholders to develop that guidance by consensus. In RILA's view, that guidance is consistent with the language and intent of the statute. We understand, however, that questions have been raised as to whether some of the proposed guidance is consistent with language in the statute. For example, a concern has been raised as to whether the proposed definition of the packaging exclusion is more expansive than the statute permits. If there are any questions as to whether any aspects of the congressional guidance can be legally implemented, RILA respectfully requests that these issues be clarified early in the implementation process and that stakeholders work with Congress to enact a technical corrections bill.

Meanwhile, RILA believes it is constructive to provide the following further comments on how best to implement the new declaration requirement.

Phase-In Schedule Should Initially Focus on Solid Wood Products

RILA welcomes the announcement that enforcement of the declaration requirement will be delayed until electronic filing capability is established on or around April 1, 2009. As stated in the Congressional letter, RILA supports a measured phase-in schedule that focuses in its initial phases on products that are only one or two processing steps removed from the tree, such as logs, timber, lumber, and solid wood flooring. Phases should be at least six months in length and should identify products based on headings or sub-headings in the Harmonized Tariff Schedule (HTS) so that the universe of products covered by each phase is measured and reasonable. Beyond the initial phases, the phase-in schedule should continue to focus on products that are primarily made of solid wood but that require more processing, such as bent wood furniture, cribs, and wooden picture frames. As traceability expertise is further developed, the scope should be expanded to cover other products such as wood veneers.

Feedback Provided Through Pilot Programs

Some RILA members have already begun pilot programs to test the ability of their suppliers to denote the origin of wood in their products. The feedback from those pilot programs indicates that, for products primarily made of solid wood that are only one to two processing steps from the tree, the wood is traceable. Suppliers also believe traceability can be achieved for veneer products like plywood. However, traceability difficulties in the supply chain increase exponentially for paper and composite wood products such as particle board and MDF.

Composite wood products are generally made of byproducts from other manufacturing processes and therefore have a broad spectrum as to the potential genus, species, and countries of origin. While this type of materials reuse is positive from a recycling perspective, it makes collection of useful data for the Lacey Act virtually impossible in the near future.

Similarly, fiber supply for paper production can come from a variety of sources that can be difficult to trace back to the source. Many different species can be used to make paper, and most paper is made from a blend of both hardwoods and softwoods. Once wood chips are separated into individual fibers and blended into pulp, it is extremely difficult, if not impossible, to identify the actual species used in a specific blend of paper pulp, or where it came from.

As an example, a product manufacturer could have 10 suppliers of particleboard as a product component. Each of those particleboard suppliers may have 50+ lumber mills supplying sawdust to them and each of those lumber mills could be supplied by 20 logging companies. This adds up to 10,000 possible loggers and forests implicated just for particleboard. At this point, the pilot program suggests it is not possible to provide a meaningful declaration for these products. This feedback is not intended to suggest that particleboard should be excluded from the declaration requirement, but is provided so that policymakers can appreciate the difficult task at hand and to request that implementation for these products be delayed until after the Congressionally-mandated review. Beginning first with the declaration process for solid woods and then veneers will allow retailers the opportunity to work with their suppliers to develop the best methods of identifying the origin of the wood and to establish the requisite traceability protocols that will allow them to expand to additional products and hopefully provide meaningful declarations for paper and more complicated wood products in the future.

Packaging

As stated in the Congressional letter, Section 3(f)(3) of the Lacey Act, as amended, is intended to exclude from the declaration requirement any packaging materials that support (either physically or by providing information), protect or carry the imported item and that are properly classified with the imported item. Only where the packaging material itself is the item being imported is it

potentially subject to the declaration requirement. APHIS therefore should interpret the term "packaging materials" to include, inter alia, tags, labels, manuals, warranty cards, wrap, boxes, cardboard or paper inserts, bottle corks, and pallets.

Declaration Should Apply Only To Certain Formal Consumption Entries

As stated in the Congressional letter, the declaration requirement in section 3(f)(1) of the Lacey Act, as amended by section 8204 of the FCEA, is intended for formal, consumption entries. It is not intended to cover other entries such as informal entries, personal importations, mail (unless subject to formal entry), transportation and exportation entries, in transit movements, carnet importations, and foreign trade zone (FTZ) and warehouse entries, except in the case of FTZs and warehouse entries when required by U.S. Customs and Border Protection for specific products when the agency is notified by appropriate enforcement agencies that compelling evidence exists that links those products to Lacey Act violations within FTZs or bonded warehouses.

Additionally, certain types of *formal* entries should also be exempt from the importer declaration requirement. Specifically, products of the United States that are exported and returned without having been advanced in value (HTS 9801 – Special Classification Provisions) and articles exported and returned to the United States after having been advanced in value or improved in condition for limited purposes (HTS 9802) should be excluded.

Quantity and Value

Section 3(f)(1)(B)(i) of the Lacey Act, as amended, states that the declaration is to include “the value of the importation.” RILA believes it is appropriate for APHIS to require the importer to state the value of the shipment, not the estimated value of plant content of the shipment.

While volume and weight are the most common measures of quantity, RILA urges APHIS to keep in mind the Congressional admonishment to minimize the cost and regulatory burden. Thus, APHIS should consider measures of quantity that are merely a count, such as eight handles a piece on 1000 vanity cabinets. The HTS itself uses a variety of measurements, including number of units.

Database and Informational Website

As stated in the Congressional letter, the U.S. government should establish and maintain on a U.S. government website a comprehensive and continuously updated database of genus, species and common/trade name information for plants. The U.S. government should also establish and maintain a continuously updated compilation of U.S. and foreign laws related to taking,

possessing, transporting or selling plants; and a reference of available tools for tracking wood and assessing and addressing risk of illegal sourcing within a wood supply chain. This effort could be maximized by creating an information clearinghouse that coordinates, organizes, and enhances information gathered through existing efforts of various stakeholders such as retailers, importers, and nongovernmental organizations.

It would also be helpful for this website to include specific information on the genus, species, and countries of origin where illegal logging is occurring. This would help to better inform retailers and importers to prevent such wood from entering their supply chains.

Finally, APHIS should also provide a guidance document for importers to reference as they seek to comply with the amended Lacey Act. The guidance document should include answers to frequently asked questions that have been directed to the Lacey Act mailbox listed on the APHIS website, as well as more general information on the new requirements. A guidance document would give importers a greater understanding of the new requirements, which would drive higher compliance.

De Minimis

Products that are covered by the importer declaration requirement should only be those whose essential character is comprised of a plant product. Products that are comprised only of *de minimis* plant product content should not trigger the importer declaration requirement. For example, plastic toys with paper stickers or cotton apparel with wooden buttons should not trigger the importer declaration because the paper stickers and wooden buttons are a *de minimis* part of the product and do not comprise the essential character of the product. There are millions of items being imported every day that contain very small or trace amounts of plant material and those imports should simply be excluded from the declaration requirement.

The regulations and implementation plan should make the *de minimis* and essential character concepts clear by specifying at least the eight digit HTS level of those plant products for which an importer declaration is required. The HTS should identify with specificity what articles require an importer declaration, as is the case for articles that are eligible for duty preferences under the Generalized System of Preferences (GSP), free trade agreements, etc., which are identified in the HTS at the eight digit level. This specificity should be clear during each implementation phase and importers should not be forced to guess whether a declaration is required or not.

RILA does not believe that excluding specific HTS codes from the phased-in declaration filing requirement for the overall HTS chapter should present any challenges for the electronic filing system.

Product Exclusions

The World Trade Organization's (WTO) Technical Barriers to Trade (TBT) Agreement clearly mandates that trade regulations be consistent with the purpose of the underlying statute and be as least trade disruptive as possible to achieve that purpose. The purpose of the amended Lacey Act is to put in place a means to control illegal logging around the world through enforcement when the product of that illegal activity enters U.S. commerce.

The question then becomes one of establishing appropriate criteria which capture those imports where declarations are capable of providing information useful to the ongoing efforts to control illegal logging and plant harvesting. As a first step, APHIS should exclude from the declaration requirement the broad product categories identified in the Congressional letter, such as beverages (HTS chapters 21 and 22); cosmetics and personal care products (HTS chapters 33 and 34); and footwear, textiles and apparel (HTS chapters 50 through 64). APHIS should also exclude similarly situated products that are not made of wood and are also unrelated to the problem of illegal logging such as pharmaceuticals, luggage, jewelry, ceramics, and glassware.

APHIS also should exclude from the definition of "plant product" those products that are extracted from plants without harvesting them. Because the intent of the Lacey Act amendments is to prevent illegal logging and harvesting, products that are extracted from living plants without logging or harvesting clearly should fall outside the scope of the term "plant product." The Congressional letter made reference to such products by suggesting that rubber and cork products be excluded. RILA suggests that other products that are extracted from plants which are not harvested, should also be excluded.

Review of Products Subject to Declaration

Once the phase-in period and the review outlined in the legislation are completed, APHIS should establish a process to add or remove products from the declaration requirement, as appropriate. A review process must be transparent and include an opportunity for interested parties to comment on whether specific products under consideration should be added or removed from the list of products subject to the declaration requirement. Moreover, a sufficient lead time of at least six months should be provided to allow importers to work with their suppliers to identify the origin of plant materials in any imported products that are added to the list of products subject to the declaration.

Definitions of Common Cultivar and Common Food Crop

As APHIS seeks to define key terms in the legislation such as “common cultivar” and “common food crop,” such definitions should not depend on the actual end use of a product. In seeking to define what is a food crop it is logical to examine whether the product can be considered food, but it should not be required that a particular import be destined for human consumption. For example, corn can be used as food, or it can be converted into other products such as ethanol. APHIS should seek to exclude all corn imports, regardless of their intended end use. Requiring an end use declaration for such products is costly and unworkable, and is not relevant to the problem of illegal logging.

Conclusion

RILA appreciates this opportunity to provide comments on implementation of the revised Lacey Act provisions. RILA supports appropriate efforts to combat illegal logging that do not hinder legitimate commerce. Please do not hesitate to contact me if you have any questions at (703) 600-2046 or by email at stephanie.lester@rila.org.

Sincerely,

A handwritten signature in black ink that reads "Stephanie Lester". The signature is written in a cursive, flowing style.

Stephanie Lester
Vice President, International Trade