



# RETAIL INDUSTRY LEADERS ASSOCIATION

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June 30, 2020

## Via Online Submission

Mr. Kevin Shea  
Administrator  
Animal and Plant Health Inspection Service  
U.S. Department of Agriculture  
4700 River Road, Unit 60  
Riverdale, Maryland 20737

**Re: Implementation of Revised Lacey Act Provisions (Docket No. APHIS-2008-0119)**

Dear Mr. Shea,

The Retail Industry Leaders Association (RILA) appreciates the opportunity to submit comments concerning the Notice of Proposed Rulemaking (NPRM) for the Implementation of Revised Lacey Act Provisions that was released on March 31, 2020 (Docket No. APHIS-2008-0119). As explained more fully below, we request the Animal and Plant Health Inspection Service (APHIS) clarify that wood pallets, containers, and other packaging material do not require a Lacey Act declaration and extend implementation to no earlier than six months after publication of the Final Rule.

RILA is the trade association of the world's largest, most innovative, and recognizable retail companies and brands. We convene decision-makers, advocate for the industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic U.S. industry by transforming the environment in which retailers operate. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad. RILA's membership includes some of the largest importers in the United States.

I. Clarification for Wood Pallets, Containers, and Other Packaging Material Under HTS 4415

RILA supports APHIS's efforts to combat the illegal trafficking of wildlife, fish, and plant products. We also appreciate APHIS has generally taken a pragmatic and risk-based approach to the phasing in of the 2008 changes to the Lacey Act. This has allowed APHIS to prioritize those products at greater risk for being illegally harvested while also minimizing disruption to legal trade. However, we are concerned with the inclusion of wood pallets, containers, and packaging materials classified under HTS 4415 in Phase VI of the enforcement schedule and request clarification that such products – whether loaded or empty – do not require a Lacey Act declaration.

Similar to other high-volume importers, the retail industry uses these items to transport goods into the United States. While we understand pallets and containers are excluded from the declaration requirement when "used exclusively as packaging material to support, protect, or carry another item, unless the packaging material itself is the item being imported,"<sup>1</sup> it is unclear from the NPRM whether wood pallets, containers, and other packaging materials will continue to be excluded from the declaration requirement if they are used exclusively as packaging material.

There are several gaps in the NPRM. First, while it is clear the Lacey Act exclusion for packaging materials applies to loaded pallets, it is unclear whether APHIS has determined the exclusion also covers empty pallets being repositioned for further use. Empty pallets frequently cross the U.S. borders with Canada and Mexico as importers reposition them to pick up additional loads – but the pallets themselves are not individually traced. Second, wood pallets are typically made from scrap wood containing different types of wood species – including mixed hardwoods or reclaimed wood from other pallets. This makes it challenging to know the origin of the wood species in the pallet at the outset. Together, this would make compliance with a declaration requirement difficult, if not impossible, and would serve as a trade barrier that would impede legal U.S. commerce.

We recognize U.S. Customs and Border Protection (CBP) regulations provide a clear exemption from duties and taxes for "instruments of international traffic" (IIT) – which includes pallets "in use *or to be used* in the shipment of merchandise in international traffic."<sup>2</sup> However, it can be challenging when repositioning empty pallets or containers

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<sup>1</sup> 16 U.S.C. 3372(f)(3).

<sup>2</sup> 19 C.F.R. 10.41a(a) (emphasis added).

for further use to determine whether such items meet IIT criteria. In addition, APHIS and CBP have different statutory authorities that may not always align. We believe this further highlights the need for clear guidance from APHIS on the treatment of these materials for purposes of Lacey Act compliance.

For all of these reasons, we request APHIS clarify in its Final Rule that wood pallets, containers, or other packaging material that cross the U.S. border loaded or empty are excluded from the Lacey Act declaration requirement unless they are being imported into the United States. We believe such an interpretation would provide much-needed clarity to the importing community – particularly given the inclusion of these products in Phase VI. Further, we believe such an interpretation is consistent with the Lacey Act because empty pallets or containers being repositioned to transport goods at a later date do not lose their essential character as "packaging material." Alternatively, we urge APHIS to delay implementation for HTS 4415 products to a later enforcement phase to provide the opportunity for consultations between APHIS and stakeholders to ensure importers are better prepared to comply with the requirements.

## II. Effective Date for Implementation

APHIS proposes the Phase VI enforcement schedule would begin on October 1, 2020 – three months after public comments are due. However, APHIS has committed to a six-month notice period for stakeholders to ensure they are able to comply with additional enforcement schedules under the Lacey Act. Because the Final Rule may contain different products than the NPRM, we request APHIS extend the implementation date for this enforcement schedule to at least six months after issuance of the Final Rule.

Further, on May 19, 2020, President Trump issued Executive Order 13924, "Regulatory Relief to Support Economic Recovery." To encourage job creation and economic recovery for businesses during the COVID-19 outbreak, the President has indicated that federal agencies should "rescind[], modify[], waiv[e], or provid[e] exemptions from regulations and other requirements that may inhibit economic recovery . . . ."<sup>3</sup> With the spirit of this Executive Order in mind, we ask APHIS consider the current global trade climate and the substantial impact of the COVID-19 pandemic on importers. America's retailers are playing a significant role in creating, transporting, supplying, and selling essential products for America's COVID-19 response. Implementing new declaration requirements during the pandemic for products will only serve to divert retailers' attention away from the critical job of ensuring consumers and employees have access to products that keep

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<sup>3</sup> Executive Order 13924, § 1.

them safe and healthy. We believe that extending the implementation date for this enforcement schedule to at least six months after issuance of the Final Rule would be consistent with the President's Executive Order and give importers time to prepare for implementation.

### III. Conclusion

In conclusion, we request APHIS: (1) provide clarification that wood pallets, containers, and other packaging material – whether loaded or empty – do not require a Lacey Act declaration; and (2) extend implementation of the Phase VI enforcement schedule to no earlier than six months after publication of the Final Rule. We believe these actions are consistent with APHIS' statutory obligation to combat the illegal trafficking of wildlife, fish, and plant products into the U.S. while balancing the impact on legitimate trade. We look forward to working with APHIS on its important mission, and we thank you for giving us the opportunity to provide insight on behalf of our membership.

Sincerely,

A handwritten signature in cursive script that reads "Blake Harden".

Blake Harden  
Vice President, International Trade  
Retail Industry Leaders Association