RETAIL INDUSTRY LEADERS ASSOCIATION
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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 Lacey Act Amendments, Docket No. APHIS-2008-0119

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 February 3, 2009. 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.

Phase-In Schedule Should Focus on Solid Wood and Paper Products

As stated in previous RILA comments to APHIS on the Lacey Act amendments, RILA supports a measured phase-in schedule that focuses 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. RILA welcomes the changes in the implementation schedule published on February 3, 2009 to allow six months between phases, and the adoption of a positive list approach to clearly identify those products that are subject to the declaration requirement based on headings or sub-headings in the Harmonized Tariff Schedule (HTS). RILA believes the phase-in should take into consideration an importer's ability to accurately identify a plant or plant product and the country of origin of the plant or plant product.

RILA also welcomes the statement, and agrees that it is appropriate, to require a declaration only for the product being imported and not for sundries that ordinarily accompany the product.

Composite Products

While the phase-in schedule outlined in the February 3, 2009 Federal Register notice is a significant improvement over the previously published schedule, it still includes products for which the traceability of the genus and species of the wood in the product is essentially impossible given the manner in which those products are made. Specifically, composite products such as particle board or medium density fiberboard (MDF) are particularly problematic because they are often made from by-products left over from the manufacture and processing of other wood products. 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. As one retailer put it, these products are the "sausage" of wood products; they are often made from sawdust, scraps, and other remnants and one piece of MDF or particleboard may contain a broad spectrum as to the potential genus, species, and countries of origin.

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 and scraps 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. Due to this

method of production, it is not possible to provide a meaningful declaration for these products. Thus, the Lacey Act declaration phase-in schedule should not include composite products such as MDF or particleboard. Instead, only solid wood products (and paper products) should be included in the declaration phase-in schedule.

The February 3, 2009 Federal Register phase-in schedule includes composite materials under several HTS headings, including HTS 4410, 4411, and all the identified chapter 94 headings. Composite products should not be subject to the declaration requirement and should be deleted from the phase-in schedule.

Pulp and Paper Products

RILA is also aware of similar traceability concerns related to the fiber supply for paper production. Specifically, 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. While the traceability problems for paper do not appear to be as acute as for products such as MDF and fiberboard, they are still a challenge and RILA notes that a study by the American Forest and Paper Association (AF&PA) found that "illegal logging manifests itself much less in the pulp and paper sector than in solid wood products manufacturing." AF&PA estimates that "suspiciously (potentially illegal) procured wood fiber for the pulp and paper industry represents less than 2% of the total fiber consumed globally by the pulp-producing sector." Given the increasing burdens of tracing pulp and paper products, RILA respectfully suggests that APHIS work with stakeholders to narrow the scope and limit the declaration requirement to pulp and paper products that are at risk of illegal activity.

Continue Identifying Products Based on HTS Numbers

The approach by APHIS and U.S. Customs and Border Protection (CBP) to identify products based on specific HTS classifications is welcome and necessary for the orderly implementation of the declaration requirement. Importers must have a clear understanding of what products are or are not subject to the declaration requirement. While this HTS approach is critical, it also raises problems related to HTS categories that contain both solid wood products and composite wood products. For example, HTS Chapters 44 and 94 do not make a distinction based on whether the product is made of solid wood versus MDF/particleboard. Thus, there is no ability to differentiate in this manner. While importers may be able to trace the wood origin of solid wood products in these categories, they will not be able to do so for composite products that are imported under the same HTS numbers. RILA has not yet been able to identify a suggestion to

resolve this problem but stresses the need to ensure that composite wood products be excluded from the declaration requirement.

The Congressionally mandated review could address the question of whether and how composite materials could be subject to the Lacey Act declaration requirement in the future.

Future Phases

RILA recognizes that environmental groups would like to expand the declaration requirement to cover additional wood products, such as all of HTS chapter 94, as well as toys, tools, instruments, works of art, and others. Through experience with pilot projects, retailers have found that wood origin can be traceable for solid wood products, so long as the product isn't too complex and sufficient lead time is provided

Sufficient advanced notice (i.e., one year) for new products is critical so retailers can educate their suppliers and begin to trace the inputs that ultimately become consumer products imported into the United States. For example, as one environmental NGO explained to RILA, it is common for logs to be purchased in May/June (or earlier) to be made into outdoor furniture that is imported by retailers the following spring. If retailers do not have sufficient notice that a declaration will be required for outdoor furniture, they may not know the origin of the logs that have already been purchased.

RILA respectfully suggests that if additional products are to be added to the phase in schedule, they should be subject to notice and comment, and one-year notice should be given to importers before declarations would be required for new products. 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.

RILA also believes that, under the current statutory framework, the potential scope of products that could be subject to the declaration requirement far exceeds those products that are relevant to the problem of illegal logging. The World Trade Organization's (WTO's) 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 Lacey Act Amendments is to put in place a means to control the global problem of illegal logging through enforcement when the product of that illegal activity crosses the U.S. border. To ensure the Lacey Act amendments continue to focus on the problems they were intended to address, RILA believes the declaration requirement should focus on products made from wood and whose essential character is derived from wood.

Declaring Genus and Species

RILA believes that APHIS should recognize the complications involved with a requirement to provide the explicit genus and species for each imported product. There can be multiple species in a genus that cannot be accurately known or distinguished in an efficient or practical manner, sometimes without conducting scientific tests. As an example, according to the USDA's Agricultural Research Service Taxonomy plant database (http://www.ars-grin.gov/cgi-bin/npgs/html/tax_search.pl), there are over 242 species in the oak genus. RILA agrees with the suggestion from Industry Trade Advisory Committee for Forest Products (ITAC-7, the trade advisory committee representing the U.S. forest products industry) that APHIS should consider allowing commonly recognized groupings of species to be used on the Lacey Act declaration form.

As an example, North American lumber grading agencies utilize common nomenclature for species identification, with the grouping of similar species under a common name. For example, "SPF" lumber is a species grouping that comes from Canada, is a common U.S. import, and is a combination of a variety of species of spruce, pine, and fir. SPF lumber even has its own HTS code (440710015) and is terminology that is formally recognized by grading agencies which are responsible for regulating the lumber industry. According to ITAC-7, the exact proportion of species contained in an individual shipment of SPF lumber is not known, as the species are interchangeable for the purpose of construction, which is their major use, and there is no commercial requirement to further distinguish among the species for this purpose. The preeminence of these types of species groups has long been part of U.S. import law.

ITAC-7 also recognizes that many other countries use species groupings in a similar fashion. For example, in Indonesia and Malaysia, it is quite common to reference "MLH," designating mixed light hardwoods. RILA agrees with ITAC-7's suggestion that the declaration requirement to list genus and species should be satisfied with the reference "MLH" instead of identifying all species that could be included (given there are more than 2,000 different species growing in many of these countries). RILA suggests that APHIS work with the forest products industry to assemble a list of common nomenclature groups for which the species that may be included under the grouping designation would be precisely identified by a recognized body with authority to enforce its proper use (such as the American Lumber Standards Committee) and then allow these common nomenclature groupings to be used on the Lacey Act declaration form.

Common Food Crop/Common Cultivar

RILA believes that APHIS should publish a Federal Notice as soon as possible with proposed definitions of the terms "common food crop" and "common cultivar." These terms become relevant as the list of products for which a Lacey Act declaration is required continues to grow, and importers need to have a clear understanding of products that will or will not be covered.

For example, phase IV (beginning April 1, 2010) includes several types of furniture. Such furniture may be made of a solid wood frame (for which the importer would be prepared to provide a declaration) but it may also contain cotton components. Importers should not be forced to guess whether a declaration is required or not. Given the time delay in global supply chains, importers need to know now whether that cotton will require a declaration. In this example, RILA strongly believes that cotton should be considered a common cultivar and exempted from the Lacey Act.

Moreover, RILA believes these terms should be interpreted broadly. For example, "common cultivar" should exempt plant materials that are commonly cultivated in the United States or abroad, and "common food crop" should exempt plant materials that are commonly identified as consumable. As such, RILA suggests that HTS Sections II (Vegetable Products, with the exception of trees)), III (Animal or Vegetable Fats and Oils), and IV (Prepared Foodstuffs, Beverages, Tobacco) should be exempted from the Lacey Act because they are common cultivars or common food crops (regardless of whether the plant material provides the basis of the HTS classification or not).

Moreover, RILA respectfully suggests that products that are extracted from plants without harvesting them should be excluded from the Lacey Act. 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." As examples, RILA suggests that rubber and cork, which are extracted from plants which are not harvested, should be excluded.

RILA recognizes the intent of the Lacey Act is to seek to end illegal logging or harvesting. Thus, RILA believes that if an expansive interpretation is given to the terms "common food crops" or "common cultivars," it would also be appropriate to incorporate an exception (from the exception) for plant products that are "common food crops" or "common cultivars" and that are (1) listed as endangered under section 8204(f)(3) of the Lacey Act or (2) the subject of a clear, demonstrated and publicly documented history of illegal harvesting.

Periodic or Blanket Declarations

Retailers often import the same product repeatedly throughout a calendar year. RILA suggests that APHIS consider how to reduce the number of repeat and identical declaration filings for shipments of plant products that are manufactured from the same genus and species from the same countries. Rather than requiring declarations on an entry-by-entry basis, RILA agrees with the separate but similar suggestions from the Government of Canada and ITAC-7 to consider allowing importers to file a periodic declaration covering products they intend to import during an extended period, such as a calendar or fiscal year.

Such periodic declarations are common, most notably North American Free Trade Agreement (NAFTA) certificates of origin or even under U.S. federal regulation (e.g. Title 19, part 12, sec 12.121(a)(2)(B)(ii)). Importers could include a notation on the entry declaration (Form 7501) that would refer to the periodic declaration on file. The periodic declaration would include a list of the products to be imported, the scientific names of the plants and plant products included in each product, and the countries of origin. The value and quantity of the import would be specified on Form 7501 on an entry-by-entry basis. If an entry contained a product that did not fit under the periodic declaration, the importer would be required to properly declare that shipment with an individual declaration, just like the above NAFTA example.

The adoption of a periodic declaration would limit significantly the increase in shipment costs for importers. By the Government of Canada's estimate, the plant declaration could potentially increase brokers' fees by a scale of 100% to 500% if done on a shipment-by-shipment basis. An entry-by-entry declaration requirement will unnecessarily increase the number of tasks for customs brokers and logistics providers who, in turn, will raise the price to importers for their services. Entry-by-entry declarations will also increase administrative burdens for APHIS and CBP, resulting in higher costs for those agencies. Repeated entry-by-entry declarations are particularly onerous given that much of the required information is already provided on current Customs entry filings.

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,

Stephanie Lester
Vice President, International Trade