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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, 74 Fed. Reg. 45415 (September 2, 2009)

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 September 2, 2009. Illegal logging is a global problem that has serious environmental and economic consequences, and effectively addressing this problem is an important goal that retailers support. Nevertheless, unless thoughtfully implemented, the declaration requirement 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 Lacey declaration requirement.

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) provides the Administration with some 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.

RILA has worked well with other stakeholders, such as importers, environmental non-governmental organizations (NGOs), and domestic producers to find common ground to successfully implement the Lacey declaration requirement. This effort has allowed for consensus in several significant areas, and has resulted in two important documents: (1) October 10, 2008 letter signed by key Congressional leaders to the Administration with Congressional guidance to implement the Lacey Act; and (2) July 17, 2009 consensus statement signed by importers, non-governmental organizations, and domestic producers on Lacey Act clarifications. If there are questions as to whether any aspects of the October 2008 Congressional guidance letter or the July 2009 consensus statement can be legally implemented, RILA respectfully requests that these issues be identified by the Administration as part of the statutorily-mandated review. RILA believes that successful implementation of the Lacey declaration requires that those consensus positions be fully implemented, either through Administrative actions or, if necessary, by Congress with a technical corrections bill.

Phase-In Schedule Should Continue to Be Measured and Reasonable and Focus on Solid Wood Products

RILA welcomes the revised phase-in schedule as published by APHIS. RILA agrees that phases should continue to 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, manageable, and reasonable. Beyond the initial phases, the phase-in schedule should continue to focus on products that are primarily made of solid wood but may require more processing. As consideration is given to add new products to the phase-in schedule, RILA believes two criteria are most relevant—risk of illegal logging, and an importers’ ability to identify the origin of the wood.

RILA believes it is imperative that importers have sufficient advanced notice when new products will be added to the phase-in schedule. The current phase-in schedule only identifies those products that are subject to the Lacey declaration before September 1, 2010, and states that additional products may be added in subsequent phases to begin on or after September 1, 2010. The notice then identifies 11 partial or entire HTS chapters that may be subject to future declaration requirements. These HTS chapters comprise many thousands of different products

that may be derived from plants. RILA respectfully urges APHIS to continue a measured and reasonable phase-in schedule beyond September 1, 2010, and to provide importers with one-year advanced notice with more precise information as to exactly which 4-digit HTS categories will require a Lacey declaration and when. Finally, as recommended by the consensus statement, APHIS should establish a process to review products subject to the declaration requirement in a manner that is transparent, inclusive, well-defined and subject to appropriate timeframes.

Composite Materials

As recognized by the consensus statement, traceability is extremely difficult, if not impossible, for composite wood products such as particle board and fiberboard. Composite wood products are generally made of byproducts such as sawdust, scraps, and other remnants 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. As recommended by the consensus statement, RILA believes Lacey declarations for composite materials should not be mandatory until appropriate administration agencies determine it is feasible and practical to collect the required information.

While most composite materials that had been included in earlier phase-in schedules published by APHIS were removed¹, there are still some products included in the current phases that may be made of composite materials. Some examples of composite products included in the October 1, 2009 phase are picture frames (HTS 4414), and pencil caddies, boxes, desk organizers, and spice racks (HTS 4420). RILA is aware that APHIS has advised importers to write “MDF” (for medium density fiberboard) on declarations for products that are made of composite materials. Since MDF is not a genus and species, RILA requests that the Administration issue formal written guidance to all importers that “composite material” is acceptable to write on Lacey declarations for relevant products or components. Further, as noted in the consensus statement, a clarification that the Lacey Act declaration requirements currently apply only to “solid wood” components of products should be included in the notes of the HTS.

Blanket Declarations

In many instances, retailers may import the same products from the same sources on a regular basis, which, in some cases can total thousands of shipments a year. The identical declarations for these repeat importations add an administrative burden and cost on the agencies, importers,

¹ For example, Harmonized Tariff Schedule of the United States (HTS) 4410 (particleboard) and HTS 4411 (fiberboard) were removed from Phase III in the September 2, 2009 *Federal Register* notice.

and customs brokers in filing and collecting the required import declaration under the Lacey Act without providing additional benefit for tracing the source of wood. RILA welcomes the consensus statement position recommending broader use of blanket declarations for importers. At the same time, RILA members have indicated that quarterly blanket declarations would not be utilized because they are even more burdensome than tracking imports on a shipment by shipment basis; instead an annual blanket declaration should be developed. RILA has sought to work with other stakeholders and Customs and Border Protection (CBP) to determine whether an annual declaration requirement could be crafted to ease the burden on importers and government agencies while satisfying concerns of NGOs

RILA members have made several suggestions on how a voluntary annual blanket declaration (as opposed to the mandatory entry-by-entry declarations) could be successfully implemented. For example, a Lacey blanket declaration could be modeled after the Antidumping Duty (ADD) Non-Reimbursement Statement (NRS) required by CBP and the Department of Commerce. The NRS is established by ADD Case/Vendor and is good for one year. Most customs brokers keep the NRS on file so they can attach them to each entry. More importantly, in the future, the Automated Commercial Environment (ACE) should allow an importer to upload NRSs so CBP can review/pull them directly from ACE. APHIS and CBP should consider whether importers could provide a blanket declaration for each vendor that would be inclusive of all products from that vendor. Thus, anytime a product from that vendor is imported and subject to the Lacey declaration, CBP could review that importer/vendor blanket declaration in ACE. Another suggestion is that a voluntary annual blanket declaration could be crafted in conjunction with the voluntary Importer Self Assessment or Customs-Trade Partnership Against Terrorism programs.

RILA is aware of concerns that the use of blanket declarations may be inconsistent with the statute. If APHIS has this concern, RILA recommends that this issue be included in the review submitted to Congress so that a technical change to the statute can be sought.

Species Groupings

As recognized by the consensus statement, the requirement to declare the specific genus and species can be complicated for some products. There can be multiple species in a genus that currently cannot be practically or accurately known. Meanwhile, identification of the wood to the genus level can often provide sufficient information for purposes of the declaration. RILA encourages APHIS to work in a timely manner with the U.S. Forest Products Laboratory and key stakeholders to develop species groupings to be used on Lacey declarations. Until the date at which these groupings are identified for purposes of the Lacey Act declaration, importers should not be penalized for use of “spp” in legitimate circumstances.

RILA is aware of concerns that a more flexible use of species groupings than was included in the September 2, 2009 *Federal Register* notice may be inconsistent with the statute. If APHIS has this concern, RILA recommends that this issue be included in the review submitted to Congress so that a technical change to the statute can be sought.

Customs Data Line Caps

CBP currently has limits on the number of data lines allowed on entry transmissions. For example, RILA is told that CBP allows only 2,000 data lines of Lacey information per entry transmission, and limits total data lines per entry to 10,000. RILA members expect that they will eventually face a situation where entries will exceed these limits.

The problem with data line caps may not be too far in the future. For example, a solid wood table that is made of "pine" would seem relatively "simple" to declare. But there are over 100 scientific names for plants that are considered "pine" and the table could be made of up to four different genus and species combinations and supplied by five countries of harvest. Thus, the pine table would require 20 data lines plus the header and ingredient level detail, for a total of 28 data lines. This is for one seemingly simple product. A retailers' import entry may contain 200 to 900 different products, many of which could be made of wood and would require a Lacey declaration. If even half of the shipment contains such "simple" wood products as the pine table example, that's 550 products multiplied by 28 data lines for a total of 15,400 data lines. Obviously more "complicated" products that have various wood components (even solid wood components) would require even more data lines.

The problem becomes exponential if/when composite materials are subject to the Lacey declaration requirement. For example, a retailer may have an entry with 300 different products, 280 of which are made of wood and may require a Lacey declaration. A Lacey declaration on a composite material product can easily include 150 data lines *for each product*. The entry transmission in this scenario would contain 42,000 data lines.

As additional HTS numbers are phased-in, the amount of data that CBP and APHIS will have to receive and process will continue to grow. If this problem is not addressed, then importers will be forced to split shipments into multiple entries (and thus the number of entries will increase) or importers will file more paper declarations. Screening will become more difficult because there will be multiple bills and entries associated with a single shipment number or container number. These are not viable solutions to the problem. RILA seeks to work with stakeholders to address the issue of CBP data line caps.

Smooth and Consistent Implementation of Lacey Declaration

Since the Lacey Act amendments were enacted, RILA has advocated for procedures that allow for an efficient and orderly implementation of the Lacey declaration. The capability to electronically file the Lacey declaration is supported by all stakeholders and it critical to ensuring minimal delays (and costs) in the supply chain. However, RILA is aware that there has been inconsistent treatment at the ports regarding the acceptance of electronic Lacey declarations. Specifically, at a few ports, APHIS has requested importers to provide the Plant and Plant Product Declaration Form (PPQ) paper document even though a Lacey declaration had already been submitted electronically to CBP. RILA notes that the [PPQ itself](#) (at the bottom of page 2) contains this note:

“SPECIAL NOTE: IF YOU HAVE FILED A LACEY ACT DECLARATION ELECTRONICALLY THROUGH THE CUSTOMS SYSTEM, THERE IS NO NEED TO FILE A PAPER DECLARATION.”

This inconsistency and insistence on a hard copy PPQ causes additional costs and delays. In the instances where APHIS has required a hard copy PPQ, the importers’ entries were held until the PPQ document was manually submitted to APHIS via fax. Only then was the entry released. While these instances have been limited, they have resulted in supply chain delays and increased workload for both the importer and APHIS. RILA urges APHIS to work with CBP to: (1) ensure that CBP turns over Lacey declarations to APHIS in a timely manner to avoid supply chain delays, (2) to educate ports on the Lacey declaration to ensure consistent treatment at all ports, (3) to encourage more electronic filings, and (4) take all measures to minimize any delays caused by the Lacey declaration requirement.

Date of Manufacture

Before the Lacey Act amendments were enacted, manufacturers were not required to collect information from their suppliers on the genus, species, country of origin, value and quantity of the plant material. As the consensus statement recognized, for many reasons, it is not consistently possible for importers to retroactively determine the genus and species of wood used in goods that were produced before the Lacey Act amendments were enacted. Thus, as recommended by the consensus statement, the Lacey Act amendments should be prospective only, and should not apply to any parts, components, or final products that were manufactured before the Lacey Act amendments were enacted. The date of manufacture for such products should be the date of final assembly or process of the imported product.

Recycled wood products

The Lacey Act declaration requirement allows flexibility to declare the percentage of recycled paper content, but it does not allow the same flexibility for recycled wood content. As recognized by the consensus statement, it is very difficult if not impossible to trace the genus and species of wood used in many recycled products. In amending the Lacey Act, Congress did not intend to discourage efficient use of wood fiber. Use of recycled wood materials during the manufacturing process supports efficiency in the same way as using recycled paper and paperboard. Thus, as recommended in the consensus statement, RILA supports treating content composed of recycled or recovered *wood* products in the same manner as recycled or recovered *paper* products.

RILA is aware of concerns that treating recycled wood products in this manner may be inconsistent with the statute. If APHIS has this concern, RILA recommends that this issue be included in the review submitted to Congress so that a technical change to the statute can be sought.

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 be excluded from the declaration requirement.

The regulations and implementation plan should make the *de minimis* and essential character concepts clear during each implementation phase and importers should not be forced to guess whether a declaration is required or not. RILA is aware of concerns that a *de minimis* standard may be inconsistent with the statute. If APHIS has this concern, RILA recommends that this issue be included in the review submitted to Congress so that a technical change to the statute can be sought.

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 at 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 part of the statutory review, APHIS should exclude from the declaration requirement the broad product categories identified in the October 2008 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, ceramics, and glassware.

As part of the statutory review, APHIS should also 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.

Definitions of Common Cultivar and Common Food Crop

Section 7(c) of the Lacey Act, as amended, states “[t]he Secretary of Agriculture and the Secretary of the Interior, after consultation with the appropriate agencies, shall jointly promulgate regulations to define the terms [common food crop and common cultivar].” Importers have repeatedly signaled the importance of defining these terms in a timely manner. The October 2008 Congressional letter urged the Administration to “initiate the notice and comment process pertaining to these definitions as soon as possible.” A year and a half has passed since the Lacey Act amendments were enacted, yet importers have been given no indication of how the Administration intends to define these key terms. RILA reiterates our request that the Administration accelerate its process to issue proposed definitions and ensure that such *Federal Register* is issued before the end of the year.

Further, 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 Lacey Act amendments. RILA supports efforts to combat illegal logging and believes that goal can be achieved without hindering 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 cursive script that reads "Stephanie Lester". The signature is written in black ink and includes a horizontal line at the end.

Stephanie Lester
Vice President, International Trade