Lacey Act Implementing Industry Coalition

September 7, 2018

Mr. Kevin Shea
Administrator
Animal and Plant Health Inspection Service (APHIS)
U.S. Department of Agriculture
4700 River Road Unit 60
Riverdale, MD 20737-1231

RE: **Lacey Act Implementing Industry Coalition Comments --**
Proposed Rule: Lacey Act Implementation Plan: De Minimis Exception [Docket No. APHIS-2013-0055; 83 Fed. Reg. 31,697 (July 9, 2018)

Advanced Notice of Proposed Rulemaking: Lacey Act Implementation Plan: Composite Plant Materials APHIS-2018-0017; 83 Fed. Reg. 31,802 (July 9, 2018)

Dear Mr. Shea,

The undersigned organizations representing U.S. manufacturers, importers, wholesalers, distributors, retailers, supply chain stakeholders and trade facilitators who represent implementing industries for the U.S. Lacey Act (16 U.S.C. 3371 *et seq.*). We are writing to share our comments in response to the Animal and Plant Health Inspection Service (APHIS) proposed rule to amend the U.S. Lacey Act regulations at 7 C.F.R. Part 357 related to the Food, Conservation and Energy Act (FCEA) of 2008 amendments and advanced notice of proposed rulemaking. Our members are currently partnering with APHIS to ensure the effective implementation of the Act and would be directly impacted by these proposals.

We continue to support the principles regarding the implementation of the import declaration requirement included in the 2008 Lacey Act amendments (Section 8204 of the Food, Conservation, and Energy Act of 2009, P.L. 110-246) outlined in the letter APHIS received from Members of Congress dated October 10, 2008. As this letter states, these amendments had "the aim of preventing the trade of illegally harvested plants and plant products without disrupting legitimate commerce." In addition, the 2008 amendments provide the implementing agencies with adequate discretion to implement the amendments in a "commonsense practical manner." We appreciate the efforts that APHIS and the other agency partners have made to ensure the declaration requirement was phased in an orderly manner.

We also note that Executive Order (E.O.) 13771 was issued by President Donald J. Trump in 2017. It directs all agencies to repeal at least two existing regulations for each new regulation issued in

FY 2017 and thereafter. It further directs agencies that the "total incremental costs of all regulations should be no greater than zero" in FY 2017. While this proposed rule and advanced notice of rulemaking put forward by APHIS *appear* in many ways to provide for a reduction in regulation in some instances these changes will in fact increase regulation and provide for greater uncertainty for the regulated industry. For these reasons, we recommend a number of changes that would address these concerns while remaining consistent with the Lacey Act (16 U.S.C. 227 *et. seq*.).

I. APHIS Proposes a New Definition of Import that Unnecessarily Increases Regulatory Burdens

APHIS proposes to add a new definition of "import" into 7 C.F.R. Part 357. The term "import" under the proposal would be defined as -- "To land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing or introduction constituted an importation within the meaning of the customs laws of the United States." The proposed new definition goes beyond Congress's intended scope for the 2008 amendments and would unnecessarily increase the burden on importers and enforcement agencies.

The 2008 amendments to the Act did not define the term import.[1] However, the October 10, 2008 Member of Congress letter did include this language:

> "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 the entries such as informal entries, personal importations, mail (unless subject to formal entry), transportation and exportation (T&E) entries, in transit (IT) 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."

In addition, a Second Consensus Statement of Importers, Non-Governmental Organizations, and Domestic Producers on Lacey Act Clarification included this statement regarding application of the declaration to formal consumption entries:

[1] Note that while the underlying statute, 16 U.S.C. 3371 had an existing definition of import, Congress clearly intended for APHIS to limit the scope of the applicability of the declaration based on its contemporaneous comments, which APHIS acted upon in subsequent guidance. In addition, Congress expressly provided the authority in its 2008 amendments to limit the scope of the declaration requirement in 16 U.S.C. 3372(f)(6). Thus, APHIS can have a revised import definition that only applies to the declaration requirement.

> "There is a broad agreement that the Lacey Act declaration ought to apply exclusively to formal consumption entries (including withdrawals from warehouse for consumption). A consumption entry is the customs documentation required in the import process for goods that will enter U.S. commerce.
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> The October 10, 2008 congressional letter to APHIS stated that the Lacey Act declaration "is intended for formal, consumption entries." In its February 3, 2009 Federal Register notice, APHIS announced that "*at present*, we will be enforcing the declaration requirement only as to formal consumption entries (i.e., most commercial shipments)." [Emphasis added] We support this interpretation on a permanent basis."

This new proposed definition included in the proposed rule is extremely broad and appears to repeal existing APHIS guidance that limited the declaration requirement to formal entries. *See* APHIS Lacey Act Q&A #13 ("At this time we are not requiring a declaration for informal entries (i.e., most personal shipments), personal importations, or mail, transportation and exportation entries, in-transit movements, carnet importations (i.e., merchandise or equipment that will be re-exported within a year), and for bonded warehouse entries unless leaving these areas and entering U.S. commerce as formal entries" except for foreign trade zones); *See also* APHIS Lacey Act Q&A #33 ("Only musical instruments being commercially imported as a Formal consumption Entry would require a declaration.").

APHIS also noted the burden of imposing the Lacey Act declaration to individuals transiting with their musical instruments in its May 2013 Report to *Congress with Respect to the Implementation of the 2008 Amendments to the Lacey Act*.

Including this overly broad definition of import would result in a significant increase in the application of the Lacey Act declaration requirement that has not been adequately explained or assessed in the cost / benefit analysis. This expanded definition would impose new obligations on unsuspecting private citizens at ports of entries who are unlikely to have the information necessary to file such a declaration. In addition, such a new requirement would divert and drain limited government resources from more pressing border enforcement concerns. Congress expressly provided the authority in its 2008 amendments to limit the scope of the Lacey Act declaration requirement in 16 U.S.C. 3372(f)(6). APHIS should maintain, for declaration purposes, the import definition from its long-standing guidance and practice that is consistent with Congressional intent.

Recommendation: Remove the proposed definition of import and replace it with clear direction that the declaration requirement only applies to formal entries of goods in the "customs territory of the United States" as defined in General Note 2 of the Harmonized Schedule of the United States (i.e., the States, the District of Columbia and Puerto Rico) that is consistent with the current

APHIS Guidance. The processes of CBP and APHIS need to be seamless to foster importer compliance so that the closing (deadline) of an entry for both agencies.

II. New Proposed Section 357.3 and 357.4 Declaration Requirement Regulatory Text Excludes Key Information and Processes for the Regulated Community

APHIS proposes to add a new section 357.3 "Declaration Requirement" to specify the conditions under which a plant import declaration must be filed and what information it must include. APHIS explains that these conditions reflect the provisions of the Act and would provide additional context for the proposed exceptions. APHIS also proposes to add a new section 375.4 "Exceptions from the declaration requirement" that includes exceptions for packaging material, a de minimis exception, and non-applicability for the exception for endangered plants under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Endangered Species Act of 1973 and State conservation laws.

APHIS notes in its discussion of the proposed rule that the declaration requirements are "being phased in" and that the phase-in schedule is largely based on the degree of processing and complexity of composition of the affected products. APHIS explains in its proposal that there is an enforcement schedule and that currently the HTS Chapters 44, 66, 82, 92, 93, 94, 95, 96, and 97 are being enforced. As currently proposed, the regulations create confusion regarding the process for phasing in new HTS codes, the process for public input and the timing of the phase in period.

This issue was also addressed in the letter APHIS received from Members of Congress dated October 10, 2008 supporting the phased-in approach and that a "phase-in schedule should be developed taking into consideration risk and an importer's ability to accurately identify a plant or plant product and the country of origin of the plant or plant product, as required by the declaration" and that a "[p]hased-in enforcement would also provide the importer community with time to set up the businesses processes necessary to obtain the required declaration information."

However, the <u>proposed rule does not provide a listing of the current enforcement schedule or even reference that such a schedule exists</u>. In addition, there is <u>no process provided for adding new HTS codes</u> other than the statement that APHIS is currently considering products for the next phase of implementation. It is unclear why APHIS did not take this opportunity to include the enforcement schedule and note a process for amending the schedule in the future. Failure to include this information in the Code of Federal Regulations makes determining its applicability difficult and raises concerns about the status of this enforcement schedule. In addition, we would encourage APHIS to provide ample time and a clear process for any new phased-in HTS Chapters

as more complex products will require more lead time to implement and will impose additional costs on the importer to collect the information required in the declaration.

Recommendation: Section 357.3 should list the current enforcement schedule in the text of the proposed regulation or reference the existence of a separate enforcement schedule in another section of the Code of Federal Regulations. In addition, section 357.4 should have an express exception for any product not listed on the enforcement schedule. Additions to the enforcement schedule should be noticed to the public and subjected to a cost / benefit and small entity impact analysis, and be counted as a new regulatory burden. Also, the final rule should include explicit provisions providing ample lead time for implementation by the regulated industry based on the complexity of the supply chain for the product but no less than 1 year.

The proposed new section 357.3 also includes language from 16 U.S.C. 3372(f) that allows for the inclusion of multiple possible plant species and multiple possible plant country of harvest information in the declaration. This is an important and welcome addition, because many tree species differ only in their non-marketable qualities (flower type, leaf shape etc.) and often multiple species grow adjacent to each other making it quite possible for there to be a variety of species in a single wood product as these logs are sorted and sold together. For example, there are 23 species of Hickory/Pecan[2] identified in the state of Tennessee alone and so it is possible that when U.S. Hickory logs are transformed into wood products in the U.S. or abroad any one of those species might be in the final product.[3]

Importers, reporting this information in the declaration would report the possible species and the possible countries of harvest. It is important to recognize that reasonable due care will often result in there being multiple possible species listings in one declaration. Currently, the declaration is resulting in a skewing of the volume figures as importers are taking different approaches to this dilemma some splitting the volume among possible species, others in an abundance of caution reporting the maximum volume possible for each species. None of these approaches provide a clear way to address multiple species and multiple possible plant country of harvest data. This inconsistency is making the data less useful to APHIS and other agency partners.

Recommendation: The declaration reporting systems should allow for individual quantity and value entries to reflect all the possible species / country of harvest combinations in a clear manner. Such an entry system would provide some regulatory relief and burden reduction for importers as it would no longer require a value or quantity to be averaged or repeated for each

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[2] *See* Identifying Hickory and Walnut Trees in Tennessee Using BRFs (Brief Recognizable Features) https://extension.tennessee.edu/publications/Documents/PB1810.pdf

[3] The American Export Council explains on its website: "American pecan and hickory are different species of a very diverse group, but in the round (log) they are virtually indistinguishable from each other and therefore often processed by saw mills and sold mixed together. Latin Name: *Carya spp*." *See* https://www.americanhardwood.org/en/american-hardwood/american-pecan

possible species or country (as is current practice). By making this change to the online declaration systems, the value and quantity field data will be much more reliable, and it will allow for importers to accurately reflect what is known about the shipment. This change would also make the online systems consistent with the statute and the proposed new section 357.3. Below is an example of how an entry would be made using this reporting process.

HTSUS #	**Entered Value**	**Article / Component of Article**	**Plant Scientific Name (Genus / Species)**	**Country of Harvest**	**Quantity of material**
12345	$100.00	Flooring (solid)	*Carya illinoinensis; or* *Carya cordiformis; or….*	USA	100 square feet

III. Exceptions from the Declaration Requirement for Packaging Material are Consistent with Current Guidance

The proposed rule includes exceptions from the declaration requirement in a new section 357.4. The first exception is for packaging material. We support this exception being included in the regulation as it is consistent with current guidance and the Second Consensus statement. APHIS noted this in is FAQ #14 "For the purposes of the Lacey Act declaration requirement, packaging material is defined as any material used to support, protect, or carry another item. This includes, but is not limited to, items such as: wood crating, wood pallets, cardboard boxes, packing paper used as cushioning, etc. Packaging material is exempt from the Lacey Act's declaration requirement unless the packing material itself is the item being imported or it is used for some other purpose than supporting, protecting or carrying another item."

Recommendation: Retain this exception and make clear that this is intended to be the same as the current guidance as noted in APHIS FAQ #14.

IV. The Proposed De Minimis Exceptions Must Reflect Current Business Calculations to be Useful

APHIS proposes a number of options for including a de minimis exception for the declaration requirement. It is unclear the rationale for the proposed thresholds and we do not have any data at this point to determine if these are reasonable targets. However, we appreciate the consideration of a de minimis exception.

We support providing multiple options to importers to determine if their product meets the threshold requirement (weight and value). The two-step approach as included in the proposed

rule increases costs without any real benefit. This approach only allows importers to choose the second method of calculation if the first method cannot be calculated. Instead, we propose providing importers complete discretion to choose whichever option that makes most sense for their business operations. With regards to the proposed methods for determining if the product meets the de minimis threshold, we support total weight per individual product unit as one acceptable option. However, for the value option, it is unclear how such a calculation would be made as the value of the imported item is known, but the value of the plant product prior to its incorporation into a final product may not be known. In fact, in some situations it may be impossible for the importer to get the information on the value of the plant product prior to its incorporation into a final product. This is especially the case for complex goods with many component parts. The value information regarding the plant product may be several tiers removed from the final product manufacturer. A simple percentage of the import value may make this more workable. We also support providing a safe harbor for making this calculation on representative samples so that an importer could use that analysis on multiple entries eliminating the need for complex calculations on each and every entry.

Recommendation: Provide importers complete discretion to choose between two alternative methods to qualify for the de minimis exception quantity and value, but simplify the calculation of value so that it will be based on the import value. We further recommend allowing for representative samples to provide justification for exceptions to provide real regulatory relief. We also support a 10% threshold for value and the proposed 2.9 kilograms for weight.

V. Time Limit for Plant Declarations Imposes a Significant Regulatory Burden and Does not Allow for Administrative Corrections

In its proposed rule, APHIS proposes to establish a new time limit for the submission of the plant declarations: "in the case of commodities for which a plant declaration is required, the declaration must be submitted within 3 business days of importation." Currently, there is no express time deadline in the Code of Federal Regulations for filing a declaration, except a requirement that it be done upon importation. APHIS noted that "[w]hile the majority of importers submit their Lacey Act declarations at the time of formal customs entry, there has been some confusion about the time frame in which declarations should be submitted, with some importers submitting declarations up to a year after importation." Currently in formal entries a filer can use one of four disclaimer codes: A) Not Regulated; B) Not Required; C) Filed Through Other System; or D) Filed Through Paper Submission. APHIS notes without citation to any supporting data that requiring a declaration within 3 business days of a product landing in the U.S. jurisdiction would have little impact on importers.

This is a significant change of current procedure and we do not understand how APHIS concluded that it would have no impact. As APHIS noted, many importers are filing their declarations using

the ACE system, which means importers are communicating with their customs brokers on this data element as well as others data elements in entries. The Lacey Act declaration requires specialized knowledge to ensure it is completed correctly. Many importers use a variety of data quality procedures including periodic internal audits to ensure that the information provided to their agents is correct and to ensure correct information was ultimately transmitted (either on paper, ACE or LAWGS) by their agents. Latin species names are often misspelled, misunderstood and may be inadvertently omitted. It is critical that enough time be provided to conduct these quality control procedures and to provide for administrative corrections. Importers need a minimum of 90 days to file original import declarations and also need additional time to make administrative corrections on filed declarations (up to one-year post entry or as long as the entry remains open, just as importers are allowed to do with other information provided in an entry).

Recommendation: Strike the burdensome 3-day requirement for declaration filing and replace it with a 90-day from importation requirement for filing an original declaration while adding new language to allow for administrative corrections on filed declarations for up to one-year post entry or as long as the entry remains open. We also recommend that APHIS consider using a post-entry correction process to provide importers with an opportunity to reconcile and correct any declarations.

VI. Advance Notice of Proposed Rulemaking on Composite Plant Materials

In addition to its proposed rule, APHIS also published an advanced notice of proposed rulemaking (ANPR) for Composite Plant Materials.

Composite wood materials enable the use of leftover fiber from saw mill operations and the use of small otherwise unmerchantable branches to be turned into useful products. The ANPRM asks a number of questions about the feasibility of addressing an exception for composite wood products. It also asks what impact any proposed approach would have on U.S. manufacturers who export finished products to Europe and other market nations that may require their traders to authenticate the source of wood and wood products. For the reasons outlined below, we strongly urge that APHIS not make any changes to the requirements for composite wood and products.

Excluding composite materials from the declaration requirement was a subject of discussion in the two Consensus statements. APHIS was requested to exclude composite materials from inclusion in the declaration requirement and should consider in the future inclusions in light of a various factors including: “advances in the feasibility and practicality of collecting the required information.”

It should be noted that any change by APHIS requirements for composite wood materials and products would be an increase in regulatory burden as currently Composite Wood Products are an approved Special Use Designation and therefore not required to submit detailed genus and species information on the declaration requirement.[4] APHIS has noted in its 2012 in its Special Use Designation guidance that "by using the Special Use Designation, the importer is representing that it is not possible through the exercise of due care to determine the genus, species, and/or country of harvest of such materials. If a product is not composed entirely of composite, recycled, reused and/or reclaimed materials, the importer must indicate the genus, species and country of harvest for all other product components." APHIS now proposes to require genus and species identification for composite wood products, however it is unclear what additional benefit will be derived from such action. What is clear is that both US producers and foreign producers of composite wood products will face a significant increase in costs for implementing new tracking and compliance programs to meet this new regulatory burden.

This Special Use Designation was provided by APHIS due to the large volume of fiber that is processed in facilities making composite wood products. Much of this fiber is secondary to another operation. In some cases, the wood shavings will be trucked from a nearby facility. In other cases, branches and small non-merchantable wood products collected from multiple logging operations will be used. In all cases, this recycled fiber is collected in staging areas prior to inclusion in large processing facilities where the product is broken down and then reconstituted. Large volumes of fiber are needed. The costs of tracking species through this reclamation and manufacturing process would be substantial and would far outweigh any potential benefit. The current process encourages responsible sourcing and manufacturing practices by ensuring that wood shavings and non-merchantable wood products can be used and incorporated into useable finished products and not sent to a landfill as waste. To the extent that U.S. Lacey Act tracking and reporting burdens prove too costly for manufacturers, these sustainable sourcing best practices could be undermined. Another unintended consequence could be that consumers will have less choice in products as some foreign suppliers may choose to not to sell to the U.S. market and take on new costly burdensome Lacey Act requirements. Finally, we also note that such a tracking requirement would be onerous for U.S. manufacturers of composite woods products if such a requirement was imposed on U.S. exports by our trading partners.

A better approach to species identification and declaration is the current process of manufacturers and importers conducting reasonable due care in the selection of fiber sources to ensure that no protected species are included and the plant sources are of legal origin. This balances the desire

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[4]APHIS has compiled the following chart of Special Use Designations (SUD's) to address certain special cases. Use of these Designations may help simplify the reporting process for plant products that are difficult or impossible to identify to the species level or as noted under Other Special Cases. Use of the Special Use Designations is dependent on the exercise of due care. Instructions governing the use of these Designations can be found at: http://www.aphis.usda.gov/plant_health/lacey_act/downloads/lacey-act-SUD.pdf

to encourage full utilization of fiber including recycled fiber with the need to support legal timber trade**.**

Recommendation: We recommend that APHIS maintain the current exception for Composite Plant Materials that acknowledges the need to conduct reasonable due care on fiber sources without mandating the tracking and reporting of genus and species information through the manufacturing process. Such an approach recognizes current technology, supports sustainable business practices and balances the benefits and costs with enforcement capability.

VII. Conclusion

Thank you for the opportunity to provide comments on the Proposed Rule and Advanced Notice of Proposed Rulemaking. We have provided comments and also proposed additional regulatory language to address issues not addressed by either proposal. We look forward to working with APHIS to ensure that the implementing industry is able to fully comply with the mandates of the 2008 amendments to the Lacey Act.

Please do not hesitate to contact Joe O'Donnell, Director of Government and Public Affairs for the International Wood Products Association by phone at (703) 820-6696 or by e-mail at Joe@IWPAwood.org for any addition information or to answer questions.

Respectfully submitted,

American Association of Exporters and Importers
American Home Furnishings Alliance
Express Association of America
International Wood Products Association
National Association of Music Merchants
National Retail Federation
Retail Industry Leaders Association