



April 6, 2009

Docket No. APHIS-2008-0119
Regulatory Analysis and Development
PPD, APHIS, Station 3A-03.8
4700 River Road Unit 118
Riverdale, MD 20727-1238

Re: Docket No. APHIS-2008-0119 – Implementation of Revised Lacey Act Provisions

On behalf of its members in the U.S. retail industry, the National Retail Federation (NRF) submits these comments in response to request for public views on implementation of the revised Lacey Act provisions published by the U.S. Department of Agriculture, Animal Plant Health Inspection Service (APHIS) in the *Federal Register* (74 Fed. Reg. 5911) on February 3, 2009.

As a preliminary matter, NRF wished to refer APHIS to its comments submitted on December 8, 2008, which provides our views on many still-outstanding implementation issues.

1. Revised Phase-In Schedule

With respect to the revised phase-in schedule for the import declaration requirement, NRF supports the agency's decision to extend the length of each implementation phase from 3 to 6 months, and to provide an affirmative list of products that fall within each phase. We believe it appropriate to consider the degree of processing and complexity of composition as a basis for placing products in later phase-in periods.

However, we still have no indication as to the treatment of products beyond those listed in the phase-in periods. We understand that APHIS needs time to assess how the process is working during the phase-in period, before it makes further decisions on how to proceed with products under other tariff chapters. Nonetheless, companies need some predictability in planning their business operations, and need to know what their obligations as soon as is feasible under the circumstances.

2. Exemptions from the Declaration Requirement

We strongly support the decision by APHIS not to enforce the declaration requirement with respect to sundries that normally accompany a product, such as tags, labels, manuals, warranty cards, etc, and with respect to all informal entries, examples of which are listed in the February 3 *Federal Register* notice. We would also urge a clarification that items exempt as packaging material include those that “contain” another item.

Second, retailers have reported that products made from composite materials, may contain trace amounts of other plants that are of such small quantity and rendered into a state, as to be impossible to identify. Therefore, we strongly urge the adoption of a *de minimis* rule under which plants, other than hard wood components or inputs, comprising less than 5 percent of the imported product by volume or weight, would be exempt from the declaration requirement. Adoption of this rule would ensure that the import declaration captures the vast majority of plant material contained in a product while avoiding creating loopholes that would allow certain items, like exotic inlays, to be exempt.

Third, we believe that certain other products should be exempt from the declaration requirement because including them would not contribute to the objectives of the Lacey Act – *i.e.*, improved enforcement and compliance with foreign laws on illegal harvesting of wood and plants, would add little or no useful information to the agencies and stakeholders, and compliance in providing the information required in the declaration would be extraordinarily burdensome, if not impossible. These products would include plants where the genus, species or country of harvest cannot be determined, such as:

- Products sold in a secondary market (e.g., antiques, used or recycled products);
- Products made from plant cellulosic material, dissolving pulp, or resins;
- Products made from chemically-reacted plant products; and
- Products made from driftwood and composite materials made from saw dust, wood particles, wood shavings, sweepings, or other scrap wood. Such composite materials should also be considered “recycled” products.

Factors in considering that the genus, species of a plant, or country from which it was harvested cannot be determined ought to include:

- The number of intermediate manufacturing processes;
- The rendering of a plant into a state that makes it virtually impossible or prohibitively difficult or expensive to determine its genus, species and country of harvest;

- The number of manufacturers and countries involved in processing a plant into a finished product;
- The length of time between manufacture and importation; and
- Whether the provenance of a product is unknown, because, for example, it is purchased or imported as previously used or otherwise sold in a secondary market.

Finally, we believe that plants incorporated into products classified under subchapters I – XVII of Chapter 98 of the Harmonized Tariff Schedule of the United States should be exempt from the declaration requirement. These products include many unique circumstances in which it makes no sense to impose a declaration requirement, for example diplomatic imports and U.S. origin goods that are re-imported.

3. Definitions of “Common Cultivars” and “Common Food Crops”

As NRF discussed in the comments submitted on December 8, 2008, we urge APHIS to adopt broad definitions of the terms “common cultivar” and “common food crop” to cover domesticated plants grown and food crops and products thereof cultivated for both human and animal use and consumption. In those comments we listed plants that we believe fall under those definitions.

Given the this extensive list, we recommend exempting all products listed under HTSUS Chapters 7-13 and 17-23, unless there is a clear history and pattern of illegal harvesting and trade, such is the case with plants like ginseng, or in the case of plants listed as threatened or endangered under federal, state, or international law. In addition, other plants, such as tobacco, cotton, and flax, that do not fall under those chapters, should also be exempt.

4. Blanket Declarations

NRF endorses the proposal by the Government of Canada, to allow importers to file a blanket declaration under the Lacey Act in those instances where they import the same fungible products from the same sources on a regular basis. In some cases, these imports can total thousands of shipments a year. Specifically, importers should be allowed to file a blanket declaration at the beginning of the calendar year, or the start of its fiscal year, that will cover multiple shipments entered at various times over the course of the subsequent year, provided that in each shipment the plant product remains the same and that the plant product was taken from the same country or countries listed on the blanket declaration. Plant products should be considered the same if they fall under the same six digit classification under the Harmonized Tariff Schedule of the United States.

Once a blanket declaration has been filed, the importer should then be allowed to submit a notation on the entry declaration that refers to the blanket declaration on file with the agency. However, the importer would be required to file a separate individual declaration for entries of any plant product contained in a shipment that is not covered in the blanket declaration, either because it is a product different than that listed on the blanket declaration or it is a plant product taken from a country different than that listed on the blanket declaration.

A blanket declaration will still provide identical and equally useful information to the agencies and stakeholders as declarations submitted on an individual shipment basis. However, use of blanket declarations would substantially reduce the burden and cost of enforcement by the agencies and compliance by importers, and is consistent with similar systems used for imports under the North America Free Trade Agreement (NAFTA) and with textile declarations.

5. Conditional Release

It is NRF's position that the filing of an import declaration should not impact the admissibility of a product. As is consistent with other entry documents, imported products subject to the declaration requirement should be afforded conditional release pending the filing of the declaration by the importer, provided sufficient bond is posted. Allowing conditional release will assure that supply chains can continue to move with a minimum of disruption, while the filing of a bond by the importer providing for the payment of liquidated damages upon default will help ensure full compliance with the law.

6. Declaration Requirements

In the absence of a *de minimis* provision, the essential-character of the product being imported, as defined by its classification under the Harmonized Tariff Schedule of the United States, should determine whether the product is subject to the declaration requirement under the Lacey Act.

NRF supports the clarification that the elements in the declaration for value and quantity refer to the value and quantity of the product presented for importation, not the plant or plant product portion of the product. We also recommend the acceptance of electronic signatures for electronically-filed declarations.

7. Confidentiality

Some of the information submitted as part of the import declaration under the Lacey Act may contain business proprietary information. Therefore, such

information be afforded the same confidentiality that is currently provided for information submitted on entry documents to CBP.

8. Due Care

Currently, what constitutes the standard of due care is a fact-specific determination by the Department of Justice, based on that level of care that a reasonably-prudent person would exercise under the circumstances. At a minimum, we would urge the inter-agency group to develop of list of actions that an importer could take that would be considered in answering the question whether due care was exercised. Generally speaking, the focus of Lacey Act enforcement with respect to the standard of due care should be less prescriptive, threatening sanctions for failure to comply (with thousands of foreign criminal and civil laws and regulations), and more, as is the case in the European Union, on ensuring that a system is in place to minimize the risk of introducing illegally-harvested wood and plant material into the market.

9. Collection of Data Through an Electronic Interface

Finally, although CBP is modifying its Automated Commercial System (ACS) to collect data contained in declarations filed by importers, NRF urges that the electronic data interface be shifted to the newer Automated Commercial Environment (ACE) system as expeditiously as possible.

The **National Retail Federation** is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 25 million employees - about one in five American workers - and 2007 sales of \$4.5 trillion. As the industry umbrella group, NRF also represents over 100 state, national and international retail associations.

Please direct any questions or comments to me at (202) 626-8104 or by email at autore@nrf.com.

Sincerely,



Erik O. Autor
Vice President, Int'l Trade Counsel
National Retail Federation