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Customs Enforcement of New Compliance Mandates

Other Laws Regulating Imports

Importer Responsibilities under the 2008 Lacey Act Farm Bill Amendment

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**Importer Responsibilities under the 2008 Farm
Bill Amendment to the Lacey Act**

The Lacey Act combats trafficking in “illegal” wildlife, fish, and plants (including trees).¹ The 2008 Farm Bill² (The Food, Conservation, and Energy Act of 2008) amended the Lacey Act by expanding its protections to include a broader range of plants and plant products. The Lacey Act now, among other things, makes it unlawful to import plants and plant products without an import declaration when one is otherwise required.³ Products that require an import declaration under the Lacey Act include certain plant materials, lumber, wood pulp, paper and paperboard, and products containing plant material or products, which may include certain furniture, tools, umbrellas, sporting goods, printed matter, musical instruments, and products manufactured from plant-based resins, and textiles.⁴

This article is intended to assist importers (and their legal counsel) who may not be familiar with the Lacey Act and the 2008 Farm Bill Amendment to better understand their responsibilities under the Act as it applies to the importation of plants, wood, and plant and wood products.

I. Responsible Agencies: The USDA and APHIS

The Department of Agriculture’s Animal and Plant Health Inspection Service (or “APHIS”) serves to facilitate and regulate the import and export of animals, plants,

¹ See [16 U.S.C. §§ 3371-3378](#)

² Section 8204 (Prevention of Illegal Logging Practices) of the Food, Conservation, and Energy Act of 2008, effective May 22, 2008. Public law 110-246; 122 Stat. 1651; 2008.

³ 16 USC § 3371(f)(2).

⁴ Notice and request for Comments; Animal and Plant Health Inspection Service, USDA, dated October 8, 2008. 73 Fed. Reg. 58925.

animal and plant products, as well as genetic engineered (GE) modified living organisms.⁵ APHIS has been designated the lead regulatory agency for the new Lacey Act amendments and U.S. Customs and Border Protection⁶ is assisting APHIS with the electronic collection of data to fulfill the import declaration requirement.⁷

APHIS is not only responsible for enforcing state and federal law regulations specific to the import and export of plants, but also the import and export of plants regulated by CITES⁸ and the Endangered Species Act (ESA). Importation of plant, animal and animal products that are listed on CITES or the ESA are regulated by U.S. Fish & Wildlife.⁹ In most cases, anyone importing or exporting wildlife or wildlife products must file a U.S. Fish & Wildlife Service Form 3-177 (Declaration for Importation or Exportation of Fish and Wildlife). Any wildlife imported from a country regulating its taking, possession, transportation, exportation, or sale has to be accompanied by documents showing compliance with all of that country's laws. This

⁵ See <http://www.aphis.usda.gov/biotechnology/index.shtml>

⁶ The Department of Homeland Security was created and the border enforcement functions of the INS, the U.S. Customs Service, and the Animal and Plant Health Inspection Service were consolidated into a new agency under DHS: Effective March 1, 2003. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1502, 116 Stat. 2135, 2308 (2002); Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108-32, at 4 (2003). The Bureau of Customs and Border Protection was renamed United States Customs and Border Protection, effective March 31, 2007. 72 Fed Reg. 20131 (Apr 23, 2007).

⁷ CBP website: www.cbp.gov, Trade Programs; Entry; Guidance on Lacey Act declarations.

⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) CITES is a comprehensive conservation treaty signed by more than 150 countries, including the United States. This international agreement regulates the commercial trade of endangered species and monitors the trade of species that are at risk of becoming endangered. See http://www.aphis.usda.gov/publications/plant_health/content/printable_version/fs_cites3-06.pdf

⁹ See 19 CFR § 12.26 and 50 CFR Pt 17--Endangered and Threatened Wildlife and plants.

documentation must include an export document from an appropriate foreign government official (every CITES species item must have CITES permit). See the new 50 CFR Part 23 (CITES) regulations.

USDA and APHIS are also responsible for and have adopted the international standard for wood packaging material (WPM). Most WPM must be either heat treated or fumigated with methyl bromide in accordance with specified guidelines and marked with an approved international mark certifying that treatment. Shipments containing non-compliant regulated WPM are prohibited from entry into the United States.¹⁰

II. Lacey Act Overview

The Lacey Act, first enacted in 1900 and significantly amended in 1981, is the United States' oldest wildlife protection statute.¹¹ The Act combats trafficking in “illegal” wildlife, fish, and plants.¹² As amended, the Act provides that it is unlawful¹³ for:

any person to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law whether in interstate or foreign commerce.

It is also unlawful for any person to make or submit any false record, account, or identification of any fish, wildlife, or plant which has been, or is intended to be imported,

¹⁰ See: http://www.aphis.usda.gov/import_export/plants/plant_imports/wood_packaging_materials.shtml

¹¹ Implementation of Revised Lacey Act Provisions: Notice and request for Comments; Animal and Plant Health Inspection Service, USDA, dated October 8, 2008. 73 Fed. Reg. 58925.

¹² Id.

¹³ 16 USC § 3372(f)(2).

exported, sold, purchased, or received from any foreign country; or transported in interstate or foreign commerce.¹⁴ (Commonly referred to as marking offenses.)

The Lacey Act protects both plants and wildlife by creating civil and criminal penalties for a wide array of violations. Violations of the Lacey Act provisions may be prosecuted in three basic ways: (1) Civil—monetary penalties; (2) criminal—fines and penalties and potential incarceration; or (3) forfeiture—dispossession of the plant, fish, or wildlife in question.¹⁵

Violations can result in civil penalties up to \$10,000 per each violation.¹⁶ Under the sentencing statute known as the Alternative Fines Act, criminal penalties can be up to \$100,000 for a misdemeanor and \$250,000 for a felony (Corporate penalties may be as much as \$200,000 for a misdemeanor and \$500,000 for a felony).¹⁷

Additionally, vessels, vehicles, aircraft, and other equipment used to aid in the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of fish or wildlife or plants in a criminal violation of the Act for which a felony conviction is obtained where the owner should have known of the illegal transgression are subject to forfeiture.¹⁸

¹⁴ 16 USC § 3372(d).

¹⁵ 16 USC § 3374(a)(1).

¹⁶ 16 USC § 3373(a) and (d).

¹⁷ See United States v. Eisenberg, 496 F. Supp. 2d 578 (2007, ED Pa), and 18 USC § 3571.

¹⁸ 16 USC § 3374(a)(2).

The Lacey Act was recently in the news when The Department of Justice reported January 12, 2010¹⁹ that a North Carolina man has been fined \$50,000 and sentenced to one year in prison for violating the Lacey Act by illegally exporting wild American ginseng. The press release notes that it is unlawful under North Carolina law to export or ship any amount of ginseng out of the state without an export certificate issued by the state. Under the Lacey Act it is illegal to transport or sell plants like wild ginseng that are taken, possessed, transported or sold in violation of state or federal law or regulation, or treaty.

III. The 2008 Farm Bill Amendment

Section 8204 of the 2008 Farm Bill²⁰ amends the Lacey Act by expanding its protection to a broader range of plants and plant products,²¹ and making it unlawful for any person to import, export any plant or wood product taken (i.e., collected, harvested, cut, logged or removed) in a foreign country that is²²:

- taken, transported, possessed or sold in violation of any foreign law or regulation that protects plants or regulates the theft of plants, the taking of plants from a park, forest reserve or other officially protected or designated area, or the taking of plants without or contrary to required authorization;

¹⁹ Department of Justice, Office of Public Affairs Press Release, <http://www.justice.gov/opa/pr/2010/January/10-enrd-022.html>. The case was prosecuted the Justice Department's Environmental Crimes Section and the U.S. Attorney's Office for the Western District of North Carolina. The case was investigated by the U. S. Fish and Wildlife Service's Office of Law Enforcement, with assistance from the National Park Service and Georgia Department of Natural Resources.

²⁰ *Supra.*, Section 8204 (Prevention of Illegal Logging Practices) of the Food, Conservation, and Energy Act of 2008. Public law 110-246; 122 Stat. 1651; 2008.

²¹ Implementation of Revised Lacey Act Provisions: Notice and request for Comments; Animal and Plant Health Inspection Service, USDA, dated October 8, 2008. 73 Fed. Reg. 58925.

²² See definition of "Prohibited Acts," 16 U.S.C. §3372(a)(2)(B) and (a)(3)(B).

- taken, possessed, transported or sold without paying required royalties, taxes or stumpage fees; or
- taken, possessed, transported or sold in violation of any legal limitation governing the export or transshipment of plants.

The legislation re-defines "plant"²³ to mean any wild member of the plant kingdom, including roots, seed, parts and products thereof, including trees from either natural or planted forest stands, but excludes:

- (i) common cultivars, except trees and common food crops (including roots, seed, parts or products thereof),
- (ii) scientific specimens of plant genetic material to be used only for laboratory or field research and
- (iii) any plant that is to remain planted or to be planted or replanted.

The exceptions do not apply if the plant is listed in an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, listed as an endangered or threatened species under the Endangered Species Act of 1973, or pursuant to any state law that provides for the conservation of indigenous species that are threatened with extinction.²⁴

A. Import Declaration Requirements

Section 3 of the Lacey Act, as amended (16 U.S.C. 3372(f)), makes it unlawful to now import plant and wood products without an import declaration when one is otherwise required. APHIS provided for both a delayed and staged enforcement of the import declaration requirements pending completion of an electronic declaration

²³ 16 U.S.C. § 3371(f).

²⁴ Supra, 16 USC § 3371(f)(3).

submission system by US Customs and Border Protection (CBP).²⁵ The enforcement schedule only applies with regard to the import declaration requirements and there is no delay with regard to enforcement of the substantive requirements of the Lacey Act amendments.

The elements of the import declaration are published in a series of federal register notices²⁶, and on the APHIS website²⁷. Under the rules promulgated in the October 8, 2008 Federal Register Notice,²⁸ importers are required to submit a declaration²⁹ for certain plant and wood products that identifies³⁰:

- (i) The scientific name of any plant (including the genus and species) contained in the importation or from which the article was produced;
- (ii) A description of the value and quantity (including the unit of measure) of the importation and
- (iii) The name of the country from which the plant or plant material was taken.

For paper and paperboard products with recycled plant content, the importer is not required to specify the species or country of harvest with respect to the recycled plant product component, but will be required to provide the average percent of recycled

²⁵ Notice and request for comment: Animal and Plant Health Inspection Service, USDA, dated October 8, 2008. 73 Fed. Reg. 58925.

²⁶ Notice and request for Comments; Animal and Plant Health Inspection Service, USDA, dated October 8, 2008. 73 Fed. Reg. 58925; [Federal Register: Implementation of Revised Lacey Act Provisions, February 3, 2009](#), 74 Fed Reg. 5911; and, [Federal Register: Implementation of Revised Lacey Act Provisions, September 2, 2009](#), 74 Fed Reg. 45415.

²⁷ http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml

²⁸ 73 Fed. Reg. 58925. October 8, 2008.

²⁹ [PPQ FORM 505: Plant and Plant Product Declaration Form](#)

³⁰ Notice and Request for Comments: Animal and Plant Health Inspection Service, USDA, dated October 8, 2008. 73 Fed. Reg. 58925

content³¹. If the product also contains non-recycled plant materials, the basic declaration requirements still apply to that component of the product imported.³² For plant products, if the plant species from which the product is made varies and is unknown, importers will have to declare the name of each species that may have been used to produce the product. Similarly, if a plant product is made of plant species commonly harvested in more than one country, and the country is unknown, the importer will be required to declare the name of each country from which the plant may have been harvested.

B. What products need to be declared?

Import declarations are not required for all products made or produced using plant, paper or wood materials. Import declarations are required for only those products that are identified on APHIS' Lacey Act Implementation Schedule by Harmonized Tariff Schedule number.³³ Currently, only items identified and classified in specific headings Chapters 44, 47, 66, 82, 92, 94, 95, and 97 of Harmonized Tariff Schedules of the United States,³⁴ are listed for enforcement of the requirement to file a plant import declaration.³⁵

APHIS illustrates this in the following example:

[A] wooden hammer handles fall under Chapter 44 and therefore failure to file a declaration would result in an enforcement action. However, complete hammers with

³¹ Id.

³² Id.

³³ See Federal Register Notices dated October 8, 2008. 73 Fed. Reg. 58925; [Federal Register: Implementation of Revised Lacey Act Provisions, February 3, 2009](#), 74 Fed Reg 5911; and, [Federal Register: Implementation of Revised Lacey Act Provisions, September 2, 2009](#), 74 Fed Reg 45415.

³⁴ See 19 U.S.C. § 1202. Available at www.USITC.gov.

³⁵ See [Federal Register: Implementation of Revised Lacey Act Provisions, September 2, 2009](#), 74 Fed Reg 45415.

wooden handles fall under HTS Chapter 82 and failure to file a declaration would NOT result in an enforcement action.³⁶

There is also a staged phase-in schedule for products subject to the import declaration requirements. Products identified in phases II and III now require import declarations.³⁷ Products identified in phase IV are scheduled to require an import declaration beginning April 1, 2010. Certain products were also removed from phase III and IV are currently under consideration for a subsequent phase in scheduled to begin on or after September 1, 2010.³⁸ These items consist of the products that are most contentious, in terms of determining

- Ch. 44 Headings (Wood & Articles of Wood)
 - ~ 4405 (wood wool (excelsior))
 - ~ 4410 (particle board)
 - ~ 4411 (fiberboard of wood)
 - ~ 4413 (densified wood)
 - ~ 4415 (packing cases, boxes, crates, drums)
 - ~ 4416 (casks, barrels, vats, tubs)

- Ch. 47 Headings (Wood Pulp)
 - ~ 4701 (mechanical wood pulp)
 - ~ 4702 (chemical wood pulp, dissolving)
 - ~ 4703 (chemical wood pulp, sulfate)
 - ~ 4704 (chemical wood pulp, sulfite)
 - ~ 4705 (combination mechanical and chemical)

- Ch. 48 Headings (Paper and Articles of)
 - ~ 4801 (newsprint)
 - ~ 4802 (uncoated writing paper)
 - ~ 4803 (toilet or facial tissue stock)
 - ~ 4804 (uncoated kraft paper)

³⁶ APHIS web site: www.APHIS.USDA.gov and follow the links to Plant Health and the Lacey Act Q & A Response to Question 16, March, 2009.

³⁷ APHIS phase-in schedule:
http://www.aphis.usda.gov/plant_health/lacey_act/downloads/FederalRegister02-03-2009.pdf

³⁸ [Federal Register: Implementation of Revised Lacey Act Provisions, September 2, 2009](#), 74 Fed Reg 45415.

- ~ 4805 (other uncoated paper and board)
- ~ 4806 (vegetable parchment, etc.)
- ~ 4807 (composite paper and board)
- ~ 4808 (corrugated paper and board)
- ~ 4809 (carbon paper)
- ~ 4810 (coated paper and board)
- ~ 4811 (paper coated, etc.)

- Ch. 66 Headings (Umbrellas, Walking Sticks, Riding Crops)
 - ~ 6601 (umbrellas)
 - ~ 6603 (umbrella parts)

- Ch. 92 Headings (Musical Instruments)
 - ~ 9205 (wind musical instruments)

- Ch. 94 Headings (Furniture, etc.)
 - ~ 9401 (seats)
 - ~ 9430.30 (wooden office furniture)
 - ~ 9403.40 (wooden kitchen furniture)
 - ~ 9403.50 (wooden bedroom furniture)
 - ~ 9403.60 (other wooden furniture)
 - ~ 9403.81 (furniture of cane, osier, bamboo, rattan, or similar materials)

- Ch. 95 Headings (toys, games & sporting equipment))
 - ~ 9504 (articles for arcade, table, or parlor games)

APHIS states that it continues to consider the applicability of the declaration

requirement to other products not included in the revised phase-in schedule or listed above.

In particular, goods classified under the following HTS Chapters:

- ❖ Ch. 48 (Paper & Articles of)
- ❖ Ch. 82 (Tools, Implements)
- ❖ Ch. 89 (Ships, Boats, & Floating Structures)
- ❖ Ch. 93 (Arms and Ammunition)
- ❖ Ch. 94 (Furniture, etc.)
- ❖ Ch. 95 (Toys, Games, & Sporting Equipment)
- ❖ Ch. 96 (Brooms, Pencils, Buttons)

Declarations need not be filed for plant and wood products used exclusively as packaging to support, protect or carry another item, unless the packaging material itself is the item being imported. For the purposes of the Lacey Act declaration requirement,

packaging material is defined as any material used to support, protect, or carry another item.³⁹ 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 packaging material itself is the item being imported or it is used for some other purpose than supporting, protecting or carrying another item. APHIS considers the exception for "packing materials" to include: manuals, warranty cards and labels.⁴⁰

C. Blanket Declarations

APHIS has announced a pilot program for certain importers using blanket declarations instead of shipment-by-shipment declarations. This program will allow importers who frequently ship goods that require the *Lacey Act* import declaration to file only one blanket declaration each month, with subsequent reconciliation reports. The program is open to importers that use CBP's Automated Line Release (ALR) or Border Release Advance Screening and Selectivity (BRASS) programs. Under the pilot program, the blanket declaration will be filed on a monthly basis. On or before the 15th of every month, the blanket declaration must be filed for the reporting period of the following month. An exporter will have 15 days after the end of the month to file a reconciliation with APHIS which will provide information on the actual shipments. Additional information on the blanket program can be found on the APHIS web site under "Plant Health: Lacey Act."

³⁹ U.S. Department of Agriculture APHIS website: Plant Health, Lacey Act: "Questions and Answers." http://www.aphis.usda.gov/plant_health/lacey_act/Q&As.shtml

⁴⁰ APHIS PowerPoint Presentation: Lacey Act Primer, October 2009.

D. PPQ 505: Plant Declaration Submission Process

Customs and Border Protection (CBP) has automated the process for collecting the PPQ 505 data elements. Data is transmitted to CBP's Automated Commercial System (ACS) through the Automated Broker Interface (ABI) in the cargo release module.⁴¹ This information is then collected and transmitted to APHIS for data analysis and enforcement purposes.

An importer also has the option to complete and present a paper PPQ 505 for each item. If a paper form of the PPQ 505 is used, the importer is to mail the form to USDA at the address on the form. CBP expects and urges most importers to use the electronic system to file the declaration.⁴² If an entry package is presented to CBP to obtain release, the CBP 3461 form will be annotated in Box 29 to indicate "PPQ 505-Paper" if the declaration is presented in paper or "PPQ 505-ABI" if the declaration information was submitted electronically. If a paper form is submitted to CBP as part of the entry package, the paper form will be returned to the importer (or importer's representative) for mailing to USDA. CBP will not mail forms to USDA.

E. Applicability of the Declaration Requirement

At present, APHIS will be enforcing the declaration requirement only as to formal consumption entries (i.e., most commercial shipments). APHIS does not intend to enforce the declaration requirement for informal entries (i.e., most personal shipments), personal importations, or mail (unless subject to formal entry), transportation and exportation entries,

⁴¹ USCBP Website:
http://www.cbp.gov/xp/cgov/trade/trade_programs/entry_summary/laws/food_energy/amended_lacey_act/guidance_lacey_act.xml

⁴² Id.

in-transit movements, carnet importations (i.e., merchandise or equipment that will be re-exported within a year), and foreign trade zone and warehouse entries.⁴³

IV. Compliance and Enforcement Issues

Currently, Customs and Border Protection provides data collection activities only for APHIS. Submission of import declarations is not considered to be a condition of admissibility and is not enforced by CBP. Responsibility for the enforcement of submission requirements for import declarations and for data integrity is the responsibility of APHIS.

The failure to submit a PPQ 505 import declaration when one is otherwise required is subject to a fine of not to exceed \$250 per violation; however, any person who **knowingly** fails to submit an import declaration in violation of section 3372(f) is subject to a civil penalty of not more than \$10,000.⁴⁴ Submission of incomplete or inaccurate declarations would be subject to the same penalties.

Any person, however, that imports, exports or otherwise transports or sells any item in violation of §3372(a) and fails to exercise “due care” in determining whether the act was done in violation of an underlying law, may be assessed a civil penalty of not more than \$10,000 per violation.⁴⁵ “Due care” is defined in the legislative history as “undertaking those steps that a reasonable man would take to do his best to insure that he is not violating the law when facing a particular set of circumstances.”⁴⁶ Thus, importers have a duty to exercise reasonable care in ascertaining whether or not the plant or wood products imported were not:

⁴³ [Federal Register: Implementation of Revised Lacey Act Provisions, September 2, 2009](#), 74 Fed Reg 45415.

⁴⁴ See 16 UCS 3373(a)(2).

⁴⁵ Id.

⁴⁶ PowerPoint presentation: Elinor Colbourn, Senior Trial Attorney, U.S. Department of Justice,

- taken, transported, possessed or sold in violation of any foreign law or regulation that protects plants or regulates the:
 - theft of plants;
 - taking of plants from a park, forest reserve or other officially protected or designated area;
 - taking of plants without or contrary to required authorization;
- taken, possessed, transported or sold without paying required royalties, taxes or stumpage fees; or
- taken, possessed, transported or sold in violation of any legal limit governing the export or transshipment of plants.

V. Compliance Programs and Action Items

To be charged under the Lacey Act the person need not be the party that violated the foreign law by the illegal taking; the plant or wood and associated products become “tainted” even if someone else commits the violation of the underlying foreign law, regulation or restriction. However, the person must know, or in the **absence of due care** should have known, about the underlying violation. In light of this, importers are advised to exercise due care and understand their product and material sourcing, by:

- Put management process in place to understand supplier material sourcing
- Investigate the product supply chain
- Obtain foreign management assurances that products are free of illegal wood products
- Require suppliers to have an auditable verification program
- Document compliance activities and supplier approval or vetting process

VI. Additional Resources:

- APHIS Web Site: http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml
- [The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking](#), by Robert S. Anderson, 16 Public Land Law Review (Public Land and Resources Law Review) 27, 1995.

Environment and Natural Resources Division, Environmental Crimes Unit, to the Potomac Form, March 24, 2009. http://www.forest-trends.org/~foresttr/documents/files/doc_696.pdf

- The 3rd Potomac Forum on Illegal Logging and Associated Trade, March 24, 2009
<http://www.forest-trends.org/event.php?id=150>
- PowerPoint presentation by Elinor Colbourn, Senior Trial Attorney, U.S. Department of Justice, Environment and Natural Resources Division, Environmental Crimes Unit, to the Potomac Forum, March 24, 2009. http://www.forest-trends.org/~foresttr/documents/files/doc_696.pdf
- PowerPoint presentation: Lacey Act Primer: United States Department of Agriculture: Animal and Plant Health Inspection Service Plant Protection and Quarantine.
http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPresentation--October2009.pdf
- Federal Register Notices
 - Implementation of Revised Lacey Act Provisions: Notice and request for Comments; Animal and Plant Health Inspection Service, USDA, dated October 8, 2008. 73 Fed. Reg. 58925.
 - [Federal Register: Implementation of Revised Lacey Act Provisions, February 3, 2009](#), 74 Fed Reg 5911.
 - [Federal Register: Implementation of Revised Lacey Act Provisions, September 2, 2009](#), 74 Fed Reg 45415.
 - The following websites may be useful to look-up the scientific names of plants:
 - <http://plants.usda.gov>
 - http://www.ars-grin.gov/cgi-bin/npgs/html/tax_search.pl
 - <http://www.itis.gov/>
 - <http://www.ipni.org/>

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