

SECOND CONSENSUS STATEMENT OF IMPORTERS, NON-GOVERNMENTAL ORGANIZATIONS, AND DOMESTIC PRODUCERS ON LACEY ACT CLARIFICATIONS

As the Administration prepares its review and report to Congress as required by sections 3(f)(4) and (5) of the Lacey Act, as amended, the undersigned organizations provide the following consensus views and recommendations.

In their October 10, 2008 letter to implementing agencies, the key chairmen of the House and Senate committees indicated an expectation that the Administration will use its rulemaking authority to expand or limit the applicability of the declaration requirement, as needed. Based upon this, we strongly urge the Administration to promulgate as soon as possible – and definitely before the end of 2010 – key regulations to clarify and streamline the requirements for industry to comply with the declaration requirement of the Lacey Act, as amended in May 2008.

If it is deemed that the statute does not afford the Secretary sufficient authority and a legislative clarification is still needed, the undersigned are committed to work with Congress to make a simple technical fix to the declaration provisions clarifying that the Secretary has the regulatory authority to take the necessary steps to ensure effective implementation of the declaration requirement of the Lacey Act.

In either case, we seek modifications only in regard to the specific aspects of the declaration implementation enumerated in the document below and in the previous consensus statement signed by our organizations in July 2009, and ask that these are addressed in an expedited fashion.

Creating a transparent and predictable process to consider future phases for the declaration

Issue: The government has yet to establish specific criteria for the phase-in of the declaration requirement. Instead, the agencies have announced schedules for enforcement discretion and then changed them in response to specific issues brought to their attention, but not necessarily illuminated through a public review. This has created uncertainty and some confusion concerning when and how the declaration requirement applies.

Proposed Solution: We recommend continuing to establish a clear list of products, by HTS number, that require a Lacey Act Declaration, and to establish a process to consider future phases of HTS categories that would proceed as follows:

- Identify by October 1, 2010 any categories on the September 1, 2009 list that will be phased in, at the four-digit HTS level or with greater specificity. Allow six months for phase-in to become effective.
- Place all remaining categories, whether on September 1 list or not, on hold for 12 months.

- Establish and initiate a process whereby additional categories or other subdivisions may be considered for coverage by or exclusion from the Lacey Act declaration requirement. Categories may be proposed either by the government or by individual private citizens.
- The review and petition process would include the following elements:
 - determination of government or submission by petitioner of product that should be covered by the Lacey Act declaration
 - publication of a preliminary determination as a proposed rule, with criteria to review a citizen submission that includes an analysis of the risk of illegally sourced plant material being included in the product category and the ability to accurately identify source material
- The review process would occur once a year and would allow sufficient time for importers to explore how the declaration would be completed and submit comments based on this experience. The comment period should extend at least 90 days.
- Final decisions on proposed phase-ins will be issued 6 months after the publication of the proposed rule determination and should include a response to comments.
- Twelve months from the publication of a proposed rule determination must be allowed for a new phase-in to become effective.

If the agencies have uncertainties about the legal permanence of decisions reached through this process, then it would be appropriate to seek legislative change. But such concerns should not stand in the way of bringing regularity and some certainty to the process.

Providing authority and a process to exclude from the declaration requirement certain highly processed products

There are numerous products that include, incorporate or are made from some plant product but have since undergone numerous processing steps, making identification of the plant(s) extremely difficult. In some instances, the amount of plant materials included in a product is quite small and would be considered a *de minimis* quantity. In their October 10, 2008, letter to the implementing agencies, the key chairmen of the House and Senate committees indicated an expectation that the Administration will use its rulemaking authority to expand or limit the applicability of the declaration requirement as needed. Nevertheless, it may be appropriate for the Congress to explicitly state the authority of the Administration to establish exclusions, as well as guidelines and a process for considering exclusions from the declaration requirement for certain highly processed products for which the plant ingredients or components are difficult to identify and/or are *de minimis*. Examples of products in this category should include beverages (HTS chapters 21 and 22); cosmetics and personal care products (HTS chapters 33 and 34); footwear, textiles and apparel (HTS chapters 50 through 64); and rubber or cork products.

Excluding Composite Materials from Declaration Requirement until Reasonable and Practical to Identify the Genus and Species

Under current production methods, it is difficult, if not impossible, to declare the genus and species of wood used in certain composite products such as particle board or medium density fiberboard (MDF), because these products are often made from by-products left over from the manufacture and processing of other wood products. This group has agreed that Lacey declarations for particleboard (HTS 4410) and fiberboard (HTS 4411) and other equivalent engineered composite materials, and any components thereof in other products, should not be mandatory until appropriate administration agencies determine it is feasible and practical to collect the required information. APHIS has provided guidance on its website that instructs importers to list the type of composite material (e.g., MDF) used in the product or component subject to the declaration, but APHIS has also noted that this is a significant issue that has not been resolved.

While the APHIS guidance provides a short-term solution on composite materials, we support a clarification that composite materials (and components comprised of composites that are in other manufactured products) are currently excluded from the Lacey declaration requirement, and the Administration shall, in the future, consider the inclusion of composite materials in the declaration requirement in light of various factors, including advances in the feasibility and practicality of collecting the required information. To provide some certainty that industry must begin to identify ways to track genus and species on composite materials, the exclusion could be time-limited unless there is a proactive determination that it remains unfeasible to identify genus and species in composite materials. We suggest that the Administration conduct a review within three to five years to determine an appropriate timeframe for phasing out this exclusion.

It is not foreseen that the composite materials definition would apply outside the engineered wood composite materials categories (and components comprised of engineered wood composites that are in other manufactured products).

Species Groupings

In line with our July 2009 consensus statement, we continue to support the definition and use of logically coherent groupings of plant species. These groupings should be included in a digital, searchable database linked to APHIS pages, and a review process should be put in place to update groupings if necessary.

APHIS/USDA should have discretionary authority to accept the declaration of “spp” or other relevant sub-genus species groupings where it is not technically feasible, by reasonable and practical methods, to obtain and provide species-specific information.¹ The Forest Products Lab

¹ Regarding ‘sub-species groupings’: It is often feasible and practical to go beyond “spp” for an entire genus, providing meaningful information for data tracking and enforcement targeting without obtaining definitive species-level information. One example is the major tropical timber genera *Shorea* and *Dipterocarpus* (family Dipterocarpaceae). While the trade names for various species in these genera vary by country and regional dialect (e.g. lauan, keruing, and meranti in Indonesia, tangile in the Phillipines, makai in India, saya in Thailand, melapi, alan and seraya in Malaysia), there are distinct sub-genus groupings (e.g. ‘red meranti’, ‘white meranti’) that correspond to well-delineated species subsets. Our recommendation would be to allow declarations to state “*Shorea* spp. (red meranti)” in cases where producers cannot verify the wood to species level. Wood products manufacturers

should lead a process to determine when such situations exist, and shall provide opportunity for input as it reviews species groupings.

We recognize the government's attempt to provide guidance on this issue in the Federal Register notice of September 2, 2009. However, the guidance offered does not significantly simplify reporting requirements in practice, because given the broad ranges of many important timber genera, it is not often that "the list of possible species in a particular product includes all species in a genus." We believe that the combination of information regarding country of origin and well-defined genus or sub-genus groupings is sufficient for the transparency that the Lacey Act seeks to foster. The word "species" as used in 3372(1)(A) could plausibly be interpreted as plural in cases where it is not possible to ascertain the unique species of plant material in question.

Date of Manufacture

Issue: Before the new law was enacted, it was not unlawful to import or trade in plant products that were harvested in violation of other countries' laws, except with regard to certain protected species. Moreover, manufacturers were not required to collect information from their suppliers on the genus, species, country of harvest, value and quantity of the plant material, nor the legality of harvest. For many reasons, it is not consistently possible for importers to retroactively determine this information for plant material used in goods that were produced before the Lacey Act amendments were enacted. Antiques are particularly problematic because, by definition, they were manufactured or created many years ago.

In addition to the underlying ban, in order to help determine whether an import of plant or plant products is lawful, Congress imposed a new declaration requirement for imports of these items. The phase-in process established for the declaration requirement means that a situation could occur in which an importer does not have on hand all of the information required by the declaration for products with a date of manufacture that pre-dates preliminary notification of phase-in. In such cases, some accommodation should be made to not unduly inhibit legal trade, but which also underscores the obligation that companies have had as of enactment of the Lacey amendments to exercise due care and to keep on hand pertinent information for all products manufactured after the enactment of the Lacey amendments.

Proposed Solution: The Lacey Act amendments should not apply to plant and plant products that were imported prior to the enactment of the amendments. To address the issue of pre-enactment harvest, the amendments should also not apply to finished wood products or parts thereof that are imported into the United States if the date of manufacture of those products occurred before the effective date of the amendments. Similarly, APHIS should modify its Declaration Form to permit an importer to indicate that finished articles or parts thereof contained within the importation were manufactured prior to the effective date of the Lacey Act amendments. The date of manufacture should be defined for such products as the date of final

and buyers can reasonably be expected to know the species in their products to a high degree of accuracy. This declaration is currently less prescriptive than the requirements that the FWS has for importers of any wildlife products or derivatives. The USFWS 3-177 requires "the Latin name including genus and species (and sub-species, when required to determine if the fish or wildlife is protected at the subspecies level)", as well as the common name. This document must be submitted upon importation.

assembly or process of the product to be imported. When an importer so indicates, then the plant and plant declaration information under Section 3372(f) shall not be required as a condition of entry.

Furthermore, as the list of products requiring a declaration changes, an importer may check the same box to indicate that an article otherwise subject to a declaration requirement was manufactured prior to the date of publication of a preliminary determination notifying parties that a specific product may be scheduled to be included within a future phase, based on the four-digit HTS code of the finished article. However, it must be made clear that an importer is still obligated to exercise due care so as to ensure that imported articles do not contain illegally-harvested wood, even in situations where a declaration is not required. We recommend that importers consider country of harvest, genus and species as valuable information in assessing risk and evaluating the legality of products for which declarations are not required.

In this discussion around date of manufacture, we have also explored whether or not this should be applicable to primary products such as logs and sawn wood, for which the identification of genus, species and country of harvest is much less difficult than for finished goods. At the same time, trade and stockpiling of materials such as logs and sawn wood that were known to be illegally harvested in the recent past, but before the date of enactment of the Lacey amendments, can be equally damaging to forests by stimulating demand for new cutting. We believe these realities should be taken into consideration when determining the treatment of such primary products under the Lacey amendments, and could be addressed by limiting or clarifying the definition of a manufactured product, or by some other means in order to prohibit the trade of logs or sawn wood that have been illegally removed from the forest in the recent past.

Burden of Proof

An importer who claims an exemption from the Lacey Act amendments or the future phase-in of the declaration requirement on the basis of the date of manufacture shall have the burden of proof, including the requirement to maintain any information that can reasonably substantiate the claim that the product was manufactured prior to the date of the Lacey Act Amendments, or, for purposes of the declaration, prior to the date of notification that the product would be covered by a declaration requirement. However, the United States government should not be released from the burden of proving a violation.

Treating recycled wood products in the same manner as recycled paper products

In line with the July 2009 consensus statement, we support treating content composed of recycled or recovered wood products in the same manner as paper products (e.g. by declaring percent content that is then exempted from species/genus declaration).

Allowing more flexibility on declarations

While the Lacey Declaration requirement is useful by requiring supply chains to know the wood that is contained in imported products and by providing information on trade flows of wood, it is also an additional administrative burden on importers. We believe the Administration should have more flexibility to reduce the burden on importers, customs brokers, and the Administering Agencies in instances where doing so would not undermine the benefits of the Lacey

Declaration. Examples of when flexibility is warranted include when shippers import the same products from the same sources on a regular basis, and making allowance for alternative, electronic, internet-based filing options that could be submitted directly to APHIS, rather than through CBP.

Streamlining the Lacey Declaration and APHIS' current requirement for component level reporting

Another area of flexibility relates to the wording of APHIS's current import declaration form, the Plant and Plant Product Declaration form (PPQ-505). APHIS's declaration form requires species and country of harvest information to be provided for the "component," rather than the "importation" as stated in the Lacey Act Amendments. Recognizing that requiring such information may play a constructive role both in encouraging the trade to gather more detailed data as well as providing an additional enforcement tool, APHIS should be flexible in implementing the Lacey Act amendments through the PPQ-505 or any future form in order to take into consideration not only the information-gathering requirements of the Act, but also the burden in reporting and analyzing such information. As such, APHIS should permit importers to list all components (e.g., "table leg", "veneer") associated with a given species/country of harvest data line on the form. For example, "Quercus velutina" and "Indonesia" would show up once on the PPQ-505 for the importation as a whole, but importers may consolidate the different articles or components that correlate to that species/country of harvest combination on a single data line rather than having to complete a separate data line for each component to the extent such detailed component-level information can be reported.

Application of the Declaration to Formal Consumption Entries

There is 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.

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.

Exclusion for Packaging Materials

Under the Lacey Act amendments, the import declaration requirement does not apply to "plants used exclusively as packaging material to support, protect, or carry another item, unless the packaging material itself is the item being imported." There is a consensus among the importing community, NGOs, and agencies that the term "packaging material" be construed to ensure that only the dutiable imported product, and not accompanying material (e.g., hang tags, labels, stickers, instruction booklets, warranty cards and other such items), is subject to the import declaration requirement. In addition, we support a clarification that the exclusion for packaging material includes wine corks.

Inputting data into declaration forms and pursuing alternative means to encourage more electronic filing of declarations

Issue: Inputting data into declaration forms should be streamlined and less burdensome while still meeting objectives of transparency and enforcement support.

Proposed Solution: Our recommendations for making PPQ-505 entry a more effective process include the following:

- Data input should eventually become fully electronic, via a no-cost APHIS interface (not only through the Automated Broker Interface).
- In the short term, APHIS should simplify and clarify the paper form to:
 - Create drop down options for page 2 entries;
 - Allow a PDF file to be saved on computer, so that compliance specialists can return to a partially completed form;
 - Include a link to Forest Products Lab common names database on the form; and
 - Harmonize the PP-505 with 7501 import forms to ensure comparability of data.

Definitions of common cultivar and common food crop

The statute requires APHIS to issue definitions on common cultivar and common food crop. Without such definitions, companies are unsure whether their products are covered by the Lacey Act. We urge APHIS to issue regulations regarding the definitions of common cultivar and common food crop at the earliest possible time.

SIGNED BY:

American Apparel & Footwear Association
(AAFA)

American Association of Exporters and
Importers

American Fiber Manufacturers Association

American Forest & Paper Association

American Home Furnishings Alliance

Canadian Manufacturers & Exporters

Coalition of New England Companies for
Trade (CONNECT)

Columbia River Customs Brokers and
Forwarders Association

Conservation International

Craft & Hobby Association

Custom Brokers & Forwarders Association of
Northern California

Customs Brokers & International Freight
Forwarders Assn. of Washington State

Defenders of Wildlife

Emergency Committee for American Trade
(ECAT)

Environmental Investigation Agency

Express Association of America

Fashion Accessories Shippers Association

Global Witness

Greenpeace USA

Grocery Manufacturers Association

Halloween Industry Association

Hardwood Federation

The Hosiery Association
INDA, Association of the Nonwoven Fabrics
Industry
International Association of Airport Duty Free
Stores
International Wood Products Association
Joint Industry Group
The Juvenile Products Manufacturer's
Association
Los Angeles Customs & Freight Brokers
Association
NAMM, the International Music Products
Association
NASSTRAC, Inc
National Association of Manufacturers
National Council of Textile Organizations
National Customs Brokers and Forwarders
Association of America
National Marine Manufacturers Association
National Retail Federation
The Nature Conservancy
Northern Border Customs Brokers Association
(NBCBA)
Outdoor Industry Association

Pacific Coast Council of Customs Brokers and
Freight Forwarders, Inc.
Personal Care Products Council
Rainforest Action Network
Rainforest Alliance
Retail Industry Leaders Association
San Diego District Customs Brokers
Association
Secondary Materials and Recycled Textiles
Association (SMART)
Sierra Club
Sustainable Furnishings Council
The Forest Trust (TFT)
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