

News

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Hellena D. Sullivan
hsullivan@barnesrichardson.com
(212) 725-0200

The New Lacey Act Requirements and their Practical Application

Many clients may have concerns about the new importer requirements created by the amendments to the Lacey Act¹ which were contained in the Farm Bill passed by Congress several months ago. The amendments extend the Lacey Act's reach so that it is now illegal to import, export, transport, sell, or purchase almost any plant that was harvested in violation of a U.S. or a foreign law. The amendments also require importers to file an import declaration at the time of import for any plants, which are defined to include any wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands. However, the declaration is to exclude three things: 1) common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof), 2) a scientific specimen of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that is to be used only for laboratory or field research, except for endangered or threatened species; and 3) any plant that is to remain planted or to be planted or replanted, except for endangered or threatened species.

Because of the inclusion of "products", this new requirement may

¹ The Food, Conservation and Energy Act of 2008, Section 8204, Prevention of Illegal Logging Practices.

potentially capture all wood and paper products such as: lumber, wood furniture, textile and apparel products of rayon, paper products, cigarettes, anything with cellulose fibers, pharmaceuticals, and many other articles that have wood or plant components. The requirements apply to any product with any amount of plant content; there is no threshold or "*de minimis*" level. Whereas the requirement does not apply to packaging material unless that is what is being imported, because the statute is very widely drafted it includes hang tags, labels, or instruction booklets. It also includes informal entries and imported personal effects.

The new statutory provisions require that any person importing any plant or plant product must file a declaration upon importation that contains the (1) scientific name (genus and species) of any plant contained within the shipment, (2) a description of the value of the importation and quantity (including the unit of measure) of the plant/plant product, and (3) the plant species country of origin (the country where the plant was harvested, cut, logged, or removed). For plants products where the required species and origin information is not definitively discernable, the importer must declare all potential species and countries of origin of the plants that may have been used in the plant product. There is a special rule that applies to recycled plant

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content of paper products, which need only give average percent of the recycled content, the normal rules applying to the non-recycled content.

In theory, the declaration requirement was to have been effective on December 15, 2008, and up until recently, CBP officials have been stating publicly that a paper declaration would be required, without which the goods could be subject to delays and inadmissibility. The Act provides for both civil and criminal penalties for violations.

Whereas Customs has been asked many questions about the new requirements, it has not been able to give any definitive answers as the USDA's Animal and Plant Health Inspection Service (APHIS), the Lacey Act lead agency, has been responsible for interpretation guidelines being developed for the scope of the new requirements and on the form of a declaration. Because the scope of the new requirements is incredibly broad, industry has been very concerned. Barnes Richardson attorneys attended several seminars recently where Customs answered questions from industry. On September 12, 2008, Cathy Saucedo, CBP's Director of Import Safety and Interagency Requirements discussed the progress that is being made and when guidelines would be forthcoming.

First, Ms. Saucedo indicated that a paper declaration would not be required and it was very likely CBP would not be receiving import declarations except in electronic form. She believed it would take 6-9 months to automate. Secondly, she indicated that

there would be a long phase-in period and that CBP would start by requiring declarations for the products most obviously impacted by illegal logging—i.e. timber and wood furniture. However she noted that APHIS was developing the scope of the new requirements with the Department of the Interior and CBP had no real say on scope. Third, Ms. Saucedo indicated that although 85 of the 97 HTSUS chapters were potentially affected, CBP is working with APHIS/Department of the Interior on ways to interpret the statutory requirements so as to exclude products that were so processed or had such a small plant content as to make compliance impossible—such as paper hang tags, instruction booklets, bubblegum, lemonades and other food products with plant content, etc. One way that was mentioned to possibly accomplish this is to use the traditional Customs rule that items are classified by “essential character” to determine what applies here—i.e. only items whose essential character is wood or plant-based items would be included. Fourth, Ms. Saucedo mentioned that guidelines may be posted on the CBP website within the next week or two. Fifth, she indicated that APHIS believes they will not have a definition of “common food crops” and “common cultivars”, which are excluded from the requirements, until December 15. For example, questions have been raised about whether bamboo, which is technically a grass, would be excluded or not. Sixth, she indicated that CBP would not itself be taking any Lacey enforcement action or assigning inspectors, unless they got a tip on a particular shipment from USDA. Finally, she indicated that the import declaration form would likely be

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available on the USDA website sometime before December 15.

We have also heard comments from counsel for trade associations who have been talking to Congressional staffers on Capitol Hill and talking to the environmental and U.S. logging industry groups who were the proponents of this legislation. They indicated that it was very unlikely that Congress would act to delay the implementation of the new statute, and it was most desirable that the agencies involved administratively interpret out some products. Where that was not possible, the environmental groups and Congress might be receptive to amendments intended to further winnow out products that do not pose a big concern regarding illegal logging. Industry also posed the question that if the violation of any country's laws protecting plants is now illegal, how industry could acquaint itself with the laws of numerous countries around the world; there is talk of a government agency website eventually having a database of such laws.

Apparently, Indonesia, Russia and Brazil are the worst offenders with regards to illegal logging practices. Clients with wood or paper products imported from those countries should pay particular attention to ensuring those products were not illegally logged. However, CBP has emphasized that the new import declaration requirements are an information collecting tool, and that importers are not the particular target for enforcement of the new laws. We will continue to monitor the progress of the interagency interpretation of the scope of the new Lacey Act requirements, and advise clients when CBP or APHIS has issued guidelines.

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