

September 2009

## Regulatory Alert

### Lacey Act Import Law Applies to Marine Products

Recent amendments to the Lacey Act require all manufacturers and importers to take more care to ensure that the wood and plant products they receive are legal. This includes any unfinished and finished products such as wood flooring, cabinetry or even finished boats. In addition, some products will not be able to be imported into the United States without an “import declaration.” Eventually, completed boats will need a declaration form to be imported into the United States.

#### What is the Lacey Act?

The Lacey Act combats trafficking in “illegal” wildlife, fish, and plants. The 2008 Farm Bill (the Food, Conservation, and Energy Act of 2008), amended the Lacey Act by expanding its protection to a broader range of plants and plant products. Import declaration requirements were included in the amendments and are effective on December 15, 2008. The lead agency, the Animal Plant Health Inspection Service (APHIS) will be slowly phasing in the requirements for the import declaration requirement. A series of notice and request for comments were published by APHIS on October 8, 2008 ([73 Fed. Reg. 58,925](#)); on February 3, 2009 ([74 Fed. Reg. 5,911](#)) and on September 2, 2009 ([74 Fed. Reg. 45,417](#)).

The products covered by the Lacey Act include any **illegally-harvested wood** and the **products made from that wood** including furniture, flooring, plywood, and cabinetry. However, the new amendments go beyond the typical wood products to also include **wild “plants”** or **“plant products”** and any plant listed as an endangered species. This applies to natural and planted forest stands, but not to cultivars and food crops.

#### Why should I care?

These amendments allow the U.S. Government to impose civil or criminal fines on individuals or companies who import into the U.S. illegally-harvested wood and other wild plant products. You can also go to jail if convicted or the illegal products can be subject to forfeiture. The sale of illegal wood products by major retailers has recently been the subject of news reports. In order to import a plant products (or products that contain plants) a declarations is required. You can be prosecuted if you submit a declaration form that contains false information.

#### What does illegally-harvested mean?

The definition of illegal is extremely broad and includes U.S. laws and foreign laws. It includes any product made from a tree or other wild plant that is taken, possessed,

transported or sold in violation of any state or foreign law. That includes illegally taking a plant from a park, forest reserve or other officially protected area. It also includes the failure to pay appropriate royalties, taxes, or stumpage fees required by law or regulation in any State or foreign nation.

## **I do not harvest the wood I use in my products – how can I comply?**

If you import any product that contains wood or covered plants you need to take steps to ensure that you are making a **good faith effort** to comply with the laws of the U.S. and the foreign nation where the trees or plants were harvested. The penalty a person or company will face under the Lacey Act is determined by whether you *actually know* or *should have known* in the exercise of *due care* that the goods are, or are made with, illegally taken trees and wild plants. The key then is to **use good faith efforts and due diligence in supply chain management.**

### **Good faith efforts include:**

- **Managing your vendors.** Manufacturers should have a process in place to track and investigate your product input supply chain. Have uniform procedures in place to ensure that you have asked all of your vendors about the source of your inputs. Be sure to keep good records.
- **Getting the scientific names of trees and plants from vendors and the place of harvest.** Declaration regulations are being imposed and importers will need to report this information as a condition of import. Establish systems now to collect this information.
- **Seeking paper assurances from your vendors, but not assuming that is enough.** A letter or contract with a vendor that states that the inputs have been harvested legally is helpful. However, the Lacey Act provisions are very robust and may even allow the Government to force you to forfeit illegally harvested product even if you have such assurances.
- **Considering how you structure your contracts.** To minimize your risk pay for and take possession of imported product only after it has been cleared through Customs.
- **Keeping alert to new changes in the law and regulations.** APHIS will be rolling out new regulations in the coming months and may make changes as this program evolves. Be sure to keep apprised of any new developments. Check [www.aphis.usda.gov/plant\\_health/lacey\\_act](http://www.aphis.usda.gov/plant_health/lacey_act) frequently. Also check the Customs and Border Protection [Guidance on Lacey Act Importation](#) web page.
- **Being ready to answer your customers' questions** about the source of the inputs into your product. Consider this a marketing opportunity.

## Tell me more about this import declaration?

The Lacey Act amendments require importers to present a declaration at the time of importation. The declaration form is submitted electronically. APHIS is phasing in the products that are required to submit declarations. Wood planks are already required and APHIS is considering adding completed boats to the list soon.

The law requires the declaration to contain:

- **Scientific name of covered plant** (including genus & species) – if unknown then *each* species that *may have* been used to produce the product
- **Value** of importation
- **Quantity** of the imported plant or wood product
- **Name of the country** in which the plant was **harvested** – if unknown the name of *each* country from which the plant *may have* been harvested.
- For paper and paperboard products with recycled content, state the **average % recycled content** without regard for species or country of harvest

There will be **phased-in enforcement of the declaration requirement** (see final page of this Alert for schedule). The initial voluntary phase began on December 15, 2008. APHIS began enforcement on April 1, 2009. NMMA recommends that members keep abreast of any changes by subscribing to the APHIS and Customs and Border Control notification e-mail list, since it is possible that this schedule will be modified in the future.

## Are there any exemptions?

Yes, APHIS announced on February 3, 2009 that for now the declaration form will only be **required for formal consumption entries** (*i.e.*, most commercial shipments) **but not for informal entries** (*i.e.*, most personal shipments, personal importations, or mail (unless subject to formal entry), transportation and exportation entries, in-transit movement, carnet importations (*i.e.*, merchandise or equipment that will be re-exported within a year), and foreign trade zone and warehouse entries.

**The import declaration does not apply to packaging material of a product.** NMMA sought a ruling that this exemption will apply to hang tags, manuals and other paper products accompanying a product. APHIS responded by announcing on Feb. 3, 2009 that **the declaration requirement only applies to the actual product and not the “sundries” that ordinarily accompany the product** such as tags, labels, manual, and warranty cards.

Please note the **Lacey Act amendments did not provide a *de minimis* exemption.** So the requirements apply to any amount of wood or covered plant product imported.

## **Recent changes to Phased-In Enforcement Schedule**

APHIS explained in its [September 2, 2009 notice](#) that it received several comments from industry that it would be difficult and in some cases impossible to identify composite and recycled or reused materials (e.g. medium density fiberboard, particleboard, and scrap wood) to the genus and/or species level. In response, **APHIS has announced it has decided to further delay enforcement of the declaration for composite and recycled or reused products.** APHIS currently proposes to enforce the declaration for those products no earlier than September 1, 2010. This delay is to give the Federal Government more time to evaluate options for enforcing the declaration for these goods.

APHIS has also emphasized that **there is no declaration requirement for products that have no wood or other plant content.** So, a steel hammer would not have to be declared, while a hammer with a wooden handle would have to be declared.

## **What about boats?**

APHIS has promised to provide at least 6 months of notice for new listed items that require a declaration form to be imported into the U.S. APHIS has specifically requested comment (by Nov. 2, 2009) on the announced revised schedule (see below) and a new list of HTS chapters / subchapters it is considering adding to subsequent phases. **HTS Ch. 89, Ships, boats, & floating structures, was included on this list.** APHIS has announced that the listed HTS chapters / subchapters would be scheduled to begin mandatory declaration filings on or after September 1, 2010. **Boat importers should therefore be advised that they may be required to submit declaration forms on or after September 1, 2010 for all wood and plant products included in an imported boat.**

NMMA seeks industry input on the complexity of completing a boat declaration so that NMMA can advocate for the industry.

## **How do I get more information?**

Go to [www.aphis.usda.gov/plant\\_health/lacey\\_act](http://www.aphis.usda.gov/plant_health/lacey_act) to get the latest information from APHIS including agency Q&As, relevant notices and rules, and genus and species information. You can also send an e-mail directly to APHIS at: [lacey.act.declaration@aphis.usda.gov](mailto:lacey.act.declaration@aphis.usda.gov). You may also contact NMMA's Cindy Squires, Esq. at [csquires@nmma.org](mailto:csquires@nmma.org); 202-737-9766.

Phase I	Phase II	Phase III	Phase IV
Until March 2009	April 1 – September 30, 2009	October 1, 2009 – March 31, 2010	April 1 – September 30, 2010
Voluntary	Mandatory	Mandatory	Mandatory
(note that false declarations can be subject to prosecution) Plant Import Declaration Form available on APHIS website and accepted after Dec. 15, 2008.  APHIS will conduct outreach.	HTS Chapters: Ch. 44 Headings (wood & articles of wood) specifically -- 4401 – Fuel Wood 4403 --wood in the rough 4404 – hoopwood, poles, piles, stakes. 4406 – railway or tramway sleepers 4407 – wood sawn or chipped lengthwise 4408 – sheets for veneering 4409 – wood continuously shaped 4417 – tools, tool handles, broom handles 4418 – builders’ joinery and carpentry of wood	HTS Chapters: Ch. 44 Headings (wood & articles of wood) specifically -- 4402 – wood charcoal 4405 – wood wool [ <del>excelsior</del> ] 4410 – particle board 4411 – fiberboard of wood 4412 – plywood, veneered panels 4413 – densified wood 4414 – wooden frames 4415 – packing cases, boxes, crates, drums 4416 – casks, barrels, vats tubs 4419 – tableware & kitchenware of wood 4420 – wood marquetry; caskets, statuettes. <del>Ch. 47 (wood pulp) specifically --</del> 4701 – mechanical wood pulp 4702 – chemical wood pulp, dissolving 4703 – chemical wood pulp sulfate 4704 – chemical wood pulp sulfite 4705 – combination, mechanical and chemical Plus Phase II	Ch. 44 Headings (wood & articles of wood) 4421—Articles of wood, nesoi <del>Ch. 48 (paper &amp; articles of) specifically -- 4801; 4802; 4803; 4804; 4805; 4806; 4807; 4808; 4809; 4810; 4811.</del> Ch. 66 Headings (umbrellas, walking sticks, riding crops). Ch. 82 Headings (tools, implements), 8201 Hand tools. Ch. 92 Headings (musical instruments), 9201 – Pianos, 9202 Other stringed instruments. Ch. 93 Headings (arms and ammunitions). 9302 – Revolvers and pistols, 9305.1020 – Parts and accessories for revolvers and pistols. Ch. 94 (furniture etc.) 940169 – Seats with wood frames. <del>940330 – wooden office furniture, 940340 – wooden kitchen furniture, 940350 – wooden bedroom furniture, 940360 – other wooden furniture, 94039070 – wooden furniture parts</del> Ch. 95 Headings (toys, games, & sporting equipment 950420 – Articles and accessories for billards. Ch. 97 Headings (works of art), 9403 – Schulptures. Plus Phases II & III

**Note** that the “~~strike through~~” items are those that had been put on the earlier schedule by APHIS and removed on Sept. 2, 2009.