

CLIENT ALERT

APHIS Publishes Notice on the Implementation and Enforcement of New Lacey Act Requirements on Imports of Plant and Plant Products

Oct.15.2008

On October 8, 2008, the Animal Plant and Health Inspection Service (APHIS) published notice and requested comments on new Lacey Act provisions that impose significant new requirements on imports and trade related to plants and plant products. [73 Fed. Reg. 58,925 \(Oct. 8, 2008\)](#). The APHIS notice focuses on how the government will implement and enforce the broad new import declaration requirements for plant and plant products. Comments are due December 8, 2008.

Background on New Lacey Act Requirements

In May 2008, Congress passed sweeping amendments to the Lacey Act to further combat illegal trafficking in wildlife, fish and plants. The amendments make it unlawful, and impose new penalties, related to the import, export and other dealings of any plant in violation of U.S., Indian, state or foreign laws. In addition, under the new law, importers of plant and plant products must file a declaration that must contain (1) the scientific name of the plant, (2) value of imported plant or product, (3) quantity, (4) name of country from which the plant was harvested, and (5) if product is of recycled plant component, the percentage of the recycled component, and prior listed information for non-recycled components. Violations of the Lacey Act may result in civil and criminal fines and forfeiture.

There are certain exceptions to the above import declaration filing and other new requirements, including: (1) common cultivars and common food crops (including roots, seeds, parts, or products thereof), (2) scientific specimens of genetic plant materials (including roots, seeds, germplasm, parts, or products thereof) used only for laboratory or field research, and (3) plants to remain planted or to be planted or replanted. Import declarations are still required for plants listed in items (2) and (3) above, if those plants are listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) appendix, Endangered Species Act, or state conservation laws on indigenous species threatened with extinction. No import declaration requirements are needed for plants or plant products used exclusively as packaging material to support, protect or carry another item (unless the packaging material itself is being imported).

In sum, the new Lacey Act import declaration requirements are very broad, and include live plants, plant parts, lumber, wood pulp, paperboard, and products containing these materials such as furniture, tools, umbrellas, sporting goods, printed matter, musical instruments, textiles, and products made from plant based resins.

Clarification and Timing of New Import Filing Requirements

APHIS will not begin enforcement of the import declaration requirements until U.S. Customs and Border Protection (CBP) develops an electronic system to collect the necessary data elements. CBP anticipates this system to be completed by April 1, 2009, but this may occur sometime thereafter. APHIS will publish notice of specific dates on which enforcement of the declaration requirements will begin when the CBP electronic system nears completion.

In the meantime, APHIS has proposed a four step phase-in of the new import declaration filing requirements:

- From December 15, 2008 to April 1, 2009 (or as soon thereafter as CBP sets up the electronic system), APHIS will make a paper declaration form available and accept "voluntary" paper submissions of this form from importers;
- On April 1, 2009 (or as soon thereafter as CBP sets up the electronic system), APHIS will begin enforcing import declaration requirements only for products classified under HTS chapters 44 (wood and articles thereof) and 6 (live trees, plants, etc.);
- Beginning approximately on July 1, 2009, APHIS will begin enforcing import declaration requirements for products classified under HTS chapters 47 (wood pulp), 48 (paper and articles thereof), 92 (musical instruments), and 94 (furniture); and
- After approximately September 30, 2009, APHIS will begin enforcing import declaration requirements for subject products classified under all other HTS chapters, including 12 (oils seeds, grains, fruits, plants etc.), 13 (gums, resins, saps, extracts), 14 (vegetable planting material and products thereof), 45 (cork and articles thereof), 46 (basket ware and wickerwork), 66 (umbrellas, walking sticks, riding crops), 82 (tools), 93 (guns), and 95 (toys, games, sports equipment).

APHIS and the Fish and Wildlife Service (FWS) are working on rulemaking to define the terms "common cultivar" and "common food crop" to clarify what imports are covered by these exceptions to the Lacey Act import declaration filing requirements.

Results of "Town Hall" Meeting

APHIS, together with representatives from CBP, Department of Justice (DOJ), and FWS, held a public meeting on the implementation of the new Lacey Act requirements on October 14, 2008 in Washington DC. The agency representatives confirmed that a number of topics remain "on the table," including:

- The difficulties of make species determinations given the fact that many species within the same genus can be nearly indistinguishable as a practical matter;
- Whether "quantity" for declaration purposes refers to the total volume of imported product, total volume of plant product, number of units containing the plant product, or some other measure; and
- Whether "value" refers to the value of the imported item or the value of the plant product content therein (agency officials indicated that in their view the value of the cargo and not its plant content is the key data point).

In addition, APHIS confirmed that packaging materials used to convey other commercial items are exempt from the declaration requirement. They also clarified that peripheral items such as labels or hang-tags are not included under any of the anticipated phase-in required declarations. While the statute as drafted is ambiguous as to whether such materials indeed fall under the packaging exemption, the DOJ stated that they have no intention of enforcing declarations for such items, unless they are actually the product being conveyed.

A transcript of the meeting will be available shortly at http://www.aphis.usda.gov/plant_health/lacey_act/. Interested parties can also use this site to register to receive email notifications of new developments in the implementation process.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

John B. Brew

Partner – Washington, D.C.

Phone: +1 202.624.2720

Email: jbrew@crowell.com

Alexander H. Schaefer

Partner – Washington, D.C.

Phone: +1 202.624.2773

Email: aschaefer@crowell.com