



December 17, 2008

*Submitted via the Federal eRulemaking Portal*

Docket No. APHIS-2008-0119  
Regulatory Analysis and Development  
PPD, APHIS  
Station 3A-03.8  
4700 River Road  
Unit 118  
Riverdale, MD 20737

**RE: Implementation of Revised Lacey Act Provisions (October 8, 2008)**

Dear Sir or Madam,

The Food Marketing Institute (FMI)<sup>1</sup> is pleased to respond to the United States Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS) October 8, 2008, request for comments on implementation of revised Lacey Act provisions. 73 Fed. Reg. 58925 (October 8, 2008). As discussed more fully below, although we appreciate the Agency's efforts to implement the law in a manner that minimizes burdens on importers and the potential for trade disruption, we recommend APHIS adopt several additional steps to ensure importers can comply with the newly enacted declaration requirements.

**A. Background and Overview**

The amendments to the Lacey Act included in section 8204 of the Food, Conservation and Energy Act of 2008 (FCEA) are significant steps toward halting the spread of illegal logging and the illegal taking of wild plants. The Food Marketing Institute and the retail food and distribution

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<sup>1</sup> The Food Marketing Institute (FMI) conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies — food retailers and wholesalers — in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of \$680 billion represents three-quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

HEADQUARTERS:

2345 Crystal Drive, Suite 800  
Arlington, VA 22202-4801

T 202.452.8444  
F 202.429.4519

WASHINGTON OFFICE:

50 F Street, NW, 6th Floor  
Washington, DC 20001-1530

T 202.452.8444  
F 202.220.0873

www.fmi.org  
fmi@fmi.org

industry strongly support the goals of the law and believe it is an important effort to remediate the economic and environmental damage inflicted by these illegal practices.

The law, however, includes a particularly burdensome provision that requires importers of record to declare the scientific name of any imported plant, its country of origin and its quantity and value. By one estimate, there could be as many as 30,000 entries every day subject to this declaration requirement, which could ultimately lead to significant delays in bringing products to market. The difficulty for importers is twofold: (1) receiving and processing this information from foreign suppliers in a timely manner, and (2) presenting it at the border in a manner that allows the government to pursue the intent of the law without needlessly slowing down the entry of a shipment.

In order to minimize the impact of the law on trade and enhance its ultimate effectiveness, we urge APHIS to pursue implementation in a staged manner that focuses first on the products most likely to be subject to illegal harvest and to add additional products only when the effectiveness of the first stage has been assessed. APHIS has already announced its intention to pursue a staggered phase-in and we applaud the recognition of the need for this kind of gradual approach. Several additional steps should help this process progress in a more effective manner.

#### **B. FMI Supports the Guidance Provided by Congress**

On October 10, 2008, six Congressmen<sup>2</sup> instrumental in the passage of the Lacey Act amendments wrote to APHIS, Customs and Border Protection, the Department of Justice and the Fish and Wildlife Service offering guidance on implementing the provisions of the law. The FCEA, they offered, “clearly provides the implementing agencies with adequate discretion to implement the new requirements in a commonsense and practical manner.” The Congressmen went on to urge the agencies to use this discretion to create a workable system as they moved forward. FMI echoes their call for APHIS to use the broad discretion provided by the law to focus the scope of coverage on the products most directly resultant from illegal logging.

Specifically, FMI supports the call to:

- Implement the declaration requirement of the law when the electronic filing system becomes available, currently estimated to be in April 2009;
- Provide phase-in periods of at least six months using the Harmonized Tariff Schedule (HTS) classifications as product identifiers;
- Focus the first phase-in period on products easily traced back to the source, e.g., logs, timber, sawn wood, lumber and solid wood flooring;

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<sup>2</sup> Representative Earl Blumenauer, Representative Nick Rahall, Representative Charles Rangel, Senator Ron Wyden, Senator Tom Harkin, and Senator Max Baucus.

- Limit the declaration requirement to formal entries and exclude informal entries, mail, personal importations and warehouse entries; and
- Establish a database of genus, species and common trade names for plants, along with foreign laws related to their importation and illegal harvesting or logging.

**C. Packaging**

The Lacey Act amendments explicitly exclude packaging of any sort from the declaration requirements. The stated exception to this is when the packaging itself is the imported product. FMI urges APHIS to interpret “packaging” in the broadest possible terms to include not only boxes, protective wrap and manuals but also to cover items such as labels and corks that may be associated with the covered product but do not constitute part of its essential character.

**D. Product Exclusions – Common Cultivars and Food Products**

The law also provides an exemption to the declaration requirement for products specifically classified as “common cultivars” and/or “food products.” However, the law leaves the definition of these two terms to APHIS as part of the rulemaking process. The agency has indicated its intent to open a rule requesting comment on a proposed definition in the near future. FMI urges APHIS to act as quickly as possible on this request for comment and to begin setting the definition of the terms. It is essential for industry to have a degree of certainty as to its exposure under the law, but unless and until these terms have a concrete and codified meaning, this certainty remains elusive. Considering that there is substantial cost and lead-time necessary to work with suppliers to prepare the information needed to meet the declaration requirements, the importance of moving quickly on these definitions cannot be overstated.

**E. Establish a *De Minimis* Standard**

As previously noted, it is widely expected that the declaration requirements of the Lacey Act could result in more than 30,000 entries every day requiring a filing. This is a level of coverage almost certain to overwhelm the system, slow down trade and ultimately render the law ineffectual. To combat this, FMI encourages APHIS to set a *de minimis* standard of plant and wood content necessary for the declaration requirements to apply. This would free the agency from having to consider and receive declarations on products that may have a negligible content falling under the definition of the law.

The agency has publicly questioned whether it has the authority to establish a *de minimis* threshold. In the absence of this power, we would encourage APHIS to seek such from Congress.

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2345 Crystal Drive, Suite 800  
Arlington, VA 22202-4801

T 202.452.8444  
F 202.429.4519

WASHINGTON OFFICE:

50 F Street, NW, 6th Floor  
Washington, DC 20001-1530

T 202.452.8444  
F 202.220.0873

www.fmi.org  
fmi@fmi.org

Although the Lacey Act amendments represent an important effort to counter the damage inflicted by illegal logging and taking of wild plants, implementation of the Lacey Act amendments will require careful consideration by the government agencies tasked with enforcing the law. FMI appreciates the opportunity to provide comment on the new amendments and looks forward to working with the agency as implementation progresses.

Respectfully submitted,



Leslie G. Sarasin, Esq., CAE  
President and Chief Executive Officer

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**F** 202.429.4519

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**F** 202.220.0873

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