



July 1, 2020

VIA ELECTRONIC SUBMISSION

The Honorable Sonny Perdue
Secretary
U.S. Department of Agriculture
Animal and Plant Health Inspection Service
1400 Independence Ave., S.W.
Washington, D.C. 20250

Re: Implementation of Revised Lacey Act Provisions (Docket No. APHIS-2008-0119).

Dear Secretary Perdue:

On March 31, 2020 the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) published a notice of enforcement schedule for Phase VI of the import declaration requirements under the Lacey Act.¹ The U.S. Small Business Administration's Office of Advocacy (Advocacy) encourages APHIS to consider revisions to the notice that would clarify the requirements, and eliminate those that are duplicative. In addition, Advocacy strongly urges APHIS to delay the compliance date for the enforcement schedule to relieve the overall burden on small entities and to consider their inability to conduct normal course of business during this time.

The Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small

¹ Implementation of Revised Lacey Act Provisions, 85 Fed. Reg. 17849 (March 31, 2020).



Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

Background

The Lacey Act, first enacted in 1900 and updated in 1981, combats trafficking of illegally taken wildlife, fish or plants.⁷ In 2008, the Lacey Act was amended by the Food, Conservation, and Energy Act to amend protections to a range of plants and plant products.⁸ Pursuant to that update, it is unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce plants that are taken in violation of any law domestic or foreign.⁹ Another provision of the Act requires that those importing certain plants and plant products produce an import declaration that contains among other things the scientific name of the plant including genus and species, the value of the importation, the quantity of the plant, and the name of the country from which the plant was harvested.¹⁰

The declaration does not apply to plants used exclusively as packaging material unless the material itself is being imported.¹¹ The enforcement of these requirements is occurring in phases. The first phase was finalized on February 3, 2009,¹² the second on September 2, 2009,¹³ and the third on February 6, 2015.¹⁴

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ *Id.*

⁶ 5 U.S.C. § 601 note

⁷ 16 U.S.C. § 3371 et. seq.

⁸ 16 U.S.C. § 3372 et. seq.

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

¹² Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 5911 (February 3, 2009).

¹³ Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45415 (September 2, 2009).

¹⁴ Implementation of Revised Lacey Act Provisions, 80 Fed. Reg. 6681 (February 6, 2015).

On March 31, 2020, APHIS published a Notice of Enforcement Schedule for Phase VI.¹⁵ This recent notice would begin on October 1, 2020, and contains five chapter headings (33, 42, 44, 92, and 99) for products covered by the notice. Among the products covered are the following headings: essential oils; trunks, cases, and suitcases; wood and articles of wood; musical instruments; and miscellaneous manufactured articles.¹⁶ APHIS is currently inviting comments on products covered under this phase.

Small Entities Are Concerned About this Enforcement Schedule

Advocacy Engagement with Small Entities

On June 24, 2020, Advocacy conducted a teleconference to hear directly from affected small entities about this notice.¹⁷ During the teleconference, Advocacy and APHIS staff heard from representatives of small wood products manufacturers, essential oils, wood instruments, and pallet producers. In all instances these small entities were concerned about the requirements of the notice. Chief among these concerns was the short deadline for compliance; however these small entities also raised concerns about their ability to trace the elements in their products to such a high level of specificity and asked that APHIS provide clarity about the products covered. These concerns are further discussed below.

Identification of Affected Small Entities

Advocacy heard from stakeholders in wood products manufacturing and import who are directly affected by this enforcement action. Small entities engaged in these activities include musical instrument dealers, furniture manufacturers, wood pallet suppliers, importers/manufacturers of wood-containing essential oils and orchestras importing wood instruments. As reference, Advocacy provides the relevant NAICS codes and SBA Size Standards in the table below.¹⁸

Affected Entity	NAICS CODE	NAICS DESCRIPTION	SBA Size Standard
Wood Pallet Suppliers/Importers	321920	Wood Container and Pallet Manufacturing	500 Employees
Wood Product Manufacturing	321999	All Other Miscellaneous Wood Product Manufacturing	500 Employees
Furniture Manufacturing	337122	Nonupholstered Wood Household Furniture Manufacturing	750 Employees
Furniture Manufacturing	337127	Institutional Furniture Manufacturing	500 Employees
Wood Product Importers	423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	150 Employees
Essential Oils Importers	424690	Other Chemical and Allied Products Merchant Wholesalers	150 Employees
Essential Oils Importers	325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing	500 Employees
Orchestras	711130	Musical Groups and Artists	\$12.0M in annual receipts
SOURCE: Cenus Bureau 2017 County Business Patterns and 2017 Economic Census. SUSB 2017			

¹⁵ *Supra* note 1.

¹⁶ *Supra* note 1.

¹⁷ See APHIS Implementation Of Revised Lacey Act Provisions Phase VI – Teleconference – June 24 Agenda, available at: <https://advocacy.sba.gov/2020/06/22/aphis-implementation-of-revised-lacey-act-provisions-phase-vi-teleconference-june-24/>

¹⁸ See 2017 County Business Patterns and 2017 Economic Census reports on employer firms only. Tables accessible through U.S. Census Bureau Statistics of U.S. Businesses, (SUSB 2017) available at: <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>

Wood Container and Pallet Manufacturing

SBA's Office of Size Standards has determined that for NAICS code 321920, Wood Container and Pallet Manufacturing, a small business is defined as having fewer than 500 employees.¹⁹ Small businesses in this NAICS code accounted for 2,327 (99 percent) of 2,342 total firms.²⁰ Most of these small firms are very small (<5 employees), and make up 753 or 32 percent of firms in this sector. Small firms in this sector account for 77 percent of annual receipts, with firms employing 20-99 workers generating the majority (37 percent) of receipts for the sector. According to the National Wooden Pallet and Container Association, while the sector is spread across the United States, the states of Texas, Ohio and California are leaders in both employment and upstream output for the sector.²¹

Advocacy Comments to the Notice

1. *APHIS should delay the effective date of this notice to reduce the burden on small entities.*

Small entities have stated that additional time is needed to comply with this notice. Lacey Act import declarations require that entities produce the genus and species for the wood products imported.²² This level of specificity would require sophisticated traceability studies that are onerous and costly to small entities.

Delaying the compliance date of this notice lessens the economic burden of this enforcement action on the very smallest firms. Specific costs associated with this enforcement action are largely due to the amount of time and effort it will take to achieve compliance, if compliance is indeed achievable, especially the unknown cost of implementing traceability programs. Traceability studies require highly trained specialists to determine genus and species of wood products, which will require very small firms to procure the services of additional highly specialized outside expertise. Once hired, these specialists will need to take time to develop and implement studies. It is unknown whether there are sufficient numbers of these highly specialized personnel to meet the demand caused by this enforcement schedule. Any shortage of such specialized human capital will result in delay. Any delay in doing business amounts to losses in revenues, which may not be readily absorbed by very small firms. Moving the compliance date could help minimize revenue losses to the very smallest firms and still meet the objectives of the enforcement action. Advocacy believes that extended compliance dates for small firms will reduce potential revenue losses, as it will allow proper planning of implementing traceability programs.

¹⁹ See 2019 U.S. Small Business Administration, Table of Small Business Size Standards available at https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019.pdf.

²⁰ See Data from the United States Census (2017) available at <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>.

²¹ See September 7, 2018 Economic Analyses: National Wooden Pallet and Container Association at Table E.4. and Table E.5. See also: <http://palletcentral.uberflip.com/i/1050251-economic-analysis-of-the-us-wooden-pallet-container-industry/0?m4=>

²² *Supra* note 8.

Another complicating factor is the ongoing global pandemic. Advocacy heard from multiple small entities that travel restrictions, border closures, and entire company shutdowns are creating major difficulties for small entities. While products themselves are moving across the borders, personnel or hired compliance managers and auditors are unable to do so. This is concerning to businesses who often conduct their own on-site inspection prior to filing an import declaration. Many countries have not deemed this type of work essential and have therefore issued travel bans on personnel traveling for these purposes.²³ It is therefore prudent that APHIS delay the compliance date for these requirements until such time that entities can resume normal course of business.²⁴

Currently, the notice of enforcement has a compliance start date of October 1, 2020.²⁵ Advocacy asks that APHIS issue a notice extending the compliance deadline as soon as possible, and *prior* to issuing a final notice of enforcement as it may take time to review public comments and accordingly revise and publish a final notice. Allowing the compliance deadline to remain October 1, 2020 without extension imposes unnecessary uncertainty on affected small entities by requiring them to comply when it is not feasible to do so.

2. *APHIS should exempt products that may be covered under other statutes in order to avoid unnecessary duplication.*

As noted above, almost 99 percent of total firms in wood container and pallet manufacturing are considered small entities. While the Lacey Act states that it does not apply to packaging material unless the material itself is being imported,²⁶ this is counterintuitive to the intended use for the material. Packaging material that is itself being imported is presumably done with the intent of using it to transport other goods; the intended use of the product does not change simply because it is empty. Furthermore, according to a 1998 International Trade Commission Ruling, wooden pallets are considered “instruments of international traffic” (IIT) and are therefore exempt from customs laws of the U.S. regardless of whether they are loaded or empty.²⁷ Applying this same principal to these same products, these items should also be exempt from Lacey Act requirements whether they are loaded or empty.

Imposing a new requirement on wood containers and pallets may result in unnecessary shipping delays for other products as businesses will have to wait to receive shipping material until it passes this additional inspection requirement. The purpose of the Lacey Act is to combat the trafficking of illegally harvested timber; however, because these products are already subject to other international trade requirements, imposing this additional requirement is not only duplicative, but an unnecessary use of agency time and resources.

²³ See CDC world-wide travel ban notices available at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html>. See also Exec. Order No. 13924, 85 Fed. Reg. 3153 (May 22, 2020) stating that agencies should address this economic emergency by modifying regulations that may inhibit economic recovery, and specifically with respect to small businesses.

²⁴ *Id.*

²⁵ *Supra* note 1.

²⁶ *Supra* note 8.

²⁷ See 19 U.S.C. § 1322(a), which exempts articles designated as instruments of international traffic (IIT) from the application of the customs laws of the United States, including the requirement of formal entry.

3. *APHIS should clarify that this notice will not impose additional requirements on products that have already been inspected.*

One of the comments that Advocacy heard was that it is not clear whether musical instruments that are otherwise personal effects being transported across borders for a performance would be subject to the requirements of the import declaration. While the statutory language in the Lacey Act does state that it is unlawful to *transport* articles that are in violation of any law,²⁸ this does not clarify whether an item that has previously been imported and sold into U.S. commerce and is now being transported as a personal effect is once again subject to the same requirements. According to the Harmonized Tariff Schedule, professional instruments and tools of occupation when returned to the U.S. after being exported temporarily are subject to duty-free treatment.²⁹

Similarly, in instances where an orchestra is moving entire lots of personal wooden instruments for their musicians at the same time, those instruments should not be subject to additional import declaration. In those instances, inspection would have already occurred when the instrument first entered the United States and was purchased. APHIS should therefore make clear that once a product has been inspected and approved, so long as the instrument has not otherwise been altered, further Lacey Act declaration filings are not necessary.

Conclusions and Recommendations

Advocacy appreciates the opportunity to provide comments to APHIS on the notice of enforcement and strongly encourages APHIS to consider the comments and recommendations from small entities. Specifically, Advocacy asks that APHIS extend the compliance deadline for the notice so that small entities are not overly burdened in trying to comply with the specific requirements of this import declaration. Additionally, Advocacy asks that APHIS consider exemptions for products that may already be covered under other statutes or may have been previously inspected under the Lacey Act itself.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

²⁸ *Supra* note 8 (emphasis added).

²⁹ *See* United States International Trade Commission, Harmonized Tariff Schedule of the United States Sec. XXII, Chapter 98, Subheading 9801.00.85 (2020) available at <https://hts.usitc.gov/current>.

/s/
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