
❖ SPC&B Update ❖

A Newsletter for Clients of Sharretts, Paley, Carter & Blauvelt, P.C.

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Lacey Act Update



The Lacey Act, the United States' oldest wildlife protection statute, seeks to end trafficking in illegal wildlife, fish and plants. In 2008 the Lacey Act was amended so as to broaden its coverage to include a greater range of plant species, including timber and wood products derived from wild harvested stands, making it illegal to import, export or otherwise purchase any such plant or plant product. Further, the 2008 amendments require that a USDA Plant and Plant Product Declaration Form be submitted with imports of non-exempt plant and plant products.

In 2009 USDA (APHIS) published a Revised Lacey Act Phase-in Schedule for wood and plant products. Importers understood that these new requirements did not apply to "common cultivars" and "common food crops" which, like scientific specimens for lab or field research, are specifically exempted from the 2008 amendments. Rather than defining these terms in the statute, it was left to USDA (APHIS) and the Interior Department to define at a later date. This has caused confusion and uncertainty and has resulted in declarations filed by importers unnecessarily with respect to exempt products.

APHIS is currently addressing this issue. In a proposed rule published in August, 2010, APHIS provided definitions of common cultivars and common food crops which provide better guidance as to which plant or plant products are exempt by inserting a commercial standard.

The proposed rule defines "*common cultivar*" as a plant (except a tree) that has been developed through selective breeding or other means for specific characteristics and is a species or hybrid *cultivated commercially*. (It also must not fall under CITES or the Endangered Species Act nor under any state conservation law pertaining to indigenous species). Similarly, a "*common food crop*" is defined as one that has been raised or grown for human or animal consumption; is *cultivated on a commercial scale* and is not listed on CITES, the Endangered Species Act nor under any state conservation law.

Under the proposed rule, once a plant falls within the definition of "common cultivar" or "common food crop" that plant species is exempt no matter the origin of the particular shipment. Moreover, after publication of the final rule, expected about 180 days after the comment period ends, APHIS intends to supplement these definitions by publishing on its website a constantly updated list of common cultivars and common food crops.

75 Broad Street
New York, New York 10004
Phone: 212-425-0055
Fax: 212-425-1797
212-742-2180

SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.

www.spcblaw.com
Email: customs@sharretts-paley.com

1660 L Street, N.W.
Washington, D.C. 20036
Phone: 202-223-4433
Fax: 202-659-3904

Finally, the proposed rule also defines plants, including trees, and products protected by the Lacey Act as “any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and including trees from either natural or planted forest stands”.

The final rule should ease the burden for importers by providing them with greater certainty concerning what constitute exempt products for which no declaration is required. At the same time the rule will clarify that the plant and plant products, including trees, which the Lacey Act is intended to protect are those plants and trees which are illegally sourced from natural, wild or planted forest locations.

In the meantime, an interagency group assigned the task of reviewing the effectiveness of the Lacey Act declaration requirements and of drafting legislation to assist in the identification of illegally imported plants intends to publish its report by late November or early December 2010. Once the report is issued, the law provides for the ability of APHIS to promulgate regulations that would (i) limit the applicability of any of the plant product declaration requirements to specific plant products and make any other necessary modifications based on the review; and (ii) limit the scope of the exclusion for certain packaging material if such limitations are warranted as a result of the review. We will continue to keep you apprised of further developments.

If you have questions on whether your products are covered by the Lacey Act reporting requirements, please contact Gail T. Cumins at gcumins@spcblaw.com or Donna L. Shira at dshira@spcblaw.com or call us at 212-425-0055.