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## MEMORANDUM

To: Clients and Friends of the Firm  
From: Neville Peterson LLP  
Re: Declaration Requirement For Imported Plant Products.

### I. INTRODUCTION

In the recently enacted 2008 Farm Bill, formally called the Food Conservation and Energy Act of 2008 [P.L. 110-246], Congress amended the Lacey Act by requiring importers of plants and plant products to declare detailed, species-specific information about any imported plant product as of December 15, 2008. The purpose is to target imports of illegally obtained timber (logs harvested or exported in violation of local laws) by forcing importers to discover and report the scientific identities, quantities, values, and origins of any form of imported plant life, whether directly imported or incorporated into downstream products. This Memorandum explains the new statutory requirements and their implications for the importation of a vast array of goods.

### II. ANALYSIS

Under the Lacey Act, 16 U.S.C. § 3371, it is unlawful to trade in wildlife, fish, and plants that have been taken, possessed, transported or sold in violation of any domestic or foreign law. Section 8204 of the 2008 Farm Bill expands the scope of plants covered by the Lacey Act and imposes a new import declaration requirement for both plants and plant products. This provision thus affects the importation of a vast array of goods containing plant material and increases importers' regulatory burdens and risks.

Prior to the amendment, "plants" subject to the Lacey Act were defined as "any wild member of the plant kingdom, including roots, seeds, parts thereof (but excluding common food crops and cultivars) which is indigenous to any State" and identified as endangered or threatened with extinction.

Section 8204 broadens the definition of "plant" and "plants" subject to the Lacey Act to cover "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 limited exceptions, as of now undefined, encompass:

- (a) common cultivars, except trees, and common food crops (including roots, seeds, parts or products thereof);
- (b) scientific specimens of plant genetic material (including roots, seeds, germplasm, parts or products thereof) to be used only for laboratory or field research
- (c) any plant that is to remain planted or to be planted or replanted; and<sup>1</sup>
- (d) packaging material used to support, protect, or carry another item, unless the packaging material is itself the imported item.

In addition, the amendment extends the acts prohibited beyond the taking, possessing, transporting, or sale of plants in violation of any domestic or foreign law. Specifically, it will be unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant taken, possessed, transported or sold (a) in violation of any law or regulation relevant to plant protection of any U.S. state or foreign country; (b) without payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any U.S. state or foreign country; or (c) in violation of any limitation governing the export or transshipment of plants under any law or regulation of any U.S. state or foreign country.

Effective December 15, 2008, all importers of plants and plant products (except for packaging products, will be required to declare specifically:

- (a) the scientific name of any plant (including the genus and species of the plant) contained in the importation;
- (b) a description of the value of the importation and the quantity (including the unit of measure) of the plant; and
- (c) the name of the country from which the plant was taken. "Taken" is further defined as the country in which the plant or plant product is harvested, cut, logged or removed.

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<sup>1</sup> Exceptions (b) and (c) do not apply if the plant is listed in an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, as an endangered or threatened species under the Endangered Species Act of 1973, or pursuant to any state law that provides for the conservation of indigenous species that are threatened with extinction.

If an imported paper or paperboard plant product includes recycled plant product, the importer will be required to include the average percent of recycled content without regard for the species or country of origin of the recycled plant product (in addition to the information required for any non-recycled plant content).

Depending on the interpretation in the implementing regulations, estimates are that the import declaration requirement may affect from one-third to virtually the entire Harmonized Tariff Schedule of the United States. At least preliminarily, CBP and USDA officials are expressing the position that no amount of plant product will be considered *de minimis* for the purposes of the declaration requirement. Aside from obvious examples such as lumber, wood furniture, and wood flooring, CBP and USDA contemplate interpreting the declaration requirement to cover a plethora of other downstream products, including:

- All paper products (*i.e.*, printing paper, hang tags on clothing articles, instruction manuals)
- Pharmaceutical products containing plant fillers (*i.e.*, aspirin)
- Textiles
- Cosmetics (*i.e.*, lipstick, often made with carob tree wax)
- Hair products (*i.e.*, hairspray made with tree resin)
- Musical instruments
- Cooking tools with wooden handles
- Dried or powdered foods (containing cellulose; or containing glycerol ester of wood rosin, a common food additive)

Importers are unlikely to be able to identify by December 15<sup>th</sup> the exact species of plants from which their products are derived. When the species of plants used in a product vary or the exact species of plants are not known, the importer will be required to provide the name of *each* species of plant that *may* have been used to produce the plant product. Where the actual country from which the imported species was taken is not known, and the species concerned is commonly taken from more than one country, the importer will be required to list *every* country from which the plant *may* have come. Section 8204 does not, however, provide for exceptions where the weight and value of a product's plant content are unknown.

It is not yet certain with which agency, U.S. Customs and Border Protection ("CBP") or the U.S. Department of Agriculture ("USDA"), an importer must file its declaration. For practical reasons, it is expected that neither the agencies nor importers will be able to automate the process of filing a declaration by December 15<sup>th</sup>; thus the declaration will need to be filed on paper.

Goods imported in violation of the Lacey Act are subject to forfeiture regardless of whether the importer knew or should have known that the goods were taken illegally. Also, importers found in violation of the law can face civil administrative penalties (fines) and criminal prosecutions (fines and/or imprisonment). The maximum civil penalty for both the illegal importation of certain plants and plant products as well the

*knowing* failure to declare plants or plant products upon importation is a fine of no more than \$10,000. However, when a violation involves only the “transportation, acquisition or receipt” of plants or plant products “taken or possessed” in violation of law with a market value less than \$350, the fine will be the lesser of \$10,000 or the maximum provided for violation of said law. If an importer *unknowingly* fails to declare certain plants or plant products upon importation, the maximum civil penalty is a fine of \$250.

There are distinct criminal penalties for the *knowing* importation of plants or plant products in violation of the Lacey Act and the *knowing* failure to declare plants or plant products upon importation. The maximum criminal penalty for the knowing illegal importation of plants or plant products is a \$20,000 fine and/or five years imprisonment. The maximum criminal penalty for the knowing failure to declare plants or plant products upon importation is a fine and/or one year of imprisonment.

Determinations on the acceptability of the declaration are expected to be made by USDA. However CBP will provide enforcement, primarily consisting of exclusion of the shipments from the country. Forfeitures, penalty proceedings, and prosecutions will also involve the Departments of Agriculture and Justice.

### III. Conclusion

This recent amendment to the Lacey Act is expected to impose a severe burden on importers to track the species of plant used in their plant products and the country from which the plant is harvested. The most effective avenue of relief would be further legislative action in response to importer concerns over the impact of the declaration requirement. Whether or not some legislative relief is forthcoming, importers will need to prepare to make appropriate declaration on their imported plants and plant products. Importers will likely need to require contractually that suppliers provide them with the information necessary to complete the declarations. Given that the declaration requirements are scheduled to take effect on December 15, 2008, it is strongly advisable for importers to begin as soon as possible to evaluate their imports that would require a declaration, revise the terms of their supplier agreements, and establish tracking systems and databases to generate their declaration procedures. For more information on this new legislation please contact Michael Tomenga (202) 776-1148, [mtomenga@npwdc.com](mailto:mtomenga@npwdc.com), or Casey Richter, (202) 776-1145, [crichter@npwdc.com](mailto:crichter@npwdc.com).