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To The

HOUSE COMMITTEE ON NATURAL RESOURCES, SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS AND INSULAR AFFAIRS

OVERSIGHT HEARING ON THE 2008 LACEY ACT AMENDMENTS

May 16, 2013

Mr. Chairman, Members of the Subcommittee, thank you for inviting me to testify at today's hearing on the Lacey Act. While I am a former representative of the retail industry, I appear today on behalf of myself and speak only as someone who has been actively involved in the policy discussions on the Lacey Act Amendments since their passage in 2008 as part of the Food, Conservation, and Energy Act.

The purpose of the 2008 Lacey Act Amendments is to prevent illegal logging and harvesting of plants in both the United States and abroad, which pose serious threats to the environment and legitimate commerce in products derived from wood and plants.

While these aims are laudable and supported by American business, the amendments were added to the 2008 farm bill largely without the benefit of the normal legislative process of full public comment, and debate and consideration in Congress. The unfortunate consequence is that this law, as written and enforced, has had several unintended consequences that unnecessarily burden compliance and enforcement, needlessly engender unpredictability, threaten American businesses and jobs, and deviate from the law's core objectives.

To address those unintended consequences, Congress should make four modest, common-sense reforms to the law that will improve and facilitate enforcement and compliance and reduce unnecessary burdens on legitimate commerce, while preserving the law's integrity and objectives.

First, Congress should correct an omission in the 2008 amendments to prevent retroactive application of the law to plants or plant products imported, processed, or manufactured prior to the law's effective date of May 22, 2008. As a general principle, penal statutes should not be applied retroactively, especially when it could subject individuals and companies to potentially severe legal consequences with no prior notice or ability to comply with the law. This reform is particularly important to ensure that enforcement actions will not be taken against antiques and used products, or musical instruments containing wood or plant products harvested, in some cases, years before 2008, the provenance of which is impossible to determine.

Second, the Lacey Act Amendments were written in a way that could trigger enforcement and penalties from violations of an almost unlimited and largely unknowable set of criminal and civil foreign laws, regulations, and ordinances at the national, sub-national, and local level. Consequently, the public has little guidance or notification as to the legal responsibilities under this law, which raises a serious legal question whether the law, as currently written, is unconstitutionally vague.

Congress should mitigate this problem by clarifying that the 2008 Amendments apply only those foreign laws that are directed at the protection, conservation, or management of plants or the ecosystems of which they are a part. For example, it is simply inappropriate to initiate a Lacey Act enforcement action based on a violation of a foreign law restricting the export of certain products that is intended not to protect the environment, but rather to protect manufacturing in that country from foreign competition.

Congress can also direct the Administration to construct a publicly-available database of applicable foreign laws. These changes will also ensure that enforcement of the law is properly focused on and consistent with its environmental goals, will provide companies greater predictability, and facilitate due diligence in their supply chain management.

A third problem that Congress should address is that the Lacey Act Amendments, as currently constructed and enforced, can subject a good-faith owner, purchaser, retailer, or other party in the chain of custody of a plant or plant product, to penalties through no fault of their own and despite best efforts to comply.

The Departments of Interior and Justice have stated that ''people who unknowingly possess a musical instrument or other object containing wood that was illegally taken, possessed, transported or sold in violation of law and who, in the exercise of due care would not have known that it was illegal, do not have criminal exposure.'' However, Justice has also stated that the Lacey Act Amendments impose a strict liability standard with respect to possession of such products, which it deems to be contraband. Thus, a company can have its products seized and forfeited regardless of the degree of due diligence that it exercises to comply with the law. Typically, products seized and forfeited are not destroyed, but are auctioned off by the federal government and returned into the stream of commerce.

Generally speaking, wood and plant products are not inherently illegal to possess. Also, it is impossible to know just by looking at a wood product whether it was made from legally or illegally harvested wood. Given these considerations, it is inappropriate to treat wood and plant products as contraband like illicit drugs, unless they involve a tree or plant specifically included under a trade ban, such as the Convention on the International Trade in Endangered Species (CITES).

Congress should address this problem by clarifying that the strict liability provision for seizure of contraband under the civil asset forfeiture statute does not apply to plants under the Lacey Act. As a matter of due process, Congress should also provide those who can demonstrate they have exercised proper due care in compliance with the law, a day in court and a right to petition a federal judge for the return of any goods seized and subject to forfeiture through no fault of their own. This change would not undermine the Lacey Act because it would actually provide an incentive to encourage the highest degree of due diligence, and would offer no loophole for knowing violators, scofflaws, or even innocent owners who cannot show that they exercised a sufficient degree of due care.

The fourth issue with the Lacey Act Amendments relates to the requirement that imports containing wood or plant material must be accompanied by a declaration filed "upon importation" with USDA's Animal and Plant Health Inspection Service (APHIS). This requirement has created three significant problems for both government and business. The first is that the term "upon importation" is a layman's expression with no legal meaning in the technical parlance of customs law. Rather, the process of "making entry" is the key action with respect to an imported product, which is the point at which it legally, rather than just physically, enters U.S. customs territory. The most common types of entry for commercial goods are "consumption entries" and "warehouse entries."

The second problem with the import declaration is that it has failed to facilitate compliance for businesses by imposing unnecessary costs and higher regulatory burdens compared to other laws regulating imports. In particular, technical limitations with the electronic system for filing import documents cannot accommodate large amounts of data that must be submitted on each shipment for even fairly simple products. As a result, importers have to resort to breaking up single shipments into multiple entries or file paper declarations. Both these options significantly complicate and delay import transactions, and force importers to incur much higher brokerage fees, Merchandise Processing Fees (MPF), and other administrative costs.

The third problem is that the import declaration requirement has compromised, rather than enhanced enforcement efforts by the federal government. Even though the law is not yet fully implemented, APHIS calculates that it already receives approximately 9,200 declarations per week. The agency faces this crush of paperwork with few resources and little ability to examine declarations, undertake any risk-based analysis, and has been unable to add new tariff lines under the U.S. Harmonized Tariff Schedule (HTS) to the declaration requirement as mandated by statute.

Congress should correct these problems, which unnecessarily cost industry and government $56 million annually, by replacing the requirement for filing a declaration upon “importation” for each shipment of imported merchandise with a “declaration on demand.” The on-demand system is currently used with other laws regulating imports, including safety certifications for imported products under the Consumer Product Safety Improvement Act (CPSIA), and is more consistent with the paperless system Customs and Border Protection (CBP) uses in its enforcement activities. It requires importers to collect and maintain the same information currently required on the import declaration but to produce that information at the request of federal enforcement agencies. This system will allow APHIS to identify and focus on higher-risk shipments by more efficiently separating the wheat from the chaff. It will also relieve businesses of the costs and burdens incurred by constantly having to file declarations, even for low-risk shipments, that are merely being sent unread to a warehouse for storage. An on-demand declaration system would in no way undermine the Lacey Act, but will actually support better enforcement and compliance.

As part of this change, Congress should also provide explicit authority to the Secretary of Agriculture to promulgate regulations regarding plant declarations, and permit the Secretary to distinguish among different plants and limit the applicability of the declaration requirement for a particular class of type of plant if the Secretary determines that applying the requirement to such plant class or type would not be feasible, practicable, or effective.

Finally, I must caution that to the extent opposition to any changes to the Lacey Act Amendments may be motivated by exploiting the problems with this law to burden or disrupt legitimate imports, it is inappropriate, inconsistent with U.S. legal obligations under the rules of the World Trade Organization, and contrary to the intent of Congress, that this law operate, or be used as a non-tariff trade barrier against legally-harvested plants.

In conclusion, I do not question the need for a law like the Lacey Act Amendments, nor would I suggest changes that I thought would undermine the law. I just believe that this law needs to be improved to make it more effective by correcting the problems I have discussed. Congress specifically contemplated possible changes to the law once it had a chance to see how it would operate. After five years, Congress has ample evidence that these modest and targeted reforms are warranted and should be adopted.