

April 15, 2009

Lacey Act Update

On May 22, 2008, the Lacey Act was amended to make it illegal to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant - with limited exceptions - to be taken or traded in violation of domestic or international laws. Now CBP has automated the process for collecting the declaration (PPQ 505). Data will be transmitted to ACS through ABI. Electronic filing of the PPQ 505 declaration still allows remote location filing. Electronic submission of the required data elements has been accepted since April 1, 2009. Enforcement of the data collection requirement will begin May 1, 2009. Customs is encouraging importers to use the 30-day period starting April 1, 2009, for live testing of the electronic system.

The Lacey Act now requires an import declaration for plants that includes the scientific name of any plant, a description of the value and quantity, and the name of the country from where the plant was taken. If a plant species or country of origin cannot be determined, the plant declaration must include **a list of possible plant species found in the product or a list of possible countries from which the plant originated**. For paper, and paperboard products, the declaration must include the average percent of recycled content regardless of species or country of origin.

- Phase I: PPQ declaration is available on the APHIS website and accepted after December 15, 2008.
- Phase II: Lists products in Chapter 44 of the HTS under headings 4401, 4403, 4404, 4406-4409, 4417, and 4418, and is effective April 1, 2009 to September 30, 2009.
- Phase III: Adds products also in Chapter 44 - 4402, 4405, 4410-4416, 4419, and 4420 - and in Chapter 47 - 4701-4705 - and is effective October 1, 2009, to March 31, 2010.
- Phase IV: Takes effect between April 1, 2010, and September 30, 2010, and adds products classified under Chapters 44 (4421), 448 (4801 through 4811), and 94 (9401.69, 9403.30, 9403.40, 9403.50, and 9403.6-9403.70).

There are only a handful of exceptions to the declaration requirement, and they include plants and plant products used exclusively as packing material to support, protect, or carry another item, including (but not limited to) instruction manuals, labels, pallets, and crating, etc. "[C]ommon cultivars" and "common food crops" are still to be defined by APHIS and FWS in joint rulemaking, as well as plants for planting or replanting.

How are you documenting the species and origin of your plant products? Remember, these details now become part of the a(1)(A) list and therefore must be maintained for five (5) years as these Lacey Act requirements are considered a condition of admissibility. How are you documenting these details to your customs broker so the data is transmitted electronically?

Interesting Twist On Antidumping Enforcement - But Will It Succeed?

Sioux Honey Association (honey), Adee Honey Farms (honey), Monterey Mushrooms Inc. (mushrooms), The Garlic Co. (garlic), and Beaucoup Crawfish of Eunice Inc. (crawfish), all domestic producers of the foods highlighted, have filed suit at the Court of International Trade against issuers of Customs bonds, CBP, and Commerce alleging they have been damaged to the tune of \$1 billion

caused by dumped Chinese food products. The defendants include Hartford Financial Services Group Inc. (HIG), Kingsway Financial Services Inc. (KFS) unit Lincoln General Insurance Co., Swiss Reinsurance Co. (RUKN.VX) unit Washington International Insurance Co., and American International Group Inc. (AIG) unit American Home Assurance, along with the two agencies.

The complaint alleges that for a period of eight years the named sureties issued hundreds of customs surety bonds that guaranty payment of antidumping duties owed to the government and did so negligently. Presumably, the complaint revolves around the oft-cited circumstance of the amount of the dumping bonds not being sufficient to satisfy all the dumping duties owed. Interestingly, the complaint is said to state the sureties refused to pay under the terms of the bonds and are also alleged to have allowed the sale of significant quantities of food imports from China at dumped or below-cost prices. As a result, the plaintiffs claim to have suffered severe financial damages. What the plaintiffs seem to really be complaining about is the underwriting guidelines relied on by the sureties coupled with Customs accepting antidumping bonds in amounts the plaintiffs seem to be claiming was too low.

The allegations against Commerce and Customs revolve around claims the two agencies failed to properly enforce the antidumping orders for honey, canned mushrooms, fresh garlic, and crawfish tail meat, including the failure to prosecute collection actions where there is bond insufficiency. Given that the Byrd Amendment is no longer in force, it seems clear the goal of the lawsuit is to get damages to make up for the shortfall from the days when the Byrd Amendment was in force and would arguably apply to these entries. When it was, the monies collected as antidumping duties were distributed to the domestic petitioners. This is certainly a case worth following as it provides a creative way to seek damages. Whether it will succeed is, of course, a different question. After all, the typical way to proceed when a company claims the government is not properly enforcing the law is through a qui tam action; but then again, it seems apparent the domestic producers have concluded the surety companies offer deeper pockets! The threshold question the parties will have to face is whether these domestic companies have the right to make claims against any of the named defendants - called challenging standing. After all, Customs accepted the bonds that the sureties wrote and also had the right to demand higher bonds. It is not clear how Commerce is responsible if Customs opted not to do so. If these claims survive the first likely challenge, this could get to be really interesting.

When Is A Shipper Truly A Trusted Shipper?

We are again seeing stories in the press about massive drug seizures being made by Customs and Border Protection in commercial shipments. What is less widely publicized is the number of times these seizures occur because the shipment of a trusted trader has been compromised; a point often omitted from the general press coverage.

In the last two weeks, news of two such seizures has been announced. In each case, Customs officers found significant quantities of marijuana in trucks that were associated with the Free and Secure Trade program. FAST, as it is known, is a program whereby trucks and drivers are prescreened and preapproved for expedited processing and release upon entry into the U.S. Following its usual approach of trust but verify, Customs checked these shipments and found the drugs.

This news comes on the heels of reports about the lawsuits filed against Union Pacific Railroad, which has refused to pay millions of dollars in fines assessed by Customs and Border Protection. CBP seeks to hold UPRR responsible for several occasions in which illicit drugs were found in its railcars when they crossed into the U.S. from Mexico. These proposed fines are understood to exceed \$38 million. UPRR has been sued in San Diego, Houston, and Omaha, Nebraska, by Customs and Border Protection. Some of the fines were apparently assessed even though it was UPRR that found the drugs and reported them to Customs.

Customs has programs wherein it seeks to partner with carriers, such as UPRR, in order that the carriers beef up the security of their conveyances. When drugs are found in a conveyance, such as a railcar or a passenger bus, the carrier is given the opportunity to reduce or mitigate the fine by spending hard dollars to further tighten its security measures. Every dollar spent on tangible security measures, such as lighting, gates, drug dogs, and the like, is offset against the proposed penalty. While these programs sound good in theory, CBP refuses to recognize the simple fact that oftentimes the U.S. carrier, such as UPRR or the bus company, simply cannot control what happens on every mile, much less every foot, of its route when its conveyance is not in the U.S. Frankly, similar problems regarding lack of control exist in the U.S., too. UPRR is hoping to make that point clearly in defending the various lawsuits filed against it.

In the case of commercial shipments, where drugs are found, Customs suspends everyone from his trusted trader program status, conducts its investigation to determine the responsible party, and everyone else gets his trusted trader status reinstated. Typically, the shipment was compromised in Mexico and usually because of something the engineer or driver did or did not do. However, with railroad operations, there are miles of unsecured tracks, and so it is relatively easy for determined drug smugglers to board a railcar, insert the contraband, and, in quickly departing, they leave no trace. Interestingly, the allegations against UPRR appear to include that train crews were stopping the trains for short periods of time in order to allow the illicit drugs to be put on board, but those crews are alleged to have taken that action in Mexico. Does that make UPRR responsible? Customs says yes; UPRR says no. Given that traffic moves to satisfy just-in-time inventory, and there is no opportunity to inspect the train in Mexico just before it crosses into the U.S., just how is UPRR expected to control those circumstances, especially when Mexico is a sovereign country with its own views about and limitations on how security is to be conducted?

FDA Prior Notice Changes - Take Effect May 6, 2009

Prior Notice and the Bioterrorism Act have, of course, been in effect since 2002. In November 2008, FDA published final amendments to those rules. Details about those changes can be found at <http://www.cfsan.fda.gov/~dms/fsbtac29.html>, where links to both the Federal Register notice and the Draft Compliance Policy Guidance can also be found. The Guidance is said to reflect the current thinking of FDA and CBP, although published by FDA only, and refreshes everyone's recollection as to when Prior Notice is not required. Except in those limited circumstances, expect refusals, holds, injunctions, prosecutions, debarments, and seizures and assessments of civil fines, depending on the facts of the individual case and the prior records of the parties involved.

ISF Report Cards

Are you filing your Importer Security Filing and wondering about its accuracy and timeliness? Well, now you can get a report card on how you are doing. Customs is issuing these performance reports to filers only, so if you are not doing your own filing, make sure your filer requests your reports and shares them with you. The filer makes the request by sending an e-mail to progrss_report@cbp.dhs.gov and must provide the following details: filer's corporate name, filer code used for ISF, point of contact and telephone number, and corporate e-mail address where reports are to be sent.

C.H. Robinson Hit With \$23.8 Million Verdict

If there was ever any doubt that companies need to be careful with whom they partner, this jury verdict is certainly a stark reminder. Robinson hired Toad L. Dragonfly Express to transport a load of potatoes. The driver was involved in an accident on April 1, 2004, that killed two people and seriously injured another. She is alleged to have driven on a suspended license and was falsifying her log book.

The trucking company is no longer in business but took full responsibility for the accident. Nonetheless, Robinson got hit with this massive jury verdict, it would appear on the basis of negligent selection/hiring. There is little doubt the jury felt sympathy for the families and held Robinson liable because it was the deep pocket. In other words, the driver had no real assets, and the trucking company had limited assets/insurance coverage, and so, in order to allow plaintiffs to fully recover, the only alternative left was for the jury to find Robinson responsible for the accident. It is likely this jury verdict will be reduced substantially or liability overturned either through post-trial motions or on appeal, but this case nonetheless should serve as a wake-up call to all service providers - find out how much insurance your subcontractors carry, measure the risk associated with the service that company is providing, and then check your own coverage.

Susan Kohn Ross
International Trade Counsel
(310) 312-3206
skr@msk.com

Mitchell Silberberg & Knupp LLP

11377 W. Olympic Blvd.
Los Angeles, CA 90064

12 East 49th Street, 30th Fl.
New York, NY 10017

1818 N Street N.W., 8th Fl.
Washington, DC 20036

www.msk.com

This alert is provided as a service to our clients and friends. While the information provided in this publication is believed to be accurate, it is general in nature and should not be construed as legal advice.

MITCHELL SILBERBERG & KNUPP LLP