October 4, 2010

Regulatory Analysis and Development
PPD, APHIS
Station 3A-03.8
4700 River Road Unit 118
Riverdale, MD 20737-1238

Ref: Docket No. APHIS-2009-0018 (75 FR 46859)

To Whom It May Concern:

On behalf of the American Apparel & Footwear Association (AAFA) – the national trade association of the apparel and footwear industries, and their suppliers – I am writing to comment on the referenced Federal Register notice relating to definitions for exempt and regulated articles for the Lacey Act.

The referenced Federal Register notice requests input for proposed definitions for the terms "Common cultivar" and "Common food crop" for use in implementation of the Lacey Act, which restricts trade in certain fish, wildlife, and plants for conservation purposes. Both terms were identified in the Food, Conservation, and Energy Act of 2008, which amended the Lacey Act to broaden its application to certain plants. Neither term was defined in the statute. The purpose of these terms, as we understand it, is to ensure that implementation of the new plant requirements, including a new import declaration, do not cover plant inputs that are routinely traded and which, therefore, cause no conservation concerns.

The proposed definition in the Federal Register notice state,

> *Common cultivar. A plant (except a tree) that:*
>
> *(a) Has been developed through selective breeding or other means for specific morphological or physiological characteristics; and*
> *(b) Is a species or hybrid that is cultivated on a commercial scale; and*
> *(c) Is not listed:*
> > *(1) In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249);*
> > *(2) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or*
> > *(3) Pursuant to any State law that provides for the conservation species that are indigenous to the State and are threatened with extinction.*
>
> *Common food crop. A plant that:*
> *(a) Has been raised, grown, or cultivated for human or animal consumption; and*

(b) Is a species or hybrid that is cultivated on a commercial scale; and
(c) Is not listed:
(1) In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249);
(2) As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or
(3) Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

Plant. Any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and including trees from either natural or planted forest stands.

We broadly support the goal of these definitions and are pleased that the agency is working to provide the business community greater clarity and predictability by developing and publishing these definitions. Specifically, we heartily agree with this statement from the Federal Register notice, "By defining the terms ``common cultivar'' and ``common food crop,'' the proposed rule would facilitate importer understanding of and compliance with the Act's requirements." With that goal in mind, we wish to make several comments that we believe will further enhance the ability of these definitions to facilitate said importer understanding and compliance with Lacey.

First, we understand from the Federal Register notice that the agency plans to publish on its website a list of illustrative examples. We believe this is a sound idea but urge that the agency clarify how the list can be used. For example, there needs to be a clear statement indicating the force of law of this list, and whether companies can rely upon the list in their due care to make sure they are properly complying with Lacey. Likewise, the agency needs to articulate procedures for how the list would be modified in the future. Of particular concern is what to do when an example is removed from the list, and whether that presents compliance issues with companies who relied upon that example. Finally, we would hope that this list would be accompanied by explanations to indicate that it is not exhaustive. We fully expect that, after publication of the initial list, the business community and other stakeholders will develop other illustrative examples to identify scenarios that were not considered when the list is first developed. In fact, we strongly urge APHIS to specifically seek comments on the list as a way to draw out further examples once the business community understands exactly how the agency envisions the list's content and presentation. Perhaps APHIS can also conduct a regular review so that the list can be updated periodically as new examples are conceived of to provide continuing clarity.

Second, we are aware of several products – such as corn – that meet the definitions of both a common food crop and a common cultivar. We urge the agency to make clear that there are instances when a plant can appear simultaneously on both lists, or that publication on one list does not preclude a use on another. For example, if future technologies enable a fiber to be made out of a common food crop, we would hope that the absence of that plant on the common cultivar example list would not preclude the use of that fiber as a common cultivar.

Third, we would urge that the agency make clear that the definitions are intended to exempt out classes of food crops and cultivars, but not apply to specific shipments. This is particularly important as companies seek to comply with a general definition that may cover the input but not to the specific circumstances over how the input used in a particular product was acquired.

For example, if mangoes are considered a common food crop but the individual mango a company is using was grown in somebody's backyard, the use of that mango should still be acceptable and covered by the definition.

Fourth, as far as examples, we believe it is important that the agency articulate how it will treat products such as rayon to provide greater clarity for the textile and apparel industry. Rayon is derived from cellulosic fiber that is extensively used in textile and apparel applications. In some cases, the product is made from a tree, which would indicate that it would not be covered by the common cultivar definition as currently envisioned. In other cases, as with bamboo, the product is derived from a grass, which would make it fall clearly within the definition.

Finally, with respect to specific definitions, we raise the following questions:

First, what is the role of the term "commercial" in both definitions? While we think we understand the agency's intention with this word – to convey that there is an established market for the input in question – we believe this term creates more uncertainty since the term "commercial" implies a size of the market that is created. We find no evidence in the underlying statute that Congress was concerned with the commercial viability of cultivars or food crops. We also believe that term would end up restricting application of the definitions, creating more burden and cost for companies seeking to comply. Thus, we recommend that the phrase "*on a commercial scale*" be removed from each definition.

Second, what is the meaning of the phrase "*through selective breeding or other means*" in the definition associated with the term "common cultivar?" This phrase is extremely unclear. It appears to articulate specific characteristics but, in reality, by containing the sub-phrase "*or other means*" adds no additional precision to the definition. Instead, it leads to potential compliance headaches as companies seek to determine whether the cultivar in question was developed through "selective breeding" or "other means." In fact, such a determination provides a distinction without a difference, rendering it meaningless. We believe the definition would be simpler, easy to implement, and easier to understand if the term "*through selective breeding or other means*" were removed.

Thank you for your consideration of these comments. We would welcome an opportunity to discuss them further and reserve the right to provide additional input, either individually or with other stakeholders, as our understanding of this rule making evolves.

For additional information, please feel free to contact Nate Herman (nherman@apparelandfootwear.org; 703-797-9062) or me (slamar@apparelandfootwear.org; 703-797-9041).

Sincerely,

Stephen Lamar
Executive Vice President