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PRODUCT STEWARDSHIP

LACEY ACT

The Lacey Act, first enacted in 1900, is the country's oldest federal wildlife and plant protection statute. Amendments to the Lacey Act in 2008 made it unlawful to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce any timber or wood product, with certain limited exceptions, if the wood was illegally sourced in violation of the laws of the United States, a U.S. state or tribal land, or a foreign country. The authors of this article say businesses and individuals who buy, sell, or trade timber and wood products need to familiarize themselves with the new regulations implementing the amendments to the Lacey Act and, at a minimum, take the necessary measures to review their current product mix and to strengthen their supply chain due diligence.

A Revised Lacey Act: Criminal Exposure from Trading in Illegal Wood Products

By RONALD J. TENPAS AND MATTHEW FORMAN

Introduction

As environmental legislation and regulation has exploded since the early 1970s, one relatively constant feature has been the largely domestic orientation of American laws. Thus, to comply with U.S. environmental requirements, companies largely had to focus their efforts on their domestic operations to determine, for example, whether air emissions in the United

States comply with the Clean Air Act, water discharges in the United States comply with the Clean Water Act, or solid waste activities in the United States complied with the Resource Conservation and Recovery Act. To be sure, there are exceptions, and some of them with significant consequences. For example, the maritime industry has been a target of the Coast Guard and Justice Department in a number of criminal prosecutions related to the disposal of oily wastes on the high seas, the Toxic Substances Control Act has provisions related to the import and export of chemicals, and the Clean

Air Act has requirements for engines manufactured overseas and imported to the United States.¹ Ultimately, these have been the exceptions to the general rule. This has been in sharp contrast to various other areas of the law, such as antitrust and, more recently, the Foreign Corrupt Practices Act (FCPA), where companies have long had to worry that overseas activity might lead to U.S.-based criminal or civil enforcement actions.

At least one recent change to federal environmental laws presents features and challenges akin to those faced in the arena of antitrust and foreign corrupt practices, making it important that companies understand environmental aspects of overseas operations lest they run afoul of U.S. law. That change is Congress' recent expansion of the Lacey Act, 16 U.S.C. § 3371 *et seq.*

As evidenced by the November 2009 raid of a Gibson Guitars plant in Nashville, Tenn., which Gibson has acknowledged is related to harvested wood, the government is eager to pursue alleged Lacey Act violations.

In sum, the changes to the Lacey Act, which already have taken effect, provide potential felony criminal liability for any person or company that knowingly imports or sells in interstate commerce products made of wood if the wood in the product was harvested illegally in the country of origin. Moreover, even if a company did not know the product was made of illegally harvested wood, but imported or sold the product without exercising "due care" to avoid importing or selling an illegally sourced product, the company is subject to criminal misdemeanor penalties. Thus, to avoid criminal exposure a company now must exercise "due care" as to its product sourcing and ensure that if it develops corporate knowledge that a product does have an illegal source, it must avoid trading in that product or risk felony prosecution.

In addition, the Lacey Act contains other civil penalties imposed on a strict liability basis and forfeiture provisions, allowing the government to seize items and products that contain illegally harvested wood.

While this may seem an "exotic, niche change" in the law with little practical consequence, stop for a moment and look around the room in which you sit. If you are in an office, chances are you will quickly spot a credenza, desk, meeting table, picture frame, or ruler, all made of wood, and each potentially incorporating timber harvested overseas. Are you a manufacturer of tools or home supplies? Many hammers and brooms have a wood handle. Are you at home? What are your flooring, cabinets, and your bowls and dishes made of, much less the framing in your house, hidden behind the walls? How are you reading this—on-line or via traditional paper, a wood-based product? In short, whether we take note of it or not, wood products are ubiquitous in our lives and economy.

Many of those products, with total value in the tens of billions of dollars every year, originate from overseas processing locations, such as China, and are made from

wood that has been harvested in foreign locations.² Yet it is the importer and seller further down the supply chain here in the United States, extending all the way to the final retailer, that now face potential criminal and civil liability if their product contains illegally harvested wood.

Environmental law now has developed aspects resembling antitrust and foreign corrupt practices, as companies operating in the United States must exercise heightened sensitivity about an aspect of their overseas conduct. In some respects, the burdens are even greater than those under the FCPA or the antitrust statutes, because the company can face legal exposure not based simply on its own direct actions, but for its failure to identify misconduct by third party suppliers who are active earlier in its supply chain. Companies now need to consider such matters as part of their due diligence in the acquisition of foreign and domestic operations if those operations relate to wood products.

Adding further to the importance of these new obligations, the European Union has announced its intention to develop a similar legal regime, one that will require importers into the EU market to demonstrate a system of "due diligence" as to the sourcing of their wood products. Companies currently operating in both markets already are covered by the U.S. legal changes and soon are likely to face similar obligations for activities in Europe.

Businesses and individuals who buy, sell, or trade timber and wood products need to familiarize themselves with the amendments to the Lacey Act and, at a minimum, take the necessary measures to review their current product mix and strengthen their supply chain due diligence. Failure to do so could lead to significant civil and criminal penalties, as well as substantial financial loss if the government seizes what it deems to be contraband under the dramatically reinforced Lacey Act.

For those also with operations in Europe, taking steps now may allow the efficient development of a global system that ensures effectiveness, avoids duplication or incompatible systems, and will help avoid being caught flat-footed when the developing European system becomes final.

Executive Summary—The Changes

The Lacey Act, first enacted in 1900, is the country's oldest federal wildlife and plant protection statute. Administered primarily by the U.S. Departments of Agriculture, Commerce and Interior, as well as through criminal enforcement actions brought by the Department of Justice, the Lacey Act criminalizes unlawful interstate and international trafficking in protected fish, plants, and wildlife. Historically, however, the statute's reach has not been of great note for most corporations. Fish and wildlife tend not to be major supply elements

¹ See "Chief Engineer Pleads Guilty to Concealing Vessel Pollution" (March 9, 2009) at <http://www.usdoj.gov/opa/pr/2009/March/09-enrd-208.html>; "Corporation Pleads Guilty to Ocean Discharge Violations" (April 29, 2008) at http://www.usdoj.gov/opa/pr/2008/April/08-enrd_354.html. See also 15 U.S.C. § 2611 (export requirements for chemical substances); 15 U.S.C. § 2612 (import certification requirement for import of new chemicals).

² According to a 2007 report prepared by the Environmental Investigation Agency, a non-profit environmental organization, total wood imports, including pulp and paper, to the United States in 2006 from China, Honduras, Indonesia Malaysia, and Peru (countries with a reportedly high degree of illegal timber exports) amounted to \$14,831,178,409. See "No Questions Asked: The Impacts of U.S. Market Demand for Illegal Timber" at 8-16 (2007) at http://www.illegal-logging.info/uploads/eia_no_questions_asked.pdf.

for most companies, and the Lacey Act's coverage of plants essentially was limited to more exotic and endangered plant species; again, items not generally of great importance in most companies' supply chain.

In recent years, driven by a variety of forces, environmental advocacy organizations have devoted significant attention to forest management and forest degradation, particularly in various overseas locations, such as southeast Asia, portions of Africa, and the South American rainforest. One aspect of that attention has been a focus on forest degradation occurring in violation of the laws of the country of origin.

Many countries have laws in place, similar to those in the United States,³ that make it illegal to harvest timber from a national park or which require the payment of stumpage or other fees for the right to harvest timber. While these foreign laws have been on the books, environmental organizations increasingly drew attention to the fact that the capacity of developing countries to enforce such laws can be limited. This, in turn, led to attention on what could be done to limit the market for illegally sourced wood.

Ultimately, various business interests began to join with these environmental organizations, seeking ways to address the problem. This culminated in the adoption of recent changes to the Lacey Act, changes targeted primarily at addressing illegal logging overseas.⁴

As discussed in more detail below, the recent amendments expanded significantly the range of plants and plant products covered under the statute so the definition of "plant" now includes timber and wood products. It also made it illegal to import or trade in such plants when harvested in violation of a foreign country's laws, where previously, the plant provisions largely had been oriented to plants harvested in violation of U.S. domestic law or international treaty, leaving unaddressed foreign law plant violations.

Thus, under the Lacey Act, it now is unlawful to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce any timber or wood product, with certain limited exceptions, if the wood was illegally sourced in violation of the laws of the United States, a U.S. state or tribal land, or a foreign country. Further, the amended Lacey Act now makes it unlawful to falsely identify or label any plant or plant product subject to the statute. Third, the act imposes new import declaration requirements for certain plants and plant products, again including timber. The substantive prohibition on commerce in illegally sourced plants and plant products (as those terms now are defined more broadly) already is in effect and enforceable. The amendments relating to new import declaration requirements currently are being phased-in, having begun for certain products in April 2009 and continuing on an announced schedule extending through April 2010.

Recent Amendments to the Lacey Act

Expanded Scope of Plants Covered. As noted above, the recent amendments to the Lacey Act expanded significantly the scope of plants and plant products protected

under the statute. The amended definition of "plants" now refers to "any wild member of the plant kingdom, including roots, seeds, parts, and products thereof, and including trees from either natural or planted forest stands."⁵ Excluded from this definition of plants are: (i) common cultivars (except trees); (ii) common food crops, (iii) scientific specimens of plant genetic material to be used for research, and (iv) any plant that is to remain planted or to be replanted, unless, with respect to exclusions (iii) and (iv), if the plant is listed on the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the U.S. Endangered Species Act or a state law protecting threatened species.⁶ This plant definition added, for the first time, the provision that a "plant . . . includ[es] trees, from either natural or planted forest stands."⁷

Expanded Scope on Origin Source. As to fish and wildlife, the Lacey Act long has established an unusual legal framework in that a violation of the U.S. statute could be predicated on infringing a foreign country's laws, combined with a later effect on U.S. commerce. As to plants, however, until the recent statutory change, a violation could be shown only if the plant had been harvested in violation of the Endangered Species Act, a state law or an international convention, known as "CITES," an international convention similar to our Endangered Species Act and focused on at-risk species.

The recent amendments changed this feature as to "plants," expanding coverage to include plants taken in violation of foreign law, thus generally mimicking the more longstanding wildlife provisions. Thus, illegally sourced plants now include plants that in violation of foreign law were stolen; taken from officially protected or designated areas, such as parks and forest reserves; taken without or contrary to required authorization; taken, possessed, transported, or sold without payment of applicable taxes, royalties or stumpage fees; or taken, possessed, transported, or sold in violation of any governing export or transshipment laws, such as log export bans.⁸

The net of two-fold change—expanding "plants" to include "trees" and expanding the relevant protection laws to include "foreign law that protects . . . or regulates" plants—is to extend the Lacey Act's coverage to foreign sourced wood products. Specifically, under the Lacey Act now it is unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant or plant product that was illegally sourced in violation of the plant protection or plant regulation laws of the United States, a U.S. state or tribal land, or any foreign country.⁹

By way of example, if a tree is harvested unlawfully from a protected forest in one country, then shipped to another country where it is manufactured into a wood-based product, such as wood furniture, and that wood product is imported into the United States, then anyone who caused to be transported, sold, acquired or possessed the wood product in the United States could be

⁵ 16 U.S.C. § 3371(f)(1).

⁶ 16 U.S.C. § 3371(f)(2). "Common cultivars" and "common food crops" are to be defined via a joint rulemaking by the U.S. Departments of Agriculture and Interior.

⁷ 16 U.S.C. § 3371(f)(1).

⁸ 16 U.S.C. § 3372(a)(2)(B).

⁹ 16 U.S.C. § 3372(a).

³ See 16 U.S.C. § 19jj-1 (prohibition against the destruction of any natural resource in a national park).

⁴ See Food, Conservation and Energy Act of 2008 (P.L. 110-234; H.R. 2419).

subject to Lacey Act penalties and forfeiture. This includes the overseas harvester and exporter, as well as the U.S. importer, wholesaler, retailer and even the consumer.

Additionally, it is unlawful under the Lacey Act to prepare or submit any false record, account or label for, or any false identification of, any plant or plant product that has been or will be transported in interstate or foreign commerce, or imported, exported, transported, sold, purchased, or received from any foreign country.¹⁰ Thus, labeling and records that accompany the product also are significant sources of potential liability.

On the other hand, the underlying foreign law violation must be one designed to “protect or . . . regulate[]” plants. Thus, it should not be a Lacey Act violation, for example, if the product includes timber that was harvested in violation of laws targeted at worker protection (e.g. wage and hour laws) or if the timber was moved on a truck that had a broken taillight, in violation of foreign traffic laws. Companies may have other reasons to be concerned with such supply chain deficiencies. However, they simply would not be Lacey Act violations.

Import Declaration Requirements. In addition to expanding the prohibition on commerce in illegally sourced plants and plant products, the recent amendments to the Lacey Act also introduced a specific new import declaration requirement. As to items covered by this provision, it will be unlawful to import into the United States any covered plants and plant products without first filing an import declaration. That declaration must identify the following information with respect to each plant article or component thereof being imported: (i) scientific name of any plant (genus and species); (ii) country of harvest; (iii) value of the importation; and (iv) quantity of plant material and unit of measure.¹¹ If the plant species or country of origin cannot be determined conclusively for a plant product, the declaration must include a list of possible plant species found in the product and/or a list of each country from where the plant may have been harvested. False declarations are subject to criminal prosecution.

There are several notable exemptions and exclusions to the new import declaration requirements, either contained in the statute itself or that are emerging de facto through subsequent agency regulations. For example, the Lacey Act provides that packaging materials used exclusively to support, protect, or carry another item, such as manuals, tags, labels, and warranty cards, do not require an import declaration, unless the packaging material itself is the item of value being imported.¹²

Declarations for paper and paperboard products made of recycled content do not need to name the plant species or the country of origin of the recycled material. For such products, an importer must identify the average percent of recycled content as well as the species and country of origin information for any non-recycled plant material contained in the product.¹³

Moreover, the federal agencies charged with developing the declaration form and the filing mechanics have announced they will pursue a phased approach to

implementation. This phase-in will occur in four blocks over a roughly 18-month period as published by the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS).

In addition to a phase in over time, the actual range of products covered by the import declaration is going to be circumscribed more narrowly than the full definition of “plants” might allow. APHIS has announced that for now it intends to implement the declaration requirement by focusing on only those items classified in certain subchapters of U.S. Harmonized Tariff Schedule (HTS) Chapters 44, 66, 82, 92-95, and 97.¹⁴ Those sections of the HTS essentially cover items that most individuals would recognize most readily as articles composed of wood. In addition, the phase-in begins by focusing on wood products exhibiting relatively low “processing,” and then advances to those that are more complicated. Thus, with the focus on wood alone, the import declaration requirement is being targeted at the primary “plant” that generated the Lacey Act amendment and additional time to prepare is being given to those companies that import more complicated wood products.

So, for example, beginning April 1, 2009, APHIS implemented the declaration requirement for certain specific Chapter 44 items, such as rough cut wood, sawn wood, tool handles, and broom handles. On Oct. 1, 2009, other items on Chapter 44 became covered. This included, for example, items such as wood charcoal, plywood and veneered panels, packing cases, tableware, and caskets.

On April 1, 2010, additional items on Chapter 44, as well as some items on Chapters 66, 82, 92-95, and 97, will become subject to the declaration requirement. This will include, for example, umbrellas, hand tools, pianos and stringed musical instruments, revolvers, sculptures, and furniture seating. Finally, APHIS continues to analyze the declaration requirements for various other products, but has said in no case will that begin earlier than Sept. 1, 2010.¹⁵

As to potential “plant” products beyond the wood products contained in the HTS chapters mentioned above, the federal agencies have announced they intend to study any further expansion before taking additional steps. The agencies will provide at least six months advance notice before expanding the list of covered items for which a declaration is required, and the agencies do not intend to refer for enforcement action any failure to file a declaration for products not already identified through the phase-in program, or as later amended.¹⁶

Substantive Provisions v. Declaration Requirement. It is important to keep clear the distinction between the Lacey Act’s new substantive requirements regarding product sourcing and the declaration requirement. The substantive requirement commanding that trade in illegally sourced timber not occur is in effect today and extends to all “plants,” including wood products, whether or not an import declaration was required for that item. So, for example, a company that today imported or sold illegally sourced wooden bedroom, office, or kitchen furniture and did so either knowingly, or unknowingly but through a failure of due care, commits a felony or a

¹⁰ 16 U.S.C. § 3372(d).

¹¹ 16 U.S.C. § 3372(f).

¹² 16 U.S.C. § 3372(f)(3).

¹³ 16 U.S.C. § 3372(f)(2).

¹⁴ See 74 Fed. Reg. 45,415 (Sept. 2, 2009).

¹⁵ See 74 Fed. Reg. 45,416.

¹⁶ See 74 Fed. Reg. 5912-13 (Feb. 3, 2009).

misdeemeanor, respectively. This is so, even though such items will not require an import declaration giving the product's source details until April 1, 2010. Thus, companies cannot simply rest secure in the fact that the products they import or sell are not on the import declaration list. To the contrary, the federal agencies have emphasized the distinction, stating that "while enforcement of the declaration requirement will be phased in . . . the other Lacey Act amendments already are effective, and actions to enforce provisions of the act other than the declaration requirement may be taken at any time."¹⁷

Across the Pond: European Union Initiatives

Across the Atlantic, the European Union also is stepping up its efforts to target trade in illegally sourced timber products. Most notably for current purposes, the European Union announced in October 2008 its intention to develop a regulatory regime that would require individual importers (those "operators" who "for the first time" place a timber product on the EU market) to establish "due diligence" systems to verify that such products are legally sourced in the country of origin.¹⁸

More recently, in April 2009, amendments were made to the October 2008 proposal. The amendments impose more stringent monitoring and enforcement measures, and appear to require more than just the importer to develop compliance systems. Finalization of the legislation requires ratification by the full European Parliament and the European Council, so details of the program still are uncertain.

But the momentum appears toward a proposal with broad coverage and incorporating significant sanctions. So, for example, it was originally proposed that "in order to avoid imposing any unnecessary administrative burden, only those operators that place timber and timber products on the [EU] markets for the first time, rather than all operators involved in the distribution chain" should be required to develop a due diligence system. In the most recent round of work, that provision was amended.

The proposal now provides that while "a full system of measures and procedures (due diligence system) to minimize the risk of placing illegally harvested timber and timber products on the market" should be required of the operator first placing the timber on the market, "all operators in the supply chain should be bound by the overriding prohibition against making illegally sourced timber or timber products available on the market, and must exercise due care to this effect."¹⁹

Similarly, the recent changes:

- (1) introduce a new labeling requirement;
- (2) eliminate an exemption for wood being used as bio-fuel;
- (3) introduce the principle that the "legality" of the logging will be determined not simply through the source country's domestic laws, but also through various enumerated international standards;
- (4) create a requirement to be able to document the full supply chain, including the species and country of origin, and the company or person responsible for the harvesting;
- (5) provide authority for commission authorities to identify "high risk" timber categories requiring "extra due diligence";
- (6) provide for creation of a system of "recognized" "monitoring organizations" that can "certify" due diligence; and
- (7) require each EU member country to develop a system of "criminal or administrative penalties," including financial penalties that will reflect the "degree of economic damage, the value of the timber products concerned by the infringement, and the tax losses and economic damage occasioned by the infringement," with such penalties being "at least five times the value of the timber products obtained by committing a serious infringement."²⁰

Thus, things still are in flux as to what the final European system will contain. It is especially notable for present purposes that the proposed substantive requirement for EU importers—a system of "due diligence"—and the proposed requirement for others involved in the chain exercising "due care," sound quite similar to the Lacey Act's requirement for avoiding misdemeanor criminal liability exercising "due care." Thus, there is reason to hope the two regimes will converge, allowing businesses with commercial activities in both the United States and EU markets to achieve compliance through a single system of compliance measures.

What Is Due Care?

For many companies, the most difficult piece of Lacey Act compliance will be identifying the steps necessary to exercise "due care." There likely is no single answer. The legislative history indicates that "due care" is "the degree of care which a reasonably prudent person would exercise under the same or similar circumstances."²¹ In turn, that suggests the steps required will vary according to "circumstances," preventing a "one size fits all" answer. However, it is possible to offer a few generalizations.

First, and at a minimum, due care likely requires a company to at least be aware of the products in its supply chain that may be covered under the definition of "plants" or exempted under the Lacey Act's definitions (recall that "common cultivars, except trees, and common food crops" are not within the definition of "plants" covered by the Lacey Act).

Second, having taken this step, companies will need to assess the likelihood that any covered plant-products could have originated from an illegal source. For certain products this may prove quite easy because there are many "plants" that are not at risk, and therefore are not the subject of any protection laws, whether here in the United States or overseas. For such products there would be no risk the plant could have been harvested illegally and, therefore, no potential Lacey Act violation.

For timber, however, this likely will not be enough. There are a variety of timber-protection statutes in

¹⁷ See 74 Fed. Reg. 5912.

¹⁸ European Union Commission Regulation No. 1024/2008.

¹⁹ See European Parliament Legislative Resolution A6-0115/2009, Amendment 19 to Recital 12, adopted April 22, 2009.

²⁰ European Parliament Legislative Resolution A6-0115/2009.

²¹ See S. Rep. No. 97-123.

place, both domestically and abroad, and Congress' very reason for expanding the Lacey Act's reach was concern that such foreign laws are regularly violated, with the product of the violation ending up in American markets. Thus, for wood products, a third step likely is necessary—identifying the source country or countries of the wood product. (For those who are actually importers of record, subject to the declaration requirement, this and other information is going to be necessary to comply with the declaration requirement). Both the United States and Canada generally are regarded, and have been documented, as countries in which there is a low incidence of illegal timber harvesting.²² Thus, that fact should bear on the required “due care.”

Establishing United States or Canadian sourcing (or some other source country that is recognized as sound) may not be enough alone to establish due care, but, for example, knowing this sourcing as well as receiving assurances from one's suppliers about how they secure their North American-based wood may be enough. On the other hand, if a company has a particularized credible reason to suspect that it is receiving U.S. or Canadian sourced product that was harvested illegally in either location, a company will not simply be able to avoid inquiry—due care will likely require some specific further level of investigation to refute the suspicion (if the suspicion of illegal sourcing is confirmed, of course, continued trade in the product would then be “knowing” and constitute a felony).

Assuming a company is receiving product that is known or suspected to originate in a country or region where illegal harvesting is more common, still further steps are likely necessary. These may include documentation from the importer of record in the United States, documentation from the manufacturer or processor overseas, or documentation from the entity that has originally harvested or brought the raw timber into the commercial market. It may include some level of onsite inspection or auditing and demonstrations from suppliers about their internal control procedures.

In short, there is probably more than one option, and the options selected will have to be calibrated in some way to the identified risk, which in turn may be a function of what is known about those earlier in the supply chain, and the steps those entities have themselves taken to avoid receiving tainted product.

Finally, companies face questions about who should undertake this review for them. One option, of course, is to use internal company resources and personnel to put the processes in place and to examine the practices of others in the supply chain. There is no logical reason that “due care” should be impossible to satisfy in this way. Self-auditing, if it fails and illegal wood does end up in one's product chain, also has the risk that it is much more likely to be viewed as having been done in a “self-interested,” and therefore deficient, way. Companies should be realistic and recognize that, by definition, there will only be a potential enforcement action if illegal wood has gotten into products that the company imports or sells. Against that assumed backdrop, it will be much easier in hindsight for enforcement officials to

“discover” failings in a self-audit program and to turn that failing into a lack of “due care,” with the attendant risk of criminal penalties.

Another option, and one that probably in turn provides greater protection that “due care” has been exercised and cannot be second-guessed even if there is a failure, is to introduce a reputable third party auditor into the process. Here there are a variety of options, because various organizations, ranging from environmental advocacy groups to private certification companies, have seen the economic opportunity available in providing “green certifications,” and already are prepared to fill this role with respect to timber supply chains. Of course, these will likely come with a financial price to be paid to the audit vendor.

One final point worth noting on this—as discussed above, the European Union is itself developing regulations that will likely impose similar burdens. While, so far, the European Union does not appear to be requiring certification from an external auditor, the developing EU regulations clearly contemplate this as an acceptable means of demonstrating “due diligence.”²³ Thus, part of any company's current analysis ought to include whether it is affected by U.S. law only, EU law only, or both. That analysis may, in turn, affect the company's assessment of different due care approaches, because the costs of a due care system may seem more manageable if those costs insure that one can participate in both the U.S. and EU markets.

Penalties & Sanctions for Violations

Violations of the Lacey Act, whether of the commerce provision or the import declaration requirement, could result in the imposition of civil and/or criminal sanctions—depending on the nature of the violation and the purported violator's *mens rea*—and the forfeiture of the plant and plant product in question.²⁴ Specifically, the statute establishes the following penalty framework:

Unlawful Commerce. Any person who knowingly violates the Lacey Act prohibition on importing, exporting, transporting, selling, or purchasing of illegally sourced plant and plant products faces a criminal felony fine of up to \$500,000 for a corporation/\$250,000 for an individual (or twice the amount of the gross gain or loss), and up to five years of imprisonment *per violation*.²⁵ Further, any person who engages in the import or other commercial activity of illegally sourced plant or plant products who does not know of the illegal sourcing, but who “in the exercise of due care should [have] know[n]” of the illegal sourcing, is subject to criminal misdemeanor penalties of up to \$200,000 for a corporation/\$100,000 for an individual and up to one year of imprisonment *per violation*.²⁶ Moreover, such failures to exercise due care may also be subject to a civil penalty of up to \$10,000 *per violation*.²⁷

²² See “Illegal Logging: A Market-Based Analysis of Trafficking in Illegal Timber” at 13 (March 31, 2006) at <http://www.ncjrs.gov/pdffiles1/nij/grants/215344.pdf> (report to the U.S. Department of Justice noting that illegal logging is seen as infrequent in the United States and Canada).

²³ European Parliament Legislative Resolution A6-0115/2009, Amendment 51.

²⁴ See 16 U.S.C. § 3373.

²⁵ 18 U.S.C. §§ 3571(b)-(e); 16 U.S.C. § 3373(d)(1).

²⁶ 18 U.S.C. §§ 3571(b)-(e); 16 U.S.C. § 3373(d)(2).

²⁷ 16 U.S.C. § 3373(a)(1).

Import Declaration Violations. Any person who knowingly violates the import declaration requirements is subject to a civil penalty of up to \$10,000, or a criminal felony fine of up to \$500,000 for a corporation/\$250,000 for an individual (or twice the amount of the gross gain or loss) and up to five years of imprisonment *per violation*.²⁸ Further, any person who unknowingly violates the import declaration requirements, regardless of whether they exercised due care, is subject to a \$250 civil fine.²⁹

Forfeiture. Regardless of whether the offense is civil or criminal, the Lacey Act authorizes the government to seize any plant or plant product associated with the unlawful activity. The civil forfeiture provision may be enforced on a strict liability basis, and the statute does not appear to provide for an “innocent owner” defense.³⁰ In other words, the government may seize products that are in violation of the statute, regardless of whether or not the person in possession of the product at the time of seizure knew of its illegal status. Further, upon a criminal conviction under the Lacey Act, “all vessels, vehicles, aircraft, and other equipment used to aid the illegal act shall be subject to forfeiture if the owner of such vessel was at the time of the alleged illegal act a consenting party or privy thereto or in the exercise of due care should have known that such vessel would be used in a criminal violation of the Lacey Act.”³¹

Where Will the Enforcement Come From?

As a practical matter, U.S. government enforcement agencies have limited resources to devote to the investigation and enforcement of the newly expanded Lacey Act offense. Moreover, since proving a violation requires government officials to establish that the wood in the underlying product was itself taken in violation of the source country’s laws, proving a violation is likely to be a complex matter, involving the collection of evidence in a foreign country, establishing the terms of foreign law, and tracking the wood’s movement until its final introduction and disposition in the U.S. market. Given that complexity, cases are likely to take time to develop.

That does not mean that companies can be indifferent to the risk for at least three reasons.

First, when faced with circumstances where cases are difficult to marshal, government enforcement officials will often seek very substantial penalties in those cases that do arise. From their perspective, this is an effective means of trying to maximize a “deterrence message” from the cases that present themselves—they seek to show that there is “high risk” in violating the law be-

cause a violation can involve substantial punishment. Thus, no company should be sanguine about being the first enterprise targeted for an enforcement action, even if the company judges the likelihood of an enforcement action to be low.

Second, although the federal agencies themselves may lack resources, a variety of environmental organizations concerned with problems of forest degradation already have shown that they are capable of, and interested in, themselves investigating timber-related activity and in documenting supply chains.³² While it may take time, such organizations may generate case referrals, including supplying relevant evidence to government agencies, and in turn helping those agencies overcome their own resource limitations.

Finally, the Lacey Act contains a “bounty hunter” provision, providing that rewards may be paid to “any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any [Lacey Act] violation.”³³ Thus external organizations, a company’s own employees, suppliers, or customers, or even a competitor may see significant incentives in providing information to the government, again effectively expanding the government’s investigative and enforcement capability.³⁴

Potential Impact on Businesses and Individuals

Congress’ Lacey Act expansion to curtail unlawful logging and reduce interstate and international trafficking of illegally sourced timber has significant implications for individuals, businesses, and organizations engaged in commerce involving timber and wood products. Theoretically, even consumers who purchase wood-based products could feel the impact of the Lacey Act should the government decide to seize goods derived from illegally sourced timber. Although the image of law enforcement entering a private home and seizing the owners’ dining room table is not likely to become a reality, importers, exporters, retailers, wholesalers and manufacturers of timber and timber products need to familiarize themselves with the recent amendments to the Lacey Act and the obligations it imposes.

At a minimum, companies ought to heighten their supply chain due diligence and implement internal procedures to eliminate illegally sourced timber and timber products from their supply chains to avoid stiff Lacey Act penalties.

³² See Environmental Investigation Agency at <http://www.eia-global.org/index.html>; Forest Stewardship Council Watch at <http://www.fsc-watch.org>.

³³ 16 U.S.C. § 3375(d).

³⁴ See “Tanker Firm Sentenced for Concealing Dumping of Waste Oil” (Aug. 6, 2004) at http://www.usdoj.gov/opa/pr/2004/August/04_enrd_546.htm (court awarded \$2.1 million of a \$4.2 million fine levied on a shipping company convicted of illegally discharging thousands of gallons of waste oil and sludge at sea to a former crew member who reported the unlawful activity to the government) (152 DEN A-1, 8/9/04); “Tanker Company Sentenced for Concealing Deliberate Vessel Pollution” (March 21, 2007) at http://www.usdoj.gov/opa/pr/2007/March/07_enrd_171.html (court awarded \$5.25 million of a \$37 million penalty to 12 current and former crew members for their role in disclosing to the government a shipping company’s unlawful discharging of oily waste and sludge) (57 DEN A-5, 3/26/07).

²⁸ 16 U.S.C. §§ 3373(a)(1),(d)(3); 18 U.S.C. §§ 3571(b)-(d).

²⁹ 16 U.S.C. § 3373(a)(2).

³⁰ 16 U.S.C. § 3374. See *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (holding that king crab taken in violation of Russian fishing regulations and imported into the U.S. constitutes contraband, and is subject to forfeiture under the Lacey Act on a strict liability basis such that the importer of the crab may not assert an “innocent owner” defense in forfeiture proceedings); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106 (S.D. Fla. 1988) (holding that an “innocent owner” defense was not available in a Lacey Act civil forfeiture action involving parakeets illegally imported from Peru).

³¹ 16 U.S.C. 3374(a)(2).

On the flip side, the act's expansion may well prove beneficial to suppliers of U.S.-based timber. Both the United States and Canada generally are recognized to have a very low incidence of illegal timber harvesting. So while it is as much a violation to move in interstate commerce wood that has been harvested illegally in the United States as it is to move illegally sourced foreign wood, U.S.-sourced wood is likely to look comparatively more attractive to those further down the supply chain who are interested in demonstrating they used "due care." Indeed, the very fact that one has used wood originating from a location acknowledged to have a substantial domestic enforcement regime and relatively low-levels of illicit product in the market may be a significant marker of "due care."

Further, non-U.S. companies that export timber and timber products to the U.S. market also need to understand the new Lacey Act requirements. At a minimum, U.S. importers bringing in products subject to the import declaration requirement will be demanding from their foreign suppliers the pertinent information to comply. More broadly, even those not acting as the importer of record may require documentation and other demonstrations to discharge their "due care" obligation.

Finally, U.S. companies that export timber and timber products to the European Union should familiarize themselves with the European Union's developing plan to require companies to demonstrate "due diligence" in their product sourcing. While not identical terms, "due diligence" and "due care" are likely to prove quite close in application. Thus, it may be possible for those operating in both markets to develop a single, unified compliance approach that will afford compliance protection for both markets.

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