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## THE LACEY ACT AND THE WORLD OF ILLEGAL PLANT PRODUCTS

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products, thanks to recent changes to the century old Lacey Act. Originally designed to protect native bird species, the Lacey Act most commonly is associated with wildlife protection—making it a crime, for example, to import into the United States wildlife knowing that it was harvested illegally in a foreign country. The Act was expanded in 2008, however, when Congress, reacting to the global problem of illegal logging, dramatically extended the reach of the Act so that it now also covers a wide range of “plants” and “plant products,” ranging all of the way from paper produced in the United States to wooded furniture made from trees harvested in Indonesia.<sup>1</sup>

We are just beginning to see the impact of the recent amendments. The changes bring to the practice of environmental law some of the features and challenges that U.S. companies long have faced under other laws that govern behavior overseas, such as antitrust regulations or CFIUS regulations, or the Foreign Corrupt Practices Act.<sup>2</sup> Recently, in the first high-profile law enforcement action under the amended Act, officials raided a Gibson guitar factory in Tennessee because some of the factory’s rosewood, an endangered and highly protected species, allegedly was imported illegally from Madagascar.<sup>3</sup> And environmental protection groups, as part of their ongoing efforts to reduce illegal logging, are using the Lacey Act’s expanded reach to exert pressure on international companies who may trade in unlawfully obtained plant products.<sup>4</sup>

### I. Introduction

A revolution is underway in the way that companies throughout the world buy and use wood, paper, and other plant

<sup>1</sup> See 16 U.S.C. § 3371(f); Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415, 45,417 (Sept. 2, 2009) (listing categories of plant products covered by the Lacey Act declaration requirement, such as frames, furniture, tools, musical instruments, paper, wood pulp, magazines, and books).

<sup>2</sup> See Ronald J. Tenpas & Matthew Forman, *A Revised Lacey Act: Criminal Exposure from Trading in Illegal Wood Products*, 29 BNA Daily Environment Report B-1, B-2 (Feb. 16, 2010).

<sup>3</sup> Sean Michaels, *Gibson Guitars Raided for Alleged Use of Smuggled Wood*, Guardian (U.K.), Nov. 20, 2009, available at <http://www.guardian.co.uk/music/2009/nov/20/gibson-guitars-raided>. Madagascar has banned the export of rosewood.

<sup>4</sup> See Press Release, Environmental Investigation Agency (EIA), *Environmental Groups Call on French Shipping Company Delmas to Cancel Shipment of Precious Wood from Madagascar* (Mar. 15, 2010) (EIA Director of Forest Campaigns, Andrea Johnson, stating that “[r]ecent U.S. enforcement actions show that companies involved in the trafficking of illegal timber can no longer act with impunity” and urging “[French shipping company] Delmas to adopt and implement policies to avoid shipping illegal products”).

For certain plant-based products, new Lacey Act import declarations now are required to accompany each shipment into the United States. Publishers and paper manufacturers in particular breathed a sigh of relief when the U.S. Department of Agriculture (USDA) recently announced that it would delay until September 1, 2010, enforcement of the new Lacey Act import declaration requirement for paper and wood pulp. Nonetheless, the import declaration requirement presently is being enforced for other products, as are the substantive changes to the Act.

Companies are trying to understand the impact the 2008 amendments will have on their business. This article describes the major differences to the law that companies should consider going forward.

## II. Background

The Lacey Act<sup>5</sup> is the nation's oldest wildlife protection statute. Enacted in 1900, it originally was designed to combat interstate trafficking in poached birds and game, and to protect against the introduction of exotic species. Early prosecutions reflected the statute's emphasis on wildlife poaching. In 1910, for example, the United States Court of Appeals for the Eighth Circuit upheld the conviction of a man for exporting quail in violation of Oklahoma law.<sup>6</sup>

The scope of the statute gradually expanded over the next hundred years. In 1935, the Act was amended to prohibit trafficking in wildlife taken in violation of foreign law.<sup>7</sup> In 1981, Congress expanded the Lacey Act to cover certain plants and plant parts taken in violation of U.S. domestic law.<sup>8</sup> However, until recently, the Lacey Act's coverage of illegal plant products was limited to plants that were both indigenous to the United States and protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>9</sup> or state conservation laws.

### A. The 2008 Amendments

The Lacey Act was expanded dramatically in 2008 when Congress, responding to increased concern over illegal logging and global deforestation, passed the Food, Conservation, and

Energy Act of 2008.<sup>10</sup> The 2008 revisions have far-reaching implications for many companies doing business in the United States. As detailed in the following sections, companies now have an obligation to exercise "due care" to ensure that many of the plants and plant products they handle derive from only "legal" sources.

First, Congress expanded the definition of a "plant."<sup>11</sup> Under the new definition, a *plant* is "any wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands."<sup>12</sup> Paper, wooden furniture, hammers with wooden handles, musical instruments containing wood, and even books and magazines are now covered by the Lacey Act. Exceptions to the definition of "plant" include:

- (1) Common cultivars. The USDA has not yet defined "cultivars," but publicly has stated that they will be plants such as cotton and tobacco.<sup>13</sup> The Lacey Act specifies that trees do *not* qualify for the common cultivar exception;
- (2) Common food crops (including roots, seeds, parts, or products thereof). The USDA has not yet defined "crops," but has advised that it will adopt a broad definition;<sup>14</sup>
- (3) Live plants; and
- (4) Scientific specimens.<sup>15</sup>

Second, the Lacey Act now covers plants taken in violation of foreign as well as of domestic law. Foreign laws that can trigger a Lacey Act violation include: (1) laws that prevent the theft of plants; (2) laws that regulate the taking of plants from designated areas; (3) laws that call for the payment of taxes, royalties, or stumpage fees in order to take, possess, transport, or sell plants; and (4) laws that regulate the export or transshipment of plants.<sup>16</sup>

The Lacey Act applies regardless whether the underlying foreign law violation is criminal or civil in nature. For example, a defendant who harvests a plant in violation of a foreign civil regulation nonetheless can be convicted of a felony violation of the Lacey Act if he or she knowingly transports the illegally harvested plant into the United States. Not all foreign law violations can support a Lacey Act violation, however. Rather, the underlying law must be one aimed at protecting plants and their products. For example, violation of speeding regulations or labor laws while transporting plant

<sup>5</sup> 16 U.S.C. §§ 3371–3378.

<sup>6</sup> *Rupert v. United States*, 181 F. 87 (8th Cir. 1910).

<sup>7</sup> Act of June 15, 1935, ch. 261, § 242, 49 Stat. 378, 380.

<sup>8</sup> Pub. L. No. 97-79, § 2(f), 95 Stat. 1073 (Nov. 16, 1981).

<sup>9</sup> *Id.*

<sup>10</sup> Pub. L. No. 110-246 (May 22, 2008). The United States Department of Agriculture (USDA) website sets out the amended Lacey Act and the implementing regulations. The amended Act and these regulations are available at [http://www.aphis.usda.gov/newsroom/hot\\_issues/lacey\\_act/index.shtml](http://www.aphis.usda.gov/newsroom/hot_issues/lacey_act/index.shtml).

<sup>11</sup> 16 U.S.C. § 3371(f)(1).

<sup>12</sup> *Id.*

<sup>13</sup> USDA, *Implementation of Revised Lacey Act Provisions*, Transcript of Public Meeting, Oct. 14, 2008, at 27:13–15. This transcript previously was available at [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/TranscriptPublicMeeting.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/TranscriptPublicMeeting.pdf), but is no longer on the APHIS website, having been taken down on or before November 20, 2009.

<sup>14</sup> *Id.* at 27:7–20.

<sup>15</sup> 16 U.S.C. § 3371(f)(2).

<sup>16</sup> *Id.* § 3372(a).

products, while perhaps troublesome in other ways, may not form a proper basis of a Lacey Act prosecution.<sup>17</sup>

Third, the Lacey Act now imposes a requirement that all importers of plant products submit a declaration with each import.<sup>18</sup> That declaration must contain, among other things, the scientific name of the plant, the country of origin, and the quantity and value of the plant products imported. Without such a declaration, the goods may not enter the United States. The Act imposes penalties for false declarations, which are more severe if the person submits the declaration knowing that it is false.<sup>19</sup>

### B. Elements of a Lacey Act Prosecution

In a Lacey Act plant prosecution, the government must prove the following elements: (1) the plant was taken, possessed, transported, or sold in violation of a federal, state, or foreign law or regulation; (2) the defendant knowingly imported, exported, transported, received, acquired, or purchased the illegal plant or attempted to do so; and (3) the defendant knew or, with due care, should have known, of that violation.

The first element is known as the “predicate offense.” The person who commits the predicate offense is not the only person who can be held criminally liable under the Lacey Act, however. Rather, any person who engages in the prohibited activities knowing of the underlying illegality of the plant products could be guilty of a felony Lacey Act offense.<sup>20</sup> For example, an importer may not have personally logged a shipment of illegal rosewood, but if the importer imported the rosewood knowing of its illegality, he or she will have violated the Lacey Act. Moreover, a conviction under the Lacey Act does not require the government to prove that the defendant knew the specific law or regulation that was violated. Rather, the government need only prove that the defendant knew of the plant’s unlawfulness.<sup>21</sup>

### III. New York Law and the Lacey Act

As noted, the Lacey Act makes it a federal offense to take wildlife and fauna in contravention of a federal, state, or foreign

law. New York’s Environmental Conservation Law includes a number of provisions designed to protect the state’s wildlife and flora. A violation of any of these laws could form the basis of a Lacey Act prosecution.

Two provisions of New York law warrant special attention. First, New York law makes it illegal to purposefully injure, destroy, or remove trees from another person’s land without the owner’s consent.<sup>22</sup> The stated legislative purpose of this provision was to preserve the forest-based economy in New York, the New York State Legislature having found that 40% of that industry’s jobs are tied to wood product manufacturing.<sup>23</sup>

Second, New York law also protects endangered plants, providing that no person shall “knowingly pick, pluck, sever, remove, damage by the application of herbicides or defoliants or carry away, without the consent of the owner thereof, any protected plant.”<sup>24</sup> The same statute also grants the New York State Department of Environmental Conservation the power to designate certain plants as “protected” upon a finding that the plants are “endangered, rare, threatened or exploitably vulnerable” and, as such, should not be picked from their “natural habitat.”<sup>25</sup> The statutory definition of “plant” includes trees.<sup>26</sup>

Accordingly, the New York statutory scheme makes it illegal to harvest certain species of protected trees (such as willow oaks<sup>27</sup>) in New York. And, if the illegally harvested wood is then moved across state lines, a wood company could then find itself as the defendant in a federal Lacey Act prosecution.

### IV. Enforcement

The Lacey Act declaration provision technically is already in force. It is only being enforced, however, for certain types of goods: wood chips, tools, charcoal, tableware, caskets, and statuettes are just some of the goods for which enforcement is in place. Beginning on April 1, 2010, the declaration requirement will be enforced for musical instruments, arms and ammunition, and sculptures. The declaration requirement for wood pulp, paper, and fiberboard will start being enforced on September 1, 2010. Enforcement of the declaration requirement for books has been postponed until a later (and as yet, unspecified) date.<sup>28</sup>

<sup>17</sup> See *Tenpas & Forman*, *supra* n. 2, at B-3.

<sup>18</sup> 16 U.S.C. § 3373(f).

<sup>19</sup> *Id.* § 3373(a).

<sup>20</sup> *United States v. Lee*, 937 F.2d 1388, 1393–1394 (9th Cir. 1991) (upholding conviction of five fishermen who could not themselves have been penalized under the Chinese salmon fishing regulation).

<sup>21</sup> See *United States v. Santillan*, 243 F.3d 1125, 1129 (9th Cir. 2001) (upholding conviction of man who argued he could not be convicted for illegally importing parrots because while he knew the activity was illegal, he did not know which law had been violated).

<sup>22</sup> N.Y. Env’tl. Conserv. Law § 9-1501.

<sup>23</sup> L. 2003, ch. 602, § 1 (N.Y.). This section continues: “The practice of forestry, including the manufacture of wood and paper products . . . is an important way of life that has been sustained for generations in many areas of the state.” *Id.*

<sup>24</sup> N.Y. Env’tl. Conserv. Law § 9-1503(3). New York has a similar law that protects “endangered wildlife,” as defined by the New York State Department of Environmental Conservation. *Id.* § 11-0535(2); 6 N.Y.C.R.R. § 182.1 *et seq.*

<sup>25</sup> N.Y. Env’tl. Conserv. Law § 9-1503(2). This provision does not cover planted forest stands.

<sup>26</sup> *Id.* § 9-1503(1).

<sup>27</sup> 6 N.Y.C.R.R. § 193.3.

<sup>28</sup> Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415, 45,417 (Sept. 2, 2009).

That said, the substantive provisions of the Act—including its requirements that companies deal only in legal plants and plant products—are already in force. The following section discusses how violations of the Lacey Act can lead to severe penalties, ranging from forfeiture and fines to prison time. While we so far have seen no plant-related prosecutions under the amended Act, one high-profile investigation resulted in law enforcement agents raiding the guitar manufacturer Gibson's Tennessee factory in November 2009, allegedly in connection with illegally-harvested rosewood from Madagascar.<sup>29</sup>

## V. Penalties Under the Lacey Act

The Act provides for criminal and civil penalties. The gravity of the penalty generally depends on the state of knowledge of the person committing the offense.<sup>30</sup>

### A. Knowing Violations

The Lacey Act makes it a felony to import, export, possess, purchase, acquire, or sell a plant or plant product knowing that it was taken in violation of U.S., state, or foreign law.<sup>31</sup> A person found guilty of a Lacey Act felony faces up to five years in prison, significant fines, and forfeiture. A person found guilty of conspiracy to violate the Lacey Act (under Title 18 of the United States Code) may be required to pay restitution to his or her victims. A knowing violation of the declaration requirement also may be a felony if the offense involves importing or exporting plants, or the sale or purchase of, or offer or intent to sell or purchase plants with a value over \$350.

The Lacey Act makes it a misdemeanor knowingly to engage in the same conduct but with a plant product whose value is

under \$350.<sup>32</sup> A person convicted of a Lacey Act misdemeanor faces up to a year in jail, significant fines, and forfeiture.

### B. Failure to Exercise "Due Care"

The Lacey Act requires the exercise of "due care" in the trade of plant products.<sup>33</sup> If a person or a company should have been aware of the illegality of the plant product after exercising "due care," that person or company may be found guilty of a misdemeanor. Alternatively, a failure to exercise due care can expose an organization or an individual to civil penalties of up to \$10,000 per violation of the Act.

What constitutes "due care" will vary depending on the knowledge and experience of the purchaser, and the context of each purchase. For example, wood pulp that comes from an area with a well-known history of illegal logging likely would require a purchaser to exercise a higher level of care to make sure that the pulp is legal. A company importing a plant product from a country with significant corruption issues should be aware of the risk that local regulators may fail to ensure properly that plants are being harvested legally. The U.S. Department of Justice, Environmental and Natural Resources Division, has discussed a number of other common sense red flags that may suggest illegally taken plants. Such red flags include: (1) offers to sell plant products at prices considerably below going market rate; (2) offers to sell plant products for cash or offers of a discount for products lacking required paperwork; (3) facially invalid paperwork; and (4) evasive answers to questions regarding products' origins.<sup>34</sup>

Forestry chain-of-custody programs will continue to be popular because they are seen as a good way to exercise due care.<sup>35</sup> Moreover, U.S. businesses may exert commercial pressure on their suppliers to certify the legality of their plant

<sup>29</sup> Tenpas & Forman, *supra* n. 2, at B-1 to B-2; Michaels, *supra* n. 3. Madagascar bans the logging of rosewood, but political unrest in 2009 led to loggers invading protected areas and harvesting large quantities of both rosewood and ebony, the trade in which was estimated to be up to \$460,000 per day. EIA, *supra* n. 4.

<sup>30</sup> 16 U.S.C. § 3373.

<sup>31</sup> *Id.* § 3373(a).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* §§ 3373(a)(1), (d)(2).

<sup>34</sup> The Department of Justice has indicated that existing precedent for non-plant Lacey Act offenses will be applied to the plant-based violations. See Elinor Colbourn, Environmental Crimes Section, Environmental & Natural Resources Division, U.S. Department of Justice, *Lacey Act Amendments of 2008* 15, Potomac Forum (March 29, 2009), available at [http://www.forest-trends.org/~forestrtr/documents/files/doc\\_696.pdf](http://www.forest-trends.org/~forestrtr/documents/files/doc_696.pdf) (citing *United States v. Virginia Star*, Case 2:07-cr-00449-PSG, a fish fillet case, as an example of application of due care standard to be applied to plant cases).

<sup>35</sup> European legislation attempting to tackle this problem has taken a somewhat more prescriptive approach to what constitutes "due diligence." See Tenpas & Forman, *supra* n. 2 (citing European Parliament Legislative Resolution A6-0115/2009). Article 4 of the European Regulation states that the required due diligence systems must: "employ[] a traceability system and third party verification by the monitoring organisation" and "comprise measures to ascertain: (i) country of origin, forest of origin and, where feasible, concession of harvest; (ii) name of the species, including scientific name; (iii) value; (iv) volume and/or weight; (v) that the timber or the timber embedded in the timber products has been legally harvested; (vi) the name and address of the operator who has supplied the timber and timber products; (vii) the natural or legal person responsible for harvesting; (viii) the operator to whom the timber and timber products have been supplied. These measures shall be supported by appropriate documentation maintained in a database by the operator or by the monitoring organisation." They must also "include a risk management procedure which shall consist of the following: (i) systematic identification of risks, inter alia through collecting data and information and making use of international, Community or national sources; (ii) implementation of all measures necessary for limiting exposure to risks; (iii) establishing procedures which shall be carried out regularly to verify that the measures set out in points (i) and (ii) are working effectively and to review them where necessary; (iv) establishing records to demonstrate the effective application of the measures set out in" the Regulation. Moreover, there must be "audits to ensure effective application of the due diligence system."

Article 4 also provides that timber products or producers deemed "high risk" require "extra due diligence obligation from the operators," which include "requiring additional documents, data or information; requiring third party audits."

products. Nonetheless, companies should know that obtaining a chain-of-custody certification, by itself, is not necessarily the same as exercising “due care” under the statute.<sup>36</sup> Traffickers of illegal plant products may well seek ways to modify their own methods so as to circumvent the various controls that companies and certification organizations erect. Accordingly, companies would be wise to examine regularly and update their chain-of-custody and purchasing processes so they can better identify potential problems in the supply chain as those problems arise.

Similarly, companies would do well to keep track of the reported levels of corruption in a country in which they do business. Although the link between the Lacey Act and corruption in a country may not seem obvious, in fact, these may be directly linked. For example, wide spread corruption in a country may lead to a greater likelihood that relevant documents or permits will be forged. Indeed, some have linked the illegal logging of rosewood in Madagascar to the purported willingness of local and national officials to accept bribes to grant loggers illegitimate permits.<sup>37</sup> Therefore, companies exercising due care should pay particular attention to reports of corruption and bribery in the countries that supply the plants or plant products they purchase.

Transparency International publishes an annual report that focuses on a global issue affected by corruption. Its Global Corruption Report for 2010 will focus on corruption affecting climate change. One of the Global Corruption Report’s four “key areas” is “Forestry governance: responding to the corruption challenges plaguing the forestry sector.”<sup>38</sup> This publication will provide further guidance for companies on the ways in which they can exercise greater care, including which countries pose greater risks, and in what ways the issue of corruption may be affecting the forestry business.<sup>39</sup>

### C. Strict Liability

The Lacey Act provides that plant products that contain illegally taken plant material are subject to forfeiture even if the owner had no reason to know that the products are illegal. Although the illegal plant content may be hard to prove, if the government manages to do so, each person or entity along the supply chain may be required to forfeit their goods, regardless whether the person or entity exercised due care or knew of the illegality. Strong chain-of-custody regimes will help control the

risk of forfeiture by helping companies avoid illegal plant products in their supply chain. That said, U.S. businesses also should consider ways to apportion this risk when negotiating contracts with suppliers or purchasers of their products.

### VI. Conclusion

The recent amendments to the Lacey Act provide a powerful tool in the fight against illegal harvesting of trees and other plants around the world. The Act now imposes criminal penalties for intentional violations of laws protecting plants, whether in the United States or abroad. Companies also may face civil and criminal penalties for failure to exercise due care in the purchasing, transport, import, or export of plant products. And U.S. law enforcement has been quick to respond to the recent amendments: officials appear to be busy investigating reports of illegally-obtained wood and, in at least one recent high-profile case, have demonstrated their willingness to enforce the amendments.

Companies trying to comply with the Act are likely to rely increasingly on certification programs as part of their efforts to comply with the Act’s “due care” standard. Nonetheless, companies also will need to be vigilant and aware of issues that may affect plant products’ legality, such as levels of corruption in wood-producing countries.

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<sup>36</sup> One of the current limitations of relying on a forestry chain of custody program is the still relatively small, albeit growing, percentage of forests that are covered by such programs. As of 2009, less than one percent of forests in Asia were covered by certification programs. In contrast, nearly two-fifths of North American forests enjoy chain-of-custody certification. Rupert Oliver & Florian Kraxner, *UNECE/FAO Forest Products Annual Market Review, 2008–2009: Forest Certification Challenged by Climate Change and Illegal Logging Concerns: Certified Forest Products Markets* 114 Table 10.2.1.

<sup>37</sup> EIA, *supra* n. 4. Madagascar was rated 99th on Transparency International’s Corruption Perception Index for 2009, with a score of 3.0—the maximum possible being 10. Transparency International, *Corruption Perception Index 2009*, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table).

<sup>38</sup> Transparency International, *Flyer, Global Corruption Report 2010: Climate Change*, available at [http://www.transparency.org/content/download/48895/780558/GCR-Flyer-web+\(2\).pdf](http://www.transparency.org/content/download/48895/780558/GCR-Flyer-web+(2).pdf).

<sup>39</sup> Likewise, a company’s learning concerning and efforts to comply with the Foreign Corrupt Practices Act may prove instructional and, indeed, intertwine with efforts to exercise due care over the supply chain for plant products.