

THE LACEY ACT AND THE WORLD OF ILLEGAL PLANT PRODUCTS

The US Department of Agriculture (USDA) recently announced that it once again will delay enforcement of the new Lacey Act declaration requirements for paper and wood pulp imported into the United States. Although the announced delay in enforcement is a welcome reprieve for companies struggling to comply with the recently amended Lacey Act, businesses have plenty of reason for concern. Most of the 2008 amendments to the Lacey Act are already in effect. And while the kinks are still being worked out, the new legal and regulatory framework may well end up revolutionizing how companies throughout the world buy and use a wide variety of plant-based products, ranging all the way from common wood products such as paper, lumber, and furniture, to certain types of cosmetics, perfumes, and plant-based pharmaceuticals.

BACKGROUND

The Lacey Act¹ 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.

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. In 1981, Congress expanded the Lacey Act to cover certain plants and plant parts taken in violation of US domestic law. But, 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 or state conservation laws.

THE 2008 AMENDMENTS

The scope of 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 2008.² 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

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¹ 16 U.S.C. §§ 3371-78.

² The USDA has set up a website setting out the amended Lacey Act and the implementing regulations published by the USDA. This can be found at http://www.aphis.usda.gov/newsroom/hot_issues/lacey_act/index.shtml.

“due care” to make sure that many of the plants and plant products they handle derive from only “legal” sources.

First, Congress expanded the definition of a “plant.” 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.” 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:

- Common cultivars. The USDA has not yet defined “cultivars,” but has stated that they will be plants such as cotton and tobacco. The Lacey Act specifies that trees do *not* qualify for the common cultivar exception;
- Common food crops (including roots, seeds, parts, or products thereof). The USDA has not yet defined “crops,” but has advised that the definition will be broad;
- Live plants; and
- Scientific specimens.

Second, the Lacey Act has been expanded to cover plants taken in violation of foreign as well as of domestic law. Foreign laws that can trigger a Lacey Act violation include:

- Laws that prevent the theft of plants;
- Laws that regulate the taking of plants from designated areas;
- Laws that provide for taxes, royalties, or stumpage fees in order to take, possess, transport, or sell plants; and
- Laws that regulate the export or transshipment of plants.

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 she knowingly transports that illegally harvested plant into the United States.

Third, the Lacey Act now imposes a requirement that all importers of plant products submit a declaration with each import. 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.

The declaration provision technically is already in place. 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 start to 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.

That said, the substantive provisions of the Act—including its requirements that companies deal in only legal plants and plant products—are already in force. In the following section, we discuss how violations of the Lacey Act can lead to severe penalties, ranging from forfeiture and fines to prison time.

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.

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 US, state, or foreign law. 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 her victims. A knowing violation of the

declaration requirement may also be a felony if the offense involves importing or exporting plants, or the sale or purchase, or offer or intent to do so, of plants with a value over US\$350.

The Lacey Act makes it a misdemeanor to knowingly engage in the same conduct but with a plant product whose value is under US\$350. A person convicted of a Lacey Act misdemeanor faces up to a year in jail, significant fines, and forfeiture.

Failure to Exercise “Due Care”

The Lacey Act requires the exercise of “due care” in the trade of plant products. 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 US\$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 areas with well-known histories 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 will fail to properly ensure that plants are being harvested legally. The US 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:

- Offers to sell plant products at prices considerably below going market rate;
- Offers to sell plant products for cash or offers of a discount for products lacking required paperwork;
- Facially invalid paperwork; and
- Evasive answers to questions regarding products’ origins.

Forestry chain-of-custody programs will continue to be

popular because they are seen as a good way to exercise due care. Moreover, US businesses may exert commercial pressure on their suppliers to certify the legality of their plant 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. Traffickers of illegal plant products likely will modify their own methods in order to circumvent the various controls that companies and certification organizations erect. Accordingly, companies would be wise to regularly examine and update their chain-of-custody and purchasing processes so they can better identify potential problems in the supply chain as those problems arise.

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 lose their goods, regardless of whether the person or entity exercised due care or knew of the illegality. Therefore, US businesses should consider ways to apportion this risk when negotiating contracts with suppliers or purchasers of their products. Strong chain-of-custody regimes will help control the risk of forfeiture by helping companies avoid illegal plant products in their supply chain.

We hope that you have found this advisory useful. If you have questions, please contact your Arnold & Porter attorney or:

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