

STATEMENT FOR THE RECORD

BY

MARCUS ASNER & KATHERINE GHILAIN

U.S. House of Representatives Committee on Natural Resources  
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs

*H.R. 3105, H.R. 3280, H.R. 3324, and H.R. 4032*

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Submitted By:

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**Introduction**

*Marcus Asner*

Marcus Asner is a partner in the New York office of Arnold & Porter LLP where he routinely advises clients on Lacey Act compliance and other environmental and criminal matters. Although he is advising several clients on legal matters relating to the Lacey Act, he is submitting this statement in his personal capacity and not on behalf of Arnold & Porter LLP or any client.

For nine years (2000-2009), Asner served as an Assistant United States Attorney (AUSA) in the Southern District of New York where he was Chief of the Major Crimes unit from 2007 to 2009. When Asner was an AUSA, he led the investigation and prosecution of *United States v. Bengis*, one of the largest Lacey Act cases in history, involving the smuggling of massive quantities of illegally harvested rock lobster from South Africa. Since he joined Arnold & Porter in 2009, he has counseled clients on a wide variety of Lacey Act issues, including assisting clients in complying with the 2008 Amendments. He has written extensively on the Lacey Act and has been invited to speak at numerous domestic and international meetings concerning environmental crime. In the past two years, for example, Asner has spoken on Lacey Act issues at the World Fisheries Conference, the Forest Legality Alliance, INTERPOL, and the Boston Seafood Show. Asner testified before the U.S. House of Representatives Committee on Natural Resources Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs in May and July of 2013 regarding “The 2008 Lacey Act Amendments” and “Why Should Americans Have to Comply with the Laws of Foreign Nations?,” respectively and, together with Katherine Ghilain, provided a written statement to the U.S. House of Representatives Committee on the Judiciary Over-Criminalization Task Force regarding the Lacey Act and purported “over-criminalization.” Asner currently serves with the President’s Advisory Council on Wildlife Trafficking.

*Katherine Ghilain*

Katherine Ghilain is an associate in the New York office of Arnold & Porter LLP where she routinely advises clients on Lacey Act compliance and other environmental matters. Ghilain has written extensively on the Lacey Act and has given several presentations on this and related subjects. Together with Marcus Asner, Ghilain provided a written statement to the U.S. House of Representatives Committee on the Judiciary Over-Criminalization Task Force regarding the Lacey Act and purported “over-criminalization.” Although she is advising several clients on legal matters relating to the Lacey Act, she is submitting this statement in her personal capacity and not on behalf of Arnold & Porter LLP or any client.

## Overview

In this statement, we will explain our thoughts on H.R. 3280, the “Lacey Act Clarifying Amendments Act of 2013,” and H.R. 3324, the “Lacey Act Paperwork Reduction Act.” We also will address some concerns that were raised during the February 27, 2014 hearing.

## Discussion

The Lacey Act is designed to further U.S. interests by keeping illegal fish, wildlife, plants and plant products from flooding the U.S. market, and by protecting our supplies of sustainable natural resources. The Act helps disrupt criminal organizations and fight corruption in foreign countries, which in turn helps level the playing field for legitimate businesses and improves our national security. By making it illegal to “import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation” of the United States or foreign countries, the Lacey Act furthers these goals and protects the victims of environmental crime, both in the U.S. and abroad. The two proposed Lacey Act amendments would undermine these goals to the detriment of legitimate U.S. businesses and consumers, as well as the victims of natural resources crime.

### H.R. 3280, the “Lacey Act Clarifying Amendments Act of 2013”

H.R. 3280, the “Lacey Act Clarifying Amendments Act of 2013,” would exempt from the Lacey Act any plants imported into the United States before May 22, 2008 (the effective date of the 2008 Amendments) and “any finished plant product the assembly and processing of which was completed before May 22, 2008.” Creating a “pre-2008 exemption” is unnecessary and would have several unintended consequences.

#### *The Bill Is Unnecessary*

H.R. 3280 appears to be aimed at preventing the unfair scenario in which someone is thrown in jail for inadvertently ending up with illegal, pre-2008 wood or wood products even though she was unaware that the wood was illegal. The bill is misdirected, however, because the Lacey Act in fact already protects innocent actors. To be guilty of a crime under the Lacey Act, a person must have a particular mental state; she either must have *known* that the wood was illegal (for a felony) or, in the exercise of due care, *should have known* that the wood was illegal (for a misdemeanor). Consistent with Constitutional due process, the mental state requirement ensures that innocent people who happen to come to possess something containing illegal wood are protected from any criminal liability.

To be sure, the item containing illegal wood still may be seized and forfeited by the government, a result that follows because of the fact that the *wood itself* is illegal. But the fact that the wood is illegal does *not* mean the possessor faces any *criminal* liability, unless she traded the wood in the United States and knew or should have known that the wood is illegal. Moreover, the risk that an innocent possessor of illegal wood faces is no different from the risk she would face in possessing anything else that may be illegal, such as counterfeit goods, illegal ivory, poached or mislabeled seafood, or stolen art. Companies in the wood sector, like companies in any other sector, can and do take prudent steps to ensure that the goods they are buying are legal and to

protect themselves. This involves, among other things, doing due diligence on their suppliers and insisting on warranties. In the unlikely event that a truly innocent owner's pre-2008 wood is seized or forfeited, she can file a "petition for remission," asking the government agency to review the particular circumstances and return the wood.

The bill also appears to address a specific concern about musical instruments made before 2008 that might contain illegal wood. In his opening statement, Chairman John Fleming stated that the bill "will ensure that musicians . . . do not have their vintage guitars confiscated when they re-enter the United States."<sup>1</sup> However, this concern already has been addressed by the agencies charged with enforcing the Act:

. . . APHIS has heard regularly from luthiers who manufacture artisan stringed instruments. Many of them have stores of tropical hardwoods that were imported into the United States before the 2008 amendments to the Lacey Act were enacted, and they are concerned about the applicability of the Lacey Act declaration requirements and enforcement provisions to musical instruments made out of such wood.

With respect to the applicability of the declaration requirement to such wood, since the wood was in the country prior to enactment of the 2008 amendments, the owners of such wood need not file a Lacey Act declaration for it. Furthermore, if the wood is made into a musical instrument and the owner of the instrument travels internationally and re-enters the country with the instrument as part of his or her personal baggage, that owner would not need to submit a Lacey Act declaration for the instrument upon entry into the United States because APHIS is not requiring the submission of a Lacey Act declaration for such informal entries.

It is also important to note that both DOJ and the USFWS have issued statements that citizens traveling with their musical instruments are not an enforcement priority.<sup>2</sup>

In other words, enforcement agencies are focused on traffickers in illegal wood, citizens traveling with musical instruments have no reason to worry, and H.R. 3280 is unnecessary to the extent that it is designed to address these concerns.

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<sup>1</sup> *Legislative Hearing on "H.R. 3105, H.R. 3280, H.R. 3324, and H.R. 4032": Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2014) (Opening Statement of Chairman John Fleming, at 2), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=370052>.*

<sup>2</sup> *Animal and Plant Health Inspection Service (APHIS) and U.S. Department of Agriculture (USDA), Report to Congress Senate Committee on Agriculture, Nutrition, and Forestry, Senate Committee on Environment and Public Works, House Committee on Agriculture, and the House Committee on Natural Resources With Respect To Implementation of the 2008 Amendments to the Lacey Act, at 22 (May 2013), available at <http://iwpawood.org/associations/8276/files/Lacey%20Report%20to%20Congress%205.30.13.pdf>.*

Regarding other complaints, the Animal and Plant Health Inspection Service (APHIS) and U.S. Fish and Wildlife Service (FWS) already are using administrative mechanisms to ease any burdens associated with pre-2008 wood. For example, APHIS has a “Pre-Amendment” Special Use Designation for those importers of pre-2008 wood who, in the exercise of due care, are unable to gather all of the information needed for the declaration form.<sup>3</sup> According to APHIS’ May 2013 Report to Congress, as well as the testimony of representatives from APHIS and FWS at the February 27, 2014 hearing, the agencies are considering additional administrative actions to address pre-2008 concerns. For example, according to Chief William Woody, Assistant Director for Law Enforcement for FWS, the agencies are considering developing an “enforcement forbearance policy that [they] believe would better address the pre-2008 imports of plant products for responsible businesses.”<sup>4</sup> Unlike a blanket pre-2008 exemption, this and other administrative actions likely would be narrowly tailored and would minimize opportunities for bad actors to avoid liability or undercut legitimate U.S. businesses by flooding the market with illegal wood.

### ***The Bill Would Have Unintended Negative Consequences***

There are several consequences that could arise if a pre-2008 exemption were added to the Lacey Act. First, a pre-2008 exemption would provide a means for wood that had been illegally harvested before 2008 to enter the stream of commerce with impunity, perpetuating the supply of illegal wood in the market and the demand for such wood. The presence of illegal wood in the market depresses the price of legal wood, to the detriment of legitimate competitors – an annual loss of about \$1 billion to U.S. industry.<sup>5</sup> The increased demand also creates incentives for the continued procurement of illegal wood.

Second, the bill is likely to complicate law enforcement efforts. A pre-2008 exemption would encourage people who are intentionally trafficking in stolen or otherwise illegal wood products to claim that their products were imported or assembled prior to 2008. Disproving these false claims may require complicated and costly technical analysis – and in some instances may be impossible. As a result, it would be more difficult to prevent illegally-harvested wood from entering and remaining in circulation, which in turn could make it harder to catch criminals. In short, it would create a massive loophole and make it easy to launder illegal post-2008 wood.

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<sup>3</sup> *Legislative Hearing on “H.R. 3105, H.R. 3280, H.R. 3324, and H.R. 4032”: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2014) (Statement of William Woody, Assistant Director, Law Enforcement, U.S. Fish and Wildlife Service, at 6), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=370052>; Legislative Hearing on “H.R. 3105, H.R. 3280, H.R. 3324, and H.R. 4032”: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2014) (Statement of Michael Watson, Ph.D., Executive Director, Plant Health Programs, APHIS, USDA, at 2), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=370052>.*

<sup>4</sup> Woody Testimony, *supra* note 3, at 5. Further, “there have been no referrals for prosecution of any such [pre-2008] situation and it would be the intent of the USFWS not to make any such referral until a[n enforcement forbearance] policy is complete.” *Id.*

<sup>5</sup> *Id.* at 2.

Finally, a pre-2008 exemption would absolve criminals from wrongdoing, without regard to the victims of illegal harvesting. Wood stolen before 2008 is still stolen wood. The amendment would excuse illegal activity by allowing someone who knowingly imported stolen, illegal, or endangered wood to profit from its sale. Excusing illegal activity undercuts the rule of law and contradicts our legal system's obligation to protect the rights of the property owners whose wood was stolen.

### **H.R. 3324, the “Lacey Act Paperwork Reduction Act”**

H.R. 3324, the “Lacey Act Paperwork Reduction Act,” would make the declaration requirement an “on demand” system; instead of completing and filing declaration forms upon import, companies would need to keep the completed forms and make them available for inspection upon request. The bill is designed to address complaints from some industry members about the burdens involved in gathering the information that the declarations require. However, H.R. 3324 would do nothing to address those complaints, and instead would change the system in a way that would undercut law enforcement and render the declaration requirement all but useless.

#### ***The Bill is Unnecessary***

The bill is designed “to reduce burdensome paperwork,” by allowing companies to retain completed declaration forms instead of submitting them to APHIS. However, the vast majority of the time and expense of the declaration requirement is the process of gathering information to complete the form.<sup>6</sup> The system proposed in the bill would not reduce the burden it purports to address; the benefit of not having to press “send” to file the declaration with APHIS upon import is marginal at best. The price of this tiny benefit is significant, however; an “on demand” system would reduce compliance incentives and undercut enforcement efforts, which ultimately would harm legitimate businesses in the long run by increasing the volume of illegal wood in the market.

#### ***The Bill Would Undermine Compliance***

The declaration requirement serves several important purposes, including compliance and enforcement. The process of *completing* the form – and the information gathering required to do so – encourages compliance with the Lacey Act because it forces companies to examine their supply chains, which in turn may highlight potential illegal activity. The *filing* requirement is critical, because it gives companies an added incentive to make sure that the information is correct, and it provides law enforcement officials with an important tool they can use to identify and stop illegal activity. According to the May 16, 2013 testimony of Rebecca Bech, Deputy Administrator of APHIS' Plant Protection and Quarantine Program, while the agency is understaffed and has insufficient resources, the majority of declarations filed still are reviewed

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<sup>6</sup> “The declaration ‘on demand’ system proposed in Mr. Harris’ bill would not save importers any time or effort as they would still be required to collect and compile the information . . .” *Legislative Hearing on “H.R. 3105, H.R. 3280, H.R. 3324, and H.R. 4032”: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2014) (Statement of Tom Talbot, Founder and CEO, Glen Oak Lumber and Milling, at 4), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=370052>.*

for completeness and compliance with the Act.<sup>7</sup> The declarations also provide information that helps agencies regulate the international trade in wood products.<sup>8</sup>

The declarations' role in encouraging compliance would be undermined if the declaration system were changed to an "on demand" system. Such a system would weaken the incentives for compliance, and therefore would render the declaration requirement less effective at deterring illegal activity.

### ***The Bill Would Undercut Law Enforcement***

In addition to encouraging compliance with the Act, declarations make it "possible to flag for further review or investigation specific shipments as to which questions arise based on information provided in the declarations filed for those shipments."<sup>9</sup> As a result, they serve to target efforts and maximize the efficiency of the limited enforcement resources that currently are available. The APHIS Report noted that "[e]nforcement agencies can use information on declarations to target their limited enforcement resources on imports with a higher likelihood of illegality."<sup>10</sup> Additionally, once an investigation turns into an enforcement action, the declaration forms can provide important evidence that links problematic imports and suppliers. Finally, the declaration requirement helps protect innocent companies that are complying with the Lacey Act, because the declarations help companies identify and remedy potential issues. In the event of an enforcement action, the declarations would help prove that those companies are exercising due care and trying to make sure their supply chains are legal.

An "on demand" system would severely undercut law enforcement efforts. If a federal agent had to request a declaration form from a target during an investigation, that would tip off the target about the investigation. That heads-up would invite dirty companies or employees to destroy evidence, cover up illegal activity, and/or flee before they were arrested. In addition to making the investigation more difficult by removing the evidence from APHIS oversight, the "on demand" system would likely make prosecution more difficult due to the destruction of evidence.

### **Conclusion**

The Lacey Act has been helping protect consumers and legitimate American businesses for over a century. It helps reduce international environmental crime, which is a threat to our national security. Creating a pre-2008 exemption and changing the declaration filing requirement to an "on demand" system ultimately would do more harm than good and would undermine the goals

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<sup>7</sup> Oversight Hearing on "The 2008 Lacey Act Amendments": Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs, 113th Cong. (2013) (Testimony of Rebecca Bech, Deputy Administrator of the Plant Protection and Quarantine Program, APHIS, USDA), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=332895>.

<sup>8</sup> Woody Testimony, *supra* note 3, at 7.

<sup>9</sup> APHIS Report, *supra* note 2, at 23.

<sup>10</sup> *Id.*

of the Lacey Act, to the detriment of legitimate American businesses and consumers. The agencies charged with enforcing the Lacey Act should be given adequate funding to address concerns using administrative actions that are more appropriately tailored to the challenges at hand.