

## MITIGATING REGULATORY RISKS AFFECTING THE WOOD AND FURNITURE INDUSTRIES: The Lacey Act

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he wood industry is both ever-changing and global in scope. And, as companies involved in the industry can attest, they are also heavily regulated. The

Lacey Act<sup>1</sup> is a significant piece of this regulatory patchwork, and, as a recent case involving Lumber Liquidators illustrates, the Lacey Act carries heavy penalties for non-compliance.



By Joshua M. Hayes

### **A. The Lacey Act: A Background and History**

The Lacey Act was passed in 1900 and is the United States' oldest wildlife protection law. Under the

Lacey Act, it is unlawful to import, export, sell, receive, acquire, or purchase in interstate and foreign commerce fish, wildlife or plants that are taken, possessed, transported, or sold in violation of U.S. law.<sup>2</sup> A



2008 amendment to the Lacey Act also allows Lacey Act provisions to be prosecuted domestically in cases where covered timber and plants are illegally taken from federal land, or illegally taken from state or private lands and then entered into interstate or foreign commerce. Thus, the Lacey Act applies to both importers of covered timber and plants as well as domestic companies that engage in interstate commerce.

In addition to its prohibition of possessing or transporting certain plants, the Lacey Act also requires the declaration of plants imported to the United States from other countries on a Plant and Product Declaration Form or "PPQ 505" form. This declaration must include the scientific name of the plant (including the genus and species) contained within the import as well as a description of the value of the import, the quantity of the plant therein, and the country or countries (if made from more than one plant) of origin.<sup>3</sup>

Failure to comply with the Lacey Act's importation, declaration, and reporting provisions can result in steep civil<sup>4</sup> and criminal penalties.<sup>5</sup> The Lacey Act's civil and criminal penalties make it necessary for companies that import wood to understand and monitor their supply chains in the exercise of due care. Every link in the supply chain is potentially liable for failing to exercise due care.

## **B. Lumber Liquidators: A Cautionary Tale**

The U.S. Department of Justice ("DOJ") has recently made clear the high cost of failing to exercise due care. In February 2016, Lumber Liquidators Inc. paid one of the highest Lacey Act fines in the law's history after pleading guilty to several Lacey Act violations.<sup>6</sup> The DOJ brought the action after lumber imported by Lumber Liquidators was discovered to be from illegal logging in eastern Russia in the habitat of an endangered species, the Siberian Tiger.<sup>7</sup>

The fines assessed by the DOJ totaled more than \$13.15 million, including \$7.8 million in criminal fines, \$969,175 in criminal forfeiture and more than \$1.23 million in community service payments.<sup>8</sup> Lumber Liquidators also agreed to a five-year term of organizational probation and mandatory implementation of a government-approved environmental compliance plan and independent audits as part of its settlement.<sup>9</sup> In addition, the company will pay more than \$3.15 million in cash through a related civil forfeiture.<sup>10</sup>

The nature of these charges, and the steep cost of failing to exercise due care, illustrate how critical well-developed and implemented compliance procedures are to doing business in the wood industry.

## **C. Mitigating Lacey Act Liability: Due Care and Risk Mitigation**

As the *Lumber Liquidators* case illustrates, in the same way that *ignorantia juris non excusat* ("ignorance of the law is no excuse") applies to liability under the law generally, ignorance of illegal behavior in your supply chain is no defense against charges of a Lacey Act violation. However, there are several steps companies can take to mitigate this risk.

First, a company should never, under any circumstances, knowingly purchase, transport, or store illegally obtained wood or wood products. Doing so incentivizes unregulated, illegal logging, which harms the sustainability of the legal wood importing industry and damages the business reputation of everyone involved in the supply chain and the public perception of the industry as a whole.

Second, industry participants should take measurable and attainable steps to exercise due care in sourcing their wood materials and products. It is the importer's responsibility to investigate and ensure that the wood is legally sourced. This can be done by researching, investigating and auditing the companies that are growing (if plantation grown) or harvesting the wood. In addition to familiarizing oneself with the specific players in their supply chain, importers should be familiar with broader regional, national, and international industry trends, reputations and risks associated with doing business in certain nations or even certain regions within nations. It is also critical to understand that this risk analysis is an ongoing process that should be dutifully maintained in the exercise of due care.

Third, after the risks associated with doing business within a particular region, and the reputations and business practices of the players in a specific supply chain are understood, businesses should develop formalized, written compliance programs for establishing best practices. Ensure that those practices are written and well documented. This should include informing your suppliers in writing of your intent to purchase only legally sourced wood and insist that they obtain certification programs from their government or an established non-governmental organization to the extent possible.

Last, companies should understand that ensuring that a compliance program is properly designed, implemented, documented, and followed is first and foremost the responsibility of the company's management and owners. Top management should actively participate in their company's regulatory compliance team, and work to develop and maintain a culture that treats compliance with these procedures as integral to the way their company conducts business. Following these procedures can help establish evidence of due care, which may help shield a company from liability associated with Lacey Act violations.

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## FOOTNOTES

<sup>1</sup> 16 U.S.C. § 3371 *et seq.*

<sup>2</sup> 16 U.S.C. § 3372 (a)(1)-(2).

<sup>3</sup> 16 U.S.C. § 3372 (f)(1)(A)-(C).

<sup>4</sup> 16 U.S.C. § 3373 (a)(1).

<sup>5</sup> 16 U.S.C. § 3373 (d).

<sup>6</sup> *Lumber Liquidators, Inc., Sentenced for Illegal Importation of Hardwood and Related Environmental Crimes*, UNITED STATES DEPARTMENT OF JUSTICE, ENVIRONMENT AND NATURAL RESOURCES DIVISION, Feb. 1, 2016, available at: <https://www.justice.gov/opa/pr/lumber-liquidators-inc-sentenced-illegal-importation-hardwood-and-related-environmental>

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*