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# The Lacey Act and Due Diligence Requirements A Legal and Practical Perspective

3<sup>rd</sup> Potomac Forum on Illegal Logging and Associated Trade  
March 24, 2009

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# Overview

- Context
- Overview of Lacey Act Amendments
- Practical Advice for Exporters/Importers
- Compliance Programs



CHINA AND FOREST TRADE IN THE ASIA-PACIFIC REGION:

IMPLICATIONS FOR FORESTS AND LIVELIHOODS

中国与亚太地区国家林产品贸易研究

AMENDMENT TO THE U.S.  
LACEY ACT

IMPLICATIONS FOR CHINESE FOREST  
PRODUCTS EXPORTERS

R. JUGE GREGG  
AMELIA PORGES



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# Context

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### THE IMPACTS OF U.S. MARKET DE

### ILLEGAL TIMBER - AND THE POT

### ENVIRONMENTAL INVESTIGATION



Seneca Creek Associates, LLC

Wood Resources International

## SUMMARY

"Illegal" Logging and Global Wood Markets:  
The Competitive Impacts on the U.S. Wood Product

Prepared for:

American Forest & Paper Assoc

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## CRS Report for Congress

Order Code RL339

### Illegal Logging: Background and Issues

Updated May 23, 2008

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Prepared for Members and  
Committees of Congress

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# Lacey Act Amendments

- Prosecution under the Lacey Act requires proof of two violations,
  - **“Underlying” violation** – breach of a foreign or U.S. state law that regulates the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants
  - **“Overlying” violation** - breach of the Lacey Act ban on importing, exporting, transportation, sale, acquisition or purchase of the tainted goods
- Amendments extend Lacey Act to cover plants
  - Covers trafficking of “any wild member of the plant kingdom, including roots, seeds, parts, products thereof”
  - *Not* covered are nursery stock or cultivars, common food crops, or *their* products – such as cotton, tea, cultivated bamboo, or apparel
  - Additional protections for CITES covered endangered species
  - The drafters clearly intended to broadly cover logs, lumber, furniture, flooring, paper and other downstream wood products

# The Lacey Act “Adopts” Foreign Laws For Products in Trade in the U.S.

- Foreign laws that act as “underlying” violations
  - Laws that generally “protects plants,”
  - Laws that regulate:
    - (I) the theft of plants;
    - (II) the taking of plants from a park, forest reserve, or other officially protected area;
    - (III) the taking of plants from an officially designated area; or
    - (IV) the taking of plants without, or contrary to, required authorization
  - Failure to pay appropriate royalties, taxes, or stumpage fees
  - Laws governing the export or transshipment of plants.
- Covers many of types of laws
  - Illegal harvesting of timber in national parks
  - Forgery of shipping documents
  - Failure to pay taxes
  - Transporting of timber at night in violation of a curfew designed to combat illegal timber trafficking

# New Declaration Requirements

- New import declaration requirements – Being phased in
  - Scientific name(s) of any timber contained in the goods
  - Value of the importation
  - Quantity of the wood product
  - Name of the country, or countries, of origin
  - Allow, at least initially, for exporters to list multiple likely countries of origin and/or possible species of the wood, if that information is unknown



# Penalties Under Lacey Act

- **Forfeiture**

- Forfeiture possible even if no knowledge of underlying violation (e.g., that the timber was harvested illegally).
- Likely no “innocent owner defense” for goods whose possession is illegal under the Lacey Act – 9<sup>th</sup> Circuit Decision
- Vessels, vehicles, aircraft or other equipment used in the commission of a Lacey Act felony are also subject to forfeiture after a felony conviction

- **Civil administrative penalties**

- If defendant actually knew, or in exercise of due care should have known, of violation of an underlying law, potential civil penalty up to \$10,000 per violation
- Government can argue lack of “due care” by showing that the respondent is in the business

# Penalties Under Lacey Act

- **Fines and imprisonment**

- If, in exercise of due care, should have known of the underlying violation – misdemeanor prosecution
  - Penalties of up to \$100,000 fine (\$200,000 for organizations) and/or
  - Up to one year imprisonment
- Knowingly engages in illegal trafficking, while knowing of violation of underlying law – felony prosecution
  - Penalties of up to \$250,000 fine (\$500,000 for organizations) and/or
  - Up to 5 years imprisonment.



# Penalties Under Lacey Act

- Foreign and U.S. prosecution – possible under “dual sovereignty” exemption to double jeopardy
- Can trigger smuggling & money laundering laws
  - Significantly increases reach of law and potential penalties
- Offense level is based on the “market value” (rather than “loss” to victim or gain to defendant)
  - Significantly increases potential penalties

# Penalties Under Lacey Act

- *Martinez-Malo* (2006) – sentences of 21 months and one year
- *Kapp* (2005) - 51 months followed by 3 year term of supervised release
- *Koczuk* (2001) - 48 months and forfeiture of \$70,000
- *McNab* (2003) – 97 months and forfeiture of \$800,000
- *Lee* (1991) – 70 months
- *Silva* (1997) – 82 months

# Expect Enforcement

STATEMENT OF  
EILEEN SOBECK  
DEPUTY ASSISTANT ATTORNEY GENERAL  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
U.S. DEPARTMENT OF JUSTICE

BEFORE THE  
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND OCEANS  
COMMITTEE ON NATURAL RESOURCES  
U. S. HOUSE OF REPRESENTATIVES  
“H.R. 1497, LEGAL TIMBER PROTECTION ACT”  
OCTOBER 16, 2007

## INTRODUCTION

Chairwoman Bordallo, Representative Subcommittees, thank you for inviting me to testify today. I am a Deputy Assistant Attorney General in the Environment and Natural Resources Division (ENRD) of the U.S. Department of Justice. The ENRD is responsible for enforcing environmental and natural resources laws against individuals or entities that violate the Lacey Act, including timber importations to plants, including timber imports.

I am a Deputy Assistant Attorney General in the Environment and Natural Resources Division (ENRD) of the U.S. Department of Justice. The ENRD is responsible for enforcing environmental and natural resources laws against individuals or entities that violate the Lacey Act, including timber importations to plants, including timber imports.

Among the environmental statutes for enforcing is the Lacey Act, discussed in my testimony is the Environment Division's role in criminal prosecution of Lacey Act violations, I should add that a number of other federal agencies are involved in the implementation of the Lacey Act, including the Department of the Interior's U.S. Fish and Wildlife Service, the Department of Commerce, the Department of Agriculture, and the Department of Homeland Security.

While the Environment Division has brought a number of cases to prosecute

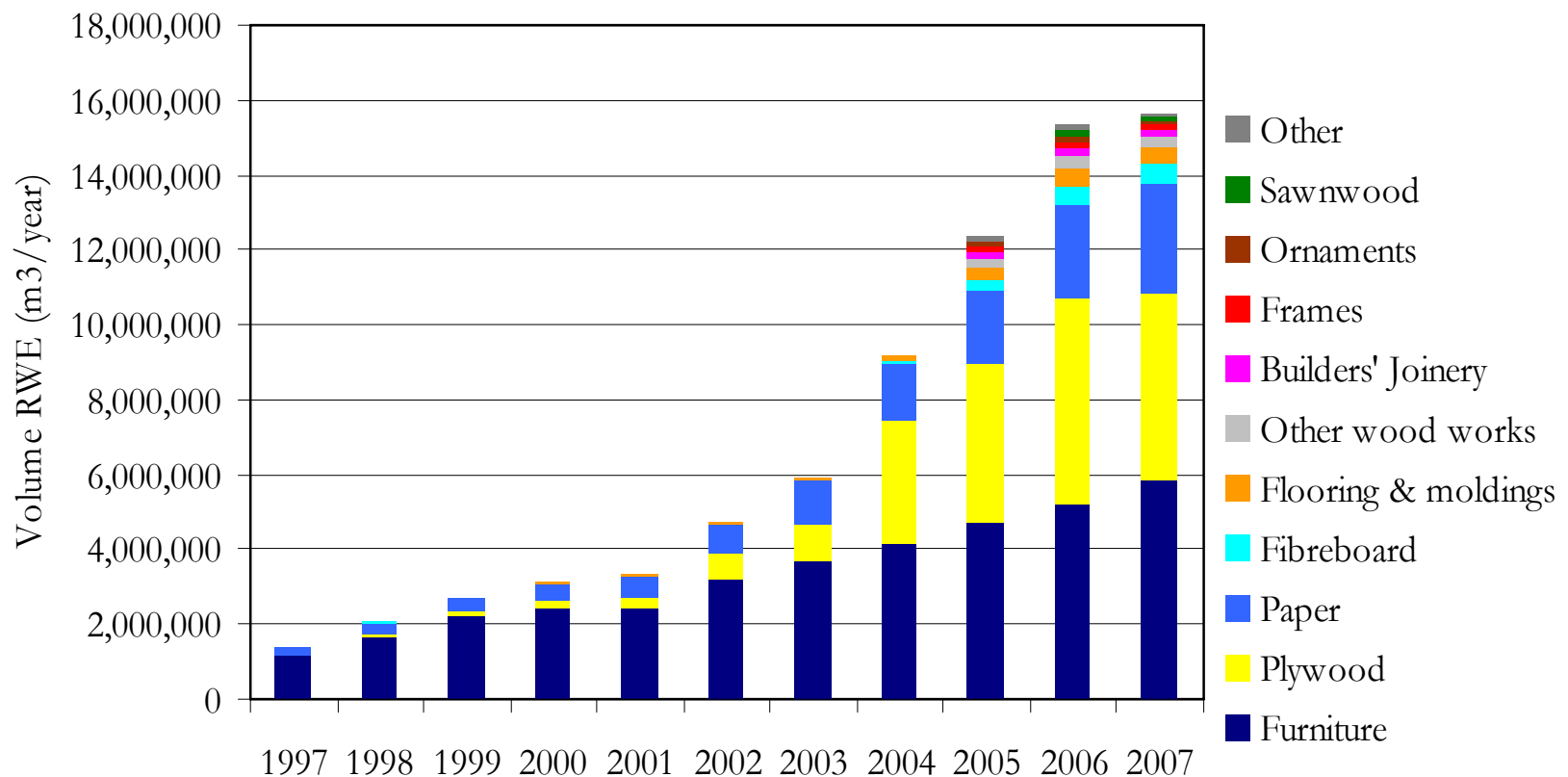
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In general, the Administration supports amending the Lacey Act to provide enforcement agencies with adequate and clearly defined legal tools to address illegal logging and trafficking of foreign timber. Addition of such enforcement tools to address trafficking in illegal timber is consistent with the President's Initiative and would enhance our ability to take steps against the multi-billion dollar trade in illegally logged timber. Such an amendment would support international good governance; it would

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# Enforcement Targets?

## U.S. Imports of Forest Products from China, 1997-2007



Source: China Custom's data, compiled by Forest Trends

# Enforcement Targets?

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## SUMMARY

**“Illegal” Logging and Global Wood Markets:  
The Competitive Impacts on the U.S. Wood Products Industry**

*Prepared for:*

American Forest & Paper Association

*By:*

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**Table 1:** Reported Estimates of Illegal Logging Activities and Estimates of Production and Trade Derived from Wood Flow Analysis (and field research)

	Reported Estimates - % Illegal Forest Production and/or Imports	Selected Results Suspicious Material Wood Fiber Flow Analysis	Comments on Strength of Evidence and Analytical Assumptions
<b>Profiled Countries/Regions</b>			
Russia	20% - 50%	<u>Softwood</u> 15 – 20% of production 25% of log exports (40% to China) 15% of lumber exports 15% of plywood exports  <u>Hardwood</u> 15 – 20% of production 25% of log exports (40% to China) 30% of lumber exports 20% of plywood exports	<p>The World Wild Fund for Nature (also known as WWF and World Wildlife Fund) has done extensive in-country analysis of Russia's legal framework and harvesting/production data. Its estimates are supported by our field research. Estimates by Greenpeace and others are less rigorous. FERN says at least 50% of the logging activities are illegal in parts of Russia.</p> <p>Several government estimates place illegal logging at 1% - 2% of harvest, but that's based on volume of seized timber only. Regional officials acknowledge serious problem.</p>
Indonesia	70% - 80%	<u>Hardwood</u> 60% of production 100% of log exports 65% of lumber exports 55% of plywood exports	<p>Very little supporting data for NGO estimates, but our field research suggests Indonesia to be one of the most problematic countries. Government officials agree. Reports of log export ban violations are persuasive. Our analytical assumption is based on wood fiber flow analysis and allowable cut estimates.</p>
Brazil	20% - 90% (generally the higher estimates)	<u>Hardwood</u> 15% of production 15% of lumber exports	<p>Estimates vary widely and depend in part on what is included as "illegal." Since the mid 1990s, Brazil has strengthened enforcement. The major</p>

# Practical Advice

- **Pay attention to your customers**
  - Customers are asking questions about wood sourcing
  - Competitive opportunity – companies can win (or lose) customers depending on answers
- **Understand your sourcing –**
  - Put management process in place to understand sourcing
  - Investigate the product supply chain
  - Get assurance it is free of illegal wood products
  - If you ignore potential sourcing problems, can still be found liable for violations of the Lacey Act
  - Ignoring industry codes of conduct can make it easier for government to prove that you “should have known”
  - If a deal is too good to be true, beware!



# Practical Advice

- **Do not “outsource” compliance**
  - **Do not rely on “paper” assurances**
    - Some Lacey Act provisions apply regardless of whether a firm has actual knowledge of illegalities
  - **Do not rely solely upon certificates of legality or sustainability (or VPA documents)**
    - They are helpful
    - However, not an absolute shield against enforcement
    - If U.S. government has proof of illegally, it can take enforcement action regardless of whether the product is certified

# Practical Advice

- **Structure contracts to protect your financial interests**
  - Importers may want only to pay for, and take possession of, product only after it has been cleared through Customs.
  - Manufacturers may want to require indemnification from wood suppliers for financial harm resulting from U.S. government actions taken against products.
- **Pay attention to regulatory and enforcement developments**
  - Declaration requirements
  - High profile cases
- **Look to industry “best practices” or industry standards**

## DoJ prosecutorial policy (“Thompson/McNulty factors”)

- Nature and seriousness of the offense
- Pervasiveness of wrongdoing
- History of criminal, civil, and regulatory enforcement actions
- Voluntary disclosure and willingness to cooperate
- Existence and adequacy of corporate compliance programs
- Remedial actions
- Disproportionate consequences of criminal prosecution
- Adequacy of prosecuting individuals
- The adequacy of civil or regulatory enforcement actions

# Compliance Program

## History -- The Sentencing Guidelines

- Sentencing Commission created in 1984 to harmonize criminal sentencing in federal courts
  - Established a nation-wide “point system” for sentencing
- U.S. Sentencing Guidelines Organizational Sentencing Criteria established in 1991
  - Organizations could get a significant decrease (up to 60% - 90%) in their sentence if they could demonstrate that they implemented an “effective program to prevent and detect” crimes, combined with self-reporting and cooperation with government
- This launched a wave of “corporate compliance programs” modeled after the Guidelines’ criteria
  - Though criteria technically apply only to sentencing context, they became the foundation for compliance program models generally, and for government review of such programs

# The Original 1991 Guidelines

## Seven criteria for an effective program

- (1) Establish compliance standards reasonably expected to reduce prospect of criminal conduct
- (2) Specific high-level personnel given responsibility to oversee compliance
- (3) Use due care not to delegate substantial discretionary authority to individuals with a propensity to engage in criminal conduct
- (4) Take steps to effectively communicate standards, including through training programs
- (5) Take reasonable steps to achieve compliance with standards (including monitoring/auditing and a system for employees to report potential criminal conduct without fear of retribution)
- (6) Enforce standards through appropriate disciplinary mechanisms
- (7) After an offense has been detected, take reasonable steps to respond to the offense and prevent recurrence

# Compliance program

- Systematic process for identifying and meeting legal obligations (or as the government would say, preventing and detecting illegal conduct)
- An effective compliance program:
  - Reduces the likelihood of misconduct in the first place
  - Increases the likelihood of early detection and mitigation should misconduct occur
  - Improves likelihood of reasonable enforcement response
  - Mitigates criminal penalties if it comes to that
- Integrate compliance into business
  - Those that generate legal obligations and risks are responsible for meeting and managing them
  - Operating management at all levels is responsible for building compliance and ethical behavior into everyday business conduct
  - Compliance officer can design & manage compliance program, but can't be responsible for everyone's compliance

# Compliance program

- Provide the necessary leadership, procedures, tools and resources so that your people will consistently do the right thing
  - Do you know how you are performing? Are you in compliance? Are there liabilities brewing? How good are the data? How old?
  - If a new person started tomorrow, would they know what to do?
  - If you lost key personnel on Friday and new qualified people started on Monday, would performance suffer?
  - If a problem occurs, how early and quickly can you detect, investigate, correct and mitigate?
- Management plays a critical role:
  - Leadership (“tone at the top”); raise compliance/ethics issues in normal leadership business (“are we doing the right thing?”); understand and exercise oversight over the compliance/ethics program (“we don’t want surprises”)



# Questions?

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