



# ***The Lacey Act Implications for Industry***

**Presentation by:**

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# About IWPA

## **Profitability, Sustainability, Growth.**

*The International Wood Products Association (IWPA) represents more than 200 companies and associations from 30 countries:*

- *U.S. Importers*
- *Offshore Suppliers*
- *Shippers, Brokers, etc.*

***Sustaining Forests - Sustaining Trade***





# *Declarations for Furniture*

- One large company deemed declarations “unrealistic”
- Overwhelming record-keeping
- Increase costs passed on to consumers



## *Lacey Act*

- The Lacey Act, as amended, is a new tool that intended to help the United States combat illegal logging.
  - Illegal to import or transport, any plant taken in violation of U.S. State laws, or any foreign law, that protects plants.
  - Illegal to trade in plants sold without the payment of appropriate royalties, taxes, or stumpages fees.

[http://aphis.usda.gov/plant\\_health/lacey\\_act](http://aphis.usda.gov/plant_health/lacey_act)



# *Compliance Issues*

- How can an importer/retailer know if a foreign forestry law was broken?
  - A goal of the law is to promote “due diligence”
  - There is no data base of foreign laws
  - Justice Department does not recognize the “innocent owner” provision for civil forfeiture – buyers must forfeit goods regardless of what steps they took to comply



## *Who's a Target?*

- “WWF has documented the extensive and complicated supply chains of [this] illegally harvested oak, ash and birch wood from the stump in the Russian Far East to specific Chinese factories and all the way to the shelves of specific, well-known American flooring and furniture retailers.”
- WWF Comment letter to APHIS October 8, 2008



## *Lacey Act Scenarios*

- Prosecution by DOJ Environmental Crimes Division, likely based on “sting”
- Seizures of good from retailer/large supplier to send message to trade
- ENGO pressure to adopt FSC certification



## *Peculiarity of Lacey*

- To be charged under Lacey you need not be the one who violated the foreign law; the timber and associated products become “tainted” even if someone else commits the foreign law violation.
- Liability extends throughout the supply chain



# *What's a Violation*

- From the obvious
  - Cutting in a protected area
- To the elusive
  - Non-payment of royalties, taxes or stumpage fees
  - To the absurd
    - United States vs. McNab



## *McNab Case*

- Charged with violating a Honduran resolution that both the Honduran Lower Court and later their Supreme Court agreed never existed
- The underlying "crime" committed by all parties was failure to obey obscure Honduran regulations that require lobster tails to be shipped in cardboard boxes and be at least 5.5 inches in length.
- Served eight years in prison



## *Lacey Act Violation Elements*

- A violation requires both
  - An underlying or “trigger” breach of some State or foreign law, at least one purpose of which must be the protection of wildlife, and
  - Evidence of an overlying breach of the Lacey Act’s prohibited actions – *import, export, transport, sale, receipt, acquisition, or purchase in interstate or foreign commerce* of plants or plant product



# *Penalty Provisions Criminal and Civil*

- Hinge on state of mind
- Did you know?
- In the exercise of due care should have known?
- Applies to entire supply chain
- Other criminal statutes may be applied, for example money laundering



## *Broad In Scope*

- Lacey's legislative and judicial history reveals a history of broad interpretation, layered prosecutions (money laundering, smuggling charges) and stiff prison sentences and penalties based on commercial value



# *Liability*

## *Standard of Care*

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- Legal precedents under the Lacey Act suggest that courts will hold persons routinely involved in the business of wood and wood product importation to a relatively high standard of care.
- According to an ENGO publication, “It is unlikely that an unsupported letter from the overseas manufacturer asserting the legality of the wood would necessarily be viewed by prosecutors or courts as ‘due diligence.’”



# *Possible Consequences for Violators*

- (1) Civil forfeitures
- (2) Civil penalties
- (3) Misdemeanor criminal penalties
- (4) Felony criminal penalties



## *IWPA Views on Lacey*

- Trade can accentuate the positive
  - Marketplace now has complete assurance that imported products are legal, responsible.
  - Architects and designers can increasingly specify imported species and products.
  - Increase/maintain imports market share in U.S.
  - IWPA Compliance Packet
- Trade must grapple with negatives of Lacey
  - Protection for “good actors”? Certification no help.
  - How to prove legality? Government or Third Party?
  - Costs / Unintended Consequences on SFM?
  - Changing Purchase Terms / Contractual Terms



## *Views from Trading Partners*

- “New legislation is intended to serve as a non-tariff barrier to imports to the U.S. during tough times” – Director Thai Trade Center, Los Angeles
- “The interpretation is that a third-party certifier is needed” – Executive Director Export Development Council, Philippines



# *How are some commodity organizations reacting?*

## **National Wood Flooring Association**

- New Voluntary Responsible Procurement Program.
- Requires FSC Chain-of-Custody certification with a commitment to trading in only FSC-certified wood products.
- Establishes requirement for imports from “high risk” countries to complete the NWFA Verified Legal Origin program

## **International Wood Products Association**

- Documentation to assist members with due diligence: Sample purchase order disclaimer language, Supplier questionnaire



# *Change Business Model*

- Exercise due care – internal policies, tracking systems, independent certification
- Structure contracts for payment post Customs clearance
- Consolidate suppliers



*Thank you*

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