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## Lacey Act Lessons from the Lumber Liquidators \$13 Million Settlement *Has the Definition of “Due Care” Been Expanded?*

By William M. Sullivan, Jr., Thomas G. Allen and Benjamin J. Cote

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*On October 7, 2015, Lumber Liquidators agreed to plead guilty to five criminal charges, including one felony, stemming from the purchase and import of certain wood products through three separate Chinese suppliers. The plea agreement marks the first criminal conviction of a major U.S. company under 2008 Lacey Act amendments that expanded the reach of the wildlife protection statute to wood products sourced from foreign countries.*

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### Lacey Act Background

As we have described [previously](#), the Lacey Act makes it unlawful to:

- Trade in any plant or wildlife product that is taken, possessed, transported, or sold in violation of the laws of the United States, a state, Indian tribe, or any foreign law that protects plants;
- Falsify or submit falsified documents, accounts or records of any plant covered by the Lacey Act; and
- Import plants and plant products (with some exemptions) without an import declaration.

See 16 USC § 3372.

The definition of plant contained in the Lacey Act broadly implicates essentially every commercial wood product. This definition is applicable to manufacturers, wholesalers, distributors and even construction companies utilizing wood products in their building materials.

Violations can result in serious criminal and civil penalties, as Lumber Liquidators’ plea agreement demonstrates.

## Lumber Liquidators' Plea Agreement

Under the plea agreement, Lumber Liquidators agreed to pay \$10 million in fines and an additional \$3.2 million government payment in lieu of civil forfeiture of some of the wood at issue. More significantly, however, the plea agreement requires Lumber Liquidators to adopt a Lacey Act compliance program containing onerous new requirements.

Significant conditions of the government imposed compliance program include:

- Written authorization by Lumber Liquidators' Chief Compliance Officer before Lumber Liquidators may do business with a new supplier;
- An in-person audit of all suppliers being evaluated under the compliance program;
- Quarterly on-site visits for suppliers deemed medium or high risk under the Lacey Act;
- Implementation of a random species verification program; and
- Required third-party compliance audits for three out of the first four years of the new program.

The Lumber Liquidators compliance program is more rigorous than the only other compliance program known to have been approved by Federal prosecutors—that of Gibson Guitar. The more severe terms imposed on Lumber Liquidators raise questions of whether the Lumber Liquidators program may be considered punitive or whether Federal prosecutors are attempting to expand the definition of due care.

## Is the Definition of “Due Care” Expanding?

While both the Lumber Liquidators and Gibson compliance programs approve of a risk-based approach requiring heightened diligence when dealing with higher risk countries or species, the Lumber Liquidators compliance program creates an increased emphasis on in-person diligence and holding a centralized decision-maker responsible for compliance choices. The Lumber Liquidators program also suggests that companies importing wood products should be wary of relying on the species identification of the supplier should flags be raised regarding the traceability of the wood. There is also a move toward ensuring that specially trained personnel or third-party experts verify that company programs are being implemented effectively.

Unfortunately for importers and sellers of wood products, the definition of “due care” remains somewhat amorphous. The Lumber Liquidators and Gibson settlements place companies on notice that they must, at a minimum, conduct due diligence of the suppliers, make an inquiry of the supply chain to the forest level, inquire into the foreign law applicable to the supply chain and document their compliance efforts. In addition, a sound compliance program should include elevated levels of diligence if any hot spot regions or wood species are implicated, and a system for procurement personnel to identify such higher risk products and regions.

Importers of record must also make reasonable efforts to ensure that the information contained on the import declarations, including the identification of the wood species, is accurate. Notably, criminal liability only attaches for knowingly false import declarations. Willful blindness to potential red flags may, however, be sufficient to satisfy this standard.

## Additional Considerations

In addition to Lacey Act compliance, companies that are sourcing and manufacturing in foreign markets should also consider compliance efforts aimed at:

- Foreign Corrupt Practices Act and anti-bribery issues;
- Sanctions administered by the Office of Foreign Assets Control;
- Child and forced Labor prohibitions;
- FTC labeling requirements (typically for leather products);
- General customs and border requirements; and
- Applicable state and local laws.

*The authors of this alert represented Gibson Guitar in its high-profile Lacey Act dispute with the U.S. Department of Justice, ultimately resulting in a modest fine to Gibson and the requirement of an improved compliance plan. The authors have also advised companies on implementing proactive Lacey Act compliance strategies as a pre-emptive measure to ward off Lacey Act investigations or prosecutions.*

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If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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