Interpreting The Lacey Act’s “Due Care” Standard after the Settlement of the Gibson Guitar Environmental Enforcement Case

The Department of Justice (DOJ) announced on August 6, 2012 that it reached a Criminal Enforcement Agreement with Gibson Guitar regarding allegations that the high-end U.S. guitar manufacturer has engaged in conduct that violates the Lacey Act, as well as other civil and criminal laws. The Lacey Act prohibits, among other things, trade in wildlife, fish, plants, and plant products that have been taken, transported, or sold in violation of law, including the law of other countries. This settlement is important both because it ends one of the highest profile international environmental enforcement cases brought by the U.S. Government in recent years and because the terms of the Agreement with Gibson set forth a due diligence road map that will help other companies meet the requirements of the Lacey Act when procuring, importing and selling covered products from other countries.

The Criminal Enforcement Agreement resolved a nearly three-year investigation and set of legal proceedings concerning wood that was allegedly illegally harvested and/or exported from Madagascar and India. Gibson promised to pay a US$300,000 penalty and a US$50,000 “community service payment,” cooperate in Lacey Act investigations and prosecutions, and drop forfeiture challenges with respect to some of the wood previously seized by DOJ.

Perhaps most significant for the many industries directly affected by the Lacey Act—including companies that rely on imported wood, paper products, seafood or other wildlife—was the rigorous Lacey Act Compliance Program that Gibson was required to implement as part of the Agreement. The Gibson Compliance Program provides some welcome clarity on the contours of the much-discussed Lacey Act “due care” requirement.

Background on the Lacey Act

The Lacey Act, enacted in 1900, is the United States’ oldest wildlife protection law. Today, the Act makes it unlawful to “import, export, transport, sell, receive, acquire or purchase any fish or wildlife or plant taken, possessed, transported, or sold” in violation of any

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2 16 U.S.C. § 3372. For more information about the history and scope of the Lacey Act, see Marcus A. Asner et al., The Lacey Act Gives Gibson Guitar the Blues, 6 White Collar Crime Report (BNA) No. 25 (Dec. 16, 2011).
The Lacey Act requires that importers of covered products, which, in Gibson's case, meant wood or wood products, exercise “due care” in identifying the source of their goods, but it does not spell out what importers have to do to meet this standard. In legal parlance, “due care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances,” and it “is applied differently to different categories of persons with varying degrees of knowledge and responsibility.” The standard is generally high in a commercial context.

With few precedents for guidance and a generally worded requirement in the statute, both regulators and affected industries naturally will look to Gibson’s Compliance Program for guidance and to supplement industry customs and standards. While developed in the context of the import of wood and wood products, these standards are a key reference point for all industries governed by the law.

**Gibson’s Lacey Act Compliance Program**

As stated in section 2.3 of the Gibson Compliance Program, the Lacey Act due care requirement is designed to “minimize the risk of purchasing plant products that were harvested or traded illegally.” To comply with this expectation, the Program requires Gibson to follow a number of steps before buying any wood or wood product:

1. work with suppliers to ensure they can implement Gibson’s policies, which include procuring wood from either recycled sources or forests where legal harvest and chain of custody can be verified, and obtaining copies of all relevant import and export documentation and business or export licenses;
2. ask questions to gather information about suppliers and the source of the wood and wood products to determine whether the products meet Gibson’s requirements for known/legal wood products;
3. “conduct independent research and exercise care before making a purchase,” which may include everything from internet research to consulting with U.S. or foreign experts or authorities and making site visits;
4. request sample documentation from suppliers to evaluate Lacey Act compliance and document validity;
5. make a determination prior to making a purchase based on all of the information collected;
6. maintain records of these efforts; and
7. decline to pursue the purchase if there is any uncertainty of legality.

Section 3 of the Compliance Program sets forth Gibson’s policies with respect to wood procurement, verification of foreign law and certifications/licenses, risk determinations, supply chain audits, employee training, record retention, and internal disciplinary actions for non-compliance. Each of these policies is designed to help Gibson ensure that its prospective wood sources are legal prior to purchase.

**Due Care Implications**

Gibson’s Lacey Act Compliance Program is binding only on Gibson and it is not meant as an official DOJ pronouncement of what “due care” is supposed to mean. That said, in the absence of other notable precedents, Gibson's Program, as a practical matter, helps articulate the industry standard for due care. While there is no “silver bullet” solution to meeting the Lacey Act's due care standard, companies nevertheless
would be well served to implement compliance programs reflecting procedures set out in Gibson’s program, tailored to their own circumstances and supply chains. Adopting an appropriately adapted Gibson-style program will give a company a decent argument that it exercised “due care,” and therefore complied with the requirements of the law, if it ever unwittingly ends up with some illegal wood and the feds come knocking. The DOJ tries to take a consistent approach to enforcement, so the Gibson Agreement, and particularly the Compliance Program, has practical precedential value, even if it is not binding as law on other companies and industries.

**Conclusion**

International attention on illegal harvesting and environmental commerce is likely to increase. That, in turn, will heighten companies’ exposure to civil and criminal enforcement actions under the Lacey Act. Commercial importers in particular would be wise to review their policies and procedures and ensure that they have in place comprehensive programs like Gibson’s. This will help insulate them from Lacey Act liability and help further the sustainability of the natural resources that are critical to their operations.

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We hope you found this advisory useful. If you have any questions, please contact your Arnold & Porter attorney or:

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