

White Collar Defense Blog

Recent Developments and Resources Involving White Collar Defense

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No Strings Attached: The Latest Expansion of the Lacey Act

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Importers of plants and plant products have good reason to be concerned about running afoul of the Lacey Act given the uncertainty created by 2008 amendments making violations of foreign law regarding plants a basis for violations under the Act. The recent saga of the Gibson Guitar Corp., maker of the iconic Les Paul guitar, has only confirmed that such concern is well-founded. As Gibson's case exemplifies, the Department of Justice ("DOJ") can disagree with foreign officials to rely on its own interpretation of foreign law to seize and seek forfeiture of goods, and even bring criminal charges.

The Lacey Act 2008 Amendments

The Lacey Act, 16 U.S.C. section 3371-3378, passed in 1900 in response to growing concern about interstate profiteering in illegally taken game, i.e., poaching, has long been recognized as the United States' first and most comprehensive federal wildlife protection law. The Act was amended by the 2008 Farm Bill (the Food, Conservation, and Energy Act of 2008) for the purpose of combating illegal logging and expanding anti-trafficking protections to a broader array of plants and plant products brought into the United States, either directly or through manufactured products. (16 U.S.C. § 3372(a)(2)(B) & (3)(B).) Prior to the 2008 amendments, plants came under the Act's jurisdiction based upon a violation of only a **state** law or regulation. The 2008 amendments added violations of foreign law regarding plants, greatly expanding the reach of the Act and injecting considerable uncertainty into its application. Although foreign law includes regulations and legally binding non-statutory provisions (*U. S. v. Lee*, 937 F.2d at 1391-92; *U. S. v. McNab*, 331 F.3d at 1235-39), the government has not identified which foreign laws will, in effect, be enforced through the Act. Indeed, "[i]t is the responsibility of the importer to be aware of any foreign laws that may pertain to their merchandise prior to its importation into the United States." (Lacey Act Amendment: *Complete List of Questions and Answers*, October 19, 2010, p. 2, http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf)

A few things are clear. The government can invoke a foreign law that is not “actively enforced in the foreign country.” (Lacey Act Primer, USDA APHIS, April 2010, at 22.) The underlying violation need not even be “prosecutable.” (*U. S. v. McNab*, 331 F.3d 1228, 1240 (11th Cir. 2003).) A third party certification that forest products were legally harvested from a foreign country will not protect against seizure. (Lacey Act Amendment: *Complete List of Questions and Answers*, p. 7.) The criminal provisions of the Act can apply even if the underlying violation does not carry criminal sanctions. (*U. S. v. Lee*, 937 F.2d at 1392-93.) And although scienter (i.e., know or should know) regarding the foreign law violation is required for prosecution, the Act’s forfeiture provisions are enforced on a strict liability basis. (*U. S. v. One Afghan Urial Ovis Orientalis*, 964 F.2d 474, 476 (5th Cir. 1992).)

Gibson Guitar Seizures

According to Gibson’s website, news articles, and court filings, gun-toting federal agents first raided Gibson’s Nashville facility on November 17, 2009, seizing guitars, wood, and electronic records purportedly because Gibson was using ebony wood illegally exported from Madagascar. Federal agents came back on August 24, 2011, seizing guitars, wood, and electronic records from Gibson’s Nashville and Memphis facilities, this time purportedly because Gibson was using ebony wood illegally exported from India. The government’s second raid prompted Gibson to take its case to the court of public opinion. The government is seeking forfeiture of the seized wood, and those proceedings have identified the central issue as the government’s intransigence in standing by its interpretation of Madagascar and Indian law. (*U. S. v. Ebony Wood in Various Forms*, Case No. 3:10-cv-00747 (U.S.D.C., M.D. Tenn.) (“Madagascar case”); *U. S. v. 25 Bundles of Indian Ebony Wood*, Case No. 3:11-cv-00913 (U.S.D.C., M.D. Tenn.) (“India case”).)

Under the laws of both Madagascar and India, it is legal to export “finished” ebony wood, but not “sawn timber,” “sawn logs,” or “sawn wood,” as the government describes the seized items. Thus, it comes down to whether the wood Gibson imported, which it refers to as “fingerboards,” is deemed “finished” (or “finished” enough) for purposes of export. The DOJ says not. It did not matter to the DOJ that government officials in Madagascar and India had approved the exports, that Madagascar and Indian law on their face appear to permit the export of “fingerboards” as “finished” products, or that the seized wood complied with “controlled wood” standards set by the Forest Stewardship Council to enable manufacturers to avoid timber and timber products unacceptable from an environmental standpoint. Perhaps most significant, it did not matter to the DOJ that Gibson obtained sworn statements from Madagascar and Indian government officials stating that the wood was legally exported. Indeed, a foreign government’s position on its own law is not “conclusive.” (*In re Vitamin C Antritrust Litigation* (U.S. Dist. Ct., E.D.N.Y.,

Sept. 6, 2011, 06-MD-1738), 2011 WL 3918165; see also Federal Rule of Civil Procedure 44.1 and Federal Rule of Criminal Procedure 26.1.)

It thus appears that the DOJ and other federal agencies can aggressively investigate, seize items, and seek convictions based upon their own interpretations of foreign law. Further complications may arise, since, as in Gibson's case, investigations can proceed without the involvement of foreign counterparts. What if, for policy reasons, the foreign government deliberately does not enforce the foreign law relied upon, but the DOJ pursues enforcement for internal political reasons anyway? Issues of this kind are not suited for legal resolution, but may instead require resort to diplomatic channels. Since manufacturing or purchasing finished goods in the country of origin is not always practical, due diligence must be conducted. In addition to retaining local counsel and trusted export firms, guidance on the legality of a prospective import can be sought from Customs and Border Protection, which issues "ruling letters" pursuant to 19 C.F.R. § 177 and maintains the Customs Rulings Online Search System ("CROSS"), a searchable database of rulings.

Conclusion

The scope of the Lacey Act has increased over time to become a powerful law enforcement tool, with the potential to ensnare intentional smugglers and innocent owners. The 2008 expansion of the plants covered by the Act in the interest of environmentalism coupled with the supremacy of our government's interpretation of foreign law have made sourcing foreign wood particularly treacherous, leaving unwary importers at the mercy of political agendas and zealous prosecutors. Consequently, Gibson's case, rather than being an outlier, may be a harbinger.

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