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The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products

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Summary

The Lacey Act regulates the trade of wildlife and plants and creates penalties for a broad spectrum of violations. In 2008, the Lacey Act was amended to include protections for foreign plants and to require adherence to foreign laws as they pertain to certain conservation and other activities involving plants. Further, the 2008 amendments make it unlawful to submit falsified documents related to any plant or plant product covered by the act, and to import certain plants and plant products without an import declaration.

The primary drivers behind the Lacey Act amendments of 2008 (2008 amendments) were to reduce illegal logging globally and increase the value of U.S. wood exports. Illegal logging is a pervasive problem with economic and environmental consequences. Some estimate that illegal logging accounts for 15%-30% of the volume of all forest extraction activities globally, and has an estimated worth of \$30 billion-\$100 billion of the global wood trade. Further, if there were no illegally logged wood in the global market, it has been projected that the value of U.S. exports of roundwood, sawnwood, and panels could increase by an average of approximately \$460 million each year. A halt to illegal logging would also raise the value of domestic wood production. If this is added to exports, some estimate the increase in revenue for companies in the United States at approximately \$1.0 billion annually.

A highly publicized raid on Gibson Guitar Corporation brought to light several existing policy issues related to the 2008 amendments to the Lacey Act. Some issues are broad and address the intent of the act. For example, some question why U.S. importers should be held responsible for violations of foreign law or if the requirements under the Lacey Act actually reduce illegal logging. Other issues are narrow and address certain requirements in the act. For example, several suggest that the declaration requirements for importing plants and plant products are cumbersome and cannot be met in some cases. Further, some contend that the 2008 amendments should not apply to plants harvested or plant products fabricated before the 2008 amendments were enacted. In contrast, some reiterate the benefits of the 2008 amendments, primarily reducing illegal logging and increasing the value of legally obtained plants and plant products on the market.

The 113th Congress is attempting to address some of these issues in proposed legislation. H.R. 3324 would amend the Lacey Act so that importers would need to *possess and make available* certain information about the plant or plant products being imported. Currently, importers are required to *file* this information. Further, the bill would amend the rulemaking authority of the Secretary to give more flexibility for specifying the applicability of declaration requirements. H.R. 3280 would amend the Lacey Act to exempt plants and plant products imported before May 22, 2008, from the Lacey Act.

Efforts to address implementation issues could also be pursued through regulations. The law requires a review of the implementation of the Lacey Act by the Animal and Plant Health Inspection Service and a report evaluating and analyzing some implementation requirements and providing recommendations to improve plant identification. Further, the Secretary (e.g., Secretary of Interior, Commerce, or Agriculture) may promulgate regulations that aim to improve implementation as discussed in the review.

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Introduction

The Lacey Act was enacted in 1900 to address game poaching and wildlife laundering, among other things.¹ The Lacey Act regulates the trade of wildlife and plants and creates penalties for a broad spectrum of violations. Violations addressed by the Lacey Act involve domestic and international illegal trade of plants and wildlife. Before the enactment of amendments in 2008, the Lacey Act addressed these issues by making it unlawful for any person² to:

- “import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law”; or to
- “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state, or in violation of any foreign law;” and any plant taken, possessed, transported, or sold in violation of any state law or regulation.³

In 2008, the Lacey Act was amended to include nonindigenous plants and violations of foreign laws pertaining to certain conservation actions and other activities involving plants and plant products.⁴ Based in part on these amendments, the Lacey Act now makes it unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant taken, possessed, transported, or sold in violation of any law or regulation of any state, or any foreign law, that protects plants or that regulates taking or exporting plants and plant products in certain situations.⁵ This includes plants taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees; and plants exported in violation of state or foreign law.

Further, in reference to plants, it is unlawful to import, export, transport, sell, receive, acquire, or purchase any plant or plant product taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.⁶ In addition, the Lacey Act makes it unlawful to falsify or submit falsified documents related to any plant or plant product covered by the act, and to import certain plants and plant products without an import declaration.⁷

¹ For example, prior to the act, hunters would kill game in one state illegally and transport it to another state where they could sell it legally. When the game was transported out of its state of origin, that state did not have the jurisdiction to prosecute the hunter in another state where the game was sold. The state where the sale took place generally had no laws prohibiting the sale of game illegally taken in another state. Robert Anderson, “The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking,” *Public Land Law Review*, vol. 16, no. 27 (1995), p. 38.

² A person includes any individual, partnership, association, corporation, trust, or any officer, employee, agent, department, or instrumentality of the federal government or of any state or political subdivision, or any other entity subject to the jurisdiction of the United States.

³ This was in the U.S. code before amendments in 2008 at 16 U.S.C. §3372(a). The term *plant* refers to only indigenous plants of any state that are listed pursuant to any state law promoting the conservation of the species or under the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

⁴ 16 U.S.C. §§3372(a)(2)-(3).

⁵ 16 U.S.C. §§3372(a)(1)-(4). For a detailed description of the 2008 amendments to the Lacey Act, including prohibitions related to plants and penalties related to civil and criminal violations, see CRS Report R42067, *The Lacey Act: Protecting the Environment by Restricting Trade*, by (name redacted).

⁶ 16 U.S.C. §3372(a)(1).

⁷ 16 U.S.C. §§3372(d) and (f).

The provisions related to fish, wildlife, and plants in reference to laws, treaties, and regulations of the United States and any Indian tribal law were unchanged (although the definition of plants was expanded to include nonindigenous plants).

The 2008 amendments to the Lacey Act (2008 amendments) also expand the definition of a plant to include *any* plants (including foreign plants), whereas before it referred only to plants indigenous to any state or associated commonwealths, territories, or possessions of the United States. A plant is specifically defined as “any wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands.”⁸ There are certain exclusions to this definition of plants, including common cultivars (except trees), common food crops, scientific specimens of plant genetic material to be used for laboratory or field research, and any plant that is to remain planted or be planted or replanted.⁹

The 2008 amendments also require importers of all covered plants and plant products to submit an import declaration to U.S. Customs and Border Protection (CBP) at the time of importation. The law requires that the declaration contain certain information, such as identification of the species and genus of plants or plants used in a product, and country of origin of plants, among other things.¹⁰ The declaration appears to apply to all plants and plant products, including those plants harvested or plant products made before the enactment of 2008 amendments.¹¹

The primary aims of the 2008 amendments were to reduce illegal logging and to increase the value of U.S. wood exports.¹² International illegal logging is a pervasive problem affecting several countries that produce, export, and import wood and wood products. Estimates of the extent of illegal logging vary and may not be completely accurate due to the clandestine nature of the activity. Some have estimated that 15% to 30% of the volume of all forestry is attributable to illegal logging.¹³ In tropical countries, some estimate that between 50% and 90% of all logging is illegal. Illegal logging is a concern to many because of its economic implications as well as its environmental, social, and political impacts.¹⁴ The economic value of global illegal logging is estimated to be between \$50 billion and \$100 billion of the global wood trade.¹⁵ An analysis by the World Bank estimates that illegal logging costs governments approximately \$5 billion annually in lost royalties and an additional \$10 billion in lost revenue.¹⁶ Some are concerned that high U.S. demand for tropical timber from countries in Latin America and Southeast Asia may

⁸ 16 U.S.C. §3371(f)(1).

⁹ 16 U.S.C. §3371(f)(2).

¹⁰ For plant products, the declaration requirements could be modified if the species and country of origin varies and is unknown. In these cases, all of the species that may have been used and all of the countries where the plants may have been taken are to be identified, as discussed below. Packaging supplies that contain plant material are excluded from declaration requirements.

¹¹ For example, wood harvested in Brazil before 2008 would need to have declaration forms if it was imported into the country now.

¹² For example, see U.S. Congress, House Committee on Natural Resources, *Legal Timber Protection Act*, report to accompany H.R. 1497, 110th Cong., 2nd sess., September 24, 2008, H.Rept. 110-882 (Washington: GPO, 2008) pp. 3-4.

¹³ Christian Nellemann, *Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the Worlds Tropical Forests*, ed. INTERPOL Environmental Crime Program (2012).

¹⁴ For example, logging illegally within designated park boundaries could lead to environmental impacts such as habitat alteration and loss of biodiversity; also, evading fees and royalties could reduce revenues to governments, which might result in lower funds for conservation activities.

¹⁵ Christian Nellemann, *Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the Worlds Tropical Forests*, ed. INTERPOL Environmental Crime Program (2012).

¹⁶ World Bank, *A Revised Forest Strategy for the World Bank Group* (Washington, DC: October 31, 2002), p. 12.

exacerbate illegal logging. The United States is the world's largest wood products consumer and one of the top importers of tropical hardwoods.¹⁷ For example, the United States is the largest importer of Peruvian mahogany, which some estimate to be 80% illegally logged.¹⁸

Global illegal logging activities can devalue U.S. exports of timber. Illegally logged wood generally costs less to bring to market than legally logged wood due to nonpayment of fees or taxes, and avoidance of costs related to laws that govern harvesting. This lowers the market price of wood, potentially harming timber operations that operate legally. According to a 2004 report issued by the American Forest and Paper Association, it is estimated that illegal logging of roundwood for wood products depresses world wood prices on average by 7%-16% annually.¹⁹ This affects U.S. producers of wood and their exports. If there were no illegally logged wood in the global market, it has been projected that the value of U.S. exports of roundwood, sawnwood, and panels could increase by an average of approximately \$460 million each year.²⁰ Further, if increases in value for domestic wood production if illegal logging is halted are taken into account, then the increase in value of wood products in the United States each year could be approximately \$1.0 billion, according to the study.²¹

Other countries and entities have adopted measures similar to the Lacey Act. The European Union (EU), for example, has a regulation that prohibits the placement of illegally harvested timber and timber products on the EU market and requires entities to establish due diligence schemes.²² Australia passed a similar law that prohibits the import of wood or wood products that were illegally logged or contain illegally logged timber.²³

The requirements established in the Lacey Act are administered by the Departments of the Interior, Commerce, and Agriculture through their respective agencies. These include the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and Animal and Plant Health Inspection Service (APHIS). This report summarizes the implementation of the 2008 amendments to the Lacey Act and discusses policy issues related to the amendments.

Policy Issues Associated with the 2008 Amendments

A raid on Gibson Guitar Corporation (see box below) brought to light several existing policy and legal issues related to the 2008 amendments to the Lacey Act. In broad terms, some question why U.S. importers should be held responsible for violations of foreign law potentially committed by foreign entities (i.e., not U.S. importers). They claim that it is difficult to monitor the harvesting

¹⁷ Shadia Duery and Richard P. Vlosky, *U.S. Demand for Certified Tropical Hardwood Products: The Supply Chain Perspective*, Louisiana Forest Products Development Center, Working Paper #78, November 15, 2006, pp. 1-14.

¹⁸ Natural Resources Defense Council, *Trade in Bigleaf Mahogany: The Need for Strict Implementation of CITES* (September 2006), available at http://docs.nrdc.org/international/files/int_06100201a.pdf.

¹⁹ Seneca Creek Associates, LLC, and Wood Resources International, LLC, "Illegal" Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry, prepared for American Forest & Paper Association (November 2004), 154 pp. Hereinafter known as *Illegal Logging and Global Markets*.

²⁰ *Illegal Logging and Global Markets*, p. ES-2.

²¹ *Illegal Logging and Global Markets*, p. 26.

²² European Union Timber Regulation, Regulation (EU) No. 995/2010 of the European Parliament and of the Council of 20 October 2010. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R0995:EN:NOT>.

²³ The Illegal Logging Prohibition Act 2012, no. 166, 2012, passed Nov. 28, 2012. See <http://www.comlaw.gov.au/Details/C2012A00166>.

and processing of plants and plant products in foreign countries to make sure that no foreign laws are being violated. Other concerns address specific provisions of the 2008 amendments such as the declaration requirements for plants and plant products imported into the United States. Several businesses have suggested that the declaration requirements for importing plants and plant products are cumbersome and in some cases, not possible to meet.²⁴ For example, some claim that identifying species for the declaration can be difficult for composite wood materials or some finished products where the wood has been modified from its natural state.²⁵ Compliance with other requirements in the act is another issue. Some contend that plants and plant products imported before 2008 should be exempt from the law. They note that getting declaration information about these products, sometimes years after importation, can be difficult.²⁶ To temper these criticisms of the 2008 amendments of the Lacey Act, some are reiterating the intended positive effects of the amendments, such as the potential economic benefits of reducing illegal logging and the potential environmental benefits of reducing deforestation and corruption associated with the illegal timber trade.²⁷

Congressional interest in this issue stems in part from the wide-reaching applicability of the Lacey Act for U.S. industries and consumers and the environmental and economic benefits of reducing illegal logging. The 2008 amendments to the Lacey Act affect all industries that import plant and plant products, including musical instrument makers, furniture manufacturers, flooring companies, toy manufacturers, the auto industry, and some textile manufacturers that use fabrics that contain plant fibers. The 2008 amendments are expected to reduce illegal logging, which will reduce corrupt practices and increase biodiversity and conservation in timber-supplying countries, and increase revenues for foreign and domestic companies that sell and process wood.

The 113th Congress has addressed the 2008 amendments with proposed legislation. H.R. 3324 would amend the Lacey Act so that importers would need to *possess and make available* certain information about the plant or plant products being imported. Currently, importers are required to *file* this information. Further, the bill would amend the rulemaking authority of the Secretary to give more flexibility for specifying the applicability of declaration requirements. H.R. 3280 would amend the Lacey Act to exempt plants and plant products imported before May 22, 2008, from the Lacey Act.

²⁴ For example, see Bill DiBenedetto, "Farm Bill's Illegal Logging Ban Hits Shippers, Logistics Companies," *Journal of Commerce*, August 8, 2008, p. 1.

²⁵ *Consensus Statement of Importers, Non-Governmental Organizations, and Domestic Producers on Lacey Act Clarifications*, July 17, 2009. See http://www.troutmansandersnews.com/marcom/news/TS-Intl_Trade_2009-07-17.pdf. Hereinafter referred to as *Consensus Statement*.

²⁶ *Consensus Statement*.

²⁷ For example, see Jake Schmidt, "Lacey Act: The Diverse Coalition that Supports It and Why Efforts to Weaken It Should be Resisted," *Switchboard*, October 3, 2011, http://switchboard.nrdc.org/blogs/jschmidt/lacey_act_the_diverse_coalitie.html. Hereinafter "Lacey Act: The Diverse Coalition That Supports It and Why Efforts to Weaken It Should be Resisted."

Gibson Guitar Case

A raid of Gibson Guitar Corporation based on alleged Lacey Act violations brought this law to the attention of many in Congress. The case illustrates several issues regarding the Lacey Act. On August 24, 2011, federal agents executed four search warrants for Gibson Guitar Corporation facilities in Nashville, TN. The search resulted in the seizure of pallets of wood, electronic files, and guitars. The search warrant affidavit²⁸ was filed in support of four search warrants and to seize evidence to support potential violations of the Lacey Act under 16 U.S.C. Section 3372(a)(2)(B) and smuggling laws under 18 U.S.C. Section 545.²⁹ The affidavit stated that Gibson Guitar Corporation imported Indian ebony and rosewood in a form that violated Indian law in shipments sent in June 2011.³⁰ Indian law states that it is unlawful to export products classified under the HS Code 4407 of the International Harmonized Commodity Description and Coding System (HS) for all species of plants harvested in India.³¹ For wood to be legally exported from India, it would have to be in a different form (i.e., processed). For example, if the wood had been processed in India into veneer,³² it could have been classified under HS Code 4408 and been legally exported under Indian law.³³ Further, U.S. Customs issued a tariff clarification ruling on sawn Indian rosewood and ebony imported for the use of manufacturing finger boards for guitars and violins, clarifying that it is illegal to import this wood in this form.³⁴

The import of Indian ebony and rosewood classified under HS Code 4407 into the United States was noted as a violation of the Lacey Act under 16 U.S.C. Section 3372(a)(2)(B)(iii). This section states that it is unlawful to import in foreign commerce, “any plant taken, possessed, transported, or sold in violation of any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants.”

In a previous action, a forfeiture action was brought against Gibson Guitar Corporation regarding shipments of illegally obtained ebony wood exported from Madagascar to Gibson Guitar Corporation in 2008 and 2009.

On July 27, 2012, Gibson settled with the Department of Justice on charges that its wood shipments into the United States violated the Lacey Act. The settlement addressed charges and forfeitures from 2008 and 2009, as well as charges stemming from the 2011 raid discussed in this box. As part of the settlement, Gibson agreed to pay a \$300,000 penalty and an additional \$50,000 community service payment to the National Fish and Wildlife Foundation. They also agreed to a list of conditions for avoiding prosecution.³⁵ Gibson also agreed to withdraw its claim to forfeited wood seized in the criminal investigation, which included Madagascar ebony from shipments that totaled \$261,844.³⁶ The agreement created a Lacey Act Compliance Program tailored for Gibson. One part of the program is adherence to a due care standard. Some components of this standard include communicating with suppliers about the legality and origin of their wood supplies, independently researching and verifying wood supplies, and auditing wood purchasing practices. The agreement is in effect for 18 months. According to the agreement, if Gibson complies with its terms, the United States would not pursue charges.

²⁸ John M. Rayfield, U.S. Fish and Wildlife Service, *Affidavit in Support of Search Warrant # 11-MJ-1067 A, B, C, D*, p. 4 (Aug. 18, 2011), hereinafter *Affidavit*.

²⁹ *Affidavit*, p. 3. In general, smuggling laws under 18 U.S.C. §545 make it unlawful to knowingly import or bring merchandise into the United States contrary to law, or to receive, conceal, sell, or facilitate the transportation of such merchandise after importation, knowing that the merchandise was brought into the United States contrary to law.

³⁰ *Affidavit*, pp. 8 and 14.

³¹ The HS implemented in the Harmonized Tariff Schedule (HTS) of the United States. An HS or HTS code is assigned to a set of products with stated characteristics.

³² Veneer is generally a thin decorative covering of fine wood applied to a coarser wood or other material. For example, under HS 4408, veneer is defined as being not more than 6 mm thick.

³³ *Affidavit*, p. 7.

³⁴ Tariff classification ruling NY 881630 (January 26, 1993), pertaining to sawn Indian rosewood (*Dalbergia latifolia*) and sawn Indian ebony (*Diospyros ebenum*).

³⁵ Letter from the U.S. Department of Justice to Attorneys for Gibson Guitar Corp. (July 27, 2012), see http://www.eenews.net/assets/2012/08/06/document_gw_02.pdf.

³⁶ Department of Justice Press Release, Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations (August 6, 2012), available at <http://www.justice.gov/opa/pr/2012/August/12-enrd-976.html>.

Implementation of the 2008 Amendments

This section reviews the implementation of declaration requirements, enforcement, and funding under the 2008 amendments. Policy issues associated with implementation are discussed below in “Issues and Legislative Options.”

Declaration Requirements

Under the Lacey Act, all plants or plant products being imported into the country must be declared, with some exceptions that include common cultivars, packaging material, and scientific specimens, among other things.³⁷ The declaration is to be made by the importer at the time of import. According to APHIS, the declaration requirements in the 2008 amendments are expected to facilitate accountability and improve data collection on plant imports.³⁸ Similar declaration requirements are used for the import of wildlife to the United States.

The declaration for plants and plant products is to provide:

- the scientific name of any plant (genus and species) contained in the importation;
- the value of the plant or plant product;
- the quantity of the plants or plant products (including the unit of measure); and
- the country of origin of where the plant was taken.³⁹

In cases where multiple species are found in a product, there are some variations to the declaration. If a product contains material from several different plants, of which the names of the species are uncertain, the law states that the declaration should contain the names of all plant species that could have been used to create the product.⁴⁰ Furthermore, if the exact country of origin is not known, the declaration must contain the names of all of the countries from where the plant species could have come.⁴¹ Information from submitted declarations is entered into a database, maintained by APHIS. It is unclear if this information will be openly available to the public.

The declaration does not require information on the chain of custody of the product or its parts.⁴² For example, if a chair was fabricated in China with wood that was harvested and shipped from Indonesia, via Singapore, a full record of transactions throughout its fabrication process would not be necessary. The declaration will require the species of plant(s) used in the making of the chair (i.e., product imported), and the origin of each plant species used (e.g., Indonesia), and the

³⁷ 16 U.S.C. §3372(f).

³⁸ Animal and Plant Health Inspection Service, *Lacey Act: Frequently Asked Questions*, Animal and Plant Health Inspection Service, November 13, 2013, http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf. Hereinafter, *Lacey Frequently Asked Questions*.

³⁹ 16 U.S.C. §3372(f)(1).

⁴⁰ 16 U.S.C. §3372(f)(2)(A).

⁴¹ 16 U.S.C. §3372(f)(2)(B).

⁴² In this context, chain of custody is the location and handlers of the plant and plant product during its harvest and fabrication until it gets to the importer.

value and quantity of the plant used. In some cases, the country of harvest for the declared plant material will be different from the country of export.

APHIS has also developed a series of special use designations (SUDs) to ease some burdens of declarations.⁴³ A SUD is an entered code that would substitute for certain required information. SUDs apply to specific products under designation regulations and are organized into three categories:

- The use of shorthand names for common trade groupings of species. (APHIS has a list of acceptable names.)
- The use of a special code to identify composite woods or recycled and reclaimed products if species and genus cannot be determined through a process of due care.
- Items manufactured prior to May 22, 2008, whose sources or species cannot be identified through a process of due care could be given a SUD.

The declaration requirements were to be implemented by December 2008; however, APHIS delayed implementation due to concerns about the complexity of the requirements. Consequently, the declaration requirements on certain items were implemented on a delayed schedule between April 2009 and April 2010.⁴⁴ The implementation of the declaration requirements is related to the Harmonized Tariff Schedule (HTS) of the United States, which classifies plants and plant products under certain codes in trade for duty, quota, and statistical purposes. Implementation is based on HTS codes and follows a schedule. Some more complex plant products (e.g., those containing specialty wood) were declared by April 2010 (e.g., musical instruments).⁴⁵ Only items classified in the current implementation schedule are subject to enforcement for compliance with the declaration schedule, according to APHIS.⁴⁶ Several other products containing wood parts, such as some firearms, furniture, and some toys, are being considered for phased-in implementation. APHIS has stated that it is not enforcing the declaration requirement for informal entries such as personal shipments. It is uncertain when or if these types of products will have to be declared.⁴⁷ Any additions to the items requiring a declaration are expected to be reported in the *Federal Register*, according to APHIS.⁴⁸

The 2008 amendments required a review of the declaration requirements and the effects of certain exclusions to the declaration requirements not more than two years after the enactment of the amendments (by May 22, 2010).⁴⁹ APHIS published a notice in 2011 stating that it is initiating this review and seeking comments on the implementation of the declaration requirements.⁵⁰ Further, 180 days after the review is complete, a report reviewing the implementation of

⁴³ For more details, see Animal Plant and Health Inspection Service, *Lacey Act Plant and Plant Product Declaration Special Use Declarations*, APHIS, September 19, 2012, http://www.aphis.usda.gov/plant_health/lacey_act/downloads/lacey-act-SUD.pdf.

⁴⁴ See 74 *Federal Register* 45415 (September 2, 2009).

⁴⁵ For a classification of goods of, or containing plants or plant products that are required to be declared under the 2008 Amendments, see http://www.aphis.usda.gov/plant_health/lacey_act/downloads/ImplementationSchedule.pdf.

⁴⁶ *Lacey Frequently Asked Questions*.

⁴⁷ *Lacey Frequently Asked Questions*.

⁴⁸ *Lacey Frequently Asked Questions*.

⁴⁹ 16 U.S.C. §3372(f)(4).

⁵⁰ 76 *Federal Register* 10874 (February 28, 2011).

declaration requirements is to be submitted to appropriate congressional committees.⁵¹ The report is to contain:

- an evaluation of the effectiveness of the declaration requirements in assisting enforcement of the requirements and efforts to integrate the requirements with other import regulations;
- recommendations for legislation that would assist in the identification of plants that are imported into the United States illegally; and
- an analysis of the effect of prohibitions and declaration requirements on the cost of legal plant imports and the effect on illegal logging practices and trafficking.⁵²

A report was completed in May 2013 and sent to Congress.⁵³ The report discusses some statistics of declaration requirements. For example, APHIS is receiving approximately 40,000 declarations per month (5,000 per month on paper, the rest electronically), and, of the declarations sent, approximately 32% are missing some aspect of the declaration. The report also mentions some of the issues associated with declarations. These range from importers not being able to identify species and genus of plants in products to mislabeling the country of harvest of the species. Further, the report discusses difficulties in processing the magnitude of paper declarations and the unsuccessful pilot program to create and implement blanket declarations. The report did not suggest recommendations for creating legislation to ease declaration requirements, but did emphasize the use of SUDs to ease the burden of declaring goods for importers.

Regulations to reflect the study's findings may be promulgated 180 days after the review discussed above.⁵⁴ The 2008 amendments authorize the regulations to include limits on the applicability of the declaration requirements to specific plant products; modifications to the requirements based on the review; and limits to the scope of the exclusions to the declaration requirement if they are warranted according to the review. No recommendations for changing the regulations of the 2008 amendments have been promulgated, although SUDs are in place to address some issues.

Enforcement of the Lacey Act

The Lacey Act states that the provisions and subsequent regulations under the act are to be enforced by the Secretaries of the Interior and Commerce, and in the case of plants, also the Secretary of Agriculture.⁵⁵ Agencies—for example, CBP, the U.S. Coast Guard (e.g., for fisheries violations), the National Marine Fisheries Service, the Federal Bureau of Investigation, the U.S. Forest Service, the Office of the Inspector General, and U.S. Immigration and Customs Enforcement—also can enforce the Lacey Act through inspection or monitoring activities.

The Lacey Act can be enforced at the border or through investigations. Agents at ports of entry inspect imports and monitor the declaration process. Inspectors can initiate and conduct

⁵¹ 16 U.S.C. §3372(f)(5).

⁵² 16 U.S.C. §3372(f)(5).

⁵³ Animal and Plant Health Inspection Service, *A Report to Congress with Respect to the Implementation of the 2008 Amendments to the Lacey Act*, Animal and Plant Health Inspection Service, May 2013.

⁵⁴ 16 U.S.C. §3372(f)(6).

⁵⁵ 16 U.S.C. §3375(a).

investigations into violations of the Lacey Act. The FWS Office of Law Enforcement reported 2,474 investigations related to the Lacey Act in 2012.⁵⁶

Enforcement of the Lacey Act sometimes depends on an understanding of what foreign laws might have been violated. There is no federal database of foreign wildlife and plant laws, thus making enforcement of the law challenging.⁵⁷ However, to facilitate investigations, officials might use information gained from foreign governments, nongovernmental organizations, private citizens, anonymous tips, declarations, industry, and border agents, among others, during the investigation. Officials are also authorized to provide rewards to informants that lead to the arrest, conviction, or assessment of fines to a violator.⁵⁸

A Lacey Act violation requires two actions to be taken. If a person violates a U.S. or tribal law by taking, possessing, transporting, or selling any fish, wildlife, or plant (or plant product), the Lacey Act is violated if that fish, wildlife, or plant is then imported, exported, transported, sold, received, acquired, or purchased. It is slightly different for violations of state or foreign laws, which require that the import, export, transport, sale, receipt, acquisition, or purchase of the fish, wildlife, or plant be in interstate or foreign commerce before there can be a violation. A Lacey Act violation can result in civil penalties that could involve fines and forfeiture of wildlife, plants, and products, and criminal penalties that could involve fines, forfeiture, and incarceration.⁵⁹

Funding

The Lacey Act does not authorize funding to implement the act or enforce provisions within the act.⁶⁰ However, funding for implementing the act could come from discretionary appropriations. The Secretary is directed to identify funds used to enforce the Lacey Act and any regulations as a special appropriations item in the Department of the Interior appropriations budget proposal to Congress.⁶¹ Funds for implementing the act could come from other accounts in federal agencies. For example, funds for FWS investigators to enforce laws that address fish, wildlife, and plant resources are provided under the Office of Law Enforcement line item for FWS.⁶² This program received \$62.3 million for FY2013.⁶³ This office also funds law enforcement officials to monitor and investigate the wildlife trade. The office has 219 agents and 143 inspectors on staff for FY2012. In FY2012, investigators conducted 12,996 investigations, of which 2,474 involved the Lacey Act.⁶⁴ FWS also has an international wildlife trade program that implements domestic laws

⁵⁶ This refers to all aspects of the Lacey Act, including fish and wildlife, and plants. Office of Law Enforcement, *Law Enforcement at a Glance*, U.S. Fish and Wildlife Service, Public Information, Washington, DC, February 2013, pp. 1-2.

⁵⁷ *Lacey Frequently Asked Questions*.

⁵⁸ 16 U.S.C. §3375(d).

⁵⁹ For further discussion of penalties under the Lacey Act, see CRS Report R42067, *The Lacey Act: Protecting the Environment by Restricting Trade*, by (name redacted).

⁶⁰ Activities authorized under law can be funded by appropriations without an authorization.

⁶¹ 16 U.S.C. §3378(e).

⁶² U.S. Fish and Wildlife Service, *U.S. Fish and Wildlife Service Fiscal Year 2012 Budget Justifications*, Department of the Interior, Budget Justification, Washington, DC, 2011, p. LE-5.

⁶³ The Administration's request for FY2014 is \$67.3 million, an increase of \$5.3 million over FY2013.

⁶⁴ Office of Law Enforcement, *Law Enforcement at a Glance*, U.S. Fish and Wildlife Service, Public Information, Washington, DC, February 2013, pp. 1-2.

and international treaties that address the wildlife trade.⁶⁵ APHIS also funds the implementation of the Lacey Act. Money taken from penalties and fines under the Lacey Act can be deposited into the Lacey Act Reward Fund. Money in this fund can be used to provide rewards to people who provide information that leads to an arrest, criminal conviction, and other things. Money can also be used to reimburse costs to those providing temporary care to fish, wildlife, or plants while a case is ongoing.⁶⁶

Issues and Legislative Options

Several policy issues are associated with the 2008 amendments, ranging from questions about the overall purpose and function of the Lacey Act to issues about specific provisions in the act such as the declaration requirements. Several environmental, trade, and industry groups have formed coalitions to identify issues and suggest solutions. Some coalitions who primarily have issues with the declaration requirements have proposed solutions that they contend could be addressed by regulations. Others contend that the regulatory process has not worked and congressional action is needed. This section discusses selected policy issues associated with the 2008 amendments and summarizes proposed and potential legislative and regulatory options.

U.S. Enforcement of Foreign Laws

Under the Lacey Act, the importer is responsible for making sure that imported plants and plant products are legally harvested, processed, and imported. This could involve monitoring the production of plant products and verifying that plants and plant products are being harvested, processed, and imported legally under foreign laws. This requirement has been interpreted by some as requiring the United States to enforce foreign laws, which some contend should be the responsibility of the country who established the laws. Others contend that the United States contributes to illegal trade by being one of the largest consumers of plant and plant product imports, and therefore is in a special position to apply demand-side pressure to ensure legally sourced plants and plant products for export.⁶⁷

Some might argue that there is limited potential to lower the level of illegal trade of plants and wildlife, since the illegal trade could shift away from responsible importers (i.e., U.S. importers following the Lacey Act) to those in countries with fewer restrictions. In the case of illegal logging, however, this argument is waning since other countries or blocks of countries are adopting regulations similar to the Lacey Act. For example, the European Union (EU) has adopted a regulation that prohibits the entry of illegally harvested timber into the European market.⁶⁸ The responsibility for regulating timber falls on those who put plants and plant products in the market (e.g., importers and producers). *Illegally harvested* is defined under the regulation as “harvested in contravention of the applicable legislation⁶⁹ in the country of harvest.” The

⁶⁵ This program also implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and processes and organizes permits and trade records. For more information, see CRS Report RL32751, *The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): Background and Issues*, by (name redacted) and (name redacted).

⁶⁶ 16 U.S.C. §3375(d).

⁶⁷ “Lacey Act: The Diverse Coalition That Supports It and Why Efforts to Weaken it Should be Resisted.”

⁶⁸ EU Timber Regulation (Regulation (EU) No 995/2010).

⁶⁹ Applicable foreign legislation covers rights to harvest timber within legal boundaries; payments for rights and taxes (continued...)

regulation applies to both timber imported into the EU and timber produced within the EU. The regulation requires that those placing timber or timber products into the market practice due diligence. Further, the regulation will require that those who buy and sell timber or timber products on the market be able to identify their suppliers and customers so that the timber and timber products can be traced.⁷⁰ Australia has also passed a law similar to the Lacey Act and the EU regulation. This law prohibits the import of timber products that contain illegally logged timber; requires importers to undertake due diligence to mitigate the risk of products containing illegally logged timber; and establishes a monitoring, enforcement, and investigation regime.⁷¹

If a large portion of the world market for timber adopts regulations similar to the 2008 amendments, such as the EU regulations, the market for illegally harvested or processed plants and plant products would be expected to decrease because the consumer base addressing illegal logging would presumably increase.

There is no proposed legislation in the 113th Congress that attempts to remove foreign laws from the coverage of the Lacey Act.

Addressing Laws Not Related to Conservation

Some contend that the 2008 amendments of the Lacey Act overreach the original intent of their proponents by addressing laws that are not related to conservation. For example, the act makes it unlawful to possess any plant that was processed illegally according to a foreign law.⁷² As discussed in the Gibson guitar case, exporting unfinished wood conforming to HS 4407 from India is a violation of Indian law governing exports and hence a potential violation of the Lacey Act. Some could contend that illegally processing wood might not have a direct effect on conservation. Indeed, under the 2008 amendments, harvesting and exporting wood where applicable conservation laws and payment of fees and taxes are followed could still violate a country's export law (e.g., due to restrictions on unfinished wood exports) and therefore would be prohibited under the Lacey Act if the plant or plant products are imported into the United States. Counter to the argument that the Lacey Act overreaches its intent, others defend the legitimacy of the Lacey Act as a conservation tool.⁷³ They contend that all areas covered by the Lacey Act, including export laws, have some connection to conservation. Enforcing payments of stumpage fees and taxes, for example, takes away the financial benefits of illegal logging and could provide revenue for conservation activities (e.g., more law enforcement officers). They also contend that enforcing export laws lowers the influx of illegal plants and plant products onto the market. For example, legally required processing or finishing of wood could provide another layer of oversight on the trade of plants and plant products, and could also increase the transparency of the supply chain of the plants and plant products, making enforcement of foreign laws easier.

(...continued)

related to harvesting; environmental and forest legislation applicable directly to timber harvesting; legal rights of third parties as it applies to land use and tenure affected by timber harvesting; and trade and customs laws related to the forest sector. EU Timber Regulation (Regulation (EU) No 995/2010), Article 2(g)-(h).

⁷⁰ Jon Buckrell and Alison Hoare, *Controlling Illegal Logging: Implementation of the EU Timber Regulation*, Chatham House, Briefing Paper, June 2011, http://www.chathamhouse.org/sites/default/files/0611buckrell_hoare.pdf.

⁷¹ The Illegal Logging Prohibition Act 2012, no. 166, 2012, passed November 28, 2012. See <http://www.comlaw.gov.au/Details/C2012A00166>.

⁷² 16 U.S.C. §3372(a)(3)(B)(iii).

⁷³ "Lacey Act: The Diverse Coalition That Supports It and Why Efforts to Weaken It Should be Resisted."

Removing violations of foreign laws from the Lacey Act would address this issue, yet would narrow the scope of the act significantly. Another alternative, as discussed above, would be to limit the applicability of foreign laws to those laws that directly address the protection, conservation, and management of plants. This would also narrow the scope of the law, but would keep it focused on addressing conservation. However, some might contend that violations not related to conservation might lead to charges that ultimately might address conservation.

Potential Costs and Benefits of the 2008 Amendments

The enactment and implementation of the 2008 amendments has led some to contend that the law increases costs for certain companies and could result in the loss of jobs.⁷⁴ Others, in contrast, contend that the law increases revenue for certain companies and thus could lead to job creation.⁷⁵ There has been no comprehensive analysis of the costs and benefits of the 2008 amendments for various types of plant and plant product industries. This section discusses the potential areas of costs and benefits of the 2008 amendments.

The primary costs to comply with the 2008 amendments are attributable to exercising due care to ensure that imported plants and plant products are harvested and processed legally, and to comply with the declaration requirements. According to H.Rept. 112-604, APHIS has stated that it is receiving approximately 40,000 declarations per month, at a cost of \$56 million annually for regulated entities. This figure could be higher when the Lacey Act is fully implemented.

The costs of compliance for regulated entities depend on the amount of due care conducted by the importer and the cost of declaration requirements. Larger companies might have more resources to exercise due care than smaller companies. Further, those importing large quantities of wood or products from single sources might have lower costs applying due care than those purchasing small quantities of specialized wood or products from several sources. In addition to costs of due care, other costs might come from complying with declaration requirements. Identifying the species and genus of wood products and filling out paperwork for declarations could require additional staff for companies importing wood and wood products. Indirect costs may result from changing trade partners that might not be able to verify the legality of their wood products. This might involve searching for new markets and establishing business with new companies. Last, there are costs associated with violations created by the 2008 amendments. Violations could result in penalties up to \$500,000 for criminal violations and forfeitures of goods, which can be costly depending on the quantity and species of plants or plant products confiscated.

One of the primary benefits of the 2008 amendments is based on the premise that reducing illegal logging would increase revenues for legal logging operations in the United States and other countries. As discussed before, illegally logged wood is cheaper to bring to market and likely depresses wood prices for both domestic and international markets. Based on this premise, if

⁷⁴ For references to jobs, see letter from Hon. Fred Upton, Chairman of the Committee on Energy and Commerce et al. to Hon. Daniel Ash, Director of the U.S. Fish and Wildlife Service, et al., September 8, 2011, <http://republicans.energycommerce.house.gov/Media/file/Letters/090811%20Letter%20to%20DOJ%20Interior%20Fish%20and%20Wildlife.pdf>.

⁷⁵ For example, see Rep. Earl Blumenauer, "Lacey Act Protects American Jobs," House of Representatives, *Congressional Record*, vol. 157, part 141 (September 21, 2011), pp. H6276-H6277 and Heath Combs, "Business Owners Say Lacey Act Can Save Jobs," *Furniture Today*, September 26, 2011, p. 1, http://www.furnituretoday.com/article/543612-Business_Owners_Say_Lacey_Act_Can_Save_Jobs.php.

illegally logged wood were removed from the market, prices for legally harvested wood would probably increase. According to one study, this increase could be 7%-16% annually.⁷⁶ Less illegally harvested wood in the market could lead to an increase in the demand for legally harvested wood, causing an upward pressure on prices. To illustrate the benefits of the 2008 amendments, several cite a trade report that estimated that illegal logging contributed approximately \$1 billion annually in economic losses to the U.S. forest products industry in the form of lower exports and depressed wood prices.⁷⁷ Some contend that the revenue gained from lowering the influx of illegally harvested wood into the market could lead to more domestic jobs.⁷⁸ Another economic benefit of reducing illegal logging would be increasing revenues for governments in countries where wood is harvested. Studies have shown that illegal logging leads to corruption and evasion of paying fees and taxes for harvested and processed wood. The World Bank estimated that governments lose approximately \$15 billion annually due to illegal logging, due primarily to lost revenue from taxes and fees.⁷⁹

It is difficult to assess whether the 2008 amendments to the Lacey Act have been effective in reducing illegal logging around the world. There have been no comprehensive studies assessing the effect of the amendments on the logging industry. Some suggest anecdotally that foreign logging operations in China and Vietnam are paying closer attention to complying with local laws because of consumer-driven pressure.⁸⁰ Others, however, might contend that restrictions on selling illegally harvested wood to U.S. companies might drive sales of illegally harvested wood higher to companies from countries that do not have restrictions on purchasing illegally harvested wood (i.e., leakage), potentially reducing the effect of the Lacey Act on illegal logging.

Declaration Requirements

The declaration requirements for plants and plant products under the 2008 amendments are controversial. Some contend that the declaration requirements are a burden and difficult to comply with under certain circumstances.⁸¹ For example, a case study of IKEA's procurement strategy noted that it would take 25 person-years annually to complete the declaration forms for IKEA's supply chain.⁸² Further, it notes that a single shipment might generate a 1,000-page document for a declaration because of all the products being shipped. Others are concerned with specific parts of the declaration requirements and have suggested modifications.⁸³ Proponents of the declaration requirements, in general, contend that they are necessary to ensure compliance with the provisions of the Lacey Act and serve as an oversight mechanism for compliance.⁸⁴

⁷⁶ *Illegal Logging and Global Wood Markets*, p. ES-2. Higher prices could be a potential negative consequence for consumers who might have to pay more for wood. This could affect a different set of domestic companies.

⁷⁷ *Illegal Logging and Global Wood Markets*, p. 26.

⁷⁸ Letter from American Forest Foundation et al. to Member of Congress, October 11, 2011.

⁷⁹ World Bank, *A Revised Forest Strategy for the World Bank Group* (Washington, DC: October 31, 2002).

⁸⁰ Patricia Elias, *Logging and the Law: How the U.S. Lacey Act Helps Reduce Illegal Logging in the Tropics*, Union of Concerned Scientists, April 2012, p. 15.

⁸¹ *Consensus Statement*.

⁸² Adam Grant and Sofie Beckham, *IKEA's Response to the Lacey Act: Due Care Systems for Composite Materials in China*, World Resources Institute, Issue Brief, January 2013, p. 10.

⁸³ *Consensus Statement*.

⁸⁴ In relation to removing declaration requirements for non-solid wood products, see letter from Blue Green Alliance et al. to Members of Congress, November 1, 2011, <http://climateadvisers.com/pdf/> (continued...)

Identifying Species and Genus

Some contend that wood in certain plant products is difficult to identify by genus and species.⁸⁵ For example, for composite products and materials (i.e., products that contain more than one species of wood such as particleboard), it is difficult to identify the genus and species of all the component fibers because numerous species of wood can be used to make the products. Some have suggested that these types of wood products be excluded from the declaration requirements until it is feasible to identify various fibers by species.⁸⁶ The law attempts to address complications with identifying several species of wood in products. For example, if the species of wood used in products is uncertain, one may declare all species of wood that the product could contain.⁸⁷ Therefore, if a composite wood product is created from by-products from several species, listing the species that may have been used to create the product would satisfy the declaration requirement.⁸⁸ However, APHIS has acknowledged that this might not be enough to facilitate the declaration of composite wood, and has asked for information on this issue to consider regulatory options.⁸⁹ In the request for comments for potential changes in regulations, APHIS proposes a definition for composite wood and identifies two possible approaches for declaring composite wood through regulations. APHIS would define composite wood as consisting of plant material that has been chemically or mechanically broken down and reconstituted. The approaches to declaring composite wood would involve applying a type of *de minimis*⁹⁰ standard to the wood. One approach is to identify the genus, species, and country of harvest for no less than a given percentage of the wood contained in the product. The percentage could be measured in terms of weight or volume. The second approach would be to declare the “average percent composite plant content” of the product, without regard for the species and country of harvest for the plant. Non-composite plant material would still need the genus, species, and country of harvest in the declaration. A *de minimis* standard has also been proposed for certain types of products that contain plant materials which are highly processed and are in small quantities.⁹¹ Some argue that identifying these plant materials is difficult due to the level of processing they have undergone and their small quantity in the product. Under this proposal, plant materials in certain products would be excluded from the declaration requirements. Product examples include cosmetics, personal care products, textiles, and rubber or cork products. Proponents of this proposal contend that federal agencies have rulemaking authority to make these exclusions, but that congressional action might be needed to clarify the agency’s authority to establish exclusions to the declaration requirements.⁹²

(...continued)

Oppose%20RELIEF%20Act%20Letter.pdf. Hereinafter *Blue Green Alliance Letter*.

⁸⁵ *Consensus Statement*.

⁸⁶ *Consensus Statement*.

⁸⁷ 16 U.S.C. §3372(f)(2)(A).

⁸⁸ *Lacey Act Amendments, Complete List of Questions and Answers*, #18.

⁸⁹ Animal Plant and Health Inspection Service, “Implementation of Revised Lacey Act Revisions,” 76 *Federal Register* 38330-38332, June 30, 2011.

⁹⁰ *De minimis* broadly refers to an insignificant or negligible quantity of something. In reference to this situation, a *de minimis* quantity of plant material would be considered negligible or small enough that it would not require a declaration.

⁹¹ American Apparel & Footwear Association et al., *Second Consensus Statement of Importers, Non-governmental Organizations, and Domestic Producers on Lacey Act Clarifications*, June 23, 2010, p. 2. Hereinafter, the *Second Consensus Statement*.

⁹² *Second Consensus Statement*, p. 2.

APHIS has addressed this issue, in part, with the use of SUDs. SUDs provide a special code to identify composite woods or recycled and reclaimed products if species and genus cannot be determined through a process of due care. Specific guidelines on using SUDs are provided.

Some counter the need for modifications to the declaration requirements because they contend that knowing the type and source of wood is important for ensuring legal practices and countering the illegal trade.⁹³ They specifically oppose suggestions to broaden the exemptions of plant products from declaration requirements, arguing that modifications proposed in H.R. 3210 would have excluded pulp and paper, which constitute a significant portion of the plant imports into the United States, from declaration requirements.⁹⁴

Blanket Declarations

Some contend that repeated or regular declarations of the same plant products add administrative burden and extra costs on industries without providing additional benefits for tracing the source of wood.⁹⁵ A proposal to address this issue would allow for a blanket declaration.⁹⁶ In a blanket declaration, importers would submit one declaration for similar products imported over a period of time, thus potentially saving the importer from submitting duplicate declarations for each product imported. APHIS has responded to this issue by initiating the Lacey Act Blanket Declaration Pilot Program in 2009 to test the feasibility of collecting information through a blanket declaration.⁹⁷ Eligible importers can participate in the program.⁹⁸ A blanket declaration will apply for one month, and a reconciliation report providing how much was actually imported during the month is due within 15 days after the end of the month. The report to Congress submitted by APHIS stated that this pilot project was not a success. Further, a survey revealed that users felt the program was duplicative of efforts related to declarations.

The modification of declaration requirements can be done either through regulations or by law. Regulatory changes to the declaration requirements under the Lacey Act can be implemented from recommendations provided by certain reports and reviews. As discussed above, under the Lacey Act, the Secretary⁹⁹ is required to review the declaration requirements and report findings to appropriate congressional committees.¹⁰⁰ The report to Congress contains information on several factors, including an evaluation of the effectiveness of declaration requirements.

The Secretary is authorized to promulgate regulations that could modify certain declaration requirements for plant products 180 days after the Secretary completes the review.¹⁰¹ For example, the Secretary could limit the applicability of declaration requirements to any plant

⁹³ *Blue Green Alliance Letter*.

⁹⁴ *Ibid.*

⁹⁵ *Consensus Statement*.

⁹⁶ *Consensus Statement*.

⁹⁷ See the description at APHIS Lacey Act Blanket Declaration Pilot Program, http://www.aphis.usda.gov/plant_health/lacey_act/downloads/Instructions.pdf.

⁹⁸ Eligible importers include those participating in one of two expedited border release programs, the Automated Line Release Program or the Border Release Advance Screening and Selectivity Program.

⁹⁹ When it pertains to plants, the Secretary under the Lacey Act refers to the Secretary of the Interior or Commerce, and the Secretary of Agriculture.

¹⁰⁰ 16 U.S.C. §3372(f)(4).

¹⁰¹ 16 U.S.C. §3372(f)(6).

product; make changes to declaration requirements for plant products that are suggested in the review; and limit the scope of exclusions if they are justified by the review.¹⁰² This could be an avenue for excluding products (e.g., composite wood products) that are difficult to declare. It is unclear, however, if these regulations could be used to exempt plant products made before 2008 from the declaration process.

In the 113th Congress, H.R. 3324 would amend the Lacey Act so that importers would need to *possess and make available* certain information about the plant or plant products being imported. Currently, importers are required to *file* this information. This would lower the burden of processing declarations for APHIS, but would not lower the burden of creating declarations by the importers. Therefore, many of the issues associated with identifying species and genus, or country of origin, would remain. Further, the bill would amend the rulemaking authority of the Secretary to give more flexibility on the applicability of declaration requirements.

Excluding Plants and Plant Products Imported or Compiled Before 2008

Some contend that the 2008 amendments should not apply to plants imported or plant products created or imported before 2008.¹⁰³ They note that declaration requirements under the act are difficult to complete for these plant products because the sources and species of plants used might not be known, since they were not required by law to be identified. In the 113th Congress, H.R. 3280 proposes to exclude plants from the Lacey Act that were imported into the United States before May 22, 2008, or plant products created before May 22, 2008.¹⁰⁴ The intent of this provision appeared to be to exclude *plant products* created and imported before 2008 from Lacey Act coverage and clarify any doubts or interpretations of the law.¹⁰⁵ Note that this provision would not cover plants harvested before 2008 that were not imported before the act took effect, making them still subject to the Lacey Act.

Exercising Due Care

The primary method by which U.S. importers can protect themselves from criminal and certain civil penalties under the Lacey Act is to exercise due care in determining if the imported plants or plant products were legally harvested, processed, and exported. The exercise of due care refers to the amount of attention and effort that a reasonable person would expend in a similar situation to address an issue or conduct an activity. Some contend that the actions needed to demonstrate due care with respect to the Lacey Act are not sufficiently defined or clear.¹⁰⁶ Some definitions of due care are found in S.Rept. 97-123, which accompanied the Lacey Act amendments of 1981, and in guidance provided by federal agencies. S.Rept. 97-123 states that “due care means that degree of care which a reasonably prudent person would exercise under the same or similar

¹⁰² 16 U.S.C. §3372(f)(6).

¹⁰³ For example, see *Consensus Statement*.

¹⁰⁴ H.R. 3280.

¹⁰⁵ Congressman Jim Cooper, “The RELIEF Act: Frequently Asked Questions,” press release, October 20, 2011, http://cooper.house.gov/index.php?option=com_content&task=view&id=538&Itemid=76.

¹⁰⁶ Jim Gould, *Continuing Wood Trade Under the Lacey Act Amendments*, Floor Covering Institute, White Paper, pp. 1-6, http://floorcoveringinstitute.com/files/Lacey_Act_Article15_2.pdf.

circumstances.”¹⁰⁷ Further, the Senate report notes that due care requires that a person under certain circumstances take steps that a reasonable person would take under similar circumstances to insure they are not violating the law.¹⁰⁸

The exercise of due care is pivotal for determining penalties under the Lacey Act. Under the Lacey Act, certain civil and criminal violations and forfeitures can be imposed on persons if they engaged in conduct prohibited by the act. If they knowingly engaged in prohibited conduct, the penalties are steeper than if they unknowingly engaged in prohibited conduct. If they unknowingly committed a violation without exercising due care, their penalties are steeper than if they exercised due care and unknowingly committed a violation. (See **Figure 1**.) Therefore, persons who exercise sufficient due care to determine if their plants or plant products were taken, possessed, transported, or sold in violation of laws, treaties, or regulations might not be held liable for certain violations under the act if a violation is committed unknowingly.¹⁰⁹ However, exercising due care and unknowingly committing a violation could still result in penalties under the Lacey Act, such as forfeiting goods.¹¹⁰ The due care standard does not apply to marking or labeling violations, and is excluded from declaration requirements under the Lacey Act.

According to S.Rept. 97-123, the intent behind incorporating a due care standard in the Lacey Act was to lower the potential for abusive and indiscriminate enforcement efforts.¹¹¹ The Senate report also notes that the degree of due care is “applied differently to different categories of persons with varying degrees of knowledge and responsibility.”¹¹² For example, a horticulturalist in a professional capacity and with experience in the plant trade could be expected to apply greater knowledge toward correctly identifying plants and verifying permits than would be expected of an airline company that transported plants to the United States and has little knowledge of the plant trade and plant species. Some practical measures one could take to demonstrate due care are given by APHIS.¹¹³ For example, importers can ask questions about the chain of custody of the wood, implement compliance plans, abide by industry standards, record efforts at each stage of the supply chain, and change their practices in response to practical experiences. Some red flags that might indicate violations of logging or processing laws offered by APHIS include:

- goods trading significantly below their common market rate;
- cash transactions without paperwork;
- invalid or falsified documents or permits; and
- unusual sales practices or transactions.

¹⁰⁷ U.S. Congress, Senate Committee on Environment and Public Works, *Lacey Act Amendments of 1981*, report to accompany S.736, 97th Cong., 1st sess., April 27, 1981, S. Rept. 97-123 (Washington: GPO, May 21, 1981), p. 10.

¹⁰⁸ *Ibid.*

¹⁰⁹ 16 U.S.C. §§3373-3374.

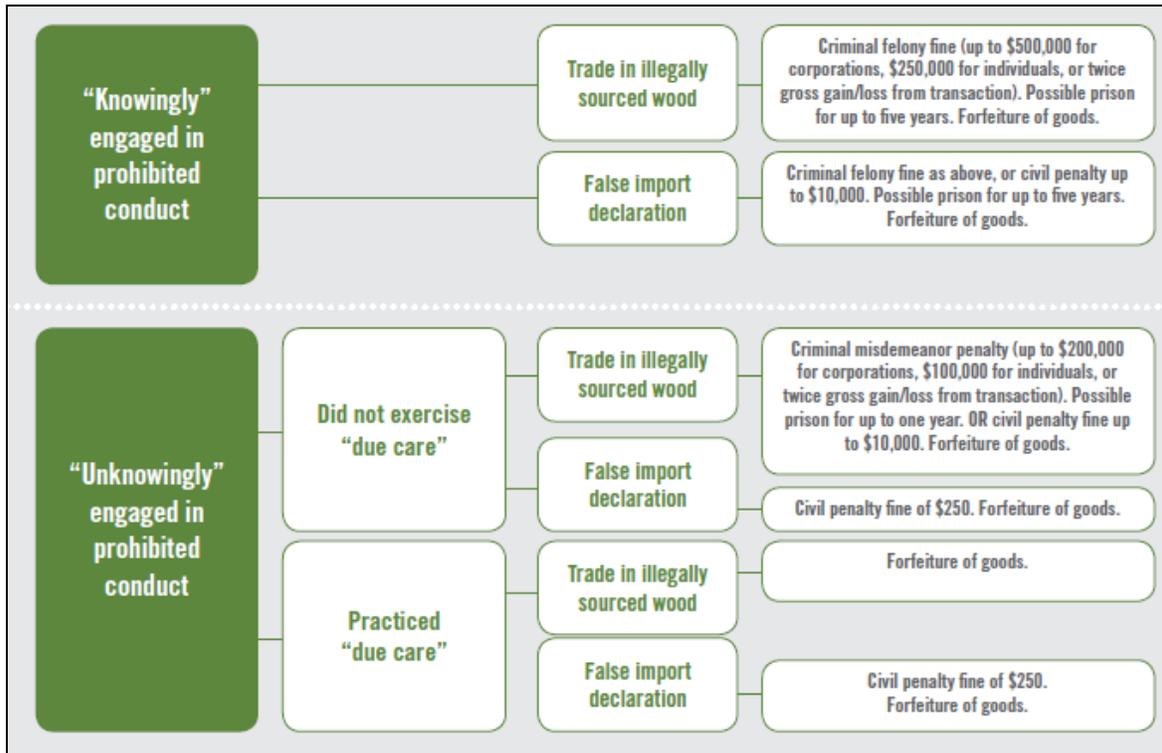
¹¹⁰ For more on violations and penalties under the Lacey Act, see CRS Report R42067, *The Lacey Act: Protecting the Environment by Restricting Trade*, by (name redacted).

¹¹¹ For a more detailed explanation of the due care standard and how it applies to violations under the Lacey Act, see CRS Report R42067, *The Lacey Act: Protecting the Environment by Restricting Trade*, by (name redacted).

¹¹² S.Rept. 97-123, p. 10.

¹¹³ Gary Lougee, *Lacey Act Primer*, Animal and Plant Health Inspection Services, Power Point, April 2010, http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf.

Figure I. Summary of Penalties Under the Lacey Act



Source: Environmental Investigation Agency, *The U.S. Lacey Act: Frequently Asked Questions About the World's First Ban on Trade in Illegal Wood*, Environmental Investigation Agency, January 2009, <http://www.eia-global.org/PDF/EIA.LaceyReport.English.pdf>.

Some suggest that the Lacey Act Compliance Program described in the agreement with Gibson Guitar could be viewed as a guideline for how due care might be interpreted or applied to the 2008 amendments.¹¹⁴ The due care standard in the Compliance Program states that Gibson should follow a number of steps before buying wood or a wood product. They include:

- communicating with suppliers to determine any challenges they might have in implementing policies within the program;
- determining the origin of the wood from discussions with the supplier;
- conducting independent research to determine risky sources of wood or the potential for false documentation;
- requesting sample documentation to evaluate compliance and validity;
- making a determination of legality before purchasing wood and maintaining records of these effects; and
- declining to purchase wood if there is any uncertainty of illegality.¹¹⁵

¹¹⁴ Marcus Anser et al., *Interpreting the Lacey Act's "Due Care" Standard after the Settlement of the Gibson Guitar Environmental Enforcement Case*, Arnold & Porter LLP, Advisory, August 2012, pp. 1-3.

¹¹⁵ Letter from the U.S. Department of Justice to Attorneys for Gibson Guitar Corp. (July 27, 2012), see http://www.eenews.net/assets/2012/08/06/document_gw_02.pdf.

Gibson is to supplement these requirements by continuing its own policies. Some policies include procuring wood sourced from forests where legal harvest and chain of custody can be certified by a third party, such as the Forest Stewardship Council. Further, when working with a new supplier, Gibson is to study foreign laws, verify certifications, and use watch lists to determine the risk of procuring illegal wood.¹¹⁶

This standard and compliance program is binding only to Gibson Guitar and is not intended to be a pronouncement of what DOJ intends due care to mean with respect to the 2008 amendments.

Process for Exercising Due Care

Establishing a process for exercising due care under the Lacey Act when dealing with plants and plant products has been proposed for clarifying guidelines. Some suggest that a process for exercising due care should have steps a person or company can take to verify that their imported plants and plant products comply with the Lacey Act, ultimately leading to a type of certification for the plant or plant product. The process could consider certification of individual items as well as certification of manufacturers, importers, and retailers. Others are also considering a process for satisfying due care. A group of stakeholders associated with the trade of plants and plant products and conservation is creating a process that aims to define due care under the Lacey Act.¹¹⁷ Their standard centers on obtaining a type of forest certification that ensures the forest is protected and conducting risk, compliance, and legal audits related to potential illegal activities.

A process for exercising due care has been adopted by the European Union (EU) in regulations that aim to curb illegal logging.¹¹⁸ The process has three primary elements that are to be provided:

- Information on the timber and timber products, including a description and scientific name of the timber, country of harvest, quantity of the timber or product, details on the supplier and purchaser, and documents indicating compliance with national legislation.
- A risk assessment of the timber being illegal throughout its supply chain based on information gathered and risk assessment criteria, which include compliance with applicable legislation, prevalence of illegal logging of specific species in the country of harvest, international sanctions on imports of timber, and complexity of the supply chain.
- Risk mitigation addressing the risks noted in the previous point, which can include gathering additional information and verification of legality from the supplier of the timber, including obtaining third party verification.¹¹⁹

The regulation also provides for monitoring organizations to be recognized.¹²⁰ These organizations are expected to provide EU operators due care systems, which they can accept or

¹¹⁶ Ibid.

¹¹⁷ See <http://www.laceyduecare.com/>.

¹¹⁸ European Union Regulation No. 995/2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:295:0023:0034:EN:PDF>. This process is referred to as a due diligence system and is planned to take effect in 2013.

¹¹⁹ European Union Regulation No. 995/2010, Article 6.

¹²⁰ European Union Regulation No 995/2010, Article 8.

refuse in lieu of creating their own system. The EU system for due diligence is similar to the 2008 amendments, but potentially more involved. Under the EU system, information on the chain of custody and a calculation for mitigating risks is required; this information is not required under the 2008 amendments.

Clarity on how to exercise due care and a defense against charges when due care is exercised are two potential benefits of implementing a process for exercising due care. A process that specifies steps to ensure the legality of imported products would reduce confusion as to how due care is exercised, and provide consistent practices among importers, thus making it easier for them to coordinate efforts to verify the legality of their products. This could also lower the costs of compliance. Further, monitoring compliance according to a process could give law enforcement officials a benchmark for bringing charges against an importer who may not have taken sufficient steps to exercise due care.

Potential drawbacks of establishing and implementing a process to exercise due care include determining the level of reliability for verifying timber practices in foreign countries and the potential for violations to go unnoticed when due care is applied. One component of a due care process might be employing third parties to verify timber operations in foreign countries (i.e., certification scheme). Third parties can invest resources in particular countries to monitor logging and processing operations for several importers, and provide a certificate to operations that comply with the law. For example, the Forest Stewardship Council (FSC) certifies timber operations to ensure legal, sustainable management of forested land and monitors the chain of custody to trace the life cycle of wood products originating in a certified forest.¹²¹ The effectiveness of third parties to monitor all aspects of plant harvesting and production, however, has been questioned by some. They claim that corruption and fraud can take place, thus undercutting the ability to certify legal wood.¹²² This would lower the credibility of the standard and lower its effect in curbing illegal logging. Further, some certification schemes might not cover all aspects of a due care process and the timber and timber products in question. FSC, for example, does not apply rigorous oversight to “FSC Controlled Wood,” which is non-FSC-certified wood that is allowed to be mixed with FSC-certified wood.¹²³ Further, certification schemes may not cover all steps in the succession from harvesting to importation. For example, FSC standards would not cover some laws dealing with the export or processing of wood after harvest that would be subject to the Lacey Act.¹²⁴

Foreign Laws

Exercising due care for importing plants and plant products under the Lacey Act can be challenging for importers because it requires an understanding of foreign laws and practices, and possibly monitoring in the foreign country where plant and plant materials are being harvested.

¹²¹ For more on forest certification and potential issues, see CRS Report R41992, *Forest Certification Programs*, by (name redacted).

¹²² Frederic Achard et al., *Vital Forest Graphics*, United Nations Environment Programme/GRID-Arendal, 2009, pp. 54-56, http://www.grida.no/files/publications/vital_forest_graphics.pdf.

¹²³ Forest Stewardship Council, “FSC Controlled Wood,” <http://www.fsc.org/cw.html>. The FSC controlled wood must still not originate from wood that was harvested illegally, in violation of civil rights, in forests with high conservation values, from the conversion of natural forests, or from areas where genetically modified trees have been planted.

¹²⁴ Although Gibson has bought FSC-certified wood in the past, the 2011 Lacey Act violation against Gibson addressed an Indian law related to finishing wood before export. The finishing process is not covered by FSC certification.

Some contend that exercising due care is complicated by the quantity of foreign laws related to plants and plant products. For example, Indonesia has more than 900 laws, regulations, and decrees that address timber harvesting and processing.¹²⁵ There is no federal database that compiles and presents foreign laws that apply to plants and plant products. According to APHIS, importers are responsible for being aware of any foreign laws that apply to the plants and plant products they are importing.¹²⁶

Options for Improving the Exercise of Due Care

Some have suggested other options for reducing illegal logging that would help importers exercise due care.¹²⁷ These options would be supply-side driven. One option is to encourage timber-producing countries to construct timber legality standards that could be implemented as voluntary guidelines or mandatory procedures for domestic timber operations. Supply-side guidelines were implemented in a trade agreement between the United States and Peru in 2006 to address illegal logging in Peru.¹²⁸ For example, Peru is required to implement several measures to deter illegal logging within the country, such as increasing the number of enforcement personnel, imposing criminal and civil penalties under existing laws to deter illegal logging, monitoring endangered plant species, verifying and auditing exporters and producers of timber products, and developing tools that strengthen regulatory controls and verification systems related to the harvest and trade of timber products. Individual countries have also initiated legality standards to differentiate between legal and illegal sources of wood.¹²⁹ Indonesia, for example, has a standard with several indicators that address timber operations and forest management. Independent auditors assess timber concessions and factories against the standard and award certificates for legal operations.

Another option is to promote international cooperation and coordination to identify areas of legal and illegal logging practices. With the advent of the EU regulation, opportunities exist for coordination among a large range of importers spanning two of the largest markets for plant and plant product exports—Europe and North America. Efforts could be made to identify “hot spots” where illegal logging is common, as well as areas where legal practices prevail. This could create incentives for suppliers to be placed on the legal lists. Further, identifying areas where illegal logging or trade exists could warn importers of areas in their supply chains they should be wary about. This might also encourage importers to change their supply chains so as to avoid these areas. However, these lists could be subjectively created and generate controversy by countries that are on the list. For example, some might question how many infractions would cause a country to be listed, or how a country could come off the list. Legal operators in the listed country might also argue that they are being unfairly targeted because of the crimes of others in their country.

¹²⁵ Rachel Saltzman, “Establishing a ‘Due Care’ Standard Under the Lacey Act Amendments of 2008,” *Michigan Law Review First Impressions*, vol. 109, no. 1 (2010), pp. 1-8, <http://www.michiganlawreview.org/assets/fi/109/saltzman.pdf>. Hereinafter “Establishing a ‘Due Care’ Standard Under the Lacey Act Amendments of 2008.”

¹²⁶ *Lacey Act Amendments, Complete List of Questions and Answers*, #8.

¹²⁷ “Establishing a ‘Due Care’ Standard Under the Lacey Act Amendments of 2008,” p. 6.

¹²⁸ United States-Peru Trade Promotion Agreement, Chapter 18, Environment, at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html.

¹²⁹ “Establishing a ‘Due Care’ Standard Under the Lacey Act Amendments of 2008,” p. 6.

Some have suggested strengthening existing federal programs aimed at reducing illegal logging in foreign countries as a mechanism to make compliance with the Lacey Act easier.¹³⁰ Some examples include programs at the U.S. Agency of International Development and Department of State that aim to educate foreign companies about the Lacey Act and provide funds to improve forest governance and law enforcement in foreign countries. An example is the Tropical Forest Conservation Act.¹³¹ Under this program, debt restructured in eligible countries generates funds to support programs to conserve tropical forests within the debtor country. Some of the eligible activities include improving law enforcement capacity in reserves to address illegal logging. This helps importers by reducing illegal logging practices in countries that supply plants and plant products.

Concluding Remarks

Some aspects of the 2008 Lacey Act Amendments have been controversial, and several observers and stakeholders have suggested potential changes. Some contend that changes should be done through law; others argue that changes should be done through regulations. Some contend that efforts to change the implementation of the Lacey Act through regulations have stalled and not produced results.¹³² This is supported, in part, by the delay by APHIS in producing a review report of implementing declaration requirements under the act. Based on this report, the Secretary is authorized to make certain changes to the declaration requirements. Some take a broader look at the Lacey Act and contend that understanding and applying foreign laws to the processes of harvesting and producing plant and wildlife products is not feasible for the average person or corporation in the United States. Thus, some might consider removing violations of foreign laws from the Lacey Act.¹³³ Proponents of making changes through regulations contend that amending the act could lead to additional changes in the law that are not contemplated or supported by various stakeholders. They also contend that amending the law is subverting the intended process of making changes through regulations.¹³⁴

Author Contact Information

(name redacted)
Specialist in Natural Resources Policy
#redacted#@crs.loc.gov, 7-....

¹³⁰ Environmental Investigation Agency (EIA), *The U.S. Lacey Act: Tackling the Illegal Trade in Timber, Plants, and Wood Products, Funding for Implementation in FY2012*, 2011, pp. 1-4, http://www.eia-global.org/forests_for_the_world/lacey.html.

¹³¹ CRS Report RL31286, *Debt-for-Nature Initiatives and the Tropical Forest Conservation Act: Status and Implementation*, by (name redacted).

¹³² Congressman Jim Cooper, "The RELIEF Act: Frequently Asked Questions," press release, 2011, http://cooper.house.gov/index.php?option=com_content&task=view&id=538&Itemid=76.

¹³³ Paul J. Larkin Jr., *Defanging the Lacey Act: The Freedom From Over-Criminalization and Unjust Seizures Act of 2012*, The Heritage Foundation, legal memorandum, March 16, 2012, p. 4.

¹³⁴ *Blue Green Alliance Letter*.

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