



Litigation/International Trade

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Importers' Duty to Know The Origin And Species of Plant And Plant Products Increases with Staged Phase-In of Lacey Act Declaration Requirement

The Potential for Criminal and Civil Penalties, as well as Other Financial Risks, Increases for Importers That Fail to Address New Compliance Challenges

May 22, 2008 marked a new U.S. enforcement era for individuals trafficking in “illegal” wildlife, fish, and plants. New amendments to a century-old law, the Lacey Act, made it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant or broadly defined plant product taken, possessed, transported, or sold in violation of the laws of the United States, a state, an indian tribe, or any foreign law that generally protects or regulates the taking, sale, or transport of plants. The amendments present new challenges and legal risks for importers of covered products, particularly highly processed plant products, such as pulp or paper, the origins of which can be difficult to trace.

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In 2009, new regulations implementing the Lacey Act amendments brought U.S. importers to the forefront of the amendments' enforcement focus with a staged phase-in of an importer declaration requirement that heightens importers' duty to know the origin and species of the plants they handle, both raw and as processed into plant products. Importantly, while enforcement of the declaration requirement is subject to a phase-in period that commenced on April 1, 2009 and extends through September 30, 2010 for different products, the other Lacey Act amendments became effective on May 22, 2008. Actions to enforce provisions of the Act other than the declaration requirement may take place at any time. Thus, importers may already be found in violation of the Lacey Act and subject to criminal or civil penalties even before they are obligated to file an importer declaration.

With introduction of the importer declaration requirement, however, importers' “due care” obligations under the Act will be subject to a higher degree of scrutiny given the affirmative action required by the declaration. The “due care” standard generally reflects the “degree of care which a reasonably prudent person would exercise under the same or similar circumstances,” but it is also a sliding scale. As a result, it is applied differently to different categories of persons with varying degrees of knowledge and responsibility. By implication, the importer declaration requirement effectively increases the degree of knowledge and responsibility that will be ascribed to an importer. With this higher standard comes increased risk of criminal and civil penalties for those who imported tainted product and are unable to demonstrate that they exercised the requisite level of care to insure the imports were not procured at any stage in the chain of supply in contravention of applicable domestic or foreign laws. Actual ignorance is not a defense where due care cannot be demonstrated.

Penalties under the Lacey Act are substantial, ranging as high as \$500,000 and five years in prison for criminal prosecutions of willful acts, and \$200,000 and one year in prison for unknowing acts where due care was not exercised. Even when an importer exercises due care and is found to have unknowingly handled tainted product, the importer is still subject to possible forfeiture of the goods in question under strict liability provisions. In this regard, there is strong case precedent against any “innocent owner” defense under the Lacey Act, and strict liability may flow all the way down to the end customer. Thus, there is a clear incentive for importers to not only mitigate their own criminal and civil liability risks under the Act, but also other financial risk associated with strict liability forfeiture and potential litigation brought by affected customers.

In light of the new Lacey Act amendments, importers dealing in plant and plant products should educate themselves on their sources of supply and implement compliance programs and practices that seek to meet the Act’s due care standard. Importers handling high risk products from high risk countries should be particularly attuned to their due care obligations, even more so if they have been engaged in their trade for a long period of time. Experience in the industry comes with added obligations, including reasonable knowledge of laws and illegal practices overseas that would warrant increased scrutiny and care to avoid handling tainted product.

Winston & Strawn LLP has decades of experience in compliance and trade regulation matters. If you have questions regarding your obligations under the Lacey Act, the most appropriate means of implementing compliance programs, “best practices” to meet Lacey Act standards, or other measures to limit your financial risk in relation to Lacey Act liability, please contact: (202) 282-2894.

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