

How the U.S. Department of Justice may apply the standard of “Due Care”

Continuing Wood Trade under the Specter of Lacey

How the Lacey Act Amendments affect the floor covering and wood products industries and suggestions for overcoming the lack of guidance regarding the due care standard.

A Research Paper By Jim Gould President of the Floor Covering Institute, LLC. Sept. 15, 2009

In May 2008 the U.S. passed the world’s most punitive and far reaching “ban” on illegally harvested forest products; declaring this country would no longer traffic in, or allow its consumer market to be the primary channel for “illegally logged wood”. This has drawn criticism from some international suppliers who complain the Lacey Act is a tool to limit competition in the world’s largest wood market and that it discriminates against certain countries.

Concern, confusion and even anger were evident over the newly implemented act at this year’s Sino-US-Europe Wood Flooring Summit held in Shanghai at Domotex Asia China Floor, Asia’s largest floor covering exhibition. This concern persists and is due in part to a lack of understanding of the act’s history and intent as well as how to continue trade under the specter of Lacey. The purpose of this article is to address those concerns.

Lacey makes it a crime to receive, transport or sell timber products harvested in a manner contrary to **the laws of the country from which the timber originated**. Once illegal wood enters the U.S. supply chain, whether on domestic or international soil, a Lacey Act violation is triggered placing everyone in the downstream supply chain at risk of prosecution, fines and seizure. There is no “innocent-owner” defense. Anyone who **knows or should have known** that the wood was illegal is guilty of a crime. Essentially, the most punitive law against illegal logging ever realigns the risk-benefit equation along the supply chain by holding the **entire chain** accountable for timber it chooses to cut, sell or buy.

The key to avoiding or minimizing penalties is exercising due diligence in buying wood products. During its investigations, the U.S. Department of Justice (“DOJ”) will evaluate the standard of care taken by parties and may hold some to a higher standard than others, depending upon the circumstances. Thus, relying solely upon someone else in the chain to meet the standard is not enough. The law intends to hold everyone accountable, sets no “due care” guidelines and purposefully leaves it up to the trade to determine what actions will meet the standard. Because the law is fact based, not document based, no document, letter or certification will guarantee legality if the opposite can be verified by facts. Needless to say, everyone in the U.S. wood products supply chain is or should be developing a policy and **system of “due care”** to ensure they can demonstrate the steps they took to remain compliant with the Lacey act.

In the absence of definitive guidelines we explored how the DOJ applied the standard of care in the past during Lacey investigations and referred to the DOJ’s internal comments on compliance and due care. All of this is discussed later in this article.

The Lacey Amendments make it illegal to... The amendments make it unlawful to import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce any plants or products made of plants that are taken or traded in violation of law of the **country in which the that plant is harvested or traded**. The amendment covers products manufactured in countries other than the country in which the illegal harvesting took place. It also prohibits false labeling and record keeping.

What is “illegally logged wood”? Wood is considered illegally sourced when it is stolen, taken from officially protected or designated areas recognized by the originating country’s laws, taken without or contrary to the required authorization, or on which appropriate royalties, taxes or fees have not been paid, or is subject to export bans. The underlying foreign law does not have to be a criminal violation, or one actively enforced in the foreign country; the underlying foreign law can be interpreted by U.S. courts.

Who is at Risk?: As of May 22, 2008, if a tree is illegally harvested, made into wood products, and then exported to the U.S., anyone who imported, exported, transported, sold, received, acquired or purchased the wood products made from that illegal timber, **who knew or should have known** that the wood was illegal, may be prosecuted for violation of the Lacey Act. To be in violation one does not need to have harvested but simply participated in the chain.

The Lacey Act -

Putting Lacey into Historical Perspective

The Lacey Amendments place all plants and trees, without regard for origin or species, under the protection of the same conservation law that has for decades protected animals and their parts such as elephant ivory and tiger skins. Originally passed in 1900, the Lacey Act has been the primary weapon in the U.S. arsenal to combat domestic and global trafficking of illegal plants, animals and fish, uphold foreign conservation laws, enforce treaties and ensure the U.S. does not traffic in illegally taken or inhumanely transported wildlife for over 109 years. The most recent amendment of May 22, 2008 extended protection to a broader set of plants and plant based products, **including timber**. It is this amendment that the floor covering industry refers to as “*the Lacey Act*”.

Compliance Called for in Four Primary Areas

Although the law is complex, it can be boiled down to four basic requirements: **(1)** do not deal in illegal wood; **(2)** employ due care in the import and buying process **(3)** file the mandatory import declaration with every shipment of wood products imported to the U.S., and **(4)** do not knowingly mis-label products or make false statements on the import declaration.

109 Years of Conservation Law Evolves to Protect Timber.

The oldest wildlife protection statute in the U.S. was originally prompted by growing concern over interstate profiteering in illegally taken game. Congress has amended the Lacey Act several times during its first century, each time expanding its coverage over a broader array of animals and plants.

- 1900 - Originally focused on helping states protect their native *game animals* by making illegal the interstate transport of wild animals or birds killed in violation of state or territorial laws.
- 1930s, '40s and '50s - lawmakers expanded the statute's prohibitions to cover *international trade, uphold federal and foreign wildlife laws, adding fish and banning the importation of animals shipped under inhumane conditions*.
- 1969 - Congress amended the Lacey Act and other laws expanding coverage to amphibians, *reptiles, mollusks, and crustaceans*.
- 1981 - Congress passed refined provisions and penalties relating to the import, export, sale or purchase of *fish, wildlife and plants*; and extended coverage to *endangered American indigenous plants*.

The lack of protection for all plants everywhere was considered a glaring omission in the Lacey Act since many wild plants face the threat of illegal harvesting. That, combined with the market disruption and ecological and social impact of illegal logging led to the most recent amendment.

- 2008 - the U.S. Congress amended the Lacey Act extending its protection to **international trafficking of plants including timber and associated wood products**. With this Amendment, the US became the first country to legislate against the handling of timber that is **illegal according to the laws of the country from which the timber originated**.

The Lacey Act is violated when someone trades illegally-sourced wood or products in U.S. interstate or foreign commerce.ⁱⁱ Anyone who exports or imports illegally harvested timber or wood products derived from that timber, into the U.S. and **knows or should have known** that the wood was illegal is guilty of a crime.

Penalties are Harsh.

Penalties depend on the extent to which a person handling goods actually knows, or should have known in the exercise of due care that the goods are, or are made with, illegally harvested wood. Penalties are both criminal and civil. Forfeiture of goods is always a risk whether or not the person from whom it is seized knew of the crime because under Lacey, the illegally harvested wood is considered contraband; consequently, there is no “innocent owner” defense.

- For an act to be a **felony** the defendant must have knowingly violating the act or was generally aware of the illegality of the product. Fines are up to \$250,000 for individuals and \$500,000 for corporations and up to five years in prison.

- A criminal **misdemeanor** penalty requires that “**in the exercise of due care**” one **should have known** the products were illegal. Penalties can reach \$100,000 for individuals, and \$200,000 for organizations, and one year in prison. The misdemeanor offense is a critical remedy in instances where it may be difficult for the government to meet the felony burden of proof. It will be easier to show that information known about the shipment should have caused the importer to seek additional information to confirm the legality, or, decline the shipment
- **Civil penalties** of up to \$10,000 may be imposed against a party who, in the exercise of due care, should have known of the illegal nature of the product in question or who knowingly commits a false labeling offense or violates the declaration requirements.



Importers who violate the Lacey Act can also be prosecuted under other laws. Smuggling and money laundering and false statements made under the declarations requirements will also trigger a violation of the felony false statement statute. In briefings within their own departments the DOJ offers the following example taken from U.S. v. Virginia Star, C.D., Ca. to illustrate the difference in standards used.

Purchasers not charged – a neophyte to the industry claimed no reasonable knowledge and proved that he had called and asked about a discrepancy and was given a plausible explanation.

Purchaser charged with misdemeanors – person, long time in the industry, recognized bargain basement prices, knew label was wrong, and repeated such transactions involving illegal trade in the same industry.

Purchaser charged with felonies –affirmative evidence beyond a reasonable doubt showed that the person knew what they were doing was illegal.ⁱⁱⁱ

Enforcement should not be under estimated.

Because no new resources were allocated to enforce the 2008 amendments, some have questioned their potential effectiveness. The U.S. has vigorously investigated and prosecuted Lacey wildlife violations for decades using a wide group of resources including the DOJ, Customs and Border Patrol (“CBP”), and international cooperation of governments and non-governmental organizations (“NGOs”). These same resources will facilitate timber investigations to protect forests just as they have for wildlife.

The Mandatory Import Declaration - Required for Every Shipment

An “Import Declaration” (PPQ505: Plant Product Declaration) must be filed **by the importer** for each shipment of wood. Without this declaration the shipment will not clear customs. The declaration requires the **scientific species name, country of harvest, quantity and measure and value**. If the plant or country of origin cannot be determined conclusively for a plant product, the declaration must include a list of possible plant species found in the product and/or a list of each country from which the plant may have been harvested; a challenge in the case of composite products such a backing materials. The information contained in the declaration is meant to increase transparency about the wood and its origins and will be the starting point for any further inquires.

The declaration requirement is being phased in by agencies required to administer the act, including customs and the U.S. Department of Agriculture’s Animal and Plant Health Inspections Service (APHIS), which is the lead regulatory agency for the declaration requirements. Solid wood flooring, covered by Harmonized Tariff Schedule 4409 (wood continuously shaped), is in effect now. Enforcement of the declaration requirement began May 1, 2009.

Declarations are legally required for wood products now but failure to submit a declaration will not be prosecuted and customs clearance will not be denied for lack of a declaration until the phase-in date.^{iv} APHIS has decided not to enforce the declaration requirements with respect to plant based sundries (paper) that may ship with a product such as tags, manuals and warranties.

Comments are Pending

In response to an invitation by the U.S. government to comment, a large coalition of Lacey stakeholders has requested review of several provisions of the act. Among the issues they want reviewed are: authorization of a renewable ‘blanket declaration’ for companies importing the same products from the same sources; consideration for the difficulty in declaring the species and country of origin for some composite products such as particle board; conditional release of product through customs pending filing of an import declaration so as not to disrupt supply; use of a *de minimus* provision for products containing small amounts of wood or of unknown species; and more guidance on what actions an importer could take to satisfy the due care standard.^v

To download a copy of the declaration and filing instructions visit the USDA’s APHIS website at http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml. Questions about the Lacey Act Declaration can be sent to lacey.act.declaration@aphis.usda.gov. Those wishing to register for updates from APHIS on the Lacey Act may do so at <https://web01.aphis.usda.gov/PPQStakeWeb2.nsf>. Additional information on how to electronically file the PPQ 505 data can be found in the Participating Government Agencies Chapter in the Customs and Trade Automated Interface Requirements (CATAIR) on www.CBP.gov.

“Due-Care” Meeting the Standard

The DOJ describes “due care” as **“that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.** Due care simply requires that a person facing a particular set of circumstances undertakes certain steps which a *reasonable man* would take to do his best to insure that he is not violating the law”. Due care is applied differently to different categories of persons with varying degrees of knowledge and responsibility.^{vi}

The DOJ says it will always look for evidence of due care^{vii} which means that **If wood turns out to be illegal the due care process used by the company will become central to determining what penalties, if any, apply.** The obvious conclusion is that provable actions are key and companies must be able to **demonstrate** the steps they took in their exercise of due care. Practically speaking, all stakeholders should create internal, demonstrable policies and procedures to follow and offer as proof of their efforts in the event an investigation arises. An unsupported letter from a manufacturer asserting the legality of wood, or a defense that the importer relied upon its agent alone to perform due diligence will not likely be viewed as sufficient.

The Role of Third-party Certifications

Because Lacey is a fact based and not a document based law, third-party certifications are not required and will not, on their own, be considered proof of legality. However, the DOJ acknowledges that those certifications would be useful to manufacturers and importers in their efforts to exercise due diligence with regard to sourcing and species of timber.^{viii} It seems likely therefore that a credible third party certification would meet any standard of care, absent contravening information. No certification program operates in every country of the world that is known to contain illegal logging, however. The first U.S. based manufacturer certification program is an option for flooring manufactures wishing to elevate recognition of their responsible forest practices. The National Wood Flooring Association (NWFA) now has a program, **Responsible Procurement Program for Hardwood (RPPH)**, established to recognize flooring companies that work to sustain our world’s forests. The program is supported by the Forest Stewardship council-US and the FSC Family Forest Alliance.

When Red Flags Mean More Caution is Called For

When faced with facts that cast a shadow of doubt on the legality of wood one should make a reasonable and documented inquiry. The DOJ expects flags like those below to trigger additional questions by the importer/buyer and could mean that a higher standard of care must be met by parties to these transactions:

- ❖ **Goods are significantly below going market rate**
- ❖ **A lower price is offered for goods without paperwork**
- ❖ **Paperwork is suspect such as not matching product ordered or anticipated possible country of origin**
- ❖ **Unusual sales and delivery methods are used, and rational answers to questions are not forthcoming**
- ❖ **Stories and relevant information published on the Internet and elsewhere give rise to questions about supply chain practices**

Illegal Logging - Some Countries Come with Higher Risks

While most flooring is likely free of illegal wood, there are many published reports of illegal logging around the world that signal a **potential** for tainted wood to enter the supply chain. More than 70 countries^{ix} are known to either support or are victims of illegal logging and as such should be considered “red flags” in the exercise of due care. The International Network of Environmental Compliance and Enforcement cites the following key U.S. wood trading partners with documented incidences of illegal timber *exports*:^x China, Malaysia, Indonesia, Brazil, Peru and Honduras.

Other higher risk countries include^{xi xii}: Bolivia, Brazil, Cambodia, Cameroon, Congo Basin, Eastern Russia, Ghana, Laos, Liberia, Mozambique, Myanmar, Philippines, Sierra Leone, Tanzania, Thailand and Vietnam. While Western Europe, North America, Chile, Australia, and Japan are identified by the Forest Stewardship Council as “**low risk**” areas.

Some Parties May be Held to a Higher Standard of Due Care

The DOJ will apply due care differently to different categories of persons with varying degrees of responsibility and uses a prior Lacey conviction involving wildlife as an example: As professionals, zoo curators should know Australia requires special permits to export certain reptiles; they would fail to exercise due care unless they check for those permits. On the other hand, the airline shipping the reptile would not have this knowledge unless it had been notified. If they were notified and still shipped the reptile they would probably fail to pass the due care test.^{xiii} While it is impossible to predict the DOJ’s actions, this example **suggests that courts will likely hold those routinely involved in importing flooring to a relatively high standard of care, especially when importing products made from wood harvested in a country with a record of illegal logging or a species that is known to be often illegally logged, such as Merbau.**

Considering a Special Challenge with an Important Trading Partner

China is the world’s largest importer of unprocessed wood and the largest exporter of finished wood products, including flooring. The U.S. is also China’s largest wood products customer. China’s own conservation laws have decreased the risk of illegal logging inside China itself but demand has ironically increased the chance of imported illegal wood in China’s manufactured products. China has increased its wood exports by over 500% in less than a decade and to meet this demand it imports about 50% of its raw wood from some high risk countries, manufacturing the wood into furniture, flooring and many other products for export.^{xiv} There is no way to know how much “high risk” wood makes its way into flooring but we do know that flooring is a tiny fraction of the total wood products exported to the U.S from China each year. Furniture and paper products, both subject to the provisions of Lacey, make up the lion’s share.

Despite China's laws and efforts to stop the importation of illegally sourced logs, violations do occur. One notorious source of illegal wood is Suifenhe, China near the northern Russia-Chinese border where there has existed an extensive and complicated supply chain of illegally logged Russian oak, ash and birch that is reportedly prepared, stored, transported and sold by organized crime. Investigated and reported by the World Wildlife Fund^{xv} and the EIC^{xvi}, among others, stolen logs from that location were traced through specific Chinese plants to the shelves of U.S. general retailers, who have acknowledged the logging is illegal under Russian law and are working to eliminate the wood from their supply chains. Lawmakers in the Russian province have called for emergency measures to stem the flow of this illegal wood. Pressure from other industries, the G8 and NGOs are also aimed at controlling the flow of stolen logs. According to Juergen Fruechtenicht, president of the European Federation of Parquet Importers, headway is being made and today there are 51 million acres of FSC certified forests in Russia.

The key to importing from any country is to deal with manufacturers who have credible reputations and will provide certifications and documentation to help importers meet Lacey's standard of due care. Some Chinese manufacturers have already established safeguard systems to protect themselves, their downstream customers and support global environmental efforts. A good example is Chinafloors Shanghai Timber Ltd, which, according to its President Thomas Baert, uses only PEFC or FSC certified wood sourced from Europe in its flooring and also controls the entire manufacturing process on its own site.

Is Lacey a Barrier to Free Trade?

The 2008 Lacey Amendments are not a barrier to free trade but a barrier to unfettered, "no questions asked" trade of illegal timber. With this law, the U.S. joins many other countries that have banned illegal wood and by criminalizing the activity hopes to help sovereign nations enforce their harvesting laws, protect their forests and minimize the social and economic impact of illegal logging. Responsible companies with demonstrable protocols offering legal wood will find the worlds' markets welcome their business.

What buyers can do to demonstrate due care.

The primary lesson here is that everyone needs to take an active role. No one should passively rely upon others to make the risk assessment for them. This is equally true for retailers, buying groups, distributors and manufacturers, alike. It seems prudent that everyone should set up some simple guidelines and here are some suggestions:

- Every business should create a written **company policy** stating the intent to buy/sell only legal wood products.
- Back that up with a standard **operating procedure**, checklist and questions for buyers to follow.
- Do not allow wood products that have not passed those standards into inventory.
- Document actions. In the event of an investigation written policies, checklist and documented actions will be primary evidence that due care was exercised.
- Ask suppliers to explain the due diligence they exercised in sourcing the wood products.
- If the price is well below market, recognize there is a reason and ask more questions.
- Know where the wood was harvested. If it's coming from a higher risk country then realize the risk is greater. If it comes from a low risk country verify that it was not first imported from a high risk area. Use third party certifications when you can.

Given the difficulty of proving chain of custody, it may rarely be possible to know for certain that wood is legal but what is possible to prove that you set standards, asked the right questions and did what a reasonable person would do to comply with the law.

RESOURCES

The Floor Covering Institute www.floorcoveringinstitute.com Jim Gould, President: jgould@floorcoveringinstitute.com

END NOTES

The [Floor Covering Institute](http://www.floorcoveringinstitute.com) provides business consulting for the global floor covering industry.

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- ⁱ <http://www.worldwildlife.org/what/howwedoit/policy/WWFBinaryitem11270.pdf>
- ⁱⁱ <http://www.worldwildlife.org/what/howwedoit/policy/WWFBinaryitem11270.pdf>
- ⁱⁱⁱ [U.S. Department of Justice Environmental Crimes Section Briefing: Lacey Act Amendments of 2008; March 24, 2009](#). (“DOJ briefing”)
- ^{iv} DOJ briefing, March 2009
- ^v [National Retail Federation’s comment on the implementation of the Lacey Act, April 6, 2009](#). April 6, 2009 Docket No. APHIS-2009-0119 - Implementation of Revised Lacey Act Provisions.
- ^{vi} DOJ briefing, March 2009
- ^{vii} DOJ briefing, March 2009
- ^{viii} [Lacey Act Amendment Enforcement of the Declaration Requirement, March 27, 2009](#) : US Dept. of Agriculture, APHIS.
- ^{ix} [The Economics of Illegal Logging and Associated Trade](#). Round Table on Sustainable Development, Paris January, 2007 at 17. The OECD is a unique forum formed of 30 democracies working together to address economic, social and environmental challenges of globalization and provides a setting where governments can compare policy experiences, identify good practices and coordinate domestic and international policies.
- ^x INEC Report p. 3
- ^{xi} Environmental Investigation Agency: No [Questions Asked – the Impact of U.S. Market Demand for Illegal Timber and the Potential for Change](#) (2008), p.8-9 (No Questions Asked Report). The EIA is an international organization that uses investigative techniques to expose environmental crimes. (“No Questions Asked Report”).
- ^{xii} [CRS Report for Congress: Illegal Logging: Background and Issues updated June 9, 2009](#).
- ^{xiii} DOJ briefing, March 2009.
- ^{xiv} No Questions Asked Report, p. 9
- ^{xv} [Written Testimony of World Wildlife fund and Traffic on H.R. 1497, a Bill to Amend the Lacey Act Amendments, October 15, 2007](#)
- ^{xvi} No Questions Asked Report.

Additional resources:

Federal Register Document October 8, 2008 (Volume 73, Number 196) APHIS Docket No 2008-0119 – Implementation of the Revised Lacey Act Provisions. <http://edocket.access.gpo.gov/2008/E8-23984.htm> and updates are available at [Federal Register: Implementation of Revised Lacey Act Provisions, February 3, 2009](#) .

Additional helpful information available on the APHIS website Plant Health Section include the following:

http://www.aphis.usda.gov/plant_health/lacey_act/index.shtml

- [Instructions for Participants in Blanket Declaration Pilot Program](#)
- - [Blanket Declaration Reconciliation Spreadsheet](#)
- - [Blanket Declaration Reconciliation Sample](#)
- [Information for Trading Community on Blanket Declaration Pilot Program for Certain Importers](#)
- [PPQ FORM 505: Plant and Plant Product Declaration Form](#)
- [Federal Register: Implementation of Revised Lacey Act Provisions, October 8, 2008](#)
- [Lacey Act Amendment: Implementation Questions and Answers](#)
- [Presentation: Amendments to the Lacey Act Farm Bill 2008](#)
- [Amendments to the Lacey Act from H.R.2419, Sec. 8204](#)
- [Amendments to the Lacey Act Farm Bill Questions and Answers Session, October 14, 2008](#) (WMV; 90 minutes)
- [Transcript: Amendments to the Lacey Act Farm Bill Questions and Answers Session, October 14, 2008](#) (PDF; 109 Kb)
- [Lookup plant genus and species](#)
- [Lacey Act Primer](#)

[U.S. Customs and Border Patrol](#): Lacey Amendment resources.