



Federal Agents Raid Gibson Guitar Corporation in an Enforcement Action Under the Lacey Act: Where does that leave “Due Care?”

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The recent raid of Gibson Guitar by the Fish and Wildlife Service underscores the need for companies to reevaluate procurement processes and contracts to reduce risk of Lacey Act violations. “Due care” under the Lacey Act is a moving target and may require multiple levels of management to protect investments, materials and prevent public scrutiny for illegal activities from upstream suppliers.

In May 2008, U.S. Lacey Act became applicable to all products and raw materials derived from plants and trees. Obligations under the Lacey Act require purchasers of timber and wood products to exercise “due care” to ensure that the materials were not harvested in violation of law. Risks associated with Lacey Act violations can be mitigated by (1) instituting a forest product procurement policy, (2) pushing suppliers to provide certified wood and fiber and (3) obtaining protective contractual rights in purchase agreements.

The Lacey Act also imposes significant requirements for purchasers of any raw material or product containing wood to verify the legality of the source of the wood which will change business-as-usual for both importing wood and domestic transactions.

The most significant penalties involve criminal liability for any knowing violation of the law. However, civil penalties of up to \$10,000 may also be assessed for each violation of the Lacey Act which, although was not actually known, would have been known had the person acted with “due care,” in evaluating the transaction. There is also the potential for the forfeiture of all products associated with the illegal plant material and the vehicle used in transporting any plant materials in violation of the Lacey Act. Forfeiture is based on strict liability, meaning that the government has the authority to seize all products and vehicles associated with plant materials sourced in violation of the Lacey regardless of whether the purchaser exercised due care in evaluating the transaction.

While elements to demonstrate due care have not been specifically defined, the U.S. Department of Justice has provided some “common sense” guidance tools that can help a purchaser establish that it exercised due care. These items include development of a documented compliance program which addresses business transactions, training of employees to understand legal obligations and identify potential red flag transactions, performing visits and audits of suppliers and following industry standards.

If there are some “red flags,” the buyer is expected to perform additional investigation. Some red flags which might indicate that a reasonable person would perform additional investigation to evaluate whether the transaction was compliant with the Lacey Act could include a transaction significantly below market value for similar materials, missing or altered paperwork or labels, taxes or tariffs are not identified or addressed in the transaction, unusual sales methods or practices and irrational or inadequate answers to straightforward questions regarding the transaction or origin of the materials.

Many of the factors involved in due care are consistent with the factors associated with the forest certification processes. Transactions and contracting will be more efficient and transparent if a purchaser



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is able to rely on a forest certification, rather than having to independently audit, investigate and verify compliance with the Lacey Act.

Due to the harsh penalties and complicated evaluation of “due care” required under the Lacey Act, it is important to analyze the current procurement policies, contracts and processes. If you have any questions, please call Derald Hay at (610) 458-2990 or contact him via email at dhay@foxrothschild.com.