

# Lacey Act Protection for Foreign Plants

Presented by

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- Century-old national law amended in 2008 to broadly cover almost all plants wherever found, including trees, to reduce global illegal logging and increase value of U.S. wood exports.
- Lacey Act enforcement is fact-based, not document-based. No single document or group of documents, whether or not official ones, is absolute proof of legality and no U.S. compliance standard created. Beware meaningless documents with “ribbons and seals.”
- Level of plant protection not set by U.S., but determined by legal requirements of foreign countries as plants move from origin through intermediate processing countries to U.S. market.
- Private sector and foreign governments develop own best compliance practices, not U.S. authorities, including how to use third party certification or verification.
- 3 Key Features: foreign law incorporation, declaration requirement, and false labeling.
- **Foreign Law Incorporation** – Prohibits trade to U.S. in plants and plant products, including furniture, paper, and lumber, taken (collected, harvested, cut, logged, or removed), possessed, transported, or sold in violation of any foreign law that protects plants, or regulates taking, payment of fees, or taxes, or places limitations upon plant exports or transshipments.
- Prove what foreign law applies using any relevant material or source including testimony without restriction by rules of evidence.

- Foreign laws need not be criminal or actively enforced to apply.
- No exception for wood harvested before Lacey Act amendments went into effect in 2008.
- Hierarchy of penalties for violations: imprisonment, fines, and/or forfeiture.
- **Declaration requirement:** Upon importation into U.S. must declare scientific name, value, quantity, and country of origin of plants. Does not apply to plant-based packaging materials used exclusively to import other products. Harmonized Tariff Schedule (HTS) used to identify wood and wood products covered by declaration requirement upon formal entry to U.S. Lacey Act still applies to plants not yet covered by declaration requirement. Unique declaration requirements identified for special circumstances. Chain-of-custody not required, but look at “due care” requirement and false labeling below.
- **“False labeling” prohibited.** Statements and documents used must be truthful. Illegal to intentionally misrepresent wood or wood products upon importation.

- **Penalties: Criminal, Felony** (maximum penalty 5 years imprisonment, \$500,000 fine for organizations/\$250,000 for individuals (higher amounts possible based upon pecuniary gain or loss) and possible monetary restitution to “victim” country whose resources abused.
- **Trafficking: Felony charges**, the most serious, used when a person knows plants or plant products illegal and still engages in prohibited conduct. The trafficker does not need to be the one who violated the foreign law. Traffickers can be prosecuted in U.S. even when they never set foot there under international rules of “extraterritoriality.”
- **False Labeling:** When a person makes or submits false records, accounts, labels for or identification of plants in the U.S. knowing they are not true, the felony penalties above apply. Treated like a false statement prohibition.
- **Failure to File a Plant Declaration:** Same felony penalty as above.
- **Penalties: Criminal, Misdemeanor** (maximum penalty 1 year imprisonment, \$200,000 fine for organizations/\$100,000 for individuals.
- **Trafficking:** Less serious charges used when a person in the exercise of due care should know plants are illegal.

- Due care: degree of care which a reasonably careful person exercises under the same or similar circumstances applied according to a person's degree of knowledge and responsibility. Use prudent business practices to determine legality.
- No government checklist to satisfy due care inquiry. Industry-developed standards a suggested substitute. Similar to European Union "due diligence" requirement. Due diligence = due care.
- Suspect legality when: goods cheaper than market rate; cash-only payment; missing, altered, questionable paperwork; transaction matches industry description of illegal trade; or supplier lacks clear answers to routine questions about product.
- **Forfeiture**
- Strict liability forfeiture (also called liability without fault) for illegal plants.
- No "innocent owner" defense. "I didn't know plants were illegal" not a defense.
- Burden of proof is "preponderance of the evidence" (more likely than not plants illegal) and a lower burden than required for criminal conviction, "proof beyond a reasonable doubt."
- The U.S. Government has the burden of proof in all Lacey Act enforcement actions

# How can foreign government's enhance Lacey Act effectiveness?

- Fight corruption – Indonesia response
- Catalogue applicable laws and make them readily available in full text on the internet and elsewhere
- Support industry self-regulation and seek assistance from non-governmental organizations
- Cooperate with international partners to identify, investigate, and prosecute transnational plant traffickers
- Impose domestic prohibitions on trade in illegal plants and plant products
- Insure penalties are sufficient to deter and punish
- Use full complement of national laws to prosecute domestic offenders, not just forest laws, and dismantle trafficking rings from harvest to market, not merely seize and forfeit illegal plants (review UNODC “Wildlife and Forest Crime Analytical Toolkit” available online)
- The ideal Lacey Act enforcement model is one incapable of locating the necessary violations of foreign law to trigger U.S. enforcement