Lacey Act Enforcement: Round Two with Gibson Guitars

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The Department of Justice (“DOJ”) made a loud, bold statement regarding the enforcement of the Lacey Act, as amended in 2008, in a new round of enforcement actions targeting imports by Gibson Guitar Corp. (“Gibson”) of tropical rosewood and ebony from India used for guitars. On August 24, 2011, federal agents executed four search warrants at Gibson facilities in Nashville and Memphis, Tennessee. The agents seized several pallets of wood, electronic files, and guitars, leading Gibson to suspend its manufacturing operations for the day. Some reports say the products seized by the DOJ, which Gibson may never recover regardless of whether Gibson itself is determined to have any culpability under the Lacey Act, are valued at $1 million.

According to the search warrant affidavit prepared by U.S. Fish and Wildlife Service (“FWS”), Gibson imported Indian rosewood and ebony classified under heading 4407 of the Harmonized Tariff Schedule of the United States (“HTSUS”) in violation of the Lacey Act. The Lacey Act makes it “unlawful to for any person to import … any plant … 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.” 16 U.S.C. § 3372(a)(2)(B)(iii). According to the FWS affidavit, India prohibits the export of all plant species harvested in India and classified under Harmonized Schedule Code 4407. The affidavit further alleges that, in some cases, the entry documentation improperly described the imported merchandise, listed an incorrect HTSUS number, and did not list Gibson as the final consignee.

Gibson’s Chief Executive Officer, Henry Juszkiewicz, issued a press release on August 25, 2011, in which he claimed Gibson had not violated the Lacey Act. Gibson contends that the “wood the Government seized on August 24 is from a Forest Stewardship Council (“FSC”) certified supplier and is FSC Controlled, meaning that the wood complies with the standards of the Forest Stewardship Council, which is an industry-recognized and independent, not-for-profit organization established to promote responsible management of the world’s forests.” This statement pertains to the harvesting of the wood (which is popularly seen as the underlying concern of the Lacey Act), but does not address the FWS allegations regarding compliance with India’s export ban for products classified under HTS subheading 4407. Indeed, Gibson contends that the current enforcement action is solely about technical compliance with the laws of India and is “not about illegal logging, not about conservation, [and] not about the environment.” The Lacey Act requires compliance with laws regarding the export as well as harvest of timber.

These developments follow a similar 2009 raid of Gibson’s facilities in which FWS agents seized guitars and ebony fingerboard blanks from Madagascar. As reported in a previous Miller & Chevalier alert, that raid was based on a sealed affidavit that reportedly alleged that Gibson was using rosewood and mahogany from Madagascar that was banned under the Lacey Act. Since that raid in 2009, the government has not filed criminal charges against Gibson. However, on August 9, 2010, the government filed a civil suit against Gibson in U.S. District Court for the Middle District of Tennessee. On October 14, 2010, Gibson filed a motion in that case to dismiss the government’s suit and to attempt to secure release of the merchandise seized. That civil proceeding is pending in federal court. Some commentators suspect that the latest raid is in retaliation for Gibson’s aggressive defense of its Lacey Act compliance in the federal civil suit.

Gibson now faces the prospect of losing the wood and the products containing the wood that have been seized by the DOJ, as well as possible civil and criminal penalties. As noted above, under the Lacey Act, the DOJ is empowered to seize the merchandise if the wood or related products containing imported wood were imported in violation of the Lacey Act, even if Gibson took reasonable steps to comply with the Lacey Act and did not otherwise commit any civil or criminal violations.

The recent Gibson seizure suggests that U.S. authorities are becoming even more aggressive in their enforcement efforts and that
while importers may mitigate the risks of Lacey Act seizures and enforcement actions by importing FSC Controlled wood from an
FSC-certified source, this does not absolve importers of the responsibility to comply with applicable foreign harvest restrictions
and export bans on timber. Importers of rare or exotic species should ensure that the goods at issue are harvested and exported in
compliance with local laws (and in fact, importers may want to retain local counsel in some instances). Importers should also
ensure that all import documentation for merchandise that is regulated under the Lacey Act is accurate and complete, as Gibson
appears to have raised the suspicions of the U.S. government with its reportedly misleading product descriptions and declarations
of the ultimate consignee and applicable HTSUS subheadings.

Background on the Lacey Act

As reported in previous Miller & Chevalier Alerts, Congress amended the Lacey Act in the 2008 Farm Bill (P.L. 110-246, 16
U.S.C. 3372) by banning importations of illegally-harvested timber, and products containing illegally logged timber, including
timber protected under the Convention on International Trade in Endangered Species ("CITES"). As demonstrated by the recent
Gibson raid, the Lacey Act also prohibits the importation of timber that is harvested and exported in violation of the exporting
country's laws, such as quotas, permit requirements or other export bans or restrictions.

Under the amended Lacey Act, importers of all covered products, including, most notably, timber and wood products, are required
to submit to U.S. Customs and Border Protection at the time of importation, a declaration that provides: (1) the scientific name of
the plant, (2) the value of the importation, (3) quantity of the plant, and (4) name of the country from where the plant was
harvested. However, due to the significant administrative and logistical burdens imposed by the declaration requirement, the
Animal and Plant Health Inspection Service ("APHIS") is phasing-in implementation of the declaration requirement in four
tranches. APHIS has revised the declaration's implementation schedule three times, in October 2008, February 2009 and, most
recently, in September 2009.

Under the current implementation schedule, declaration requirements became effective, yet optional, on December 15, 2008. On
April 1, 2009 the declaration requirement became effective for products classified under HTSUS headings 4401, 4403, 4404,
4406-4409, 4417-4418. Effective October 1, 2009, the declaration requirement entered into force for products classified under
headings 4402, 4412, 4414, 4419, and 4420. Finally, in April 2010, the declaration requirement became effective for products
classified under heading 4421, chapter 66, heading 8201, 9201-9202, 9302, subheading 9305.1020, chapter 94, chapter 95
and chapter 97.

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