



THE EFFECT OF THE PROPOSED “RELIEF” ACT ON THE LACEY ACT

I. Introduction

The Lacey Act is the United States’ oldest conservation law and widely hailed as one of its most effective.¹ In 2008, Congress addressed a longstanding and well-recognized deficiency in the Lacey Act by extending its protections to cover plants taken or traded in violation of foreign law. This bipartisan amendment was supported by a landmark coalition of business, labor and environmental groups who hailed it as a vital and necessary step to address the scourge of illegal logging, support efforts to strengthen forest governance worldwide, and level the playing field for U.S. businesses forced to compete with illegally sourced products.

The proposed “Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act” (hereinafter “RELIEF Act”), H.R.3210, would narrow the scope of the Lacey Act’s application to foreign plants and make other changes to the law. The Center for International Environmental Law was asked to assess the impact of these proposed amendments on the Lacey Act. This analysis concludes that the proposed RELIEF Act would have consequences far beyond those described by the bill’s proponents.

II. Brief History of the Lacey Act 1900-2011

Originally adopted in 1900, the Lacey Act was devised, among other purposes, to supplement state level wildlife laws and address the challenge of wildlife laundering by making the interstate sale or transportation of wildlife taken in violation of such laws a federal offense.² The Act has been amended many times throughout the past century to broaden its reach and extend the protections it provides. Notably, the Tariff Act of 1930 broadened the Lacey Act to prohibit the importation of birds and mammals illegally taken or exported from foreign nations.³ A 1969 modernization of the Act added new civil penalties for negligent violations, thus closing a major loophole in the effective enforcement of the Act by extending Lacey’s reach from those who knowingly violated the law to those who, in the exercise of due care, should have known of the violation.⁴

In 1981, responding to “a ‘massive illegal trade in fish and wildlife’ perpetrated by ‘well organized large volume’ criminal operations which generated substantial profits and ‘grim environmental consequences’,” Congress amended the Act again to address key weaknesses in responding to that trade.⁵ Among other things, Congress extended the Lacey Act to cover plants native to the United States due to concern that illegal harvest was threatening the survival of

¹ See generally, Anderson, Robert S., “The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking,” 16 Pub. Land L. Rev. 27 (1995).

² Ruth Musgrave, *Federal Wildlife Law of the 20th Century* (Center for Wildlife Law 1998). Available online at: <http://www.animallaw.info/articles/arusfedwildhistory.htm>. (Accessed November 10, 2011).

³ *Id.*

⁴ Anderson, *supra* note 1, at 48.

⁵ See *id.* at 49. (quoting S. Rep. No. 123, 97th Cong., 1st Sess. 1 (1981), reprinted in 1981 U.S.C.C.A.N. 1748.)

some species.⁶ The 1981 amendments also added a strict liability forfeiture standard for fish, wildlife or plants possessed in violation of the law—bringing forfeiture standards for illegal fish, wildlife or plants into line with those for other forms of federally recognized contraband— and raised the maximum fines for civil and criminal violations to \$10,000 and \$20,000 per offense, respectively.⁷

While the 1981 amendments added coverage for domestic plants, they included a broad exclusion for non-native plants. Long recognized as a “serious deficiency” in the Lacey Act by those involved with its enforcement, this exclusion effectively precluded the use of Lacey in addressing international trade in illegal timber and other plant products.⁸ While some enforcement tools were available under the Endangered Species Act for the small number of timber species protected by the Convention on International Trade in Endangered Species,⁹ enforcement actions under these provisions proved complex and challenging to implement in practice,¹⁰ raising substantial obstacles to effective and consistent enforcement. Moreover, large quantities of illegally traded timber and plant products involved species that were not protected by the Convention or, more commonly, were traded without the species or origin of the products being known or specified.

Congress acted to close this loophole in Section 8204—*Prevention of Illegal Logging Practices* of the Food, Conservation and Energy Act of 2008 (hereinafter “Lacey Amendments of 2008”).¹¹ The Lacey Amendments of 2008 amended the definition of “plant” under the Lacey Act to bring non-native species within the scope of its protections.¹² To provide greater clarity on the scope of illegalities covered, the 2008 Amendments amended the Lacey Act prohibitions to include plant-specific categories of offenses, including, *inter alia*: the theft of plants; the taking of plants from a park, reserve or protected area; the taking of plants without or contrary to required authorization; taking, possessing, transporting or selling plants without payment of appropriate taxes, royalties or stumpage fees; and taking, possessing, transporting or selling plants in violation of a law governing their export or transshipment.¹³ The 2008 Amendments also established a system of declaration requirements to ensure that the species and origin of plants in trade is properly documented and reported.¹⁴ The implementing agencies were required to review the effectiveness, cost and impact of the declaration requirements two years after their adoption, and to report to Congress on their findings within 180 days together with recommendations for any additional legislation that might be appropriate to assist in the identification of plants imported into the United States.¹⁵

Passage of the 2008 Lacey Amendments was promoted and endorsed by a landmark coalition of businesses, trade associations, labor and environmental groups as a means of

⁶ Anderson, *supra* note 1, at 50

⁷ *See id.*

⁸ Anderson, *supra* note 1, at 55.

⁹ *See* http://www.fws.gov/international/DMA_DSA/CITES/timber/CITES_tree_species.html.

¹⁰ *See, e.g.,* Castlewood Products, LLC v. Norton, 365 F.3d 1076 (D.C. Cir. 2004).

¹¹ Public Law 110–246, §8204 (June 18, 2008).

¹² Pub. L. 110-246, § 8204 (a), codified at 16 U.S.C. 3371(f).

¹³ *Id.* §8204(b)(1).

¹⁴ *Id.* § 8204(b)(2).

¹⁵ *Id.*

addressing the burgeoning, destructive and unfair international trade in illegal timber and other plant products. In the three years since the act's adoption, this diverse coalition has continued to work together to identify potential challenges with the implementation of the Act and to propose solutions that protect the environment and promote good governance while minimizing unnecessary regulatory burdens or regulatory uncertainty for legitimate businesses engaged in legal trade.

III. The RELIEF Act: Analysis of Key Provisions

The "RELIEF Act", introduced by Representatives Marsha Blackburn (R-TN), Mary Bono Mack (R-CA), and Jim Cooper (D-TN) would effect dramatic changes to the current Lacey Act. These changes include, *inter alia*:

- Congressional findings that would inject substantial uncertainties into the law, particularly with respect to the proper scope of enforcement activities;
- The insertion of new, broadly worded exceptions for pre-Act specimens and for products not composed of "solid wood";
- Changes to federal forfeiture laws that would allow "innocent owners" of illegal plant products to retain their contraband, negating a key economic incentive to comply with the law;
- A dramatic reduction in the penalties available under the law for first offenses involving plants, even in cases involving knowing violations of the law, enabling companies to treat the risk of such penalties as a simple cost of business;
- Unfeasible review and reporting mandates for the agencies tasked with implementing the Lacey Act;
- A requirement that agencies responsible for implementing significant new mandates under the Act do so without a supporting increase in their agency budgets;
- A mandate that implementing agencies establish a standard certification process under the Act for plant and plant products;
- A review of the impact of these amendments by the Federal Trade Commission just 180 days after their enactment.

A section by section analysis of the RELIEF Act's effects follows.

a. Section 2—Findings

The proposed findings of the RELIEF Act may be relevant to the implementation of the Lacey Act in several respects. First, they may inform how the implementing agencies develop and implement regulations and other measures required to be taken under the Act. Second, they will inform how authorities enforce the Act. Third, they may provide a guide to courts in circumstances in which the meaning of a particular provision is subject to litigation. Given the frequent use of terminology whose meaning is undefined, not readily discernible from its context and susceptible to a wide range of potential interpretations, there is a near certainty that many provisions in the RELIEF Act would be subject to such litigation.

In light of these considerations, the RELIEF Act's findings are a source of serious concern. Specifically, these findings create tremendous ambiguities regarding the purpose, applicability, standards of care and proper enforcement of the Lacey Act that, taken together, will impair the effective enforcement of the law and create substantial uncertainty for regulators and the regulated community alike.

As a preliminary matter, the RELIEF Act ignores important objectives underlying the 2008 amendments. The RELIEF Act asserts that the 2008 amendments to the Lacey Act "were designed to level the playing field for American businesses . . . whose prices had been undercut by a black market fueled by irresponsible and illegal taking of protected plants around the globe."¹⁶ While leveling the playing field for American businesses was among the purposes of the 2008 amendments, Section 2(2) of the RELIEF Act omits other, equally important purposes of those amendments, including the conservation of exhaustible natural resources and the support of forest governance efforts. In discounting these goals of the Lacey Act, Section 2(2) implies, incorrectly, that the purposes of the 2008 Amendments lies exclusively in the protection and promotion of commerce, to the exclusion of other important public policy objectives.

Further, Section 2(3) of the RELIEF Act asserts incorrectly that the enforcement of the present Lacey Act "could criminalize actions of a good-faith owner, purchaser or retailer of a plant or plant product." This finding is belied by the express terms of the statute, which authorize criminal penalties only for persons who knowingly violate the law or who violate a standard of due care with respect to the legality of the products being traded.¹⁷ Read in conjunction with the other findings in Section 2, this incorrect assertion that enforcement of the Lacey Act could criminalize good faith owners would, if adopted, contribute to an overall chilling effect on the effective enforcement of the law.

More troublingly, the findings in the RELIEF Act create new and significant ambiguities regarding the standards of compliance applicable under Lacey. Section 2(4) finds that individuals not in the "commercial shipping business" should be held to a different standard of compliance under the Lacey Act.¹⁸ Unfortunately, the Act neither defines "commercial shipping business" for purposes of this finding nor specifies the appropriate standard of compliance which should apply to those not engaged in it.¹⁹ When read in light of the RELIEF Act's broadly worded exemptions, its manifest intent to narrow the scope of the law, and its injunction against overzealous enforcement, this language would not only engender substantial uncertainty both for enforcing agencies and the regulated community, but would potentially exclude the overwhelming majority of importers from enforcement actions, effectively eviscerating the law.

The RELIEF Act creates further uncertainty regarding the proper enforcement of the Lacey Act by finding, in Section 2(9), that law enforcement officials should "not engage in overzealous enforcement action under the 2008 amendments."²⁰ By singling out the 2008

¹⁶ RELIEF Act, H.R. 3210, 112th Cong. §2(2) (2011).

¹⁷ 16 U.S.C. §3373(d).

¹⁸ RELIEF Act §2(4). This clause also finds that "[s]anctions for violating the 2008 amendments should be proportional to the act in violation." As discussed below, the current Lacey Act already provides detailed requirements designed to ensure that penalties assessed are proportional to the violations involved.

¹⁹ *Id.*

²⁰ *Id.* §2(9).

Amendments in this way, the RELIEF Act raises the question of whether Congress has implicitly endorsed the overzealous enforcement of other sections of the Act. Additionally, the RELIEF Act's failure to define the phrase "overzealous enforcement action" is likely to generate significant uncertainty regarding what types of enforcement action should be avoided, and against whom.²¹ Both the finding and the resulting uncertainty it generates could have a substantial chilling effect on legitimate and necessary enforcement activities under the Lacey Act. As noted above, this effect will be compounded by the ambiguities and manifest anti-regulatory intent found elsewhere in the Act.

Beyond injecting tremendous uncertainty into enforcement operations, Section 2(9) would add no clear benefit to the substantial safeguards already provided by the existing Lacey Act to protect against arbitrary or excessive punishments. Section 3373(a) of the Lacey Act provides that no civil penalty may be assessed under the Act unless the accused is given notice and opportunity for a hearing before an administrative law judge with respect to the violation.²² The Act specifies procedures to ensure that any business or individual subject to potential penalties is afforded adequate opportunity to defend itself before a neutral arbiter.²³ Any civil penalty so assessed may be remitted or mitigated by the Secretary,²⁴ who must take into account not only the nature, circumstances, extent and gravity of the offense, but also the violators "degree of culpability, ability to pay, and such other matters as justice may require."²⁵ These provisions give the Secretary an explicit and affirmative responsibility to ensure that penalties are appropriate to the scale of the offense, the violator's culpability and any extenuating circumstances which may exist. Moreover, the Lacey Act entitles any person penalized under §3373 to seek *de novo* review in federal district court.²⁶

Accordingly, to the extent there is any risk of overzealous enforcement under any provision of the Lacey Act, the most effective solution lies within one of the three mechanisms that already exist within the Lacey Act. By injecting substantial and needless uncertainty into this process, Section 2(9) would only serve to prevent law enforcement officials from fulfilling their federal mandated responsibility to fully and effectively enforce the law.

Finally, Section 2(11) would establish a Congressional finding that implementing agencies have an affirmative responsibility to create and maintain a publicly accessible database "of the foreign laws of countries as they apply to plants". As discussed more fully below, this finding—which presumes the outcome of a report required elsewhere in the RELIEF Act—would establish a costly and unfeasible mandate likely to engender profound uncertainty for both businesses and enforcement officials, generate substantial barriers to successful prosecutions under the Act, vest executive branch personnel with a responsibility properly vested in the judicial branch, and provide a potential source of friction in the United States' foreign relations.

²¹ *Id.*

²² 16 U.S.C. §3373(4).

²³ *Id.* § 3373(b).

²⁴ *Id.* § 3373(a)(5).

²⁵ *Id.* § 3373(a)(6).

²⁶ *Id.* §3373(c).

b. Section 3—Treatment of Plants and Plants Products under Lacey Act Amendments of 1981

i. RELIEF includes a broadly-worded grandfather clause for pre-2008 specimens

Section 3 of the RELIEF Act would add a new provision to the Lacey Act designed to exempt pre-2008 specimens from coverage under Lacey. Specifically, Section 3(a) provides that the Lacey Act does not apply with respect to: (1) any plant imported into the United States prior to May 22, 2008; or (2) “any finished plant or plant product the assembly and processing of which was completed before May 22, 2008.”

In theory, the inclusion of an exception for specimens imported prior to enactment of the 2008 amendments is compatible both with the principle of notice and with the underlying purposes of the 2008 Amendments. Indeed, the general concept has been endorsed by a diverse coalition of Lacey Act stakeholders,²⁷ and the Fish and Wildlife Service has communicated that it does not intend to seek out pre-Act materials. As written, however, the RELIEF Act would extend this exemption to cover not only plant products imported prior to the 2008 Amendments, but also to plants or plant products whose “assembly and processing” were completed prior to the amendments, even if those products have not yet been imported. This extension of the exception to products not already within U.S. borders would create a significant loophole in the Act and provide a ready avenue for laundering illegal products. Enforcement authorities would be forced either to accept this risk, thus substantially undermining the effectiveness of the Lacey regime, or else require compelling documentation that the specific products for which entry under the exemption is sought were demonstrably and fully manufactured prior to May 2008. The need for this documentation would, to a considerable extent, negate the benefits of exempting such products from the Lacey Act.

ii. RELIEF creates a vague and potentially broad exclusion for all products not made of “solid wood”

In adopting the 2008 amendments to the Lacey Act, Congress made it unlawful to import any plant unless accompanied by a declaration that contains: the scientific name of any plant contained in the importation; a description of the value of the importation and the quantity of the plant; and the country from which the imported plant was taken.²⁸ By requiring importers to ask basic questions regarding the origin and legality of products in their supply chains, the declaration requirements for shipments involving plants were central to achieving the amendment’s primary purpose of addressing international trade in illegally-sourced plant products.

Given this intent, the trade in plant products derived from trees was explicitly and emphatically the central focus of Congressional concern. Thus, the current Lacey Act defines the term “plant” comprehensively to include “any wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest

²⁷ Second Consensus Statement of Importers, Non-Governmental Organizations, and Domestic Producers on Lacey Act Clarifications.

²⁸ 16 U.S.C. §3373(f).

stands.”²⁹ In addition to explicitly including trees within the definition, Congress took great care to make clear that trees were *not* included within the carefully negotiated set of exclusions provided by the 2008 amendments.³⁰

The RELIEF Act would add a new, significant and ill-defined exclusion to these declaration requirements. Specifically, the RELIEF Act creates an exclusion from the declaration requirements for any product “derived from a tree” that does not include products that are “solid wood.”³¹ This amendment creates two distinct and significant problems.

First, and most fundamentally, Section 3 of the RELIEF Act has the practical effect of undermining the basic purpose of the declaration requirements established by the 2008 amendments. The declaration requirements were broadly worded to address the critical need to ensure that persons importing plant products, specifically including plant products derived from trees, were able to provide basic information regarding the nature and origin of plant specimens in their imports. Section 3 would create a new and potentially huge loophole in that system by excluding a large and ill-defined category of products that would otherwise be subject to the declaration. In so doing, the RELIEF Act would remove a major regulatory incentive for importers to know their supply chains and ensure that their operations do not include illegally sourced material. The fact that it creates a potentially massive exemption to a core element of the regulatory scheme established by the Lacey Act makes the provision’s ambiguity all the more troubling and more potentially damaging.

Second, Section 3 would create substantial regulatory uncertainty because the term “solid wood” is not defined in either the RELIEF Act or the existing Lacey Act, and the precise content of the term is not readily apparent on its face.³² The RELIEF Act would require the Administrator of the Animal and Plant Health Inspection Service “to issue regulations that define the term ‘solid wood’ for purposes of this subparagraph.” In the absence of more explicit guidance from Congress regarding its intent, and given the potentially significant competitive advantage that may accrue to businesses that fall within this exclusion, APHIS is likely to encounter both substantial uncertainty and significant opposition in its efforts to define the term. Nor does the term “solid wood” appear to have been defined in any other relevant regulatory context which might help alleviate this uncertainty. For example, there is not a distinct and separate category for “solid wood” products within any chapter, heading or sub-heading of the Harmonized Tariff Schedules and the bill itself does not provide an understanding of which categories or sub-categories of HTS codes might be encompassed by the exclusion. The FAQs from Congressman Cooper only further the confusion over the term, and seem to imply that if a product contains a combination of particleboard and solid wood, then part of the product would be exempt from the Lacey Act, and part would still be subject to declaration requirements.³³ The inclusion of an ambiguous and potentially extremely broad exception to a core provision of the Lacey Act, combined with limited Congressional guidance in the RELIEF Act itself and

²⁹ Id. §3371(f)(1) (emphasis added).

³⁰ Section 3371(f)(2) provides that: “[t]he terms ‘plant’ and ‘plants’ exclude...(A) common cultivars, except trees, and common food crops (including roots, seeds, parts or products thereof)” (emphasis added).

³¹ RELIEF Act, §3(b)(2)(B).

³² *Id.*

³³ Jim Cooper, *The RELIEF Act: Frequently Asked Questions*, CONGRESSMAN JIM COOPER, http://cooper.house.gov/images/stories/relief_act_faq_final.pdf.

confusing evidence of the sponsors' intent in the FAQs will likely precipitate a drawn out regulatory process that culminates in extensive litigation, further delaying the effective implementation and enforcement of the Act. In so doing, this language will contribute to an extended period of regulatory uncertainty likely to elevate the risks for businesses considering long-term investments in product sectors where imported woods are a critical component.

iii. RELIEF exempts “innocent owners” of plant contraband from federal forfeiture requirements

Beyond simply amending the Lacey Act, the RELIEF Act effects broader changes to other federal laws of general applicability. Chapter 46 of Title 18 of the United States Code establishes the general federal standard for civil forfeiture in cases involving contraband goods,³⁴ including violations of the Lacey Act.³⁵

The general rules for federal civil forfeiture proceedings are set forth in Section 983 of Title 18. These rules provide a defense to forfeiture in cases where a claimant proves by a preponderance of evidence that he or she is an “innocent owner” of the property that would otherwise be subject to forfeiture.³⁶ Notwithstanding this defense or any other provision of the section, however, Section 983 establishes a clear and common-sense rule that “no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.”³⁷ Put simply, a person cannot claim legal ownership of illegal goods.

The RELIEF Act would create a special exception to that general rule for “innocent owners” of plants or plant products imported, possessed, transported or sold in violation of the Lacey Act, allowing them to keep their contraband goods.³⁸ This change would thus create an exemption to forfeitures of contraband plant products that runs counter to the basic standards of US forfeiture law. Such a change would provide a perverse incentive for businesses to remain willfully ignorant regarding the legal status of the goods they are importing with the goal of retaining contraband goods even if they are detected. Combined with the significant weakening of civil penalties created elsewhere in the RELIEF Act, and discussed below, this exception to general forfeiture standards negates one of the central economic incentives at the heart of the Act's deterrence model and creates a converse economic incentive for companies to continue importing illegal goods and simply accept the reduced financial risks from potential enforcement as a modest cost of doing business.

c. Section 4—Changes to § 3373—Penalties and Sanctions

Under the current Lacey Act, any person who engages in conduct prohibited by the Act (other than marking, labeling and declaration offenses under subsections (b), (d), and (f) of section 3372), who, in the exercise of due care should know that the specimens involved were taken, possessed, transported or sold in violation of law, may be assessed a civil penalty by the

³⁴ 18 U.S.C. §§983-987.

³⁵ 16 U.S.C. § 3374(d).

³⁶ 18 U.S.C. §983(d)(2011).

³⁷ *Id.* §983(d)(4)

³⁸ RELIEF Act §3(c).

Secretary of not more than \$10,000 for each such violation.³⁹ Significant civil penalties for negligent violations were introduced in 1969 to close a major loophole in the effective enforcement of the Act.⁴⁰ In the absence of such civil penalties, persons engaged in the trade have a perverse incentive to remain willfully ignorant regarding the legality of their operations.

Section 4 of the RELIEF Act would modify the existing Lacey Act by inserting a new paragraph that establishes special provisions for first offenses involving plants.⁴¹ These provisions would decrease the maximum fine to only \$250—a tiny fraction of the \$10,000 applicable to Lacey offenses involving non-plant products.⁴² Additionally, the changes would treat multiple violations as a single offense if they all arise from a single act or omission.⁴³ This reduction in penalties—amounting to a mere slap on the wrist when compared to the value of the shipments involved—will create a huge incentive for companies to purposefully ignore the legal status of their operations, essentially re-opening the loophole that previous amendments purposefully closed. This change would severely restrict effective enforcement of the Lacey Act.

Finally, and most significantly, a plain text reading of Section 4 indicates that it is intended to supplant not only the civil penalties for Lacey violations set forth in the current law, but the criminal penalties as well. Depending on the nature and circumstances of the violation, current law provides for criminal penalties of up to 5 years imprisonment and \$20,000 in fines for each violation of the Act.⁴⁴ The RELIEF Act would preclude these penalties for first offenses involving plants, thus eliminating the risk of criminal sanction as an incentive to compliance.⁴⁵

d. Section 5—Review and Report

In establishing the declaration requirements under the 2008 amendments to the Lacey Act, Congress provided for a review of the implementation of declaration requirements, and exceptions thereto, not later than two years after the enactment of the amendments.⁴⁶ Within 6 months of completing this review, the Secretary of Interior must submit to Congress a report that:

(A) evaluates the effectiveness of each type of information required in the declaration and the potential to harmonize the declaration requirements with other applicable import regulations;

(B) recommends such legislation as may be appropriate to assist in the identification of plants imported in violation of the Lacey Act; and

³⁹ 16 U.S.C. § 3373(a)(1).

⁴⁰ Anderson, *supra* note 1, at 48.

⁴¹ RELIEF Act §4.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 16 U.S.C. §3373(d).

⁴⁵ RELIEF Act, § 4.

⁴⁶ 16 U.S.C. §3372(f)(4).

(C) analyzes the effect of the amended Lacey provisions on the cost of legal plant imports and the extent and methodology of illegal logging practices and trafficking.⁴⁷

The RELIEF Act would modify this provision to require a review of its implementation no later than 180 days after the bill is enacted, with a report to Congress to follow within 180 days thereafter. In so doing, the RELIEF Act sets a timeline for review and reporting that is wholly unrealistic given the short duration, the scope of the review required, and the need to provide public notice and comment as part of the process. Even were it feasible, however, conducting a review so shortly after massive changes have been made to the law would be of no utility because the majority of the regulatory changes necessitated by the RELIEF Act are very unlikely to have been completed within this timeframe. Fewer still, if any, would have become operational. Assessing the bill's impact under these circumstances would almost certainly prove an exercise in futility and a considerable waste of resources.

Even in the absence of the RELIEF Act and the profound changes it would affect, the process of implementing the 2008 amendments has proven to be a slow and iterative one, with declaration requirements to date reaching only a fraction of the product categories known or believed to harbor illegal plant products. Reviewing and evaluating the impacts of these measures has been concomitantly slow and gathering the data and experience necessary for a comprehensive assessment of trends and evaluation of outcomes will take still more time. By injecting significant changes into the law, many of which will require new regulatory processes and potentially litigated outcomes, the RELIEF Act would extend any realistic and useful timeline for assessing outcomes far into the future.

Moreover, the RELIEF Act would add a new requirement for the Fish and Wildlife Service to report on the “feasibility of creating and maintaining a publicly available database of laws of foreign countries from which plants are exported.”⁴⁸ As discussed in Section 3(a) above, the findings section of the Act would include an express determination by Congress that “appropriate agencies have the responsibility” to provide such a database.⁴⁹ The mandate to conduct the feasibility review should be evaluated in light of this determination and the evident expectation on the part of Congress that this responsibility must be fulfilled as a prerequisite to the fair and effective implementation of the Lacey Act.

The database envisioned by the RELIEF Act is problematic in many respects.

In order for the database to include all relevant laws, agencies would need to identify all potentially relevant law at multiple levels of government from every country in the world from which wood products might conceivably be sourced. Creating such a database in a usable form would necessitate an information architecture capable of encompassing the diverse forms legal requirements might take—from presidential decrees to constitutional standards to agency guidance—in countries with profoundly divergent legal systems and management structures. Without constant monitoring and updating, moreover, any such database would quickly become outdated and unreliable. Thus, keeping it current would require agencies to follow changes in

⁴⁷ *Id.* § 3372(f)(5).

⁴⁸ *Id.* § 5(2)(D).

⁴⁹ *Id.* § 2(11).

the regulations, laws, and judicial findings of scores of countries on a constant and ongoing basis. The resource implications of such an undertaking would be tremendous. Nonetheless, Section 6 of the RELIEF Act mandates that this database, along with the rest of the law, be implemented using amounts otherwise available to the implementing agencies, with no special allocation. Thus, this provision would divert limited and necessary resources from other implementation and enforcement efforts under the Act.

Even were Congress to allocate the significant resources needed to undertake this database, however, any potential utility from building and maintaining it would be heavily outweighed by its likely negative impacts. These impacts include increased regulatory uncertainty, the proliferation of legal loopholes, the incursion of executive branch personnel into matters of legal interpretation that are the proper provenance of the judicial branch, and potential risks to U.S. foreign relations arising from mischaracterizations of foreign law.

Determining which laws will apply to a particular activity in a particular circumstance, and how the many potentially applicable laws will interact one with another, is a very fact-specific undertaking. By contrast, building and maintaining the database would require agencies to make determinations about the theoretical applicability of foreign laws “to plants” in the abstract, devoid of specific factual contexts that give the law meaning. This would create substantial risk that some relevant laws from a given country might be excluded from the database while other irrelevant ones were included. In both cases, implementing agencies and regulated entities would rely on the database at their peril.

This fact, in turn, raises the question of which characterization of the applicable law would govern for purposes of the Lacey Act when the database was demonstrably in error or simply in disagreement with interpretations by relevant foreign authorities. Such circumstances would present a choice between relying on the database and effectively supplanting the law of a foreign sovereign on the one hand or applying the foreign law to companies that may reasonably have relied on the database in the other. In both cases, the mere existence of the database is likely to engender both confusion and strategic legal wrangling on the part of prosecutors and putative violators alike.

Businesses operating in an international context are much better situated to assess the law relevant to their unique operations and circumstances and should reasonably be expected to do so. To the extent such businesses require an understanding of how legal regimes that might affect their use of plant or forest products from a particular country, competent local counsel are better equipped and better suited to provide that guidance. To the extent businesses engaged in the import of plant products require a higher level overview of forest regimes, publicly accessible databases already exist for this purpose, such as the United Nations Food and Agriculture Organization’s FAOLEX project.

e. Section 6—Funding for Implementation of Plant Declaration Requirement

As discussed in the preceding section, the RELIEF Act would impose new, significant and questionable mandates on the agencies responsible for implementing the Lacey Act. Congress emphasizes, in its findings, the importance of ensuring that the implementing agencies

have the necessary funding to implement current phases of the declaration requirement before considering any future phases.⁵⁰ Notwithstanding this finding, however, Section 6 of the RELIEF Act mandates that the requirements of implementing the law be met with amounts otherwise available to the implementing agencies, with no special allocation. As a result, the RELIEF Act effectively diverts substantial amounts of funding away from core implementation and enforcement efforts under the Act.

f. Section 7—Standard Certification Process for Plants and Plant Products

Section 7 of the RELIEF Act directs each agency responsible for implementing the Lacey Act to establish a standard certification process under the Act for plant and plant products legally harvested, imported or manufactured after May 22, 2008. This process must consider “individual item certification and individual manufacturer, importer, and retailer certification for purposes of sale and resale.”⁵¹ The precise content and significance of such certification process or processes, including, for example, how certifications would relate to declaration requirements, is not specified. Nor does the Act indicate whether and how agencies might consider any of the several existing—and at times conflicting—certification processes for forest and paper products either as components or alternatives to a standard process. Experience with these existing processes has suggested that they are difficult to establish and to maintain with the degree of integrity that would be essential for widespread use as a legal instrument in the world’s largest single consumer market for wood products.

g. Section 8—Federal Trade Commission Review

Finally, the RELIEF Act requires that, not later than 180 days after its enactment, the Federal Trade Commission shall review the competitiveness in the U.S. market for raw materials used in the manufacture of musical instruments and the affect on that competitiveness of the changes to Lacey made by the RELIEF Act. The purpose of requesting such an assessment from the FTC is unclear, particularly in the absence of reliable baseline data on the competitiveness of the same market under the existing Lacey Act, prior to the RELIEF Act amendments. In the absence of such baseline data, any determination of impacts or causality attributable to the RELIEF Act itself would be questionable. As noted in previous sections, moreover, the feasibility and value of any such assessment conducted only six months after the bill is passed is, at best, highly suspect.

⁵⁰ RELIEF Act §2(10).

⁵¹ *Id.* §7.

IV. Conclusion

The RELIEF Act would create sweeping changes to the Lacey Act. These changes would create gaping loopholes that would diminish the effectiveness of the overall enforcement of the Act. Additionally, the bill would create serious and pervasive regulatory uncertainties from the perspective of businesses and implementing agencies alike. These uncertainties, combined with the substantial opportunity for gamesmanship created by the bill's various exclusions, are likely to engender extensive litigation in the event it is adopted. On balance, the RELIEF Act is likely to create or, at minimum, exacerbate perverse incentives for companies to willfully ignore the legality of the plant products in their supply stream. In so doing, the RELIEF Act would undermine the central purpose of the Lacey Act amendments of 2008, heighten regulatory uncertainty, unfairly penalize businesses operating legitimately, and contribute to continued deforestation and forest degradation in much of the world.

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About CIEL

Founded in 1989, the Center for International Environmental Law (CIEL), www.ciel.org, is uses international law and institutions to protect the environment, promote human health, and ensure a just and sustainable society. With offices in Washington, DC and Geneva, CIEL's staff of international attorneys work in the areas of human rights and the environment, climate change, law and communities, chemicals, trade and the environment, international environmental governance, biodiversity and international financial institutions by providing legal counsel and advocacy, policy research and capacity building.

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