

Compliance in the Supply Chain - The Lesson of Gibson Guitar and the Lacey Act

Just when you think things cannot get any worse for the forlorn AAA Houston Astros, aka Lastros, last night they sank to a new low, while riding their current 3-35 streak (109 loss season projected – ouch!). After managing to take the National League East leading team the Washington Nationals into extra innings the Lastros executed what can only be called the best Little League Bad News Bears play of the season. With a National runner on first the batter bunted down the first base side of the diamond, the Astros Pitcher and First Baseman smashed into each other as the First Baseman picked up the ball and pivoted, while falling, and whizzed his throw into Right Field. Not to be outdone, the Astros Right Fielder retrieved said throw and then sailed the ball over the head of the Astros Catcher while the Nationals runner scored all the way from First Base. For those of you scoring at home it was single, E-3, E-9, or as Houston Chronicle beat writer Zach Levine said, “*arguably the lowlight of the lowest season in Astros history.*” To see a video of the play, [click here](#).

I thought about the Astros futility when reading about the Criminal Enforcement Agreement (CEA) entered into by Gibson Guitar Corp (Gibson) for violations of the Lacey Act, which is a 111-year-old law, originally enacted to protect wildlife and expanded in 2008 to cover wood products. I say futility because as recently as a couple of weeks ago, the Chairman and Chief Executive Officer (CEO) of Gibson, Henry Juskiewicz, wrote in a piece appearing in the July 20, 2012 edition of the Wall Street Journal (WSJ), entitled “*Gibson's Fight Against Criminalizing Capitalism*”, that on August 24, 2011, “Without warning, 30 federal agents with guns and bulletproof vests stormed our guitar factories in Tennessee. They shut down production, sent workers home, seized boxes of raw materials and nearly 100 guitars, and ultimately cost our company \$2 million to \$3 million worth of products and lost productivity.” Two weeks later, his company admitted to violations of the same federal law that he protested did not apply to his company. In addition to the cost of non-compliance laid out by Juskiewicz in the article, Gibson agreed to a CEA, a penalty in the amount of \$300,000 and a community service payment of \$50,000. It also agreed to a withdraw claims for wood seized by federal agents in the course of the criminal investigation, specifically “including Madagascar ebony from shipments with a total invoice value of \$261,844.”

So what's the compliance lesson here? First and foremost, understand the laws that apply to you and put a system in place to comply with those laws. It does no good to claim that if you are investigated it's “an attack on capitalism”. On the other hand, if your company does feel that it has been prosecuted by the “overreach of government authority” and you are indeed being picked on by the US Department of Justice (DOJ) and the Fish and Wildlife Service, you can always go to court to assert your innocence. Of course, to successfully assert innocence it really helps to be innocent.

But more than the ‘water is wet’ lesson that Gibson has reminded us all still exists; the CEA entered into by Gibson had a guide to the creation of a Lacey Act Compliance Program

(Appendix B to the CEA). While this Lacey Act Compliance Program was designed to “support legal wood sourcing” and to “expand upon the sustainability goals of Gibson’s existing Responsible Wood Purchasing Program” it provides some excellent guidance to the Foreign Corrupt Practices Act (FCPA) or UK Bribery Act compliance practitioner for questions to ask of third parties doing work with or for your company. Prior to purchasing wood products, Gibson employees are required to exercise “due care” in evaluating its supply chain. Gibson agreed to take the following steps:

1. *Communicate with suppliers* about Gibson’s policies to see if any suppliers cannot implement the compliance program.
2. *Ask questions* about the supplier and its source of wood.
3. *Conduct independent research* to identify high risk sources.
4. Request documentation *prior* to purchase that the wood in question was legally harvested.
5. Make a *reasoned determination* based upon a review of all information.
6. *Maintain records* documenting these steps.
7. If there is uncertainty in any of the above steps, *do not engage in the transaction*.

The Lacey Act Compliance Program also had several other steps which should be incorporated into any FCPA or Bribery Act compliance program and they are:

- If Gibson finds out that an importer/exporter with which it is doing business violates the law, it will cease doing business with them and where appropriate, notify the relevant enforcement agency.
- Gibson will encourage its suppliers to work with third parties to certify that they are in compliance with the relevant laws.
- Gibson will work with other organizations dedicated to sustainable sourcing to supplement these practices.
- Gibson will, on no less than an annual basis, perform due diligence on its suppliers to determine if they are on any government watch lists for illegal acts.
- Gibson will on an annual basis, audit its Supply Chain practices, policies and procedures. If there are any material weaknesses identified, there will be appropriate corrective action.
- Gibson will train its employees on this compliance program.
- Gibson will retain its Compliance Program records for a minimum of five years.
- Gibson will discipline employees who violate its Compliance Program and maintain records relating to such discipline.

The CEA also included an Attachment A, which was a sample checklist of questions that its employees should ask suppliers. I found this list to be a very good list of basic questions that can be used when questioning representatives from a vendor in your company’s Supply Chain. I include the list in full below.

ATTACHMENT A – SAMPLE CHECKLIST QUESTIONS

- 1. Does supplier have long standing relationships with the supplier/s (exporter) of this product? How long?**
- 2. Do the supplier/s of this supplier buy this product from ‘spot markets’?**
- 3. Does supplier regularly question their suppliers regarding the origin of this product?**
- 4. Did supplier provide you with all required documentation?**
 - a. e.g., for non high risk countries, a written and signed document from supplier identifying companies included in the full supply chain of the product back to the harvesting entity/ies, including name and location of the harvesting entity/ies and Forest Management Unit.**
 - b. A list of supplying companies harvesting wood from source forests and copies of the associated harvesting permits for supplied product and/or other form of authorization from the forest owner, including, for example:**
 - i. species, district of origin information and any other related harvesting or purchasing agreements.**
 - c. Evidence of compliance with timber transportation documents: Copies of transport or sales permits with specification of species and volumes as applicable.**
- 5. Have you reviewed the documents and verified that they meet Gibson requirements?**
- 6. Is there any reason for supplier to believe that paperwork from their suppliers may not be authentic for this product?**
- 7. Is there a ban on exports from this region/country?**
- 8. Have you checked on approved species/products with State/Province for that supplier?, etc.)**
- 9. Have you retained copies of required documentation?**
- 10. Is this supplier sourcing from a high risk country?**

11. If yes, verify that additional required procedures were followed, e.g.,

- a. product is certified against a Chain of Custody or Traceability Standard,**
- b. the supplier certificate is valid and the scope includes the product supplied,**
- c. the product has been traced by Gibson along an unbroken and verified chain of custody from the purchaser back to the source entirely by obtaining supplier certification codes on documentation for that product down to forest level, and**
- d. the harvest and export of the species is not restricted or prohibited in the source country.**

So will the futility of Gibson's claim that the Lacey Act does not apply to them continue? Probably not as they have also agreed in the CEA to commit no criminal violations going forward. I should note that the Chairman/CEO of Gibson was quoted in a WSJ article that "he felt the company was targeted inappropriately. He added that the company settled the dispute to avoid the cost of litigation..." So perhaps Gibson will continue to assert that it was the evil government that caused his company to act illegally. But such conduct might be as futile as the Astros 2012 season...

This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at tfox@tfoxlaw.com.

© Thomas R. Fox, 2012