

**H.R. 3210, “RETAILERS AND ENTERTAINERS  
LACEY IMPLEMENTATION AND  
ENFORCEMENT FAIRNESS ACT” AND  
H.R. 4171, “FREEDOM FROM OVER-  
CRIMINALIZATION AND UNJUST  
SEIZURES ACT OF 2012”**

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**LEGISLATIVE HEARING**

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WILDLIFE,  
OCEANS AND INSULAR AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

—  
Tuesday, May 8, 2012  
—

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**LEGISLATIVE HEARING ON H.R. 3210, TO AMEND THE LACEY ACT AMENDMENTS OF 1981 TO LIMIT THE APPLICATION OF THAT ACT WITH RESPECT TO PLANTS AND PLANT PRODUCTS THAT WERE IMPORTED BEFORE THE EFFECTIVE DATE OF AMENDMENTS TO THAT ACT ENACTED IN 2008, AND FOR OTHER PURPOSES. "RETAILERS AND ENTERTAINERS LACEY IMPLEMENTATION AND ENFORCEMENT FAIRNESS ACT"; AND H.R. 4171, TO AMEND THE LACEY ACT AMENDMENTS OF 1981 TO REPEAL CERTAIN PROVISIONS RELATING TO CRIMINAL PENALTIES AND VIOLATIONS OF FOREIGN LAWS, AND FOR OTHER PURPOSES. "FREEDOM FROM OVER-CRIMINALIZATION AND UNJUST SEIZURES ACT OF 2012."**

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**Tuesday, May 8, 2012**

**U.S. House of Representatives**

**Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs**

**Committee on Natural Resources**

**Washington, D.C.**

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The Subcommittee met, pursuant to call, at 1:02 p.m., in Room 1324, Longworth House Office Building, Hon. John Fleming [Chairman of the Subcommittee] presiding.

Present: Representatives Fleming, Duncan, Harris, Sablan, Faleomavaega, and Markey (ex officio).

Dr. FLEMING. The Subcommittee will come to order. The Chairman notes the presence of a quorum. Good afternoon.

**STATEMENT OF THE HON. JOHN FLEMING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA**

Dr. FLEMING. Today the Subcommittee will conduct a legislative hearing on two bills that amend the Lacey Act. As a result of amendments enacted in 2008, the impact of this law was significantly expanded to include for the first time thousands of American companies that trade in wood and wood products.

The first bill, H.R. 3210, the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act, or RELIEF Act, was introduced by our distinguished colleague, Congressman Jim Cooper of Tennessee. The purposes of this proposal are to exempt any plant or finished plant product imported or completed before May 22, 2008, to limit the declaration requirement to solid wood and items imported only for commerce and provide an innocent owner defense to individuals under the Civil Assets Forfeiture Reform Act. At the time of introduction, this legislation was endorsed by an impressive list of organizations, including the National Association of Home Builders, the National Retail Federation, the International Wood Products Association, the National Association of Manufacturers, National Association of Music Merchants, National Audubon Society, the National Federation of Independent

Business, National Marine Manufacturers Association, and the U.S. Chamber of Commerce.

The second bill we will hear is the Freedom from Over-Criminalization and Unjust Seizures Act as introduced by Senator Rand Paul of Kentucky and Congressman Paul Broun of Georgia. This bill would remove all references to foreign laws in the Lacey Act, and it reduces the penalty provisions under the Act. One of the organizations that supports this legislation is the Heritage Foundation, which recently stated in an article that, "It is a Federal offense to import fish, wildlife or plants in violation of any foreign law. Such legislation violates one of the fundamental tenets of Anglo-American American law that 'men of common intelligence' must be able to understand what a law means. No one should be forced to run the risk of conviction and imprisonment for making a mistake under a foreign law."

The rushed changes in 2008 made for imperfect outcomes that need to be addressed. This is the purpose of a congressional hearing. What is disappointing is that the same environmental organizations that don't want even a comma changed in this law have consistently opposed any logging in this country. Today we will hear reasons why changes may be needed to address the legal jeopardy that Americans may face as a direct result of the 2008 amendments.

During this hearing I am interested in learning what is the cost and value of the declaration requirement, why all suspected Lacey Act products are treated as contraband, and why in the case of the 2008 amendments, Americans must comply with the thousands of foreign laws, some of which may have little, if anything, to do with the protection, conservation, and management of plants.

[The prepared statement of Dr. Fleming follows:]

**Statement of The Honorable John Fleming, Chairman,  
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs**

Good afternoon, today, the Subcommittee will conduct a legislative hearing on two bills that amend the Lacey Act. As a result of Amendments enacted in 2008, the impact of this law was significantly expanded to include for the first-time thousands of American companies that trade in wood and wood products.

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to run the risk of conviction and imprisonment for making a mistake under a foreign law.”

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I now recognize the Ranking Minority Member for any statement he would like to make at this time.

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Dr. FLEMING. I now recognize the Ranking Minority Member for any statement that he would like to make at this time.

**STATEMENT OF THE HON. GREGORIO KILILI CAMACHO  
SABLAN, A DELEGATE IN CONGRESS FROM THE TERRITORY  
OF THE NORTHERN MARIANA ISLANDS**

Mr. SABLAN. Thank you very much, Mr. Chairman, and welcome to all our guests, the Senator and my colleagues here in the House.

Today we will discuss our most comprehensive Federal law to combat wildlife crime, the Lacey Act. This 100-year-old law is one of our most powerful protections we have for our natural resources in the United States and the most powerful tool we have for preserving important wildlife and habitat abroad. Wildlife like tigers, rhinos, and apes capture the human imagination, yet they face multiple threats around the world. Although these animals are not native to the United States, Americans have repeatedly supported measures to invest in protecting these iconic species in their natural habitat.

For example, we recently held a bipartisan hearing in this Subcommittee that examined the reauthorization of the multinational species conservation funds. While these grants play an integral part in species protection, the global trade in illegal wildlife is estimated to be worth at least \$5 billion annually. The minimal civil penalties recommended in H.R. 4175 would not deter the organized crime syndicates selling wildlife in the black market. Congress recognized in the early 1980s that the Lacey Act required criminal enforcement to provide wildlife—effective wildlife protection, and this remains true today.

Over the last decade, it became clear that vulnerable species were not going to recover as long as their habitats continued to be destroyed. The 2008 amendments to the Lacey Act addressed this deficiency by making it illegal to import illegally logged wood, thus protecting the trees in the forest where these animals live. However, these provisions not only preserve wildlife, they also protect people and their jobs. The loss of forest resources have been found to directly affect the livelihood of 90 percent of the 1.2 billion people living in extreme poverty worldwide. The Lacey Act has helped reduce illegal logging by at least 22 percent globally with reductions as high as 50 to 70 percent in some key countries.

Illegal logging also affects domestic jobs. Prior to passage of the 2008 amendments, timber and wood industries in the United

States were forced to compete with countries that illegally log in national parks, avoided duties and taxes, and pay little or nothing for raw materials. These unfair practices can cost U.S. logging industries up to a billion dollars a year which directly translates to a decrease in American jobs.

There have been challenges in implementing these new provisions, and we must make sure the agencies continue to work with industries, retailers, and other stakeholders to minimize the regulatory burden and uncertainty for legitimate businesses. Without additional oversight, it is too early to legislate on these challenges.

I look forward to examining legislation in this Committee that addresses some of the serious problems facing our country rather than spending time on bills that unravel a law that has been examined and unanimously agreed upon by Congress multiple times over the last 112 years. The Lacey Act is working to invigorate U.S. industries and protect human rights and the environment around the world. Thank you, and I look forward to hearing from our witnesses.

[The prepared statement of Mr. Sablan follows:]

**Statement of The Honorable Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs**

Thank you, Mr. Chairman and welcome to all our guests.

Today we will discuss our most comprehensive federal law to combat wildlife crime; the Lacey Act. This 100-year-old law is one of the most powerful protections we have for our natural resources in the United States and the most powerful tool we have for preserving important wildlife and habitat abroad.

Wildlife, like tigers, rhinos, and apes, captivate the human imagination, yet they face multiple threats around the world. Although these animals are not native to the United States, Americans have repeatedly supported measures to invest in protecting these iconic species in their natural habitat. For example, we recently held a bipartisan hearing in this subcommittee that examined the reauthorization of the Multinational Species Conservation Funds. While these grants play an integral part in species protection, the global trade in illegal wildlife is estimated to be worth at least \$5 billion dollars annually. The minimal civil penalties recommended in H.R. 4171 would not deter the organized crime syndicates selling wildlife on the black market. Congress recognized in the early 1980s that the Lacey Act required criminal enforcement to provide effective wildlife protection and this remains true today.

Over the last decade, it became clear that vulnerable species were not going to recover as long as their habitats continue to be destroyed. The 2008 amendments to the Lacey Act addressed this deficiency by making it illegal to import illegally logged wood, thus protecting the trees in the forests where these animals live. However, these provisions not only preserve wildlife, they also protect people and their jobs. The loss of forest resources has been found to directly affect the livelihood of 90 percent of the 1.2 billion people living in extreme poverty worldwide. The Lacey Act has helped reduce illegal logging by at least 22 percent globally, with reductions as high as 50 to 70 percent in some key countries.

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tiple times over the last 112 years. The Lacey Act is working to invigorate U.S. industries; and protect human rights and the environment around the world.

Thank you and I look forward to hearing from our witnesses.

Dr. FLEMING. I thank the Ranking Member Mr. Sablan for his opening statement. I now recognize Mr. Markey for an opening statement.

**STATEMENT OF THE HON. EDWARD MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS**

Mr. MARKEY. Thank you, Mr. Chairman, very much. While there may never be an answer to the age old question of whether a tree falling in an empty forest makes a sound, today we ask another question. If a tree is illegally cut down in a forest and made into a guitar, do we make a sound about it? Is undermining a bedrock law the right tone for us to set, especially if it threatens domestic timber industries? Throughout its 112 years, the Lacey Act, a Republican Congressman from Iowa, has enjoyed strong bipartisan support. The original bill was proposed by John Lacey in 1900. Republicans have frequently championed provisions to expand and strengthen the Act, including the Reagan-era addition of criminal penalties in response to major organized crime smuggling.

Most recently, the 2008 amendments have revived the domestic timber industry and reduced illegal logging internationally, and they were supported strongly by the Bush Administration and passed this Committee by unanimous consent. It has helped to stop illegal trade in timber, wildlife, and other natural resources. It is one of our greatest conservation laws and protects domestic industries. Stemming the tide of illegal wood translates to a billion dollars of increased revenue here in the United States every year. But now, the times, they are a-changin'.

Both bills we are considering today will significantly weaken, or outright destroy these benefits, but while H.R. 3210 focuses on the 2008 amendments, H.R. 4171 targets the entire Lacey Act. H.R. 4171 would end criminal prosecution for violating the Act. It would excise all references to foreign law. The law also says that Fish and Wildlife agents can't carry a gun while enforcing the law, even when they are working in remote areas where many of the individuals involved in illegal wildlife trafficking also participate in drug trafficking, human trafficking, and other forms of organized crime.

My Republican colleagues who defend the right to bear arms would disarm law enforcement officers charged with protecting endangered bears and other wildlife. Someone claimed that we should shred up the Lacey Act just so guitar players can shred on illegally sourced instruments, that if you want to play Norwegian Wood, you shouldn't fret about where your guitar's wood originated. Well, some of our Nation's best musicians disagree.

Today we will hear from Adam Gardner, the frontman for the Boston-based band, Guster. He is a graduate of Tufts, which is in my district, and has dedicated his career to ensuring that musical tours keep in better harmony with our environment. Today he is releasing a pledge of support for the Lacey Act signed by Willie Nelson, Bonnie Raitt, Dave Matthews Band, Maroon 5, Jason

Mraz, and many others. Mr. Chairman, I ask for unanimous consent to submit for the record text from this pledge which has been signed by those musicians.

Dr. FLEMING. Without opposition, so approved.

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**Turn Up The Volume On Illegal Logging**

Widespread illegal logging is placing at risk the wood we treasure in our musical instruments, and thus the future of music as we know it. As musicians dedicated to our art and to protecting the earth's natural resources, we call on everyone involved in the sourcing, crafting and production of musical instruments to join us in our commitment to eliminating all trade in illegally logged timber and forest products. We will not buy a new instrument without asking where the wood comes from and if it was harvested legally and sustainably.

We support the Lacey Act and other laws that prohibit trade in illegally sourced wood and we oppose the efforts currently underway to weaken the Lacey Act. We urge lawmakers, suppliers and craftsmen to ensure that our art has a positive impact on the environment rather than contributing to forest destruction. We call on our fellow musicians to do the same.

Signed,

Bonnie Raitt  
David Crosby  
Willie Nelson  
Maroon 5  
Dave Matthews Band  
Jack Antonoff, F.U.N.  
Jason Mraz  
Bob Weir  
Bare Naked Ladies  
Brad Corrigan, Dispatch  
Pat Simmons, Doobie Brothers  
Ray Benson, Asleep at the Wheel  
The Cab  
Of a Revolution(O.A.R)  
Ryan Dobrowski, Israel Nebeker, Blind Pilot  
Guster  
Reverb  
Razia Said

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Mr. MARKEY. We know that slash and burn techniques are destroying the Amazon, and now many are saying we should also burn through international forests to make guitars for Slash. These musicians reject that notion. Over the years, these artists have gathered to sing "We Are the World." They have said that they "Ain't Gonna Play Sun City" in apartheid South Africa. They have pushed for Farm Aid to assist oppressed world communities, and yet again these artists can see the forest for the illegal trees and are rejecting this latest attack against our bedrock conservation laws.

I would like to thank my colleagues for calling this hearing. I am confident that by exploring these two bills further, we can all come to the conclusion that we should stand by the Lacey Act and soon be singing from the same songbook on this matter. I thank you,

Mr. Chairman. I thank my colleagues for coming to this Committee today to testify on this very important issue. I yield back the balance of my time.

Dr. FLEMING. I thank the gentleman, Mr. Markey.  
[The prepared statement of Mr. Markey follows:]

**Statement of The Honorable Edward J. Markey, Ranking Member,  
Committee on Natural Resources**

While there may never be an answer to the age old question of whether a tree falling in an empty forest makes a sound, today we ask another question: if a tree is illegally cut down in a forest, and made into a guitar, do we make a sound about it? Is undermining a bedrock law the right tone for us to set, especially if it threatens domestic timber industries?

Throughout its 112 years the Lacey Act has enjoyed strong bi-partisan support. The original bill was proposed by Republican John Lacey in 1900. Republicans have frequently championed provisions to expand and strengthen the Act, including the Reagan era addition of criminal penalties in response to major organized crime smuggling. Most recently, the 2008 amendments that revived the domestic timber industry and reduced illegal logging internationally were strongly supported by the Bush administration and passed this committee by unanimous consent.

It has helped to stop illegal trade in timber, wildlife, and other natural resources. It is one of our greatest conservation laws, and protects domestic industries. Stemming the tide of illegal wood translates to a billion dollars of increased revenue here in the U.S. every year.

But now, the times they are a-changing.

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H.R. 4171 would end criminal prosecution for violating the act. It would excise all references to foreign law. The law also says that Fish and Wildlife agents can't carry a gun while enforcing the law, even when they are working in remote areas where many of the individuals involved in illegal wildlife trafficking also participate in drug trafficking, human trafficking, and other forms of organized crime. My Republican colleagues, who reflexively defend the right to bear arms, would disarm law enforcement officers charged with protecting endangered bears and other wildlife.

Some will claim that we should shred up the Lacey Act just so guitar players can shred on illegally-sourced instruments. That if you want to play "Norwegian Wood", you shouldn't fret about from where your guitar's wood originated.

Well, some of our nation's best musicians disagree. Today we will hear from Adam Gardner, the frontman for the Boston-based band Guster. He's a graduate of Tufts, which is in my district, and has dedicated his career to ensuring that musical tours keep in better harmony with our environment. Today, he is releasing a pledge to support the Lacey Act, signed by Willie Nelson, Bonnie Raitt, Dave Matthews Band, Maroon 5, Jason Mraz [Mur-AZ] and many others. Mr. Chairman, I ask for Unanimous Consent to submit for the record text from this pledge, which has been signed by over 40,000 musicians, bands, and music organizations.

We know that slash and burn techniques are destroying the Amazon, and now the Republicans are saying we should burn through international forests to make guitars for Slash. These musicians reject that notion.

Over the years, musicians have gathered to sing "We Are the World." They have said they "ain't gonna play Sun City" in apartheid South Africa. They have pushed for Farm Aid to assist depressed rural communities. And yet again, these artists can see the forest for the illegal trees, and are rejecting this latest attack against our bedrock conservation laws.

I'd like to thank my colleagues for calling this hearing. I am confident that by exploring these two bills further we will all come to the conclusion that we will stand by the Lacey Act, and soon be singing from the same songbook on this matter.

Dr. FLEMING. Like all witnesses, your written testimony will appear in full in the hearing record, so I ask that you keep your oral statements to 5 minutes, as outlined in our invitation letter to you and under Committee Rule 4(a). Our microphones are not automatic, as you know, so please press the button when you are ready

to begin, and just parenthetically, we have a series of votes coming up in about 20 to 30 minutes, so our main goal, apart from hearing from our fantastic witnesses, is to get through them before our vote is called. So that is one of the things we are going to be working for.

And of course, as you know, the lights, the way they work here is 4 minutes on green, 1 minute on yellow, and then when it turns red to conclude your remarks.

I would now like to welcome today's witnesses on panel one, Senator Rand Paul of Kentucky, thank you, sir, Congressman Jim Cooper of Tennessee, Congressman Earl Blumenauer of Oregon, thank you, and Congressman Paul Broun of Georgia.

Senator Paul, you are now recognized, sir, for 5 minutes.

**STATEMENT OF THE HON. RAND PAUL, A SENATOR IN  
CONGRESS FROM THE STATE OF KENTUCKY**

Senator PAUL. Thank you, Chairman Fleming, and thank you for inviting me over here to talk about this important issue. You know, when I first heard about the raid at Gibson Guitars, I was appalled, you know, that this could happen in the United States of America, that we would send in Federal agents from the Fish and Wildlife with automatic weapons to invade a company that hires, you know, 2,800 people around our country. These are law-abiding people that are making guitars, and there is no grizzly bears in downtown Nashville or in Gibson Guitar that we need to be concerned with.

I was aghast when I learned that what they were accused of was not even breaking a U.S. law, they are accused of breaking a foreign law. The more we looked into this, I was then incensed to find out that the foreign law they are accused of breaking has nothing to do with conservation, has nothing to do with the rain forest, that all that hyperbole about rain forests and conservation has nothing to do with the issue here. They are accused of breaking an Indian labor law.

This is a law that says the wood has to be finished in India. Same wood can come here. They just want the jobs over in India and not over here. And they have actually said in their legal pleadings that if Gibson Guitar will finish the wood over there, they won't be in violation. So if we send the jobs that we have in Nashville over to India, everything is fine.

This is ridiculous. I could not believe that we have a law on our books that says we are to obey all foreign laws. How can that possibly be an American law and how can that possibly be constitutional? Not just all past foreign laws. We have agreed to obey all future foreign laws.

There was a case a few years ago of two fishermen off the coast of Florida, Abner Schoenwetter and David McNab. They got 6 years in prison for breaking a law that wasn't a U.S. law, but for breaking a Honduran fishing regulation. There is something from the tradition of due process that says you have to have fair notice. It comes out of our common law tradition. How are you supposed to have fair notice of a Honduran law? What if you don't speak Spanish? What if you don't speak Mandarin and it is a Chinese fishing regulation?

We are expected to obey all the laws of the entire world? It really smacks at our sovereignty, it smacks at the concept that we create the laws in our country and that we are of any importance here, that we are going to agree to accept all past and future laws of foreign countries?

So I think really this is something that is long overdue. It really grieves me that we put two people in jail for 6 years for breaking the laws of a foreign country. In their case, the Honduran government actually came and testified on their behalf and said they hadn't broken the laws. One of the laws that they were accused of breaking was that the fish were not in cardboard, they were in plastic. You know, to put someone in jail for that, you can be put in jail a year for each one of these misdemeanor crimes. What if you brought in 30,000 lobster and they found 10,000? You could get 10,000 years in prison. It is out of control. It is outrageous, and we need to do something to stop it.

Really, you need to say that, look, if we are in favor of the environment, and I am, and you want to protect against illegal logging or you want to protect certain species, if you don't want people cutting off the horns of a rhinoceros and importing it, make a law. That is what we are here for. Make the law, but it would then be a U.S. law. But don't say that we are going to accept all the laws of Kenya or we are going to accept all the laws of South Africa. That is absurd on its face, it is Pandora's Box, we have gone too far.

There are now 4,500 Federal crimes. The Constitution only authorizes us to deal with four crimes—treason, counterfeiting, and a couple of other crimes, laws against Nations, but it doesn't authorize us to be involved in all of this. We can have some restrictions on importation, but I see no reason to have criminal penalties.

Our bill is very simple. We get rid of all reference to obeying foreign laws, which doesn't do anything to the Lacey Act. You still have restrictions in the Lacey Act. And if you need more, pass them, but don't obey foreign laws, and it says that we should have civil penalties, not criminal penalties. I don't think we should be putting Americans in jail for this. Thank you, Mr. Chairman. I yield back my time.

Dr. FLEMING. Thank you, Senator. That is very compelling testimony on your part, and really eye opening. I would imagine most people in this room would not even be aware of some of the things that you bring forward today.

[The prepared statement of Senator Paul follows:]

**Statement of The Honorable Rand Paul,  
a U.S. Senator from the State of Kentucky**

Chairman Fleming, Ranking Member Sablan, and distinguished Members of the Committee on Natural Resources, I am honored to be here today to urge the House and Senate to move forward on the Freedom from Over-Criminalization and Unjust Seizures Act of 2012—the FOCUS Act (S. 2062 & H.R. 1471).

Congressman Broun and I introduced companion bills in the Senate and in the House because of our shared concern regarding a dangerous law called the Lacey Act. The FOCUS Act makes significant revisions to the Lacey Act, revisions that we believe are necessary to prevent Americans from having their businesses raided by armed federal agents, their property seized, and even being sent to federal prison.

I refer to the Lacey Act as “dangerous” because of the ways in which it has already wreaked havoc in the lives of many innocent Americans. The Lacey Act serves as a high-profile and frightening example of overcriminalization. Victims include Abner Schoenwetter and David McNab, who spent years in federal prison for “violating” Honduran fishing regulations that the Honduran government itself argued were invalid.

Most recently, just this past August, Henry Juskiewicz, the Chairman and CEO of Gibson Guitar Corporation, had his company raided by armed federal agents. A half million dollars worth of Mr. Juskiewicz’s property was seized, along with guitars and computer hard drives. His factory was shut down for a day, and his employees were ordered to go home. All this was done to him because he allegedly violated the Lacey Act, yet the Department of Justice has yet to file any formal charges against him.

In my testimony today, I will first provide a brief background regarding the history of the Lacey Act. I will then discuss the ways in which I believe this law violates the original intent of the Constitution, and will summarize the revisions the FOCUS Act makes to the Lacey Act. I will conclude with a discussion of the manner in which the FOCUS Act relates to my overall concern with the ever-growing threat of overcriminalization.

### **I. Background**

The Lacey Act is a conservation law that attempts to prohibit trafficking in “illegal” wildlife, fish and plants. The original law was passed in 1900 for the purpose of protecting against interstate poaching.<sup>1</sup> Congress later amended and expanded the Lacey Act to make it a crime to import or take any wildlife, fish or plants “in violation of any foreign law.”<sup>2</sup> Since its passage in 1900, subsequent amendments (in 1935, 1969, 1981, 1988, and most recently, 2008) have produced what today is an extremely broad and vague law that contains harsh criminal penalties.

As Paul Larkin, Senior Legal Fellow at the Heritage Foundation explains, “[t]he Lacey Act would not raise concern if the only penalty were a civil fine, but the law authorizes up to one year’s imprisonment for every violation of the act. A one-year term of confinement may not seem onerous (unless, of course, you have to serve it), but a combination of one-year sentences could add up quickly. For example, if each fish taken in violation of the act were to constitute a separate offense, a fisherman could wind up with a three-or four-figure term of imprisonment just by bringing aboard one net’s worth of fish.”<sup>3</sup>

Notably, the original Lacey Act of 1900 contained a penalty “not exceeding two hundred dollars,” and there was no provision imposing jail or prison time.<sup>4</sup> When the Lacey Act was significantly amended in 1981—an amendment that expanded the potential penalties to allow for felony criminal convictions—a representative of the National Rifle Association specifically voiced civil liberties concerns with the changes, stating that his “first concern [wa]s with the broad expansion of criminal liability.”<sup>5</sup>

### **II. The Lacey Act is Unconstitutional**

I believe that the Lacey Act in its current form violates our Constitution in a couple significant ways. First, its broad and unspecific delegation of congressional power to foreign governments violates Article I of the Constitution, which vests all legislative powers in the United States Congress alone. By making it a federal offense to import fish, wildlife, or plants “in violation of any foreign law,” Congress essentially delegates law-making authority to other nations.<sup>6</sup>

Second, the Lacey Act is unconstitutionally vague, and fails to satisfy basic due process requirements of fair notice. As the Heritage Foundation notes, the Lacey Act in fact “violates one of the fundamental tenets of Anglo-American common law: that ‘men of common intelligence’ must be able to understand what a law means...The criminal law must be clear not to the average lawyer, but to the average *person*.”

<sup>1</sup> Act of May 25, 1900, Ch. 553, 31 Stat. 188 (codified as amended at 16 U.S.C. §§3371–78).

<sup>2</sup> 16 U.S.C. § 3371(d), § 3372(a)(2)(A) & (B), § 3372(a)(3)(A), and § 3373(d).

<sup>3</sup> Paul J. Larkin, Jr., *Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012*, The Heritage Foundation Center for Legal & Judicial Studies, No. 78, at 2 (March 16, 2012).

<sup>4</sup> Act of May 25, 1900, Ch. 553, 31 Stat. 188 (codified as amended at 16 U.S.C. §§3371–78).

<sup>5</sup> *Proposed Amendments to the Lacey Act of 1981*, 97th Cong. 227 (March 18, 1981) (testimony of Neal Knox).

<sup>6</sup> Although this argument has been rejected by various circuit courts, it has never been squarely presented before the U.S. Supreme Court. *See, e.g., United States v. Lee*, 937 F.2d 1388, 1393–94 (9th Cir.1991) (rejecting a delegation challenge to the Lacey Act).

Even if there were lawyers who could readily answer intricate questions of foreign law—and do so for free—the criminal law is held to a higher standard.”<sup>7</sup>

Consider the practical effect of having a law such as the Lacey Act on the books that makes it a federal crime to violate any fish, wildlife, or plant law or regulation of any country in the world:

[N]o one should be held accountable under this nation’s law for violating a foreign nation’s law. Laws come in all forms (e.g., statutes vs. regulations); in all shapes and sizes (e.g., the Sherman Act vs. the Clean Air Act); and in all degrees of comprehensibility (e.g., the law of homicide vs. the Resource Conservation and Recovery Act). Different bodies have authority to promulgate laws (e.g., legislatures, courts, and agencies); to interpret them (e.g., the President or an agency’s general counsel); and to enforce them (e.g., city, state, and federal law enforcement officers and prosecutors). And that is just in America.

Foreign nations may have very different allocations of governmental power, bureaucracies, and enforcement personnel. Some will speak and write in English; some will not. Some will make their decisions public; some will not. Some will have one entity that can speak authoritatively about its own laws; some will not. And different components of foreign governments may change their interpretations of their own laws over time, perhaps nullifying the effect of a prior interpretation, or perhaps not.

It is sheer lunacy to assume that the average citizen can keep track of such laws, let alone do so by him- or herself without a supporting cast of lawyers—that is, assuming that the average citizen could find a lawyer knowledgeable about the intricacies of a particular foreign nation’s law.<sup>8</sup>

A particularly tragic real-life example of the manner in which the Lacey Act violates basic constitutional requirements of due process and fair notice occurred with the convictions and imprisonment of Abner Schoenwetter and David McNab. Schoenwetter and McNab were convicted and sentenced to eight years in federal prison for violating Honduran regulations regarding lobster importation. The regulation required that the lobsters be packed in plastic bags, but Schoenwetter and McNab instead packed them in boxes. On appeal, the Honduran government itself filed a brief on Schoenwetter and McNab’s behalf, arguing that the regulation never even had the force of law in Honduras, yet the circuit court refused to overturn the convictions.<sup>9</sup>

There are violent criminals who spend less time in prison than did these two innocent men.

The FOCUS Act would alter the Lacey Act by removing all references to “foreign law.” It would also remove the Lacey Act’s criminal penalties and substitute a reasonable civil penalty system. Lacey Act violations with a market value of less than \$350.00 would be subject to a maximum penalty of \$10,000.00, and other violations would be subject to a penalty of up to \$200,000.00. These changes would remove the constitutional flaws inherent in the Lacey Act in its current form.

### III. The Problem of Over-Criminalization

The Lacey Act is but one example of the ever-growing problem of overcriminalization that we face in this country. Criminal law is increasingly being used as a tool by our government bureaucracies to punish and control honest businessmen attempting to make a living. Historically, the criminal law was intended to punish only the most heinous offenses that were known and understood by all people to be inherently evil or wrongful, offenses such as murder, rape, theft, arson, etc. Yet today, the criminal law is constantly used to punish behavior such as fishing without a permit, packaging a product incorrectly, or shipping something with an “improper” label.

The plain language of our Constitution specifies a very limited number of federal crimes. But we have now moved so far away from the original intent of our Constitution that we don’t even know or have a complete list of all the federal criminal laws on the books. There are over 4,450 federal statutory crimes scattered throughout the U.S. Code. And it is estimated that there are tens of thousands more crimes

<sup>7</sup>Larkin, *supra* note 3, at 4.

<sup>8</sup>Larkin, *supra* note 3, at 4.

<sup>9</sup>See *United States v. McNab*, 331 F.3d 1228, 1233, 1239–47 (11th Cir. 2003). The *McNab* case is discussed extensively in the book, *ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVISTS JUDGES THREATEN YOUR LIBERTY* (2010) (Paul Rosenzweig & Brian W. Walsh, eds.).

that exist among all our federal regulations. But no one—not even criminal law professors or criminal lawyers—actually knows the exact number with certainty.<sup>10</sup>

In addition to not knowing the exact number of federal crimes, another serious problem is that many of the criminal statutes that have been passed by Congress in recent years lack adequate *mens rea* requirements. In other words, Congress passes laws that either completely lack—or have an extremely weak—“guilty mind” requirement, which means that someone charged under the statute could be convicted of a federal offense when he or she simply made an honest mistake, or did not possess the criminal culpability traditionally necessary for a criminal conviction.

The Lacey Act is a frightening example of this trend of overcriminalization. I urge my colleagues to support Congressman Broun and me in our efforts to pass the FOCUS Act. As Justice Scalia recently stated, “We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws...In the field of criminal law, at least, it is time to call a halt.”<sup>11</sup>

Dr. FLEMING. Next I would like to recognize Mr. Cooper from Tennessee. You have 5 minutes, sir.

**STATEMENT OF THE HON. JIM COOPER, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF TENNESSEE**

Mr. COOPER. Thank you, Chairman Fleming. The bipartisan legislation that my Republican colleagues, Mary Bono Mack and Marcia Blackburn, and I have introduced is really very simple, although the details of Lacey Act issues can be extremely complex. Our legislation tries to correct several mistakes that we think Congress made in 2008 when it passed the latest amendments to the century-old Lacey Act. We are not trying to undermine the Lacey Act or other environmental protections, only to reduce the unintended consequences of the 2008 amendments. Many Members did not notice the 2008 drafting errors because the Lacey amendments were a minor part of the farm bill that year.

The following are three legislative goals which have broad bipartisan support: Number one, rare wood products, such as guitars that were purchased prior to May 22, 2008, should be grandfathered so that musicians do not have to fear owning them. They were purchased innocently, and their owners should not be punished retroactively.

This is particularly important because due to the interaction with the 2000 law involving drug dealers, musicians cannot complain or cannot claim the innocent owner defense and do not even have the right to file a complaint if the government confiscates their instruments. This is a government taking combined with a gag order.

Point number 2. Keep in place the Lacey Act ban on importation of endangered wood and plant products after May 22, 2008. We support the prospective nature of the Lacey Act because we are against illegal logging. We want to preserve rare trees and plants so that future generations have the chance to enjoy and benefit

<sup>10</sup>See generally John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation L. Memo. No. 26, June 16, 2008; CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, *THE FEDERALIZATION OF CRIMINAL LAW* (1998). For an excellent and thorough analysis of the serious problems posed to our nation by the proliferation of criminal laws at the federal level, and the lack of adequate *mens rea* requirements in the majority of these laws, see BRIAN W. WALSH AND TIFFANY M. JOSLYN, *THE HERITAGE FOUNDATION AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (2010).

<sup>11</sup>*Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

from them. Our bill is not a broad overhaul of the Lacey Act, but a small surgical fix. It is based on the belief that the Lacey Act is working but requires a clarification to ensure musicians and folks like that can keep their guitars.

Some have argued that this can be accomplished through regulation, not legislation, but for years, we have waited for agency regulators to clarify the 2008 amendments. They have not. We should not delay any longer when Congress can pursue a legislative course of action to help musicians and small business owners.

Point number 3. Let's streamline the importation of legal goods. There are countless wood and plant products that can be harvested abroad in an environmentally sustainable fashion. U.S. firms that depend on such supplies should not face needless hassles importing these products. Likewise, a store owner who unknowingly imports a guitar made from illegal wood shouldn't be penalized the first time, but those firms and individuals who knowingly violate U.S. laws on importing endangered species should be severely punished.

There has been a lot of unnecessary confusion about our attempts to improve the Lacey Act. For example, there is a pending investigation of a company located in my congressional district, Gibson, which has received a great deal of publicity. Our legislation does not affect that case nor any other pending investigation.

Months before the latest Gibson investigation, a very prominent Nashville musician, Vince Gill, had been quoted in Newsweek Magazine pointing out the risks that he took in traveling with his old guitar to perform in concerts. Helping musicians like Vince Gill and Ricky Skaggs is the primary impetus of our legislation because all Americans have the constitutional right to travel. Musicians are denied that right if they cannot travel with their old instruments.

Another confusion in the legislation comes from American distaste for foreign law. H.R. 4171, the FOCUS Act, makes a strong ideological statement but does nothing to protect musicians or other owners of pre-2008 products. It eliminates criminal penalties for violation of any foreign law with regard to the Lacey Act which harms efforts to curb illegal logging. Our bill does not require that we obey foreign law, but treats foreign law as data to be included in an accessible U.S. database to streamline the importation process and help ensure compliance. U.S. agencies retain the discretion to state the requirements that U.S. importers and owners should follow.

Mr. Chairman, I ask you to help us change the unintended consequences of the 2008 Lacey Act amendments. Without your help, not only are musicians and music stores in jeopardy, but other legitimate businesses such as antique dealers and lumber importers. We can help these innocent people without harming the worthy environmental goals of the Lacey Act. We can have healthy forests and legal guitars. Thank you, Mr. Chairman.

Dr. FLEMING. I thank the gentleman for his testimony.

[The prepared statement of Mr. Cooper follows:]

**Statement of The Honorable Jim Cooper, a Representative  
in Congress from the State of Tennessee**

Chairman Fleming and Ranking Member Sablan, thank you for allowing me to testify to you today regarding H.R. 3210, the RELIEF Act.

The bipartisan legislation that my Republican colleagues, Mary Bono Mack and Marsha Blackburn, and I have introduced is really very simple, although the details of Lacey Act issues can be extremely complex. Our legislation tries to correct several mistakes that we think Congress made in 2008 when it passed the latest amendments to the century-old Lacey Act. We are not trying to undermine the Lacey Act or other environmental protections, only to reduce the unintended consequences of the 2008 amendments. Many members did not notice the 2008 drafting errors because the Lacey amendments were a minor part of the farm bill that year.

The following are our three legislative goals, which have broad bipartisan support:

1. Rare wood products such as guitars that were purchased prior to May 22, 2008 should be grandfathered so that musicians do not have to fear owning them. They were purchased innocently, and their owners should not be punished retroactively. This is particularly important because, due to interaction with a 2000 law involving drug dealers, musicians cannot claim the innocent owner defense, and do not even have the right to file a complaint if the government confiscates their instruments. A government taking is combined with a gag order.
2. Keep in place the Lacey Act ban on the importation of endangered wood and plant products after May 22, 2008. We support the *prospective* nature of the Lacey Act because we are against illegal logging. We want to preserve rare trees and plants so that future generations have the chance to enjoy and benefit from them. Our bill is not a broad overhaul of the Lacey Act, but a small surgical fix. It is based on the belief that the Lacey Act is working, but requires a clarification to ensure musicians can keep their guitars. Some have argued that this can be accomplished through regulation, not legislation. For years, we have waited for agency regulators to clarify the 2008 amendments. They haven't. We should not delay any longer when Congress can pursue a legislative course of action to help musicians and small business owners.
3. Streamline the importation of legal goods. There are countless wood and plant products that can be harvested abroad in an environmentally sustainable fashion. U.S. firms that depend on such supplies should not face needless hassles in importing those products. Likewise, a store owner who *unknowingly* imports a guitar made from illegal wood shouldn't be penalized the first time. But those firms and individuals that knowingly violate U.S. laws on importing endangered species should be severely punished.

There has been a lot of unnecessary confusion involving our attempts to improve the Lacey Act. For example, there is a pending investigation of a company located in my congressional district, Gibson, which has received a great deal of publicity. Our legislation does not affect that case, or any other pending investigation. Months before the latest Gibson investigation, a very prominent Nashville musician, Vince Gill, had been quoted in *Newsweek* magazine pointing out the risks he took in traveling with his old guitar to perform in concerts. Helping musicians like Vince Gill and Ricky Skaggs is the primary impetus of our legislation because all Americans have the constitutional right to travel. Musicians are denied that right if they cannot travel with their old instruments.

Another bit of confusion comes from American distaste for foreign law. H.R. 4171, the FOCUS Act, makes a strong ideological statement but does nothing to protect musicians or other owners of pre-2008 products. It eliminates criminal penalties for violation of any foreign law with regard to the Lacey Act, which harms efforts to curb illegal logging. Our bill does not require that we obey foreign law but treats it as data to be included in an accessible database to streamline the importation process and help ensure compliance. U.S. agencies retain the discretion to state the requirements that U.S. importers and owners must follow.

Mr. Chairman, I ask you to help us change the unintended consequences of the 2008 Lacey Act amendments. Without your help not only are musicians and music stores in jeopardy, but other legitimate businesses such as antique dealers and lumber importers. We can help these innocent people without harming the worthy environmental goals of the Lacey Act. We can have healthy forests *and* legal guitars.

Mr. Chairman, there are many technical details in our legislation but all you need to know is that we did not draft our bill in haste or without input from interested groups. We were guided by the three Consensus Statements that were issued from 2009 to 2011 by all interested stakeholders, from retailers, to musicians, to domestic hardwood groups, to environmental organizations. You see, Mr. Chairman, almost immediately after the 2008 Lacey Act amendments were passed, most people realized that the amendments were deeply flawed. They immediately set to work on a collegial basis to identify and solve those problems by issuing Consensus Statements signed by all the parties. There is no more helpful legislative guide than the com-

mendable volunteer efforts behind these Consensus Statements, which we did our best to embody in our bill, H.R. 3210, the RELIEF Act.

Thank you again, Mr. Chairman and Ranking Member Sablan, and I look forward to any questions you may have.

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Dr. FLEMING. Next, Mr. Blumenauer, you have 5 minutes, sir.

**STATEMENT OF THE HON. EARL BLUMENAUER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON**

Mr. BLUMENAUER. Thank you, Mr. Chairman. I appreciate the opportunity to testify in support of the Lacey Act amendments and in opposition to legislation that would undermine the success we have had in protecting the U.S. timber industry and leading by example to strengthen sustainable forest practices worldwide. I was a principal author of that in the House, I worked with this Committee, spent countless hours with industry, labor, environmental groups to have a piece of legislation we think is very important.

The two bills under consideration today would not only devastate the 2008 Lacey Act, but throw into question a century of environmental protections while adding additional uncertainty, and I am happy to work with this Committee or anybody else to deal with any legitimate concerns or unintended consequences. I am intrigued that somebody is doing 6 years in prison for putting a fish in a plastic box. I will look forward to finding the details about that.

But the Lacey Act, first passed in 1900, to prohibit trade in endangered species, requires U.S. importers to ensure that the products they import were not harvested illegally. In 2008, the legislation I sponsored amended the Act to include prohibition of trade in wood and wood products illegally harvested in their country of origin. It is very straightforward. Companies who import wood products need to play by the rules in the country from which they import.

The amendments were needed because the American forest products industry was losing over \$1 billion a year to people who cheat. For too long, developing countries were struggling to do the right thing by implementing sustainable forestry laws, and it was being undermined by pirates, and it isn't just illegally harvested. These people were involved with trafficking. The testimony before this Committee about the violence, the bribery, the oppression goes beyond just a few endangered species. And it had devastating consequences on the environment, and the rate of illegal logging was going up, and finally there was a consensus across industry groups, business and labor, as I mentioned, that a legislative approach was necessary to undermine that black market and to protect the United States' economy, the environment, and local communities.

Now, the Bush Administration in 2002 started work on this, noting the problems. I worked with the Bush Administration, one of the officials who testified with me before this Committee on the amendments. The Lacey Act actually is far broader than the immediate impact on protecting American jobs and the forest products industry. It was a perfect illustration of the United States leading by example having a positive impact on the strength of local environmental protection laws in developing countries. Since 2008, ille-

gal logging has been reduced by as much as 25 percent worldwide. Taking their cues from the United States, countries such as Japan, New Zealand, Australia, I worked with the European Union doing legislation modeled on this. It is having an effect.

The RELIEF Act and FOCUS Act would undermine these successes. Proponents claim that these offer technical corrections, but they would move an entire global market back in time. Both bills would remove important tools the Lacey Act provides for investigators, law enforcement officials, and companies who care about where their products come from, and that is actually most of the people and probably most of the performers.

That is why the bills do not represent the consensus statements and are opposed by a broad coalition of stakeholders, including the League of Conservation Voters, the Hardwood Federation, American Forest and Paper Association, the Sierra Club, and the United Steelworkers. When did you ever see a coalition like that united? Implementation takes time and cooperation. We need to work together. I am happy to deal with refinement. But it is very, very important that we not undermine it.

With all due respect, there is no performer that is being prosecuted for carrying an instrument to a city that might have been prior to that. In fact, it has been abundantly clear that there is no intent by USFWS to enforce it on the individual level and it has never happened. There is no need to eliminate the notion of first-time penalties in the exercise of due care. For 4 decades this has been the standard in the Lacey Act, and other businesses have been able to deal with it.

And last but not least, I would have been happy to work with my friend, Mr. Cooper; we are two doors down. We have never talked about it before. I am happy to work with him to clarify this ambiguity. Mr. Chairman, I will conclude my remarks. I would like unanimous consent, however, to enter into the record the statement from a broad coalition of environmental groups. I would like unanimous consent to enter into the record a statement from the United States Forest Products Industry, including the American Forest Foundation, American Forest and Paper Association, American Hardwood Council, the Hardwood Federation, Indiana Hardwood Lumber Association, Kentucky Forest Owners Association, State Lakes Lumber Association, National Alliance of Forest Owners, the National Hardwood Lumber Association, and the Southeastern Lumber Manufacturers. And then, last but not least, the effect of the proposed "RELIEF Act," on the Lacey Act, I would like to have entered into the record.

Dr. FLEMING. Without objection, so ordered.

Mr. BLUMENAUER. Thank you. Thank you for your courtesy.

Dr. FLEMING. We are down under the 8-minute point, so we will go ahead and recess. Would you, Dr. Broun, be able to join us immediately after votes? We will get your testimony.

Mr. BROUN. I would be happy to, Mr. Chairman.

Dr. FLEMING. So we will be happy to get your testimony. We are now recessed until voting.

[Recess.]

Dr. FLEMING. OK, the Committee will come to order. We will resume with Dr. Broun, so Dr. Broun, sir, you have 5 minutes.

**STATEMENT OF THE HON. PAUL C. BROUN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA**

Mr. BROUN. Thank you, Chairman. I greatly appreciate your holding a hearing on this important issue, and my bill, H.R. 4171, the Freedom From Overcriminalization and Unjust Seizures Act or FOCUS Act of 2012. I greatly appreciate Senator Rand Paul, my dear friend, for being a leader on this issue in his bill, which is a companion bill. It is Senate Bill 2062. I was glad that he was here to testify along with others on this Act.

When the Lacey Act was first signed into law in 1900, it was primarily designed as a measure to preserve wild game and to make poaching a Federal crime. As originally enacted, it imposed a maximum penalty of \$200 for a violation. It did not contain any provisions for arrest or imprisonment as it does today. Over the years, and most recently through the changes in 1981 and 2008, the Lacey Act has become the poster child for how the Federal Government abuses its power and has developed a system of sweeping criminalization.

The Lacey Act is no longer about conservation. American citizens now face prosecution based upon foreign laws and regulations that are only concerned with many things such as labor management relations, minimum wage rules or with tax laws, and those can be very ambiguous in nature. U.S. importers have been turned into policemen who are responsible for knowing a myriad of foreign laws and regulations that are simply impossible to keep track of those. Even worse, importers face the threat of criminal prosecution regardless of whether or not they intended to violate a foreign law.

As a practical matter, the Lacey Act delegates lawmaking authority to foreign governments and foreign government officials. We are subjugating American citizens to foreign law, whether they are there in the foreign country or here in this one. And it is an attack upon our sovereignty, as Senator Rand Paul mentioned in his testimony.

These officials in foreign countries are neither legally accountable in U.S. courts nor politically accountable to the U.S. electorate. This delegation of congressional power to foreign governments and foreign officials raises serious questions under Article I of the U.S. Constitution. It also makes little sense as a matter of Federal criminal justice policy. Furthermore, it allows U.S. officials to apply foreign laws in cases where the accused might not even have been aware of the law that they allegedly violated.

Most of the glaring abuses of the Lacey Act took place in the case brought against David McNab and Abner Schoenwetter. These were two businessmen that were sentenced to 97 months in prison for supposedly violating Honduran fishing regulations, and what crimes did they commit deserving of such a harsh sentence? They imported lobsters that had been transported in plastic bags instead of cardboard boxes, as required by Honduran law. Six years in jail for transporting lobsters in plastic bags.

Additionally some of the lobster tails had fallen short of the minimum length spelled out in Honduran law. Even more disturbing, the government of Honduras told U.S. authorities that these regulations were not even valid in Honduras. These men were found

guilty based on Honduran law that technically wasn't even valid law.

This is insane and inane. Yet the Justice Department even went forward with a case and the 11th Circuit Federal Court of Appeals upheld these convictions. Most recently and infamously this past August, armed Federal agents raided the Gibson Guitar Corporation because of the wood that the company used to manufacture its guitars was supposedly illegal. The government seized more than a million dollars worth of property, shut the factory down, and has yet to even file formal charges or drop the case. Gibson Guitar has been a responsible corporate citizen throughout its existence, and they support conservation efforts. The company deserves better treatment from the Federal Government.

It is often impossible for importers to know that certain products may violate the Lacey Act, and therefore subject them to prosecution. Even worse, foreign producers are often not even held accountable for violating their own laws. It is troubling that our U.S. Government holds U.S. citizens responsible to foreign laws in this country.

I do not believe that Members of Congress intended to delegate our constitutional power to foreign governments or to overcriminalize innocent importers of minor violations. In fact, that is what the Lacey Act does today. The Lacey Act would change all this, and I thank the Chairman for holding this hearing, and hopefully we can move forward to stop this overcriminalization in this country and subjecting American citizens to foreign laws and regulations. Thank you. I yield back.

Dr. FLEMING. I thank the gentleman.

[The prepared statement of Mr. Broun follows:]

**Statement of The Honorable Paul C. Broun, a Representative  
in Congress from the State of Georgia**

I would like to thank Chairman Fleming and Ranking Member Sablan for allowing this hearing today on H.R. 4171, the Freedom from Over-Criminalization and Unjust Seizures (or FOCUS) Act of 2012. I would also like to welcome Senator Rand Paul, my friend and author of the Senate companion bill, S. 2062, to testify with me today on the need for this critical legislation.

When the Lacey Act was signed into law in 1900, it was primarily designed as a measure to preserve wild game and to make poaching a federal crime. As originally enacted, it imposed a maximum penalty of \$200 for a violation, and did not contain any provisions for arrest or imprisonment as it does today.

Over the years, and most recently through changes in 1981 and 2008, the Lacey Act has become the poster child for how the federal government abuses broad, sweeping criminalization. The Lacey Act is no longer about conservation. American citizens now face prosecution based upon foreign laws and regulations that are concerned only with labor-management relations, with minimum wage rules, or with tax laws, and that can be ambiguous in nature. U.S. importers have been turned into policemen, who are responsible for knowing a myriad of foreign laws that are simply impossible to keep track of. Even worse, importers face the threat of criminal prosecution regardless of whether they intended to violate a foreign law and regardless of the reasonableness of their actions.

As a practical matter, the Lacey Act delegates lawmaking authority to foreign governments and foreign government officials who are neither legally accountable in U.S. courts nor politically accountable to the U.S. electorate. This delegation of Congressional power to foreign governments and foreign officials raises serious questions under Article I of the U.S. Constitution. It also makes little sense as a matter of federal criminal justice policy. Furthermore, it allows U.S. officials to apply foreign laws in cases where the accused might not even be aware of the law they allegedly violated.

One of the most glaring abuses of the Lacey Act took place in the case brought against David McNab and Abner Schoenwetter, businessmen who were sentenced to 97 months in prison for supposedly violating Honduran fishing regulations. What crimes did they commit deserving of such a harsh sentence? They imported lobsters that had been transported in plastic bags instead of cardboard boxes, as required by Honduran law. Additionally, some of the lobster's tails had fallen short of the minimum length spelled out in Honduran law. Even more disturbing, the government of Honduras told U.S. authorities that these regulations were not even valid in Honduras. These men were found guilty based on a Honduran law that technically wasn't even a valid law. Yet, the Justice Department still went forward with the case, and the Eleventh Circuit Federal Court of Appeals upheld the convictions.

Most recently and infamously, this past August, armed federal agents raided the Gibson Guitar Corporation because of the type of wood that the company used to manufacture its guitars. The government seized more than a million dollars in property, shut the factory down, and has yet to even file formal charges or drop the case. Gibson Guitar has been a responsible corporate citizen throughout its existence and supports conservation. The company deserves better treatment from the federal government than it has received to date.

Yet, Gibson's case points to a larger issue faced by virtually all American importers. It is often impossible for importers to know that certain products may violate the Lacey Act and may therefore subject them to prosecution simply because of the composition of materials in those imports. Even worse, foreign producers are often not even held accountable for violating their own country's laws. It is troubling that our government holds U.S. importers responsible for foreign laws—but the countries enacting these laws could care less about enforcing them.

I do not believe that Members of Congress intended to delegate congressional power to foreign governments or to over-criminalize innocent importers for minor violations of foreign laws when they passed this legislation. Unfortunately, that is where we stand today with the Lacey Act.

The FOCUS Act removes every mention of foreign law from the Lacey Act. It does so to protect the constitutional rights of our citizens. The FOCUS Act also strikes the provision allowing a federal prison sentence of up to 5 years, and reduces the maximum fine from \$500,000 to \$200,000. In addition, violations with a market value of less than \$350 would be subject to a maximum penalty of \$10,000.

I believe that passage of the FOCUS Act would go a long way toward correcting many of the abuses that have occurred. Our bill is a common-sense step to protect law-abiding businesses and American citizens from foreign laws and over-criminalization. Again, thank you for allowing me to testify today and I look forward to your questions.

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Dr. FLEMING. That concludes our first panel. Ordinarily we don't have a round of questions for Members, but if you would like, Mr. Cooper, any additional comments since you are still at the table or if any Members on the dais would like to ask questions, we would be happy to entertain them.

Mr. COOPER. We are at your disposal, Mr. Chairman. These are relatively technical matters, and I think we have struck a bipartisan and fair compromise, so I would urge you to look at our legislation, but I have no disrespect for my friend and colleague from Georgia. There are different ways to approach this, and we try to balance the interests and also keep this a bill that could pass not only the House, but the Senate. That is the goal here, to preserve the many, many good features of the Lacey Act and cure some of these problems that have cropped up, especially with the 2008 amendments.

Dr. FLEMING. Mr. Faleomavaega?

Mr. FALEOMAVAEGA. Would the Chairman yield?

Dr. FLEMING. Yes.

Mr. FALEOMAVAEGA. I just want to thank both of our colleagues for their most eloquent statements, Mr. Cooper and Mr. Broun, and we know the situation is not only complicated, but contentious also in terms of what we should be doing, and, Mr. Chairman, I look

forward to working with you and your staff in seeing how we can find some sense of reconciliation here with the two proposed bills that Mr. Cooper and Mr. Broun just proposed. I thank both gentlemen for appearing before our Committee this afternoon. Thank you, Mr. Chairman.

Dr. FLEMING. Yes, thank you. The gentleman yields back. I will ask the second panel to step forward, and we thank you—

Mr. BROUN. Could I make a statement, Mr. Chairman—

Dr. FLEMING. Yes, yes, by all means.

Mr. BROUN.—since we gave Mr. Cooper an opportunity.

Dr. FLEMING. Sure.

Mr. BROUN. I worked on some wildlife management projects in Pakistan, and actually, the Lacey Act prevented good conservation in protecting some wild goats—they are called markhor in Pakistan—from having a good management program set up, and it is a difference between central government Pakistani law and what the tribal regions, which are totally autonomous and have nothing to do with the central government, but the Lacey Act and U.S. Fish and Wildlife Service under the Lacey Act prevented establishing these wildlife management programs. That is what the Lacey Act was geared to do, was to protect wildlife, particularly those who are threatened and endangered, and actually it is acting adverse to that.

Now, U.S. Fish and Wildlife Service, because of the—particularly with the new additions to the Act, are criminalizing people who want to establish good management practices for wildlife, which is what the Lacey Act was geared to do, and it is a travesty. We are harming those entities that we were supposed to be protecting, and we are putting people in jail for just minor violations of things that they have absolutely no control over. And it needs to be altered. We need to stop this criminalization, we need to alter the Act so that it does have some flexibility, and we have none today.

I appreciate the Chairman holding these hearings and look forward to moving forward, and hopefully we can find a solution to stop this overcriminalization.

Dr. FLEMING. I thank both you gentlemen today. Thank you for your time and your testimony. We will ask the next panel to step forward, please.

We are now ready for our second panel, our panel of witnesses which includes Mr. Jeff Baxter, musician and producer, former member of Steely Dan and the Doobie Brothers, and former Chair of the Advisory Board for Missile Defense; Mr. Barry Rutenberg, Chairman of the Board, National Association of Home Builders; Ms. Laurie Everill, regional customs compliance and operations manager for IKEA—North America; Ms. Donna A. Harman, President and Chief Executive Officer, American Forest and Paper Association; The Honorable Mark Rey, representing Climate Advisers; Mr. Adam Gardner, frontman of Guster and founder and Co-Director of Reverb; and Mr. Ray D. Rubinstein, partner, Dinsmore & Shohl law firm, who is appearing on behalf of the U.S. Chamber of Commerce's Institute for Legal Reform, and not necessarily in that order. So we will have to work around that.

Your testimony today will appear in full in the hearing record, so I ask that you keep your oral statements to 5 minutes, as out-

lined in our invitation letter to you and under Committee Rule 4(a). Our microphones are not automatic, so please press the button when you are ready to begin, and you may have heard me talk about the timing lights for our first panel. You will have 5 minutes for your testimony. You will be under a green light for 4 minutes, a yellow light for 1 minute, which means you need to think about closing up, and then when it turns red, we ask you to quickly conclude your remarks so we can make sure and hear from everyone and get to questions.

It is my understanding, Mr. Baxter, that you will need to leave after your testimony, and so we will, of course, excuse you whenever you are ready to go. As I understand it, you have led a fascinating life, and I recognize you for 5 minutes, and thank you for your contributions to the music industry, sir.

**STATEMENT OF JEFF BAXTER (H.R. 3210), MUSICIAN/  
PRODUCER, FORMER MEMBER OF STEELY DAN AND THE  
DOOBIE BROTHERS, ADVISOR TO D.O.D. AND I.C., FORMER  
CHAIR OF THE ADVISORY BOARD FOR BALLISTIC MISSILE  
DEFENSE**

Mr. BAXTER. Thank you, sir. Mr. Chairman, members of the Committee, my name is Jeffrey Baxter, also known as Skunk Baxter. I have been a professional musician since the mid 1960s, most notably as a founding member of Steely Dan, a Grammy-winning guitarist for the Doobie Brothers, among others performed with Elton John, The Stray Cats, Barbra Streisand, Rod Stewart, and a devoted player of iconic American-crafted instruments, whether in concerts and recording studio or even in my living room.

I have also built, customized, and repaired guitars for over 50 years and have a great deal of practical knowledge as to the special relationship between wood and musical instruments.

What brings me here today is how unintended consequences of a very good law have impacted our Nation's music industry and can harm our cultural heritage, and I applaud the Committee for holding this hearing today and want to give a special thanks to Representatives Jim Cooper and Marcia Blackburn, who have been leaders in advocating a pragmatic solution to this problem. They represent the cradle of American music from Music Row in Nashville to Memphis. I believe their bill, H.R. 3210, is a good starting point toward making what I believe are necessary changes in an important law.

In 2008 the Congress and President signed amendments to strengthen the conservation aims to one of our seminal environmental statutes, the Lacey Act. While most of the American public has never heard of the Act, it has been a cornerstone of conservation and stewardship policy for our country for many years. What has not worked so well is Lacey's unintended effect on the American music community. This includes everyone from members of the New York Philharmonic to the small retailer that rents violins to the local elementary school. Guitars, violins, piano keys, clarinets, and other common instruments are made using tropical hardwoods, usually ebony or rosewood, known and referred to as tonal woods. Musicians value these woods because of their durability and

the unique sound they help create. There is no domestically grown substitute.

Yet under the current language of the Lacey Act, questionable wood and wood products are treated as contraband in the same way as cocaine and heroin. This strict interpretation of illegality of musical instruments and other wood products can generate serious liability for their owners, even with no knowledge or reason to know of the product's questionable past. Once an instrument is seized as contraband, the musician or retailer has no legal recourse to regain the product. There is no way for honest owners to demonstrate they acted with due care or bought from a reputable source. Makes sense for cocaine and heroin where there is no lawful reason to possess the product but doesn't make sense if you have a Steinway or a Stradivarius. I strongly recommend that consumers are given the opportunity to challenge procedures and forfeitures before an impartial judge.

This change in the Lacey Act will provide consumers with an opportunity to prove they have exercised due care. If the judge agrees, they would get their item or materials returned, and I think we can all agree that this will provide the maximum benefit to all concerned parties.

The second change would be to exempt products that were made before Congress expanded the Lacey Act in 2008. I don't think Congress intended to make antique mahogany desks or vintage guitars illegal contraband when the recent amendments were passed, but in reality, that is what has happened. There is a legitimate fear that because the legality of the wood source may be in question, it has become extremely difficult to prove which items are or are not contraband. Selling a pre-2008 guitar on eBay or any other manner can make criminals out of both the buyer and the seller and everyone else in the chain.

Finally, I have heard from guitar makers that the Lacey Act is incredibly vague in what it defines as a violation. Currently people who use foreign-sourced wood to make products must not take possession of any wood that could have violated foreign law. It doesn't matter whether the law has to deal with protecting the environment or not, and it doesn't matter whether the foreign country believes its laws have been violated. If the wood is harvested, processed, finished or shipped using any method that the U.S. Government alleges violates foreign law, then that wood and the products from it become contraband.

I agree that people who knowingly violate the law should be punished, but people who follow the rules, exercise good judgment, buy from reputable sources should not find themselves in a Kafkaesque situation where no proof is needed and no appeal is heard. To me this is contrary to the very ideals and laws on which this country was founded. The law, as it stands, presents an impossible burden not only for Steinway and Fender and the other companies in the musical instrument business, but also the small business artisans and the Federal agencies we task to enforce their laws. Conservation efforts are best served when they are focused, fair, and when limited resources can be used to make the most impact.

I believe we can make two positive changes: One would be to narrow the scope of laws to those that deal directly with the envi-

ronment and conservation. Another would be to create programs that allow businesses to work in concert with the government to ensure they are in compliance with the law prior to bringing their products into the U.S. These are just some of the ideas Congress should consider. We need exotic forests to thrive, and we all want to see the Lacey Act be successful. For too long the world has let the tropical forests be decimated without protection. The best way to protect and ensure the survival of all of the world's forests is to make more valuable for a poor farmer to protect the forests than to clear it for grazing land or uncontrolled harvesting.

I am not here to advocate overturning, eviscerating or weakening the Lacey Act. Rather, I believe it should be made more effective and focused while ensuring that law abiding American musicians and American businesses can continue to create music and create jobs without fear of accidentally violating the Lacey law by identifying and correcting potential violations before rather than after environmental harm is done.

American musicians and the music they make are national treasures respected the world over. American music is a vital component of American history, American soft power, and plays a very important and positive role in the way the U.S. is perceived by the global community. Making criminals out of musicians as well as those who design, build, and sell musical instruments serves no rational purpose whatsoever. The Lacey Act is a good piece of legislation, but let's all work together to make it as beneficial as can be for all concerned. Thank you for your time and the opportunity to speak to you today, sir.

Dr. FLEMING. Thank you, Mr. Baxter. Thank you for your testimony.

[The prepared statement of Mr. Baxter follows:]

#### **Statement of Jeff Baxter**

Mr. Chairman and the members of the Committee, my name is Jeffrey Baxter, also known as Skunk Baxter. I have been a professional musician since the mid-1960s, most notably as a guitarist for Steely Dan and the Doobie Brothers. Among others, I have performed with Elton John, The Stray Cats and The Beach Boys, as a studio musician for over 40 years have backed artists as varied as Barbara Streisand, Gene Simmons and Dolly Parton, and have been a devoted player of iconic, American-crafted instruments whether in stadium concerts before thousands of people, in the recording studio or alone in my living room. I have also built, repaired and customized guitars for over 50 years and have a great deal of practical knowledge as to the special relationship between wood and musical instruments.

What brings me here today are the how the unintended consequences of a very good law have impacted our nation's music industry and could harm our cultural heritage. I applaud the Committee for holding this hearing today, and I want to give a special thanks to Representatives Jim Cooper and Marsha Blackburn, who have been leaders in advocating a pragmatic and bipartisan solution to the problem. They represent a state that is the cradle of American music from the country capital of Music Row in Nashville to the blues of Memphis' Beale Street. They've shown an understanding of issues facing American musicians, and we all appreciate it. I believe their bill, H.R. 3210, is a good starting point toward making what I believe are necessary changes in an important federal law.

In 2008, the Congress passed and the President signed amendments to strengthen the conservation aims of one of our seminal environmental statutes, the Lacey Act. While most of the American public has never heard of the Act, it has been a cornerstone of conservation and stewardship policy for more than century.

Originally passed to ensure that exotic bird species weren't wiped out in the pursuit of feathers for hats, the Lacey Act has been expanded to take in other species—most notably woods and other plants. Make no mistake about it, this was a good change. The 2008 amendment was a groundbreaking way to put a stop to the illegal,

clear-cut forestry that has decimated the world's vital tropical rain forests. By many metrics, the law and others like it have worked to slow deforestation and to help establish more sustainable forestry in countries that had a lack of control.

But what has not worked so well is Lacey's unintended effect on the American music community. This includes everyone from members of the New York Philharmonic to the small retailer that rents violins and guitars to the local elementary school band. Music Trades magazine estimates that the American music industry employs approximately 65,000 people (including retail and manufacturing) and in 2011 generated approximately \$6.6 billion in revenue for the American economy. Based on some surveys, there are approximately 9 to 10 million guitar players in the U.S. alone.

Guitars, violins, piano keys, clarinets, and many other common instruments are made using tropical hardwoods. Ebony and rosewood, two of the most common woods used in the manufacture of musical instruments, are not naturally available in North America. Musicians value these woods because of their durability and the sound they help create. As such they are known as "tonal woods" and, quite frankly, there isn't a substitute for them in our business.

Yet under the current language of the Lacey Act, questionable wood and wood products are treated as contraband, in the same way that cocaine and marijuana are. But unlike cocaine, wood is not inherently illegal; there are perfectly legal reasons to possess wood, and there are none for cocaine. This strict liability treatment of musical instruments and other wood products can generate serious liability for their owners, even those with no knowledge or reason to know of the product's questionable past. Put simply, once a government agency seizes wood and plant products it claims were illegally harvested, their owners face forfeiture of the products irrespective of the steps they took before acquiring the product to determine its history and legality.

Once an instrument is seized as "contraband," the musician or retailer has no legal recourse to regain the product on the basis of his compliance efforts. There is no way for honest owners to demonstrate that they exercised due care. I agree that, people who knowingly violate the law should be punished. But people who follow the rules, exercise good judgment, and buy from reputable sources should not be put in a Kafka-esque situation where no proof is needed and no appeal is heard. I strongly recommend that the Act be amended to allow consumers the opportunity to challenge seizures and forfeitures under the Lacey Act. This change will only provide consumers with an opportunity to prove to an impartial judge that they exercised due care. If the judge agrees, the consumer will be permitted to retain the products; if not, the products will be subject to forfeiture. This amendment will have no effect on the civil penalty or criminal forfeiture and penalty provisions contained in the Lacey Act.

A second change that should be made is to exclude products that were made before May 22, 2008, when the Lacey Act amendments were enacted. I don't think Congress intended to make antique mahogany desks or vintage guitars illegal contraband when the recent amendments were passed, but that is what happened. Many people are worried that because they cannot clearly demonstrate the ultimate sourcing of their products, they could lose their valued instruments or wood inventory in the event the law is retroactively applied. By providing clear legal title to items that were legal up to the date of enactment you can provide a great deal of certainty to musicians everywhere, many of whom have played the same instrument for years and treasure them as an integral part of the creative process.

Finally, I have heard from luthiers—the people who make guitars—that the Lacey Act is incredibly vague in what might be a violation. Currently, people who use foreign sourced wood to make products must not take possession of any wood that could have violated *any* foreign law. It doesn't matter whether the law exists to deal with protecting the environment or not and it doesn't matter whether any foreign country believes that its own law was violated. If the wood was harvested, processed, finished, or shipped using any method that the U.S. Government alleges violated any foreign law then that wood, and the products made from it, become contraband.

Digesting the encyclopedia containing every agricultural, labor, export, transportation, taxation, or certification statute that might deal with a plant or animal in every country in order to legally import materials in conformity with Lacey is just too heavy a burden for any business. Conservation efforts are best when they are focused and when limited resources can be used to make the most impact.

I believe we can make two positive changes. One would be to narrow the scope of laws to those that deal directly with the environment and conservation. This would uphold the Lacey Act's conservation purpose, while giving businesses a realistic metric with which to comply. Another method would be to establish a voluntary

pre-certification program that would allow businesses to work with the U.S. Department of Agriculture to ensure that their products or raw material are fully in compliance with the law prior to importing them into the US. This voluntary pre-certification would give industry clarity, while cutting down on the enormous paperwork the government has to process. It would also strengthen the true aims and spirit of the Lacey Act by identifying and correcting potential violations BEFORE, rather than AFTER, any environmental harm is done.

I would posit that these are just some of the ideas that Congress should consider. As musicians, we need these exotic forests to be sustainably managed and we want to see the Lacey Act succeed. For too long the world let tropical forests be decimated without protecting them as vital resources. The best way to ensure forest survival though, is to make it more valuable for a poor farmer to protect the forest than to clear it for grazing land. One of the ways to do that is for musicians to continue to be able to buy legal and well-crafted guitars and other instruments. We cannot play our part if we inadvertently make instruments, and their inputs, into contraband.

I am not here to advocate overturning, eviscerating, or weakening the Lacey Act. Rather, I think it could be made more effective and focused, while ensuring that law-abiding American musicians and American businesses can continue to create music and create jobs without fear of accidentally violating Lacey. American musicians and the music they create are national treasures, respected the world over. American music is a vital component of American Soft Power and plays a very important and positive role in the way the U.S. is perceived by the global community. The Lacey Act is a good piece of legislation, but let's work to make it better.

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Dr. FLEMING. Next, Mr. Rutenberg, you have 5 minutes, sir, and make sure the microphone is close to your mouth.

**STATEMENT OF BARRY RUTENBERG (H.R. 3210), CHAIRMAN OF THE BOARD, NATIONAL ASSOCIATION OF HOME BUILDERS**

Mr. RUTENBERG. Mr. Chairman, the microphone isn't working.

Dr. FLEMING. I think it is not on yet.

Mr. RUTENBERG. May I exchange seats with the gentleman in the center?

Dr. FLEMING. Sure, absolutely, whatever is easier for you. See, if Congress could make more compromises like this, I think we would get a lot more done. It is a good first step. All right, you have 5 minutes when you are ready, sir.

Mr. RUTENBERG. Thank you, Chairman Fleming, Ranking Member Sablan, members of the Subcommittee, and thank you for the opportunity to testify today. My name is Barry Rutenberg, and I am the Chairman of the Board of Directors for the National Association of Home Builders and a home builder from Gainesville, Florida. NAHB supports the goals of the Lacey Act. We do not support illegal logging in anyplace at anytime. NAHB also commends Representative Cooper for his proposed reforms of the Lacey Act. Honest business owners must have the right to seek the return of goods acquired through the exercise of due care, and we thank you for initiating this important discussion. NAHB believes that a more thorough examination of this requirement and other provisions of the Lacey Act is appropriate, and we are pleased that the Subcommittee is looking into these issues.

NAHB is concerned the 2008 amendments created a number of unintended consequences. Home builders and our customers are now faced with the unrealistic requirement of divining the origin and legality of the thousands of wood products we use. There is no magic 8 ball for that. The liability placed on the builder and the end user creates unnecessary uncertainty. It is tough enough being

a home builder these days, and the thought that I could face government action for unknowingly using an illegal wood product and not having access to courts to challenge the government action is something no business should face. With this in mind, it is of the utmost importance that honest business owners, including home builders, have the right to seek the return of goods acquired through the exercise of due care under the Lacey Act.

Amending the Act to include reaffirmation of civil forfeiture law provides an important liability protection for the business community, and ultimately the consumer. U.S. Department of Justice has virtually eliminated this important defense for honest business owners through a broad interpretation of the law. By deeming wood products that violate Lacey contraband, innocent companies are left without legal standing to challenge a government taking in court. Coupled with a requirement that the U.S. Government enforce an almost limitless set of foreign laws, builders and ultimately consumers are left at great risk. The result is that the entire supply chain dealing with imported wood products, including builders and consumers, are held personally liable to certify that the timber product did not come from plant material that was taken, transported, possessed or sold in violation of any foreign law. The way the law is currently structured leaves wide open the entire chain of custody of a timber product, including builders who have no way of knowing the origin of a particular piece of lumber, a component of a cabinet, closet door or crown molding to the details of an enforcement action.

Further, because our builders generally buy their products through U.S. suppliers or importers, and all products that enter the United States must pass through U.S. Customs, the products have already gone through the required foreign paperwork, documents, and permits to allow them to enter the U.S. at the outset.

For the U.S. Government to later determine the products of a component of a product violate the Lacey Act after its entry into the U.S. is unfair and illogical. There is no reasonable expectation that the supply chain should know when or if a violation has occurred, much less the underlying laws that have been violated. Holding a remodeler, for example, responsible for knowing, much less understanding the laws of a particular country where his or her wood cabinet was sourced is simply unfair. I do not read foreign laws to my grandchildren when they go to sleep at night.

To preserve the integrity of the Lacey Act, NAHB also recommends that the law should be revised to be more focused and transparent about which foreign laws may give rise to a violation. By narrowing the scope of foreign laws covered by the Lacey Act, such as those laws that promote the protection or conservation of threatened or endangered plants or plant products, there would be greater certainty about the law in the supply chain's obligations.

H.R. 3210 represents an important first step, and we look forward to working with Representative Cooper and the Subcommittee to improve the bill as it moves through the legislative process. Thank you again for the opportunity to testify. I look forward to your questions later.

Dr. FLEMING. Thank you, Mr. Rutenberg.

[The prepared statement of Mr. Rutenberg follows:]

**Statement of Barry Rutenberg, Chairman of the Board,  
on Behalf of the National Association of Home Builders**

**Introduction**

Chairman Fleming, Ranking Member Sablan and members of the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, I am pleased to appear before you today on behalf of the National Association of Home Builders (NAHB) to share our views on the 2008 Amendments to the Lacey Act (16 U.S.C. §§ 3371, *et seq.*). We appreciate the invitation to appear before the Subcommittee on this important matter. My name is Barry Rutenberg, and I am the Chairman of the Board for NAHB and a home builder and remodeler from Gainesville, Florida.

NAHB represents more than 140,000 members involved in the home building, remodeling, multifamily construction, property management, subcontracting and light commercial construction industries. We are affiliated with more than 800 state and local home builder associations throughout the country, and since the association's inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

First, I want to say that NAHB supports the goals of the Lacey Act and the prevention of trade in illegally harvested plant and plant products. Unequivocally, we do not support illegal logging in any place at any time.

Second, NAHB commends Representative Cooper for his earnest and diligent efforts in proposing much needed reforms to the Lacey Act, while at the same time, making efforts to improve and protect the integrity of the law. H.R. 3210, the *Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act* or "RELIEF Act", recognizes the essential need to hold harmless those who, unknowingly and without any culpability, are found to be in possession of products that run afoul of the Lacey Act. Honest business owners must have the right to seek the return of goods acquired through the exercise of due care, and we thank Representative Cooper for initiating this important discussion.

Notwithstanding, NAHB believes that a more thorough examination of this requirement and other provisions of Lacey is appropriate, and we deeply appreciate the Subcommittee taking a judicious look into these issues.

**The Lacey Act and Implications on Affordable Housing**

Prompted by a growing concern about interstate profiteering in illegally taken wildlife, Representative John Lacey of Iowa introduced the Lacey Act in 1900, producing America's first federal wildlife protection law. The original law intended to conserve and protect certain species of wildlife in the states. Through a series of amendments over the last century and most recently in 2008, the current Lacey Act has expanded to criminalize trade in protected species of both plants, including wood products, and animals. Today, the Lacey Act generally makes it unlawful for any person to import, export, transport, sell, receive, acquire or purchase fish, wildlife, or plants taken, possessed, transported, or sold in violation of any federal, state, foreign, or Native American tribal law, treaty or regulation.

NAHB is concerned the 2008 Amendments created a number of unintended consequences for downstream users. Creating uncertainty in plant-based products harvested, produced or imported can have a detrimental effect on home builders and their clients. By including an extremely wide and elastic set of foreign laws that could potentially form the basis of a violation, the 2008 Amendments left builders unreasonably ignorant of the bounds their legal responsibilities. This uncertainty is undeniably magnified absent a hold harmless provision for honest business owners.

The ability to operate effectively in the home building industry and to price a home competitively depends on the degree to which the builder's overall costs are certain and predictable. Predictability is of paramount importance as it allows builders to accurately estimate and account for costs in building homes. Further, the more confidence a builder has in pre- and post-construction costs, the more cost-effective the home building process is, as well as the builder's ability to pass those corresponding savings through to homeowners.

The building industry is vitally important in maintaining a healthy economy. A strong housing sector provides a critical component of local economic development. Housing creates jobs, increases the demand for goods and services within a particular community, generates revenues for local governments and provides affordable housing. Residential construction provides significant income and jobs for local workers and generates important local economic activity for residents, local businesses and governments.

Construction activities have positive impacts by creating ongoing beneficial impacts in communities as new home purchasers pay taxes, and buy goods and serv-

ices in the community. For example, NAHB estimates the first-year economic impacts of building 100 typical single family homes include \$23.1 million in wage and net business income, \$8.9 million in federal, state and local taxes, and 305 jobs.

This impact is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate income home buyers who are more susceptible to being priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home purchase will no longer be able to afford to purchase a new home. A 2012 priced-out analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home due to a \$1,000 price increase. Nationally, this price difference means that when a median new home price increases from \$225,000 to \$226,000, 232,447 households can no longer afford that home.

Home builders are generally small business entrepreneurs. 82 percent of home builders build fewer than 25 homes a year, and 60 percent of NAHB's members build fewer than ten homes a year. Many of these small-volume builders and subcontractors do not have the capital to withstand the artificial price increases and price volatility of trade restrictions. Increases in building material costs mean that small builders may be disproportionately affected by more expensive lumber, leading to fewer homes constructed and sold to downstream purchasers.

Furthermore, U.S. trade laws give little consideration to the interests of consumers and downstream industries. This bias has limited the ability of American consumers to receive products and services of the highest quality at the lowest cost, and of U.S. businesses to provide jobs and increase production. It also encourages other countries to adopt similar protectionist policies that limit the choices of their citizens and opportunities for U.S. exporters.

The people who ultimately pay the cost of trade restrictions are consumers—the homebuyers, renters and people remodeling their homes. Consumers are rarely organized, and that makes them an easy target to fund subsidies for special interests.

#### **Lacey Act Recommendations**

For these reasons, NAHB is specifically concerned about the provisions in Lacey related to civil forfeiture law, in addition to the seemingly limitless jurisdictional boundaries that could potentially form the basis of a Lacey Act violation.

Modern day civil forfeiture law, the Civil Asset Forfeiture Reform Act, was indeed contemplated by Congress as a part of the Lacey Act through the 2008 amendments. Recognizing the need to hold harmless those who exercised due care in the acquisition of wood and plant products, Congress sought to exempt honest business owners, and instead, provide the U.S. government more targeted tools to go after egregious, knowing violators.

The U.S. Department of Justice, however, has virtually eliminated this important defense for honest business owners through a broad interpretation of the law. By deeming Lacey-violative wood and plant products “contraband”, innocent companies are left without legal standing to challenge a government taking in court. Coupled with a requirement that the U.S. government enforce an almost limitless set of foreign laws, builders, and ultimately consumers, are left at great risk.

The result is that the entire supply chain dealing with imported wood products—including builders and consumers—are held personally liable to certify that the timber product did not come from plant material that was taken, transported, possessed or sold in violation of any foreign law. The way the law is currently structured leaves wide open the entire chain of custody of a timber product, including builders who have no way of knowing the origin of a particular piece of lumber, a component of a cabinet, closet door or crown molding, to the details of an enforcement action.

Considering all of the components that may go into the construction of a house, such as a set of kitchen cabinets, it quickly becomes clear how daunting it would be to identify and track down the source for each component of that final product. The sheer number of different sources of wood that could be included in the finished home makes it nearly impossible for a builder or remodeler to know with certainty where and under what circumstances the individual components were sourced.

Further, because our builders generally buy their products through U.S. suppliers or importers, and all products that enter the United States must pass through U.S. Customs, the products have already gone through the required foreign paperwork, documents and permits to allow them to enter the United States at the outset. For the U.S. government to later determine the products, or a component of a product, violate the Lacey Act after its entry into the United States is unfair and illogical. There is no reasonable expectation that the supply chain should know when or if a violation had occurred, much less the underlying laws that had been violated. Holding a remodeler, for example, responsible for knowing, much less under-

standing, the laws of a particular country where his or her wood cabinet was sourced is simply irrational.

With this in mind, it is of the utmost importance that honest business owners, including home builders, have the right to seek the return of goods acquired through the exercise of due care. Amending the Lacey Act to include reaffirmation of civil forfeiture law provides an important liability protection for the business community and ultimately the consumer.

To preserve the integrity of the Lacey Act and help advance its policy objectives, NAHB also recommends that the law should be revised to be more focused and transparent about which foreign laws may give rise to a violation. By narrowing the scope of foreign laws covered by the Lacey Act, such as those laws that promote the protection or conservation of threatened or endangered plants or plant products, builders would be provided with greater certainty about the law, their obligations, and subsequently, be able to more accurately estimate and account for costs in building homes.

### **Conclusion**

NAHB commends the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs for examining the Lacey Act today. At a time when the economy remains stagnant, it is wise to reconsider laws, such as the Lacey Act, and their impact on American businesses. The century-old law and its subsequent amendments are certainly ripe for meaningful reform.

NAHB also expresses deep appreciation to Representative Cooper, who's RELIEF Act represents a positive step towards bringing the intent of Lacey in line with the practical effects of its implementation. We remain hopeful that with some clarifying language on the chain of liability and scope issues, NAHB can fully support H.R. 3210 as it moves forward in the legislative process.

Dr. FLEMING. Next we have Ms. Everill. You have 5 minutes, ma'am. Thank you.

### **STATEMENT OF LAURIE EVERILL (H.R. 3210), REGIONAL CUSTOMS COMPLIANCE AND OPERATIONS MANAGER, IKEA—NORTH AMERICA**

Dr. FLEMING. The light is not coming on? OK. Yeah, we have a technical problem.

Ms. EVERILL. Thank you. My name is Laurie Everill, and I work for IKEA—North America in New Jersey. We at IKEA appreciate the opportunity to speak today on the Lacey Act. IKEA is one of the world's most recognizable brands and one of the largest retailers of furniture and housewares in the United States. We have a workforce of 16,000 workers, we operate 38 retail stores, five distribution centers, a service and a trading office, and support a manufacturing facility all here in the United States.

Incorporating good stewardship and sustainability into its everyday business is one of IKEA's four corporate cornerstones. Wood is IKEA's most important raw material. As such, IKEA has been performing due care to create a sustainable forest management program for over a decade. IKEA is directly impacted by the Lacey Act, and we strongly support the law's objectives to end illegal taking of trees and plants.

Notwithstanding IKEA's commitment to the Lacey Act, we believe there are several challenges that we encourage Congress to review. Our verbal testimony today will cover three issues: The import declaration, due process, and the scope of foreign laws and regulations. IKEA recognizes the importance of the declaration to sustainability and enforcement; nevertheless, IKEA has found that providing genus, species, and country of harvest information on a transactional basis requires the submission of a tremendous

amount of data that is costly and administratively burdensome for both importers and the government while contributing little to the prevention of illegal logging.

It is IKEA's opinion in its current form the declaration is unsustainable long term and not the best use of resources in the prevention of illegal logging. IKEA suggests that Congress consider alternatives to the current declaration process that can meet the needs of business, environmental, and enforcement communities. The potential of a declaration for composite wood products makes the requirement even more untenable as such products are made by by-products such as sawdust, scraps, and other remnants derived from other manufacturing processes. While this type of material reuse is positive from a recycling and a sustainability perspective, it makes the collection of data for declaration purposes virtually impossible. IKEA believes that the declaration requirements should not apply to composite products until it is determined to be feasible, practical, and effective.

The heart of the Lacey Act is the prohibition against the importation of products containing illegally harvested wood or plant material, which is enforced through criminal and civil penalties and seizure and forfeiture of merchandise. Importers must exercise due care to ensure their products do not contain illegally harvested wood or plant material. The Lacey Act amendments specifically state that seizures are governed by the Civil Asset Forfeiture Reform Act, or CAFRA, which provides due process for authorities to present their case and facts through a legal process. However, in practice, the enforcing agencies treat wood and plants alleged to be illegally harvested as contraband. IKEA believes that Congress should clarify the provisions to provide a legal means for importers to address allegations, forfeitures, and seizures and preserve the rights of appeal in a court of law.

The law defines illegal taking of trees or plants broadly, and in practice, the definition is open to interpretation and sweeps in laws and regulations having little or no connection to the conservation of trees and plants. As a result, importers have little clarity as to what foreign laws and regulations would be applied under the Lacey Act. IKEA recommends that Congress clarify the foreign laws and regulations to be directed toward conservation of trees and plants.

To address these challenges, IKEA is looking for a new legislative approach that effectively addresses the issues of businesses and environmental organizations, stands the best chance of generating broad bipartisan support, but does not undermine the important goal to stop illegal logging. We believe our recommendations will better achieve these objectives by making enforcement of the law more targeted and effective, encourage the adoption of strong compliance measures within the industry, and advancing the policy goals of the law to promote proper forest stewardship and conservation practices around the world. We thank you, again, for the opportunity to appear before you today.

[The prepared statement of Ms. Everill follows:]

**Statement of Laurie Everill, Regional Customs Compliance and  
Operations Manager, IKEA—North America**

My name is Laurie Everill, and I work for IKEA—North America in Westampton, New Jersey. My responsibilities as Regional Customs Compliance & Operations Manager include ensuring company compliance with the Lacey Act and other laws and regulations affecting IKEA's import operations. As a member of both the National Retail Federation and the Retail Industry Leaders Association, the two trade associations representing the U.S. retail industry, we at IKEA appreciate the opportunity to speak not only on behalf of our company, but also other retailers at today's hearing on the Lacey Act Amendments regulating the importation of wood and plant products.

With 325 stores in 41 countries and more than 1,000 suppliers in 53 countries, IKEA is one of the world's most recognizable retail brands. IKEA is also one of the largest retailers of furniture and house wares in the United States, where we operate 38 retail stores, five distribution centers, a service facility in Pennsylvania, a trading office in Texas, and support a manufacturing facility in Virginia. IKEA's U.S. workforce totals 16,000 associates in a wide range of jobs from product sourcing, manufacturing, sales and marketing to warehousing, logistics, and legal compliance.

The IKEA vision is to create a better everyday life for the many people. As a company with its roots in Sweden, IKEA has a long commitment to policies and practices that advance the highest degree of corporate social responsibility. Promoting and implementing good environmental stewardship and sustainability into its everyday business is one of IKEA's four corporate cornerstones.

Since many of the products we sell contain wood and plant material, IKEA is directly impacted by the Lacey Act Amendments, and we strongly support the law's objectives to end the illegal taking of trees and plants throughout the world. We support Lacey as it promotes those activities and efforts that IKEA has undertaken for over a decade and it will create a level playing field amongst importers that are serious about the prevention of illegal logging. IKEA sources 14.5 million cubic meters of round wood equivalents from 51 countries, making wood our most important raw material. As such IKEA has been performing due diligence and traceability to prevent illegally harvested wood and create a sustainable forest management program for over a decade and several years before the passage of the Lacey Act Amendments in 2008.

Notwithstanding IKEA's commitment to comply fully with the Lacey Act Amendments, we believe there are several challenges that we encourage Congress to review and consider options to address. There are four specific issues the retail industry believes require legislative action, which, if undertaken, will improve the operation of the law, make enforcement more effective, provide incentives for industry to adopt robust due diligence measures in their supply chains, and help better achieve the law's policy goals to end illegal logging.

**Import Declaration**

IKEA will not be recommending that the declaration requirement be removed from Lacey Act Amendments as we recognize the importance to sustainability and the value of importers knowing the type of wood used and the origin of wood in their products. Nevertheless, it has become apparent that there are some challenges with the declaration requirement as it is written and IKEA believes Congress should improve and streamline the import declaration requirement. IKEA has found that providing genus, species and country of harvest information on a transactional basis even for seemingly simple wood products requires a tremendous amount of data to be submitted to the U.S. Government. These submissions are costly and administratively burdensome for both importers and the U.S. Government while achieving little to prevent illegal logging. It is IKEA's opinion that, in its current form, the Import Declaration process is unsustainable long term and not the best use of resources in the prevention of illegal logging. IKEA suggests that Congress consider alternative means of providing declaration information and we would be willing to have further discussions on this point to identify the best alternatives to meet the needs of stakeholders in the business, environmental and enforcement communities.

The potential requirement of a Lacey Declaration for composite wood products (such as particle board and fiberboard) in the future makes the requirement even more untenable because composite wood products are generally made of byproducts such as sawdust, scraps, and other remnants from other manufacturing processes and therefore have a broad spectrum as to the potential genus, species, and countries of origin. While this type of materials reuse is positive from a recycling and sustainability perspective, it makes collection of useful data for the declaration re-

quirement virtually impossible. IKEA also believes that the declaration requirement should not apply to composite products until it is determined that it is feasible, practical and effective to gather such information. However, we would like to underline that this should not in any way reduce the responsibility of the importer to exercise due care in procurement.

#### **Due Process**

The heart of the Lacey Act Amendments is the prohibition against the importation of products containing illegally-harvested wood or plant material, which the U.S. Department of Justice and the Fish and Wildlife Service enforce through criminal and civil penalties and seizure and forfeiture of merchandise. To avoid possible civil and criminal penalties, importers must exercise proper due diligence in their supply chains to ensure their products do not contain illegally-harvested wood or plant material.

The Lacey Act Amendments specifically state that seizures are governed by the Civil Asset Forfeiture Reform Act (CAFRA), which provides due process for parties to present their case and facts to petition through a legal process for return of government-seized property.<sup>1</sup> At the time of its passage, some Members of Congress made it clear that inclusion of this language would make this remedy available under the Lacey Act Amendments.<sup>2</sup>

In practice, however, the enforcing agencies have nullified Congress' intent by treating as contraband wood and plants alleged to be illegally harvested. As a result, the Lacey Act Amendments have become a strict-liability law—an importer may exercise the highest degree of due care in complying with the law, yet still have its products seized with no legal recourse or due process. Therefore, IKEA believes that Congress should provide for a legal means for importers to address illegal logging allegations, forfeitures and seizures and preserve the rights of appeal in a court of law.

#### **Retroactivity**

While IKEA is not directly impacted, on behalf of the NRF and RILA membership we represent here today, we recommend that any change to the current law should correct an omission found in the original Lacey Act Amendments—the lack of language limiting retroactive application of the law. As recommended in consensus statements issued by U.S. businesses and environmental NGO's, Congress should clarify that the Lacey Act Amendments do not apply to antiques and other products containing wood or plant material harvested or manufactured prior to May 22, 2008, when the Lacey Act Amendments went into effect. Since the provenance of the wood and plant material in these products cannot be verified, this change is logical and non-controversial.

#### **Scope of Foreign Laws and Regulations**

The scope of the Lacey Act Amendments is also an issue. The law defines “illegal taking” of trees or plants broadly to include any foreign law or regulation that protects wood or plants, limits their export or transshipment, or regulates the manner in which they are taken, including required authorization and payment of taxes or fees.<sup>3</sup> In practice, this definition is open to wide interpretation that sweeps in laws and regulations having little or no connection to conservation and preservation of trees and plants. As a result, importers have little clarity in exercising their due diligence obligations as to what foreign laws and regulations would be applied under the Lacey Act Amendments, creating a greater degree of uncertainty, especially when dealing with a strict-liability statute.

Therefore, Congress should clarify the Lacey Act Amendments to give businesses better guidance on which foreign laws and regulations may give rise to a violation, by specifying that applicable foreign laws and regulations be directed to the preservation or conservation of trees and plants. This clarification would exclude laws and regulations that have little or no relationship to this goal, such as export restrictions designed to protect manufacturing or processing in the country of export. This change would also improve enforcement and compliance by directing efforts in ways that truly advance the policy objectives of the law.

<sup>1</sup> 16 U.S.C. sec. 3374(d).

<sup>2</sup> Commenting on addition of the CAFRA language, Senator Richard Burr (R-NC) said: It is crucial, that as this legislation is implemented, a clear distinction be drawn between “innocent” owners in the supply chain who in good faith trade in wood products that they believe to be legally harvested abroad, and those who knowingly traffic in illegal material. It is the concern of Congress that this line be clearly drawn when prosecutions occur under this act.

<sup>3</sup> 16 U.S.C. sec. 3372(a)(2)(B).

### Current Legislation

The current bills in the House—Tennessee Congressman Cooper’s RELIEF Act<sup>4</sup> and Georgia Congressman Broun’s FOCUS Act<sup>5</sup>—have raised awareness of Members of Congress and the public to the practical challenges related to the Lacey Act Amendments. However, neither of these bills would adequately address these challenges, and in order to be credible, any change needs to be supported by the environmental community.

We are looking for a new legislative approach that effectively addresses the issues of business stakeholders, stands the best chance of generating broad, bipartisan support in Congress and all stakeholders, but without undermining the very important goal to stop illegal logging. We believe our recommendations will achieve these objectives by making enforcement of the law more targeted and effective; encouraging the adoption of strong compliance measures by industry; and advancing the policy goals of the law to promote proper forest stewardship and conservation practices around the world.

Thank you again for the opportunity to appear before you today.

Dr. FLEMING. We thank you for your testimony. Next, Ms. Harman. Hopefully we can get a unit that works for you. That is not working either. OK. I think something is not plugged in.

### STATEMENT OF DONNA A. HARMAN (H.R. 3210), PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN FOREST AND PAPER ASSOCIATION

Ms. HARMAN. Mr. Chairman and members of the Committee, I appreciate this opportunity to present the views of the American Forest and Paper Association and its members regarding the Lacey Act. AF&PA is the national trade association of the forest products industry, representing pulp, paper, packaging and wood products manufacturers. Our industry accounts for about 5 percent of the total U.S. manufacturing GDP, and we produce about 190 billion in products annually, employing about 900,000 men and women.

The U.S. forest products industry is a strong proponent of sustainable forest management practices in the United States and around the world. Last year our industry adopted a sustainability initiative called “Better Practices, Better Planet 2020.” This includes a specific framework to work with governments, industry, and other stakeholders to promote policies around the globe to reduce illegal logging. Illegal logging is not just an environmental issue. It is also a global economic issue.

When illegally sourced, forest-based raw materials enter the stream of commerce, a global economic problem is created for U.S. producers of products from legally sourced raw materials. AF&PA commissioned a study in 2004 to assess the economic impact of illegal logging on timber production and trade. The report concluded that up to 10 percent of global wood products production and roughly a similar share of global wood products trade are of suspicious origin. The report also estimated that the economic cost to the U.S. forest products industry is approximately \$1 billion per year in terms of lost exports and lower value of domestic shipments.

Moreover, supplying wood and paper products that are derived from sustainable and legal sources of raw materials is what our customers demand. Without a sustainable supply of legally har-

<sup>4</sup>H.R. 3210.

<sup>5</sup>H.R. 4171.

vested wood, our very existence and jobs we provide are at risk. Because illegal logging is a global issue, the U.S. industry needs the involvement of government to help ensure that our markets are not a haven for products from illegal timber harvest. For these reasons, we believe it is appropriate for the U.S. to have laws that prevent illegally harvested raw materials from entering U.S. commerce.

The 2008 amendments brought heightened international awareness to the illegal logging issue, and introduced a strong incentive throughout the global supply chain to ensure the legality of forest products. Already, we are seeing the effects of the law. The hardwood sector of our industry is seeing a pickup in demand for U.S. hardwoods, not only from domestic customers, but also from buyers in Asia, who are reportedly looking for hardwoods from reliable and legal sources. Many U.S. hardwood timber mills are small, family owned businesses, like Glen Oak Lumber Company whose CEO, Tom Talbot, is in the audience today.

The Lacey Act provides significant economic benefits to American rural businesses and jobs. While the 2008 Lacey Act amendments have accomplished much good, the implementation has not been problem-free. We have been working with many organizations to develop consensus recommendations, and to help streamline and clarify the requirements for compliance with the Lacey Act. The following are AF&PA's recommendations.

First and foremost, the Administration was mandated by Congress to produce a report on implementation issues within 2 years of passage of the 2008 amendments. We urge members of this Committee to formally request that the implementing agencies provide a short-term date certain for the release of this report. Second, the declaration report requirement is an important tool in ensuring that businesses along the supply chain from harvesting to manufacturers, brokers, importers, and retailers become part of the solution through joint action. The declaration for pulp and paper is on hold, but we hope that by working with APHIS and other stakeholders it can be implemented.

Third, we believe the Lacey Act amendments should not apply to plants and plant products manufactured or imported prior to the enactment of the 2008 amendments.

Fourth, Federal agencies should issue clear guidance that enforcement action will not be taken against individual consumers. There is no precedent in the Lacey Act's long enforcement history of the government targeting end users of individual products.

Finally, Congress should provide adequate funding for Federal agencies responsible for carrying out the Lacey Act mandate. It is critical to ensure the full implementation of this Act.

The Lacey Act is an important tool for protecting forests around the world and combating international trade and illegally taken plant and plant products, including wood and paper. As with any other law, there is room for improvement in the manner in which the Act is being implemented and enforced. We believe that the first thing the Federal agencies need to do is issue their report on the implementation and operation of the Lacey Act amendments. If it is determined that the Act does not provide sufficient administrative authority and legislative changes are still needed, we would be glad to work with the Congress to implement technical changes

that would improve the effectiveness of the Lacey Act. Senators Lamar Alexander and Ron Wyden are currently leading such a process and we would welcome a bipartisan and bicameral effort for identifying areas of agreement on how to move forward with improving and strengthening the Lacey Act's implementation. Thank you very much for the opportunity to present our views.

Dr. FLEMING. Thank you, Ms. Harman.

[The prepared statement of Ms. Harman follows:]

**Statement of Donna Harman, President and Chief Executive Officer,  
American Forest & Paper Association**

I appreciate this opportunity to present the views of the American Forest and Paper Association (AF&PA) and its members regarding H.R. 3210, the Retailers and Entertainers Lacey Implementation & Enforcement Fairness (RELIEF) Act and H.R. 4171, the Freedom from Over-Criminalization and Unjust Seizures Act (FOCUS) Act of 2012.

AF&PA is the national trade association of the forest products industry, representing pulp, paper, packaging, and wood products manufacturers and forest landowners. Our companies make products essential for everyday life from renewable and recyclable resources that sustain the environment. The forest products industry accounts for approximately 5 percent of the total U.S. manufacturing GDP. Industry companies produce about \$190 billion in products annually and employ nearly 900,000 men and women, exceeding employment levels in the automotive, chemicals, and plastics industries. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

The U.S. forest products industry is a strong proponent of sustainable forest management practices in the U.S. and around the world and is committed to using forest management and manufacturing practices that meet environmental, social, and economic objectives. Our customers rely on us as the foundation of their supply chain to ensure that the products we sell are produced in a legal and sustainable manner.

Building on its legacy of sustainability, the U.S. forest products industry last year set sustainability goals called "*Better Practices, Better Planet 2020*." The initiative recognizes the importance of procurement of our primary raw material (wood) from sustainable sources. It includes a specific commitment to increase the amount of fiber procured from certified sources in the U.S. and to work with governments, industry, and other stakeholders to promote policies around the globe to reduce illegal logging.

Our industry is sympathetic to the concerns of committee members about over-regulation and its effects on jobs and the economy. We know firsthand about well-intentioned laws that, when implemented, result in unforeseen or unintended consequences. American paper and wood products manufacturers are facing over twenty major regulations from EPA's Clean Air Act alone. Many of these regulations could be written in much less burdensome ways and still produce equivalent or better environmental benefits. Boiler Maximum Achievable Control Technology (MACT) is just one of the rules adding to the cumulative regulatory burden. Although most boilers already are well controlled for key pollutants, EPA's Boiler MACT Rule will require more than 90% of boilers to make significant changes. Our estimated capital cost for the re-proposed rule is \$4 billion, plus billions more in operating costs. We expect thousands of forest products jobs will be affected by the final Boiler MACT Rule unless further changes are made to the final rule. The U.S. forest products industry operates in a fiercely competitive global marketplace. Increasingly, the competition in our sector is coming from developing countries with lower environmental and forest management regulations than those to which we adhere in the U.S. We believe that the cumulative regulatory burden our industry is facing is placing the competitiveness of our industry and its workers at risk.

While very little illegal logging occurs in North America, this is not the case around the globe. Conversion of forest land to agriculture is the primary cause of deforestation in developing countries and illegal logging also contributes to over-exploitation and unsustainable forest management. Illegal logging is not just an environmental issue—it is also a global economic issue. When illegally sourced forest-based raw materials enter the stream of commerce, a global economic problem is created for U.S. producers of products from legally sourced raw materials. For these reasons, we believe it is appropriate for the U.S. to have laws that prevent illegally harvested raw materials from entering into U.S. commerce.

By its very definition, it is difficult to get a good estimate of the economic cost of illegal logging. The World Bank estimated in a 2006 report that illegal logging costs developing countries some \$15 billion in lost assets and revenue. In addition, legitimate companies around the world involved in the forest products trade are losing billions of dollars in revenue annually due to market distortions caused by illegally harvested wood and wood products entering world markets.

AF&PA commissioned its own study in 2004 to assess the economic impact of illegal logging on timber production and trade to better inform the industry's policy. The report concluded that up to 10 percent of global wood products production and a roughly similar share of global wood products trade are of suspicious origin. The report also estimated that eliminating global illegal logging would increase U.S. wood exports by over \$460 million per year and increase the value of U.S. domestic shipments by \$500–700 million annually.

Controlling illegal logging has been a bipartisan effort. Early on, President George W. Bush's Administration recognized that illegal logging could not be controlled at the source alone because of weak governance and enforcement structures in timber-rich developing countries, together with corruption, poverty, and poor incentives to maintain land as forests. The administration understood that global cooperation on effective forest management was necessary to protect American economic and trade interests—such as the ability of the U.S. forest products industry to compete on a level playing field. In 2003, the Bush Administration launched the President's Initiative Against Illegal Logging. The international initiative, a result of collaborative efforts involving the administration, industry, and non-governmental organizations aimed to assist developing countries in their efforts to combat illegal logging, including the sale and export of illegally harvested timber, and to fight corruption in the forest sector. The administration followed that with separate memoranda of understanding with Indonesia and China on combating illegal logging and associated trade. U.S. government officials continue to have bilateral meetings with their counterparts to address illegal logging issues. More recently, illegal logging has received broader attention in the Asia Pacific Economic Cooperation forum.

In addition to government-to-government actions to control illegal logging, AF&PA recognized that international trade needs to be used as a complementary tool to create the political will to make policy improvements and enforce changes on the ground in high-risk countries. To that end, AF&PA was an active participant in a unique stakeholder coalition comprising the forest products industry, labor, environmental organizations, and importer groups, who worked together for the Congressional passage of the 2008 amendments to the Lacey Act.

The 2008 amendments passed with bi-partisan Congressional support. The amendments make it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plants or products—including wood and paper—made of plants that are taken or traded in violation of the laws of a federal, state, or foreign law. The plants or products are considered illegally sourced when they are stolen, taken from officially protected or designated areas, taken without or contrary to the required authorization or on which appropriate royalties, taxes, or stumpage fees have not been paid, or are subject to export bans.

The amendments also require importers to file a declaration identifying the country of harvest, the genus and species of plants contained in the products, and the unit of measure. The declaration requirement, administered by the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, already applies to imports of certain solid wood products but has not yet been phased-in to composite wood products or to pulp and paper, among others.

The 2008 Lacey Act Amendments brought heightened international awareness to the illegal logging issue and introduced a strong incentive throughout the global supply chain to ensure the legality of forest products. The Chatham House, a UK-based nonprofit on international and current affairs, has documented welcome reductions in illegal logging or trade over the past few years, and enacting the Lacey Act Amendments has been part of the reason.

Closer to home, we are hearing from the hardwood sector of our industry that it is seeing a pickup in demand for U.S. hardwoods not only from domestic customers but also from buyers in the Far East who reportedly are looking for hardwoods from reliable and legal sources. Many U.S. hardwood timber mills are small, family-owned businesses so the Lacey Act provides significant economic benefits to American rural businesses and jobs.

Nonetheless, implementation has not been problem free. As is the case with other laws, the government and the private sector learn from each other about implementation realities. Our industry has worked within a wide coalition including importers, industry, environmental groups, labor organizations, retailers, and others to develop consensus recommendations to the federal agencies on implementation of the

Lacey Act Amendments. The consensus group provided the federal agencies with two sets of detailed documents (in 2009 and 2010) encouraging the agencies to use their rulemaking authority to clarify and streamline the requirements for industry to comply with the Lacey Act. As recently as August 2011, the consensus group submitted a joint statement to APHIS proposing a process for addressing outstanding technical issues. Unfortunately, the Administration has been slow to act on these recommendations and many of the problems persist.

The following are AF&PA's recommendations:

- First and foremost, the administration was mandated by Congress to produce a report on implementation issues within two years of passage of the 2008 amendments. This report has still not been completed. Without the report, it is difficult for Congress and private sector stakeholders to assess whether the understanding of the outstanding implementation issues are best resolved administratively or by legislative changes. We urge members of this committee to formally request that the implementing agencies provide a short-term date certain for the release of the report so that Congress and the public may have access to the information needed to determine the best course of action for solving the identified problems with implementation.
- We believe that the declaration requirement is an important tool in ensuring that businesses all along the supply chain—harvesting operations, manufacturers, brokers, importers, and retailers—become a part of the solution through joint action. The idea behind the 2008 amendments was not a heavy-handed government system of regulation, but a requirement that put the burden on the supply chain to exercise due care in knowing where the raw material is coming from. However, the implementation of the declaration requirement is a work in progress. Several paper companies that have implemented internal fiber tracking systems have told AF&PA that it will be very difficult to identify the genus and species of the wood fiber they use at their paper mills on a shipment-by-shipment basis. Typically, their wood fiber comes from low-risk North American sources. In anticipation of the eventual phase-in of the declaration requirement to pulp and paper, AF&PA is working with its member companies to identify alternatives that will provide flexibility for the reporting of the genus and species of fiber used at pulp and paper mills without degrading the utility of the declaration.
- AF&PA believes that the Lacey Act Amendments should not apply to plants and plant products manufactured or imported prior to the enactment of the amendments. We agree that it is unreasonable to expect importers to obtain complete supply chain information retroactive to pre-May 2008. Specific language could be developed by stakeholders that would preclude unintended gaps.
- Federal agencies should issue clear guidance that enforcement action will not be taken against individual consumers. There is no precedent in the Lacey Act's long enforcement history of the government targeting end users of individual products.
- Finally, we believe that adequate funding for federal agencies responsible for carrying out the Lacey Act mandate is critical to ensure the full implementation of the act. This should include funding for international programs that educate foreign governments and businesses on how to comply with the Lacey Act.

Recent reports about enforcement actions taken by the U.S. Fish and Wildlife Service have generated media and political attention to the Lacey Act Amendments. We believe effective enforcement is essential to combating illegal logging. We do not have the information necessary to comment on the particulars of any specific enforcement action, but we do know that enforcement of the law provides a strong deterrent to illegal behavior. Should this Committee decide changes are needed, we would urge that the changes be made administratively, if possible, before legislative changes are contemplated and that care should be taken to ensure that any changes do not undermine the legitimate economic and environmental goals of the 2008 Lacey Act Amendments.

#### **H.R. 3210, the Retailers and Entertainers Lacey Implementation and Enforcement Fairness (RELIEF) Act**

We do not support H.R. 3210 in its current form and are concerned that it sidesteps the administrative review process set out in the original 2008 amendments. The Secretary of Agriculture was mandated to produce a report to Congress within two years of the enactment of the amendments. That report was intended to provide factual information on the implementation and enforcement of the declaration re-

quirement and address some of the questions before the committee today. Without this report, Congress and the business community do not have a common set of information on which to make decisions about whether the implementation issues can be addressed administratively or require legislative changes. The net effect of legislation without this information may be to undermine the goals of the 2008 amendments. We believe H.R. 3210 could diminish the effectiveness of the 2008 Lacey Act Amendments.

- Limitation on application of the Lacey Act’s declaration requirement to “solid wood”—We are concerned with the proposed exclusion of non-solid wood products from the Lacey Act. As we indicated above, AF&PA supports the phase-in of the declaration to pulp and paper but seeks to work with APHIS to address the difficulties in identifying the genus and species of the fiber used to produce each shipment of pulp and paper. The U.S. imports pulp and paper from regions of the world that are known to have inadequate enforcement of logging practices. Reasonable efforts can and should be taken in supply chain management to ensure that illegally sourced raw material is not used widely. The U.S. is one of the largest markets for paper in the world and its requirements will set the standard for production in many developing countries where there might otherwise not be an incentive for good environmental practices.
- Application of the Lacey Act to items imported only for commerce—We do not object to this general idea, but believe it is best dealt with through regulatory guidance. The guidance would need to be carefully crafted, however, so that it does not allow for the operation of off-shore firms that can supply individual Americans with wood products that would otherwise be in violation of the Lacey Act. A broad brush statutory change may not reflect the precision that will be required to prevent the creation of more unintended consequences.
- “Innocent Owner” Defense—H.R. 3210 seeks to eliminate the limitation on the “innocent owner” defense currently inherent in the Lacey Act. Plants and plant products imported in violation of the Lacey Act are treated as stolen goods so in effect are contraband subject to forfeiture by the government. We believe that the threat of forfeiture serves as a strong deterrent but more study may be in order.
- Review and report—We believe that the creation of a public database on “all” foreign laws from which plants and plant products are exported should be explored. However, such a government database should be considered for guidance only and should not be intended to replace the exercise of due care required for compliance with the Lacey Act. Already, the Forest Legality Alliance and other groups have developed databases to assist the trade in identifying foreign laws that could be covered by the Lacey Act. The foundation of the 2008 amendments was a public-private partnership where companies are responsible for asking questions of their suppliers to reasonably know that the raw material they are procuring comes from legal sources.
- Standard certification process for plant and plant products—We are concerned with the level of government intervention in the marketplace that this might entail. We also are concerned that this proposal could lead to a requirement for third-party forest certification, which has the potential to discriminate against U.S.-based certification programs. We also note that a majority of small family forest owners in the U.S. are not third-party certified, and thus, could not meet such a requirement. These forests are, however, sustainably managed and harvested according to the laws of the U.S. Care was taken in the drafting of the 2008 amendments to ensure that any future regulations imposed by other countries to mirror our Lacey Act Amendments would not be harmful to U.S. exports of wood and paper products.

**H.R. 4171, the Freedom from Over-Criminalization and Unjust Seizures Act (FOCUS) Act of 2012**

The 2008 Lacey Act Amendments reinforce and support the laws of other countries concerning the management and trade of plants and plant products. As stated above, a Lacey Act violation is triggered by laws concerning the way plants and plant products are taken, possessed, transported, imported, or exported. Bans and restrictions on exports of raw materials such as logs and sawnwood are common laws in tropical countries and are directly linked to forest management and protection efforts. In countries where corruption is common or where there is weak governance, these laws are an important tool in controlling large exports of illegally logged timber.

In addition to supporting foreign forest governance efforts, another important objective underlying the Lacey Act Amendments was to level the playing field for legitimate American producers of forest products. We believe that the Lacey Act is meeting that objective and that the elimination of the violation of foreign laws as a basis of prosecution will eviscerate the Lacey Act.

In conclusion, given that the U.S. is the largest importer of forest products, with proper implementation and enforcement, the Lacey Act is an important tool for protecting forests around the world and controlling international trade in illegally taken plants and plant products, including wood and paper. By fighting illegal logging, the Lacey Act also is leveling the competition in the international wood market. We have received reports that many Asian manufacturers of wood products are returning to U.S. hardwood to avoid sourcing from questionable suppliers. This helps in preserving and growing jobs in U.S. communities.

As with any other law, there is room for improvement in the manner the act is being implemented and enforced. We believe that first thing the federal agencies need to do is issue their report on the implementation and operation of the Lacey Act Amendments. If it is determined that the act doesn't provide sufficient administrative authority and legislative changes are still needed, we would be glad to work with Congress to implement technical changes that would improve the effectiveness of the Lacey Act.

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Dr. FLEMING. And next up, we have Mr. Rey. You have 5 minutes, sir.

**STATEMENT OF THE HON. MARK REY (H.R. 3210 AND H.R. 4171), FORMER UNDER SECRETARY OF AGRICULTURE FOR NATURAL RESOURCES AND THE ENVIRONMENT, ON BEHALF OF CLIMATE ADVISORS**

Mr. REY. Thank you, Chairman Fleming and members of the Subcommittee for allowing me to present my views. I am testifying today on behalf of Climate Advisors, an environmental consulting firm. I am also an adjunct faculty member at the Michigan State University School of Agriculture and Natural Resources. Prior to these positions, I served under President George W. Bush for nearly 8 years as U.S. Department of Agriculture as the Under Secretary for Natural Resources and the Environment. In that capacity, I oversaw the work of the U.S. Forest Service and participated in the development of the 2008 Lacey Act amendments.

I want to start by commending the Subcommittee for convening this hearing. The implementation of new statutory programs is almost never flawless, and this is not an exception to that, and congressional oversight of agency implementation decisions are crucial.

With the Subcommittee's permission I would also like to submit for the record a statement from Former Deputy Secretary of the Interior, Lynn Scarlett concerning the ecological and economic impacts of illegal logging, as well as the efforts of the George W. Bush Administration to remedy this situation, including the bipartisan enactment of the 2008 Lacey Act amendments. And I would be happy to answer any questions about Secretary Scarlett's statement for the record as well as my own.

[The prepared statement of former Deputy Secretary of the Interior Lynn Scarlett follows:]

**Statement submitted for the record by Lynn Scarlett,  
Former Deputy Secretary, U.S. Department of the Interior**

Thank you Mr. Chairman, Mr. Ranking Member, and members of the committee for the opportunity to share my experience and views on the Lacey Act, illegal logging and its impact on natural resources and the economy. I am currently a Visiting Scholar at Resources for the Future. Prior to this position, I spent nearly 8 years

at the U.S. Department of the Interior, including nearly 4 years as Deputy Secretary during the Administration of President George W. Bush. It is through that lens that I offer my comments.

The extension of the 100-year-old Lacey Act in 2008 to apply to illegally harvested timber was an internationally significant milestone. Through passage of the 2008 amendments, the United States became the first nation in the world to enact an enforceable ban on the importation of illegally harvested timber. Through a bipartisan effort, the Bush Administration supported this addition to the Act. Indeed, passage of these new provisions to the Act was the culmination of an effort against illegal logging by the Bush Administration during nearly the entire 8 years of the Administration. The effort engaged Republicans, Democrats, the timber industry, labor, and the conservation community.

Before turning the “how” of this multi-year effort, consider a few observations on the “why” of this focus on illegal logging. Multiple motivations spurred the efforts to address illegal logging. Banning commerce in illegally harvested timber benefits the U.S. and global economies, protects the environment, and benefits local communities in areas afflicted by these illegal activities. Addressing illegal logging brings win-win-win results.

In terms of the economy, the American Forest & Paper Association estimates that illegal logging costs U.S. businesses over \$1 billion per year in lost sales opportunities and lower prices to U.S. timber companies. The industry had identified commerce in illegally harvested timber as a significant international issue.

The ban on commerce in illegally harvested timber is also good for the environment. Very preliminary estimates indicate an apparent drop of around 22 percent in illegal timber activities since the U.S. and other nations began to target such activities. These include illegal activities associated with deforestation and unsustainable harvesting practices in some developing countries. They include timber harvesting in areas designated by countries as national parks and other protected areas, some of which sustain populations of highly endangered species.

The Lacey Act provisions also benefit local communities. Illegal logging can undermine local economic activities linked to healthy forestlands and often depriving local and national governments of revenues. The World Bank estimated in 2006 that timber harvested illegally worldwide, from public lands alone, resulted in lost assets and revenues of more than \$10 billion annually in developing countries. Illegal activities also shift economic opportunities away from local communities and deprive them of a voice in management of resources linked to these communities.

These details provide the “why” behind the effort to amend the Lacey Act. But these efforts were the culmination of a series of other measures undertaken by the Bush Administration. As early as 2002, the Bush Administration had identified commerce in illegally harvested timber as a significant problem. President Bush asked Secretary of State Colin Powell to develop an initiative to help developing countries stop illegal logging practices. Secretary Powell launched the initiative in 2003, announcing its four main features. These included: good governance and capacity building of legal regimes and enforcement practices; community-based actions to strengthen local economic opportunities; technology transfers; and strengthening of market forces and institutions to ensure accurate timber source reporting, transparent practices, and so on.

The initiative generated significant benefits in the Congo, Southeast Asia, Central America and the Amazon. But, ultimately, the Administration recognized the key role the Lacey Act could play in reinforcing the goals of the initiative to stem illegal logging.

The Bush Administration testified in favor of application of the Lacey Act to commerce in illegal logging in 2007. I offer a couple of observations drawn from that testimony (See Statement of Eileen Sobock, Deputy Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, before the Subcommittee on Fisheries, Wildlife, and Oceans, Committee on Natural Resources, U.S. House of Representatives, Concerning H.R. 1497, Legal Timber Protection Act, October 16, 2007). The Administration’s testimony underscored that the Lacey Act provisions under consideration were not about policing other nations. Rather, the focus was on recognizing foreign laws by prohibiting commerce in illegally harvested timber and timber products. In short, the provisions were based in enhancing international cooperation and reciprocal respect among nations. The provisions were consistent with 100 years of laws pertaining to wildlife under the Lacey Act.

There was another critical part of the discussion about the Lacey Act provisions. Prior to the Bush Administration’s testimony, the Justice Department undertook a review of other laws and concluded that these laws were inadequate to address trade in illegally harvested timber. Amending the Act was viewed by the Administration as essential to addressing this illegal harvesting problem.

As I conclude my remarks, I want to go back to the beginning—the issue of benefits. The Lacey Act provisions on illegal harvesting of timber benefit U.S. businesses, the environment, and local communities in areas currently affected by illegal logging activities. The Act creates an even playing field. It is good for U.S. companies that operate legally in the United States and abroad. But its success depends on its continuation and implementation. Like many statutes, translation from statute to action involves putting in place procedures and building blocks. Such processes always involve a learning curve and some iterative adjustments. The remedy to any perceived implementation challenges resides in addressing those specific issues—not in undoing a statute that is, fundamentally, about reducing fraud and respecting the rule of law in the United States and abroad.

Mr. REY. Passage of the bipartisan 2008 Lacey Act amendments have so far produced very dramatic and positive results as well as some of the problems that have already been discussed. As you have been told, illegal logging has decreased by 22 percent worldwide, and in some countries, by as much as 50 to 70 percent in only a couple of years' time. There is, as you have also been told, some evidence that as companies seek assurances that their timber supply is legal, they are either keeping operations in the United States, or moving them back here to get that assurance. There is also evidence that forest products importers are taking new steps to ensure their wood comes from legal sources.

The Lacey Act has also had a significant international impact, inspired, in part, by the 2008 amendments; the European Union passed similar legislation in 2010, and Australia and several other developing countries are considering similar legislation. It is imperative that as we work to oversee the implementation of the 2008 amendments, and see what changes, if any, are necessary, that this progress not be halted.

Unfortunately, we come to the conclusion that H.R. 3210 would unnecessarily weaken implementation of the 2008 amendments. The Act's advocates have primarily framed the legislation as a narrow fix for the music industry. The effect of enactment of the RELIEF Act, however, would be much more sweeping and would have other effects outside of the music industry.

It, for instance, removes the declaration requirement for nonsolid wood. As you have just been told, pulp and paper alone constitutes more than half of the dollar value of forest products imports into the United States. It weakens penalties for noncompliance, even though for 112 years, the Lacey Act has been constructed to work primarily through deterrence. And it eliminates the possibility of confiscation, as is normal with other stolen goods.

H.R. 4171, would unfortunately return the American wood producers to the unfair trade regime that existed prior to the enactment of the 2008 amendments. Those amendments are designed to reinforce and support the laws of other countries concerning the management and plant—the management and trade of plants and plant products, and that is what has put American wood producers back on a level playing field.

As has been indicated already, the implementation of the 2008 amendments has not been flawless. The 2008 amendments require a report from Congress that was to be delivered—a report to Congress, I am sorry, that was to be delivered in 2010, and that report is still unavailable. So the first place to start, it seems to me, is to get that report up here, review it critically, and then decide

what changes need to be made and whether those changes need to be administrative changes or legislative changes.

So I will conclude by, again, commending you, Mr. Chairman, and the members of the Subcommittee for this important congressional oversight effort. I would hope that your attention today, and in the future, spurs agency actions. Such actions need to be, to respond to and remedy legitimate implementation concerns that have been raised to date. And it is my judgment that most of those can be done administratively. Thank you.

Dr. FLEMING. Thank you, Mr. Rey.

[The prepared statement of Mr. Rey follows:]

**Statement of Mark Rey, Former Under Secretary of Agriculture for Natural Resources and the Environment, on behalf of Climate Advisors**

Thank you Mr. Chairman and members of the Subcommittee for allowing me to present my views on the implementation of the Lacey Act, and on H.R. 3210, the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act (RELIEF Act), and H.R. 4171, the Freedom From Criminalization and Unjust Seizure Act (FOCUS Act).

I am testifying today on behalf of Climate Advisors, a consulting firm that provides scientific, technical, and policy advice to government and non-government organizations. I am also an adjunct faculty member of the Michigan State University School of Agriculture and Natural Resources. Prior to this position, I served under President George W. Bush for nearly 8 years at the U.S. Department of Agriculture as the Undersecretary of Agriculture for Natural Resources and the Environment. In this capacity, I oversaw the work of the U.S. Forest Service and participated in the development of the 2008 Lacey Act Amendments.

I commend the Subcommittee for convening this hearing. The implementation of new statutory programs is seldom flawless, and Congressional oversight of agency implementation decisions is crucial.

I would like to submit for the record a statement from former Deputy Secretary of the Interior Lynn Scarlett concerning the ecological and economic impacts of illegal logging, as well as the efforts of the George W. Bush Administration to remedy this situation, including the bipartisan enactment of the 2008 Lacey Act Amendments. After briefly recounting some of the positive effects of these amendments, I will focus the balance of my remarks on H.R. 3210 and H.R. 4171.

**Impacts of the 2008 Amendments to Date**

Passage of the bipartisan 2008 Amendments and the limited enforcement actions undertaken so far have produced dramatic and positive results. According to a report by Chatham House, the Lacey Act has helped reduce illegal logging by at least 22 percent globally, with reductions as high as 50–70% in some key countries. That is the equivalent of at least a one billion ton reduction in greenhouse gas emissions from deforestation, achieved without the implementation of any new taxes. Chatham House estimated the cost of the greenhouse gas reductions achieved through the reduction in illegal logging ranges between seven cents and \$2.48 per metric ton, providing one of the most affordable examples of reduced greenhouse gas emissions.

There is some evidence that, as companies seek assurances that their timber supply is legal, they are either keeping operations in the United States or moving them back here. Indeed, the Lacey Act may be a factor in the dramatic reversal of the U.S. trade deficit in forest products with China, which went from a \$20.6 billion deficit in 2006 to a \$600 million surplus in 2010. We should look at this success as a model to build upon.

There is also significant anecdotal evidence that forest products importers are taking new steps to ensure their wood comes from legal sources. In the guitar industry alone, Taylor and Martin guitar companies have both said they have worked to bring their operations into Lacey Act compliance, and wood importers, large and small, in all the industries that use forest products have made huge strides in ensuring the compliance of their operations.

The Lacey Act has also had significant international impact. Inspired in part by the 2008 Lacey Act Amendments, the European Union passed a similar regulation in 2010, and Australia and several other countries are considering similar legislation. Earlier this year, the United Nations recognized the Lacey Act with a silver medal as one of the world's three most effective forest conservation policies. The law

has also been recognized by political leaders of forest nations, which are grateful for the support it provides them in their efforts to reduce illegal logging. According to the World Bank, illegal logging costs forest nations \$10 billion a year in lost assets and revenues from permits and other sources.

#### **H.R. 3210 Would Unnecessarily Weaken Implementation of the 2008 Amendments**

The RELIEF Act's advocates have primarily framed the legislation as a "narrow fix" that primarily affects the music industry. They have focused much of their arguments on the idea that individual musicians could be targeted for Lacey Act enforcement for crossing international boundaries, even if they are just carrying instruments with illegal wood that was purchased before the Lacey Act amendments were passed in 2008. The Fish and Wildlife Service and the Justice Department have repeatedly clarified that individuals are not targets for enforcement: "Individual consumers and musicians are not the focus of any U.S. Fish and Wildlife Service law enforcement investigations pertaining to the Lacey Act, and have no need for concern about confiscation of their instruments by the U.S. Fish and Wildlife Service," FWS wrote in a recent statement.

The effect, however, of enactment of the RELIEF Act would be far more sweeping, and would be likely to have much greater impact outside the music industry. The key provisions are:

- *Removes the declaration requirement for "non-solid wood."* This exempts the pulp, paper, and composites industry from the key requirement of the Lacey Act—that they know where their wood is coming from. Pulp and paper alone constitute more than half of the dollar value of forest products imports into the United States.
- *Weakens penalties for non-compliance.* The bill would remove most of the deterrent effect of the penalties by lowering them to traffic ticket levels of \$250 for "first offenses." Given limited enforcement resources, the Lacey Act was constructed to work primarily through deterrence, rather than through widespread issuance of small fines.
- *Eliminates possibility of confiscation.* The bill wouldn't make illegally logged goods subject to confiscation, as is normal with other stolen goods—removing another significant deterrent to illegal logging.

A broad coalition has assembled to oppose the RELIEF Act, including major environmental groups, unions, and almost the entire U.S. forest products industry. Groups opposing the legislation include: Blue Green Alliance, American Forest & Paper Association, Environmental Investigation Agency, Hardwood Federation, Greenpeace, National Wood Flooring Association, League of Conservation Voters, National Alliance of Forest Owners, Natural Resources Defense Council, Sierra Club, The Field Museum, American Hardwood Lumber Association, United States Green Building Council, United Steelworkers, Wildlife Conservation Society, World Wildlife Fund, Union of Concerned Scientists, the American Hardwood Export Council, and many others.

#### **H.R. 4171 Would Return American Wood Producers to an Unfair Trade Regime**

The 2008 Lacey Act Amendments are designed to reinforce and support the laws of other countries concerning the management and trade of plants and plant products. A Lacey Act violation is triggered by laws concerning the way plants and plant products are taken, possessed, transported, imported, or exported. Bans and restrictions on exports of raw materials are common in tropical countries and are directly linked to forest management and protection efforts. In countries where corruption is common or where there is weak governance, these laws are an important tool in controlling large exports of illegally logged timber.

In addition to supporting improved global forest governance, a longstanding pillar of U.S. trade policy, another important objective underlying the Lacey Act Amendments was to level the playing field for legitimate American producers of forest products. We believe that the Lacey Act is meeting that objective, and that the elimination of the violation of foreign laws as a basis for prosecution will threaten the enormous benefits of the Lacey Act.

The implementation of the 2008 Amendments has not been flawless. The 2008 Amendments required a report from the Administration on implementation issues to be delivered to Congress in 2010. That report is still unavailable. A broad coalition of importers, manufacturers, retailers, labor unions, and environmental organizations has been meeting and developing consensus recommendations to the federal agencies involved in Lacey Act implementation. Unfortunately, the agencies have been slow to act on two sets of consensus recommendations submitted thus far.

One of the top areas for improvement would be the establishment of an electronic database at the Animal Plant Health Inspection Service (APHIS) with the associated capacity to more easily and quickly process importer declarations. Creating this resource will enable APHIS to clear legal shipments (which constitute the overwhelming majority of imports), while focusing on the small number of shipments that merit further investigation. This will help legitimate importers to do business at the speed they require in order to compete. The key to addressing this gap is providing sufficient funding to APHIS of approximately \$5.5 million to develop the database. Also needed are sufficient resources for Fish and Wildlife Service and Department of State implementation (including providing technical assistance to the industry for implementation). We recommend a total of \$13.5 million for these purposes. Although the federal budget is tight, the Lacey Act is producing results on a larger scale than most other international conservation programs, and should be prioritized for funding within existing budget constraints.

I commend the Subcommittee for this important Congressional oversight effort, and hope that the Subcommittee's attention spurs agency action. Such action needs to respond to, and remedy, the legitimate implementation concerns that have been raised to date. It is my judgment that these concerns can be resolved administratively.

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Dr. FLEMING. Next, Mr. Gardner for 5 minutes.

**STATEMENT OF ADAM GARDNER (H.R. 3210 AND H.R. 4171),  
FRONTMAN OF GUSTER, FOUNDER AND CO-DIRECTOR OF  
REVERB**

Mr. GARDNER. Thank you. Good afternoon, Mr. Chairman, and distinguished members of the Committee, my name is Adam Gardner. I am a frontman of the band Guster, and the Founder and Co-Director of an organization called Reverb, a nonprofit that educates and engages musicians and their fans to take action toward a more sustainable future.

Since 2004, Reverb has greened more than 115 top-selling major national musicians tours. I come here today to represent a large swath of high-profile musicians who care deeply about their direct impact on the environment, social inequalities, and the economy. Creating musical instruments like guitars, violins and pianos depends on the availability of materials like tone woods. These precious woods are running out and the jobs that depend on them are under severe threat because of illegal logging. Resilient rosewood which was ubiquitous in guitars and other stringed instruments is now under imminent threat of extinction because of illegal logging. The black market trade in these goods severely undermines efforts to revitalize and sustainably harvest these tree populations.

In response, many instrument manufacturers have taken important steps to ensure that their wood is both legal and sustainable. Referring to Lacey, Taylor Guitars' CEO Bob Taylor says: "It is very simple. We now investigate the sources of our wood and we ensure to the best of our ability that the wood was taken legally. The cost isn't so much for us, it is not an unbearable added burden, and we are happy to do extra administrative work."

Similarly, Chris Martin, Chairman and CEO of Martin Guitars stated last year: "I think the Lacey Act is a wonderful thing. Illegal logging is appalling. It should stop. And if this is what it takes, unfortunately, to stop unscrupulous operators, I am all for it."

But just as the Lacey Act is starting to work, we are being prevented with both the FOCUS Act, that would remove any criminal liability and the need to comply with foreign laws, and the so-called

RELIEF Act, which proponents would like you to believe is a surgical fix to the Lacey Act. The reality is much different.

The RELIEF Act's sweeping provisions would remove almost all key deterrents to illegal logging. The changes being proposed would mostly benefit the commercial agenda of big Asian timber conglomerates that have long opposed the Lacey Act. The RELIEF Act provisions would exempt pulp and paper from the core requirements of the Lacey Act as we already heard many times today, even though they comprise more than half of forest product imports. The bill would also lower fines for import of illegally logged wood to the meaningless level of a traffic ticket, just \$250 for first offenders, even if that first offense involves a container-sized shipment of illegally sourced forest products worth hundreds of thousands of dollars. And perhaps most surprisingly, the bill would allow for businesses to keep the profit from wood that has been proven to be stolen.

This runs counter to all other U.S. law and I would argue against the very core of American ethic. In other words, if someone came in your house, stole your TV and sold it to someone else, wouldn't you expect the authorities to return your property to you rather than allow the criminals who stole it to keep it and sell it?

The same should be true for wood. As for musicians, let's set the record straight. Lacey does not pose a threat to musicians. A number of misleading claims have been raised by RELIEF advocates that are simply not true. First, no individual has ever been investigated or had their instrument taken under the Lacey Act. Moreover, the U.S. Government itself has said it is not after individual musicians.

Second, the Lacey Act does not ban the purchase of rare types of wood, nor traveling with them. It simply bans trade in illegal wood products. The only relief H.R. 3210 provides is to illegal loggers, while leaving musicians and other consumers with burdensome doubt about the legality and sustainability of the wood products we use.

By contrast, the Lacey Act provides comforting assurance to conscientious consumers like myself, that the wood I am buying in my instruments or elsewhere is legally sound. The need for keeping Lacey strong was further underscored by the recent murder of Cambodian conservationist Chut Wutty who was killed while working to expose illegal logging of rosewood.

No musician I know wants to play an instrument that is made from wood stolen from a national park or harvested using slave and child labor and violence. That is why a number of prominent musicians have signed a pledge to support the Lacey Act and oppose current efforts to weaken it, which Ranking Member Markey submitted for the record earlier today. These artists includes, Bonnie Raitt, David Crosby, Willie Nelson, Dave Matthews Band, Jack Johnson, Maroon 5, Jason Mraz, Bob Weir, Pat Simmons of the Doobie Brothers, Barenaked Ladies, Dispatch, Fun, My Morning Jacket, Of a Revolution, Razia Said, my band Guster and my organization, Reverb. This is in addition to over 40,000 sign-ons to a similar petition early this year. And as word spreads across the music industry, more are sure to add their names and voices in support of Lacey Act.

Chairman Fleming and honorable Members of Congress, please listen to the voices of American musicians and keep the U.S. on a path of defending forests, the law, American forest products, and a sound future for music. Thank you.

Dr. FLEMING. Thank you, Mr. Gardner.

[The prepared statement of Mr. Gardner follows:]

**Statement of Adam Gardner, Frontman of Guster,  
Founder and Co-Director of Reverb**

Good afternoon. My name is Adam Gardner, and I'm the frontman of a band called Guster and the founder and co-director of Reverb, a non-profit organization that educates and engages musicians and their fans to take action toward a more sustainable future. Since 2004, Reverb has worked with over 60 top-selling artists on greening more than 115 tours and over 1800 concert events. We've achieved a reduction of nearly one-hundred thousand tons of carbon emissions, partnered with over 2,500 environmental organizations, and have reached an estimated 14.5 million fans with our message. We believe in using the musician's voice to create change, which is why I am providing testimony today on this very critical issue for our forests, climate, and planet.

Great music transports us to the sublime, where we can forget the banal tugs of the physical world. But the ability to create ethereal symphonies and emotionally raw thrasher solos alike rests on the availability of some very physical materials, most notably the prized tonewoods that give guitars, violins, pianos, and dozens of other instruments their immediately recognizable timbre. Unfortunately, these precious woods are running out and the availability of those materials and the jobs that depend on them are under severe threat because of illegal logging.

For instance, Brazilian Rosewood, once ubiquitous in guitars and other stringed instruments, was loved nearly to death: because of illegal logging, this species is now under imminent threat of extinction. Efforts to revitalize dwindling tree populations and manage their harvest sustainably are severely undermined by the black market trade in these goods. The effects can be seen in illegal logging hotspots like Madagascar and Indonesia: tugged by the lure of quick profits, illegal logging gangs bribe officials to gain access to national parks and other protected areas, pillage the valuable species, and sometimes feed themselves by hunting endangered "bushmeat" like lemurs.

The human consequences are no less devastating. Revenue from illegal logging and export trade supports and perpetuates corruption and criminal activities, and is reaped in an atmosphere of fear, intimidation and human rights abuses. Illegal logging in some countries has been used to finance violent conflicts—much like the "blood diamonds" that funded wars in West Africa—while in others it is linked with wildlife and drug smuggling operations.

As a result of this threat to sources of tonewoods, many individual instrument manufacturers have taken important steps to ensure that their wood is both legal and sustainable. Speaking about Taylor Guitars' response to Lacey, Bob Taylor says, "It's very simple. We now investigate the sources of our wood, and we ensure to the best of our ability that the wood was taken legally. We fill out the paperwork required and we present our business as an open book. The cost isn't so much for us. It's not an unbearable added burden, and we're happy to do the extra administrative work." Similarly, Chris Martin, Chairman and CEO of Martin Guitars stated last year, "I think [the Lacey Act] is a wonderful thing. Illegal logging is appalling. It should stop. And if this is what it takes unfortunately to stop unscrupulous operators, I'm all for it."

The law is delivering impressive results. According to a recent report from Chatham House (the UK's equivalent of the Council on Foreign Relations), the Lacey Act has helped reduce illegal logging globally by a whopping 22 percent, as companies around the world take steps to ensure their supplies come from legal sources. The United Nations recently recognized the Lacey Act as one of the world's three most effective forest conservation laws, and the European Union passed similar legislation after seeing Lacey's outsize success.

But just as the Lacey Act is starting to work, we are being presented with the FOCUS act that would remove any criminal liability and the need to comply with foreign laws, and the so-called RELIEF Act, which proponents would like you to believe is a surgical "fix" to the Lacey Act. The reality is much different.

The RELIEF Act's provisions would remove almost all the key deterrents to illegal logging; those things that are really bringing about change on the ground and in the trade. They are so far reaching that they would completely undermine the law's

effectiveness in preventing deforestation as well as threaten U.S. jobs by allowing cheap illegal imports to undercut local products. The changes being proposed would mostly benefit the commercial agenda of big Asian timber conglomerates that have long opposed the Lacey Act. The revised provisions would exempt pulp and paper from the core requirements of the Lacey Act, even though these products comprise more than half of forest products imports. The bill would also lower fines for import of illegally logged wood to the meaningless level of a traffic ticket—just \$250 for “first offenders,” even if that first offense involves a container-size shipment of illegally-sourced forest products.

The rationale that RELIEF advocates put forth for these sweeping changes is that Lacey poses a threat to musicians. This is simply not the truth. Let’s set the record straight on a number of misleading claims that have been raised: First, no individual has ever been investigated or had their instrument taken under the Lacey Act. Moreover, the U.S. government itself has said it’s not after individual musicians. Second, the Lacey Act does not ban the purchase of rare types of wood, nor travelling with rare types of wood; it simply bans trade in *illegal* wood products. Third, the government has made allowance in the declaration for musical instruments or other products manufactured prior to May 22, 2008 to declare them as pre-2008 material, without the specifics usually required by the declaration.

In effect H.R. 3210 only provides “relief” to illegal loggers while leaving musicians and other consumers of wood products with burdensome doubt about the legality and sustainability of the wood products we use. By contrast, the Lacey Act provides comforting assurance to conscientious consumers like myself that the wood I am buying in my instruments or elsewhere is legally sound.

No musician I know wants to play a guitar, violin, or piano made from illegal wood, wood stolen from a national park, or harvested using slave and child labor. In fact, the musicians I know through Reverb’s work are doing as much as they can to make the products and practices of their music as earth-friendly as possible, from fueling their tour busses with sustainably produced biodiesel to offering organic merchandise to fans. There is no more obvious product than the instrument itself through which we express our music. The musicians I know are committed to ensuring sustainable practices so future generations also have access to the tonewoods that provide the rich sounds that make music great.

Reverb has recently created a formal coalition of these like-minded musicians called the Green Music Group. Since learning about the recent challenges to the Lacey Act, a number of prominent musicians have signed a pledge to support the Lacey Act and oppose current efforts to weaken it. The pledge reads as follows:

*Widespread illegal logging is placing at risk the wood we treasure in our musical instruments, and thus the future of music as we know it. As musicians dedicated to our art and to protecting the earth’s natural resources, we call on everyone involved in the sourcing, crafting and production of musical instruments to join us in our commitment to eliminate all trade in illegally logged timber and forest products. We will not buy a new instrument without asking where the wood comes from and if it was harvested legally and sustainably.*

*We support the Lacey Act and other laws that prohibit trade in illegally sourced wood and we oppose the efforts currently underway to weaken the Lacey Act. We urge lawmakers, suppliers and craftsmen to ensure that our art has a positive impact on the environment rather than contributing to forest destruction. We call on our fellow musicians to do the same.*

The following musicians signed on within 48 hours of learning about the threat to the effective implementation and enforcement of the Lacey Act:

Bonnie Raitt  
David Crosby  
Willie Nelson  
Maroon 5  
Jason Mraz  
Bob Weir  
The Barenaked Ladies  
Brad Corrigan of Dispatch  
Pat Simmons of the Doobie Brothers  
Ray Benson of Asleep At The Wheel  
The Cab  
Of A Revolution (O.A.R)  
Ryan Dobrowski and Israel Nebeker of Blind Pilot  
Razia Said  
Rob Larkin  
My band, Guster

And my organization, Reverb

This is in addition to over 40,000 sign-ons to a petition called “Musicians Against Illegal Logging” last January. Having worked on initiatives within the music industry for a while, I can say that this is quite an enthusiastic showing of support to have such quick responses from bands of this caliber. And as word spreads across the music industry, more are sure to add their names and voices in support of the Lacey Act.

U.S. leadership to combat illegal logging in this way has been impressive. It has taken away a market that was historically “no questions asked”—and other consuming nations are following the U.S. lead.

Chairman Fleming and honorable members of Congress: please listen to the voices of America’s musicians and keep the U.S. on a path of defending forests, the law, American forest products, companies with ethical wood sourcing, and a sound future for music.

Thank you.

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Dr. FLEMING. And last, we have Mr. Rubinstein. You, sir, have 5 minutes.

**STATEMENT OF REED D. RUBINSTEIN (H.R. 3210 AND H.R. 4171), PARTNER, DINSMORE & SHOHL, LLP, UNITED STATES CHAMBER OF COMMERCE’S INSTITUTE FOR LEGAL REFORM**

Mr. RUBINSTEIN. Thank you, Mr. Chairman, good afternoon. Good afternoon, Ranking Member Sablan and members of the Subcommittee. My name is Reed Rubinstein. I am a partner in the Washington, D.C. office of Dinsmore & Shohl. For 25 years, I have practiced environmental and administrative law, defending individuals and companies in Federal, civil, and criminal enforcement matters. I have also served as the U.S. Chamber of Commerce’s Senior Counsel for Environment, Technology, and Regulatory Affairs, and as an adjunct professor of environmental law at the Western New England School of Law.

I am testifying today on behalf of the U.S. Chamber Institute for Legal Reform. ILR promotes civil justice reform through legislative, political, judicial and educational activities at the National, State, and local levels. The U.S. Chamber is the world’s largest business federation representing the interest of more than 3 million businesses and organizations of every size, sector and region. ILR strongly supports the Lacey Act’s important fish, wildlife, and plant conservation goals. However, the statute is deeply flawed and reform is needed. To begin with, the Act is an exemplar for the vice of overcriminalization. It lacks a meaningful mens rea, wrongful intent requirement. Instead, it uniquely imposes vicarious criminal and civil liability on American citizens for violations of a vast unchartered universe of foreign laws, regulations, decrees, and ordinances.

As enforced, American musicians, fishermen, and florists are deemed to know all potentially applicable foreign requirements and then required to guess at the risk of their liberty and property how these requirements will be interpreted by both foreign, and U.S. regulators.

This offends basic principles of due process, equity, and prudence without materially advancing the Act’s purposes. Also, when Congress amended the Lacey Act in 2008 and enacted 16 USC Section 3374(d), it did so to protect innocent owner’s right under the Civil Asset Forfeiture Reform Act, or CAFRA, these rights to recover

properties seized by the government under Lacey. Congress did this to account for the practical compliance difficulties, created by its 2008 expansion of Lacey liability to plants and plant products, and to cure a 2005 Ninth Circuit ruling striking CAFRA's innocent owner affirmative defense because the court there deemed all properties seized by the government under Lacey at all times to be contraband.

The government continues to apply the punitive Ninth Circuit rule, but punishing objectively blameless persons who act with due care has not been proven to materially enhance the Act's protection of endangered fish, wildlife, or plants, and it is inconsistent with basic U.S. legal norms.

ILR believes that Congress should reform the Lacey Act to cure these serious flaws. Therefore, it applauds Representative Cooper for introducing the RELIEF Act, and Representative Broun for introducing the FOCUS Act. These bills demonstrate that there is bipartisan support both for a congressional hard look at the Act, and for implementation of the commonsense reforms needed to remedy the Act's unintended consequences.

As a general matter, ILR believes that Congress' hard look should include whether the Act includes an adequate wrongful intent requirement; appropriately defines both the guilty act, and the intent required in specific and unambiguous terms; provides a clear statement whether the intent requirement applies to all elements of the offense, or if not, which mens rea terms apply to which elements of the offense.

And finally, whether or not the Act sets proper limits on the delegated criminal law making authority of regulators. At a minimum, ILR believes that Congress should cabin the foreign laws that Lacey jeopardy triggers to provide Americans with fair notice of prohibited conduct, and to prevent arbitrary and discriminatory enforcement and prosecution. Also, Congress should solve the contraband issue by explicitly providing that innocent owners, as defined by CAFRA, may recover their property. Both the FOCUS Act and the RELIEF Act should play an important role in the Lacey reform process.

The FOCUS Act addresses the overcriminalization and due process problems by striking foreign law references and criminal sanctions, but retains the due care standard for civil liability, which seems adequate, appropriate, and beneficial in this context.

The RELIEF Act provides useful language for finally solving the contraband issue so that innocent owners are entitled to CAFRA's protections. This is not something new. This is what Congress intended in 2000 when it enacted CAFRA, and then amended Lacey in 2008 to provide such protection. And this is what Congress intended and it is time now to finish the job.

The Lacey Act deserves congressional support, let us be clear. And Congress can do this best by ensuring that the Act is properly aligned with our most fundamental legal norms and values. Thank you for your attention.

[The prepared statement of Mr. Rubinstein follows:]

**Statement of Reed D. Rubinstein, Esq., Partner, Dinsmore & Shohl LLP,  
on behalf of the U.S. Chamber of Commerce's Institute for Legal Reform**

Good afternoon, Chairman Fleming, Ranking Member Sablan, and members and staff of the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs. I am Reed D. Rubinstein, a partner in the Washington, D.C. office of Dinsmore & Shohl, LLP. For twenty-five years, I have practiced environmental and administrative law, defending individuals and companies in federal civil and criminal enforcement matters. I also have served as the U.S. Chamber of Commerce's Senior Counsel for Environment, Technology and Regulatory Affairs, and as an adjunct professor of environmental law at the Western New England School of Law.

I am testifying today on behalf of the U.S. Chamber's Institute for Legal Reform ("ILR") in support of Lacey Act reform. ILR promotes civil justice reform through legislative, political, judicial and educational activities at the national, state and local levels. The U.S. Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

**I. SUMMARY**

ILR strongly supports the Lacey Act's important fish, wildlife and plant conservation goals.<sup>1</sup> However, the statute is deeply flawed. To begin with, the Act is an exemplar for the vice of over-criminalization. It lacks a meaningful *mens rea* (wrongful intent) requirement, instead imposing vicarious criminal and civil liability on American citizens for violations of a vast, uncharted universe of foreign laws, regulations, decrees and ordinances.<sup>2</sup> As enforced, American musical instrument makers, fishermen, and florists are deemed to "know" all potentially applicable foreign requirements and then required to guess, at the risk of their liberty and property, how these requirements will be interpreted by both foreign and U.S. regulators. This offends basic principles of due process, equity and prudence.<sup>3</sup>

Also, Congress enacted 16 U.S.C. §3374(d) to protect innocent owners' rights under the Civil Asset Forfeiture Reform Act ("CAFRA")<sup>4</sup> to recover property seized by the government under Lacey. Congress did this to account for the practical compliance difficulties created by its 2008 expansion of Lacey liability to plants and plant products, and to cure a 2005 Ninth Circuit ruling striking CAFRA's innocent owner affirmative defense because it deemed all property seized by the government under Lacey to be "contraband."<sup>5</sup> However, the government continues to apply the punitive Ninth Circuit rule. Punishing objectively blameless persons who act with due care has not been proven to materially enhance the Act's protection of endangered fish, wildlife or plant populations, and is inconsistent with basic U.S. legal norms.

ILR believes that Congress should reform the Lacey Act to cure these serious flaws. Therefore, it applauds Rep. Cooper, for introducing H.R. 3210 (the "RELIEF Act"), and Rep. Broun, for introducing H.R. 4171 (the "FOCUS Act"). These bills demonstrate that there is bipartisan support both for a Congressional "hard look" at the statute and for implementation of the common-sense reforms needed to remedy the Act's unintended consequences.

As a general matter, ILR believes the "hard look" at Lacey should include whether the Act: (1) includes an adequate *mens rea* requirement; (2) appropriately defines both the *actus reus* (guilty act) and the *mens rea* of the offense in specific and unambiguous terms; (3) provides a clear statement of whether the *mens rea* requirement applies to all the elements of the offense or, if not, which *mens rea* terms apply to which elements of the offense; and (4) sets proper limits on the delegated criminal

<sup>1</sup> 18 U.S.C. §§42–43; 16 U.S.C. §3371 et seq.

<sup>2</sup> That these foreign "laws" lack a direct nexus to fish, wildlife or plant conservation, or provide only for civil fines, or even are ruled invalid and retroactively repealed by the government that enacted them in the first instance, is of no moment. See generally *United States v. McNab*, 324 F.3d 1266, 1268 (11th Cir.) cert. denied 540 U.S. 1177 (2004); *United States v. Lee*, 937 F.2d 1388, 1393 (9th Cir.) cert. denied 502 U.S. 1076 (1992).

<sup>3</sup> See generally *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>4</sup> 18 U.S.C. §§981, 983(d)(1).

<sup>5</sup> See Testimony of Craig Foster, *Legal Timber Protection Act: Hearing on H.R. 1497 Before the Subcomm. on Fisheries, Wildlife and Oceans of the H. Comm. on Natural Resources*, 110th Cong. at 55 (2007) (discussing compliance barriers and explaining that "it is necessary to understand that long supply chain and the fact that there are many people along that supply chain. . . I cannot audit the entire supply chain. . . Criminal behavior is criminal behavior. All I can do is work with the best of my knowledge"); *United States v. 144,774 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005).

lawmaking authority of regulators.<sup>6</sup> At a minimum, ILR believes that Congress should cabin the foreign laws that are Lacey jeopardy “triggers” to provide Americans with fair notice of prohibited conduct and to prevent arbitrary and discriminatory enforcement and prosecution. Also, Congress should solve the contraband issue by explicitly providing that innocent owners, as defined by CAFRA,<sup>7</sup> may recover property seized by the government under Lacey.

## II. DISCUSSION

### A. *Lacey Act Background*

Passed by Congress in 1900, the Lacey Act was the first federal wildlife protection law. In its initial iteration, the Act supported state game animal and bird protection efforts by prohibiting the interstate shipment of wildlife killed in violation of state or territorial law, requiring wildlife to be clearly marked when shipped in interstate commerce, banning the importation of certain animals (including English sparrows) that could harm U.S. crop production and authorizing the federal government to preserve and restore game bird populations.<sup>8</sup> Amendments in 1935 prohibited interstate commerce in wildlife captured or killed in violation of any federal or foreign law. Amendments in 1945 banned the importation of wildlife under “inhumane or unhealthful” conditions.<sup>9</sup> Amendments in 1981 diluted the *mens rea* requirement from “willfully” to “knowingly.”<sup>10</sup> And, amendments in 2008 criminalized the import, export, transport, sale, receipt, acquisition or purchase of any plant or plant product taken, possessed, transported or sold in violation of any domestic or foreign law.<sup>11</sup>

### B. *Lacey Act Structure*

The Lacey Act uniquely subjects American citizens to domestic jeopardy for the violation of a foreign sovereign’s enactments.<sup>12</sup> 16 U.S.C. § 3373 imposes strict civil and criminal liability for conduct “in violation of, or in a manner unlawful under, any underlying law” that is “prohibited” by the Act, subject only to a “due care” defense. Section 3372(a)(2) prohibits any person to “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce” any fish or wildlife “taken, possessed, transported or sold in violation of. . .any foreign law,” and plants “taken, possessed, transported or sold in violation of. . .any foreign law” including laws governing the payment of appropriate royalties, taxes or stumpage fees and “the export or transshipment” thereof. Section § 3371(d) defines “law” to mean “laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.”

Lacey Act civil liability and criminal penalties attach when “in the exercise of due care” a defendant “should know” that the fish, wildlife or plants were taken in violation of the underlying law.<sup>13</sup> The Act does not define “due care.” The legislative history states that “[d]ue care simply requires that a person facing a particular set of circumstances undertakes certain steps which a reasonable man would take to do his best to insure that he is not violating the law.”<sup>14</sup> No clarifying regulations have

<sup>6</sup> See generally Walsh & Joslyn, WITHOUT INTENT: HOW CONGRESS IS ERODING THE INTENT REQUIREMENT IN FEDERAL LAW 26—31 (2010) available at <http://www.nacdl.org/withoutintent/> (accessed May 3, 2012).

<sup>7</sup> 18 U.S.C. §§ 983(d)(2)—(3).

<sup>8</sup> U.S. Fish & Wildlife Service, “Nation Marks Lacey Act Centennial, 100 Years of Federal Wildlife Law Enforcement,” available at <http://www.fws.gov/pacific/news/2000/2000-98.htm> (accessed May 2, 2012).

<sup>9</sup> *Id.*

<sup>10</sup> See Lacey Act Amendments of 1981, Pub. L. 97–79.

<sup>11</sup> 16 U.S.C. § 3372(a)(2).

<sup>12</sup> *United States v. McNab*, 324 F.3d 1266, 1274 (Fay, J. dissenting) (“the Lacey Act, by its very terms, is dependent upon the laws of a foreign sovereign”), cert. denied 540 U.S. 1177 (2004). As the Deputy Assistant Attorney General for Environment and Natural Resources Division of the U.S. Department of Justice testified in 2007:

One unique feature of the Lacey Act is that it allows the incorporation of foreign law as an underlying law or predicate offense that “triggers” a Lacey Act violation. . . The law or regulation must be of general applicability, but may be a local, provincial, or national law. The defendant need not be the one who violated the foreign law. . . However, the defendant must know or, in the exercise of due care, should know, about its [violation].

See TESTIMONY OF EILEEN SOBECK BEFORE THE SUBCOMMITTEE ON FISHERIES, WILDLIFE AND OCEANS, COMMITTEE ON NATURAL RESOURCES, U.S. HOUSE OF REPRESENTATIVES CONCERNING H.R. 1497 at 4 (Oct. 16, 2007) available at <http://naturalresources.house.gov/uploadedfiles/sobocktestimony10.16.07.pdf> (accessed May 2, 2012).

<sup>13</sup> See 16 U.S.C. § 3373.

<sup>14</sup> Lacey Act Amendments of 1981, S. Rep. No. 97–123, 97th Cong., 1st Sess. 10–12 (1981); 1981 U.S.C.C.A.N. 1758–59. The Committee explained:

Continued

been issued by any enforcing federal agency.<sup>15</sup> However, in 2010, the United States Department of Agriculture Animal and Plant Health Inspection Service identified “Tools to Demonstrate Due Care” in a PowerPoint presentation.<sup>16</sup> These included “asking questions,” “compliance plans,” “industry standards,” “records of efforts,” and, helpfully, “changes in above in response to practical experiences.”<sup>17</sup>

*C. The Lacey Act’s Flaws Lead To Absurd And Unjust Results*

The Lacey Act’s broad liability scheme charges Americans to know and “properly” interpret the statutory and regulatory minutiae of fishery, wildlife and forest management, tax, customs, logging, commercial and real property “law” in places like Indonesia, Vietnam, Peru and China.<sup>18</sup> It then requires our citizens to “verify” that foreign actors in a supply chain that may span countries rife with legal inefficiency, imprecision and corruption appropriately “comply” with all of these laws.<sup>19</sup> Finally, the statute’s non-existent limits on regulatory discretion empower U.S. regulators to “Monday Morning Quarterback” good faith interpretative and verification efforts, and then to raid and prosecute anyone whom the government decides has failed to measure up. This leads to absurd results.

For example, on August 24, 2011, Gibson Guitar factories in Nashville and Memphis were raided by armed agents from the Department of Homeland Security and the U.S. Fish & Wildlife Service.<sup>20</sup> The company was not accused of importing banned wood.<sup>21</sup> Rather, the raid apparently occurred because Gibson ran afoul of

[D]ue care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances. As a result, it is applied differently to different categories of persons with varying degrees of knowledge and responsibility. For example, zoo curator’s [sic], as professionals, are expected to apply their knowledge to each purchase of wildlife. If they know that a reptile is Australian and that Australia does not allow export of that reptile without special permits, they would fail to exercise due care unless they checked for those permits. On the other hand, the airline company which shipped the reptile might not have the expertise to know that Australia does not normally allow that particular reptile to be exported. However, if an airline is notified of the problem and still transships the reptile, then it would probably fail to pass the due care test.

*Id.*

<sup>15</sup>Tanczos, *A New Crime: Possession of Wood—Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 RUTGERS L. J. 549, 567 (2011).

<sup>16</sup>U.S. DEPT OF AGRIC., LACEY ACT PRIMER 20 (April 2010) available at [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/LaceyActPrimer.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf) (accessed May 3, 2012).

<sup>17</sup>*Id.* As one environmental group has correctly noted, “‘Lacey compliance’ is not defined by any one document, checkbox, due diligence system or due care check-list, and do not expect the U.S. government to provide that.” EIA, *Setting the Story Straight—The U.S. Lacey Act: Separating Myth from Reality 2* (2010) available at <http://www.eia-global.org/PDF/Report—Mythbusters—forest—Jan10.pdf> (accessed May 3, 2012).

<sup>18</sup>According to the government, “It is the responsibility of the importer to be aware of **any** foreign laws that may pertain to their merchandise prior to its importation into the United States.” See ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEPT OF AGRIC., LACEY ACT AMENDMENTS: COMPLETE LIST OF QUESTIONS AND ANSWERS 2 (Feb. 16, 2012) available at [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/faq.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf) (accessed May 3, 2012)(emphasis added).

<sup>19</sup>Indonesia, for example, has over nine hundred laws, regulations, and decrees that govern timber exploitation, transportation, and trade. Saltzman, *Establishing a “Due Care” Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1, 6 (2010). Further complicating the matter is the problem of corrupt foreign governments and regulatory “agencies.”

Consider, for example, the case of Bigleaf mahogany imports from Peru. . . Peruvian officials have. . . supplied false documentation for these products. . . Not only was timber being illegally harvested in Peru, but illegal timber was also being moved into Peru from neighboring countries to be laundered. . . Such “deeply entrenched patronage systems” are most often linked to political networks. . . Clearly, it is wrong to require U.S. importers to comply with a myriad of foreign laws when the governments enacting these laws not only fail to adhere to them, but seem to be at the very root of the problem.

See 42 RUTGERS L. J. at 572 (citations omitted); see also Henry Juskiewicz, *Repeal the Lacey Act? Hell No, Make It Stronger!* The Huffington Post Green Blog (Nov. 2, 2011) available at [http://www.huffingtonpost.com/henry-juskiewicz/gibson-guitars-lacey-act\\_b\\_1071770.html](http://www.huffingtonpost.com/henry-juskiewicz/gibson-guitars-lacey-act_b_1071770.html) (accessed May 5, 2012) (“The U.S. should also use the power of the marketplace to encourage sustainable harvesting practices in **countries whose forestry systems are rife with graft and corruption**”)(emphasis added).

<sup>20</sup>According to Juskiewicz “They...come in with weapons, they seized a half-million dollars worth of property, they shut our factory down, and they have not charged us with anything”, quoted on Reason TV, available at [http://www.liveleak.com/view?i=cd2\\_1330024001](http://www.liveleak.com/view?i=cd2_1330024001) (accessed May 5, 2012).

<sup>21</sup>See Affidavit of Special Agent John M. Rayfield in support of Search Warrant 11–MJ–1067 A, B, C, D at ¶¶ 15–18 (Aug. 18, 2011) available at <http://www.scribd.com/srcohiba/d/63869457–>

a technical Indian regulation governing the export of finished wood products, which was designed to protect Indian woodworkers from foreign competition.<sup>22</sup> To make matters worse, although the Indian government certified that the wood was properly and legally exported, the regulators substituted their own opinion to create a Lacey Act violation.<sup>23</sup> To this day, the government refuses either to return the company's goods or to allow Gibson its day in court to contest the seizure.

In another notorious case, on the basis of an "anonymous facsimile" Americans were convicted and sent to prison for importing lobster tails from Honduras in plastic bags, rather than in boxes as "required" by a Honduran "regulation." Also, a "significant number [of the lobsters] had a tail length that was less than the 5.5 inches required" by the Hondurans for export.<sup>24</sup> Although the Honduran government averred that the "laws" supposedly violated by the defendants were either invalid at the time of the lobster shipment or had been retroactively repealed, the Eleventh Circuit upheld the criminal convictions and ruled: "Although Lacey Act offenses are predicated upon violations of [foreign] law, the statute nowhere states that a viable or prosecutable [foreign] law violation is necessary to support federal charges. . . Thus, the subsequent invalidation of the underlying foreign laws does not make the defendants any less culpable for their actions."<sup>25</sup>

### III. KEY LACEY ACT CONCERNS

#### A. The "Over-criminalization" Problem

The Lacey Act is an exemplar for the vice of over-criminalization. "Over-criminalization" is seen in Congressional enactments that expand criminal liability to individuals who hardly seem blameworthy, including strict liability offenses that dispense with culpable mental states; vicarious liability for the acts of others without some evidence of personal advertence; grossly disproportionate penalties that bear no relation to the wrongfulness of the underlying crime, the harmfulness of its commission, or the blameworthiness of the criminal; and the broad delegation of criminal enforcement authority to bureaucratic regulators.<sup>26</sup> Such enactments corrode individual civil liberties.

The Lacey Act does all of these things. It holds Americans vicariously liable for the violation of even the most technical foreign law, rule or local ordinance without evidence of personal advertence or intent. It penalizes without relation to the harm done by the "violator" to fish, wildlife or plant populations. It criminalizes obscure foreign requirements, including civil customs, transportation, and packaging rules and even local tax or royalty ordinances, and then delegates unlimited prosecutorial power to federal regulators. Perversely, the Lacey Act unleashes the coercive power of the federal government not against the corrupt and lawless foreign individuals, companies and governments that allow, encourage or conduct poaching, clear-cutting and environmental degradation, but rather against Americans who are innocent of wrong-doing, by any common measure.

The U.S. Supreme Court has repeatedly held that a criminal law is unconstitutionally vague and invalid if it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, or if it authorizes or encourages arbitrary and discriminatory enforcement.<sup>27</sup> The Court has not considered whether Lacey's "foreign laws" references pass constitutional muster. However, at best it is very difficult to justify the legal fiction that the owner of a small business in Topeka, Kansas who imports wooden-handled brooms from China has fair notice of and understands the conduct prohibited by all applicable national, provincial and

US-Government-s-Affidavit-in-Support-of-Search-Warrant-at-Gibson-Guitar-Factory (accessed May 4, 2012).

<sup>22</sup>Juszkiewicz, *supra* at note 19.

<sup>23</sup>Apparently, Gibson was advised by the U.S. government that if it finished its guitar fingerboards using Indian labor rather than Tennessee craftsman, the Lacey Act issue would not exist. Juszkiewicz, *supra* at note 19.

<sup>24</sup>*McNab*, 324 F.3d at 1268.

<sup>25</sup>*Id.* at 1270 (citations omitted).

<sup>26</sup>See Luna, *The Overcriminalization Phenomenon*, 54 American Univ. L. Rev. 703, 715 (2005).

<sup>27</sup>*Morales*, 527 U.S. at 56 (citation omitted). As the Court held long ago:

That the terms of a penal statute. . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

*Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925).

local Chinese civil and criminal laws, regulations, ordinances and requirements.<sup>28</sup> Also, the Gibson Guitar case starkly illustrates the statute's inherently subjective, arbitrary and discriminatory enforcement regime.<sup>29</sup> Although the Indian government certified that the wood there in question was properly and legally exported, the U.S. Fish and Wildlife Service substituted its own opinion and dispatched armed agents to raid the company.<sup>30</sup> The fact that U.S. regulators can do such a thing certainly suggests that the Act may be tainted by a due process infirmity.

#### B. The "Contraband" Problem

In 2008, Congress amended Lacey by adding 16 U.S.C. § 3374(d). This section states that Lacey Act forfeitures of fish, wildlife or plants are subject to the Civil Asset Forfeiture Reform Act ("CAFRA").<sup>31</sup> Among other things, CAFRA states that an innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.<sup>32</sup> Congress enacted § 3374(d) to account for the practical compliance difficulties caused by Lacey liability expansion to plant products,<sup>33</sup> and to cure a Ninth Circuit ruling in the case of *United States v. 144,774 Pounds of Blue King Crab* that essentially holds that all fish, wildlife or plants seized under the Lacey Act are "contraband," nullifying the innocent owner defense in all such cases.<sup>34</sup>

Notwithstanding § 3374(d)'s enactment, the government apparently still denies innocent owners the benefit of CAFRA's protection. This is puzzling, because to do this the government must hold, contrary both to controlling authorities and to the legislative history, that § 3374(d) is superfluous.<sup>35</sup> Furthermore, punishing objectively blameless persons who act with due care does not materially advance the statute's goal of fish, wildlife and plant conservation, and offends basic U.S. legal norms. In circumstances where an importer reasonably cannot have knowledge of illegality, the government's approach seems to directly counter what Congress intended to do via § 3374(d) and CAFRA itself.<sup>36</sup>

#### IV. POTENTIAL SOLUTIONS: THE FOCUS AND RELIEF ACTS

The Lacey Act's fish, wildlife and plant conservation goals are worthy and deserve strong Congressional support. Nevertheless, the Act's minimal *mens rea* threshold

<sup>28</sup>The Ninth Circuit has held that the term "foreign law" enables an ordinary person to understand the prohibited conduct in a given case. *Lee*, 937 F.2d at 1395. Yet, the court did not explain how, exactly, American fishermen were supposed to identify or understand applicable Taiwanese regulations.

<sup>29</sup>"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108 (citations omitted). The Gibson case, in which U.S. regulators rejected the Indian government's interpretation of Indian law, and the *McNab* decision, in which a U.S. court rejected the Honduran government's interpretation of Honduran law, demonstrate that Lacey Act enforcement is "ad hoc and subjective" because U.S. regulators apparently are free to interpret and apply foreign law as they see fit. *See generally Morales*, 527 U.S. at 41 (striking down an ordinance providing absolute discretion to police officers to determine prohibited "loitering").

<sup>30</sup>Juszkiewicz, *supra* at note 19.

<sup>31</sup>18 U.S.C. § 981 et seq. In 2000, Congress enacted CAFRA and created the "innocent owner" affirmative defense to cure the government's "abuses of fundamental fairness" and to ensure that property owners obtain adequate due process in civil forfeiture cases. *See generally* Moores, *Reforming The Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 782–83 (2009)(citations omitted).

<sup>32</sup>18 U.S.C. § 983(d)(1). Sections 983(d)(2) and (3) set the criteria for proof of innocence.

<sup>33</sup>As the House Report on H.R. 1497 (subsequently enacted as § 8204 of the Food, Conservation and Energy Act of 2008, Pub. L. 110–246) states:

Under Lacey, the entire supply chain handling imported plant material is held responsible for illegal acts of which they would have no reasonable expectation to know the violation much less know the underlying laws that exist in all foreign countries. Amending the Lacey Act to include reaffirmation of CAFRA provides important forfeiture liability protection for "innocent owners". . . .Recent case law had effectively exempted Lacey Act forfeitures from the "innocent owner" defense. . . .[so] the specificity of language in H.R. 1497 and specific reference to CAFRA subsequent to the [*Blue King Crab*] case are intended to clearly show that it is Congress' intent to provide "innocent owner" [sic] in forfeiture proceedings under the Lacey Act.

HOUSE REP. 110–882, at 20–21; *see also* 42 RUTGERS L. REV. at 576–78 (discussing the "missing" innocent owner exception under Lacey)(citations omitted).

<sup>34</sup>18 U.S.C. § 983(d)(4) states "Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess." The Ninth Circuit ruled that all property seized under Lacey was by definition "illegal to possess" and therefore ruled that the innocent owner affirmative defense to forfeiture should be stricken. *Blue King Crab*, 410 F.3d at 1135–36.

<sup>35</sup>The government's position contradicts the basic canon of statutory interpretation that Congress does not enact superfluous provisions. *See, e.g., Bailey v. United States*, 516 U.S. 137, 146 (1995)(citations omitted).

<sup>36</sup>42 RUTGERS L. REV. at 578 (citations omitted); 51 ARIZ. L. REV. 782–83 (citations omitted).

and its overly broad reliance on “foreign law” to create domestic jeopardy require a Congressional remedy. At a minimum, Congress should cabin the foreign laws that serve as jeopardy “triggers” to provide Americans with fair notice of prohibited conduct. U.S. courts, agencies and citizens all would benefit from clear “rules of the road” to prevent arbitrary and discriminatory enforcement and prosecution, and companies like Gibson ought to be able to rely on the Indian government’s interpretation of Indian law as a defense to Lacey liability.<sup>37</sup> Additionally, the “contraband” issue must be addressed to better align the Act with both the practical realities of the marketplace and with basic Anglo-American legal norms.

Both the FOCUS Act and the RELIEF Act should play an important role in the Lacey Act reform process. The FOCUS Act (H.R. 4171) addresses the Act’s over-criminalization and due process problems by striking both the Act’s foreign law references and its criminal sanctions.<sup>38</sup> It retains the “due care” standard for civil liability and potential forfeiture, which seems adequate, appropriate and beneficial in this limited context.<sup>39</sup> It also limits the reach of the Act’s forfeiture provision to the prohibited fish, wildlife and plants only. The RELIEF Act (H.R. 3210), in turn, provides useful language for finally resolving the “contraband” issue so that innocent owners are entitled to CAFRA’s protection.<sup>40</sup> This is what Congress intended to do when it enacted 16 U.S.C. § 3374(d) in 2008. It is time now to finish the job.

#### V. CONCLUSION

We thank you for your attention to this important matter and look forward to working with you.

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Dr. FLEMING. Thank you, Mr. Rubinstein. At this point, we will begin Member questioning of the witnesses to allow all Members to participate, and to ensure we hear from all of our witnesses today, Members are limited to 5 minutes for their questions. However, if Members have additional questions, we can have more than one round of questioning.

I now recognize myself for 5 minutes. This really is a very, very interesting, and very, very important issue that affects, I think, many parts of what we do as a people, and the laws that affect this land. I have to say that as a Congressman, and more so as an American, I am offended by the fact that the government can go in and seize someone’s property as contraband, and that company not have its day in court, or that person. And with respect to considering those people as criminals, we are talking about Gibson Guitar, or Gibson Instruments, actually.

And then, I think it was Mr. Gardner, I believe it was, you made reference to the fact that it would be sort of like a protect—in that someone going into your home and stealing your property and you have no way of recovering it.

Well, that is exactly what the Federal Government is doing in this case, going in and raiding companies who have, at least in their view, and in the case of foreign countries, have determined that they have broken no laws, and yet things are taken from them, confiscated, and not returned, and not have a day in court.

<sup>37</sup> See Juskiewicz, *supra* at note 19. Congress also should consider re-examining whether, and to what extent, the Act’s broad criminal and civil sanctions and its minimal *mens rea* requirements actually advance its conservation goals. As Gibson CEO Juskiewicz points out, limited government enforcement dollars may be better devoted to fighting illegal logging and poaching by bad actors, and not to fights with American companies that try hard to comply with the law. Thus, he quite reasonably suggests creation of a compliance system that would allow businesses to know before they buy wood and other plant products whether or not they are in compliance with the Act. *Id.*

<sup>38</sup> H.R. 4171, §§ 2(a), (b).

<sup>39</sup> *Id.* § 2(c). The goal, of course, is for Congress to improve the Act and make its scope and application more clear without imposing limited, artificially rigid and commercially inadequate enforcement or interpretative checklists on the regulated community.

<sup>40</sup> H.R. 3210 § 3(a).

I am also very disturbed by the whole idea that somehow that A, a citizen, or a citizen company, must know the laws of another company—excuse me, of another country, but also must comply with those laws. I am very disturbed by the fact that, how in the world can someone operate, particularly in this worldwide economic environment, that a company dealing with vendors, dealing with other countries around the world, must somehow know, understand, and read all of the laws of the world? I find that amazing, and I would question that it is even constitutional.

Ms. Harman, I have a question for you. What is the number of declaration documents your members filed with the APHIS in 2011?

Ms. HARMAN. Mr. Chairman, I can get you additional information on that. As you have heard, the pulp and paper products declarations have not yet come into effect as a result of the law, neither have the declaration requirements for composite wood products. So from our members, the types of products that our members might be importing may not yet be covered. But primarily, our members are in the business of producing products here in the U.S. They work in a global supply chain, and so they are concerned, and they do have issues around those declarations, but those issues, we think, are best resolved administratively, and working through a consensus process to develop exactly what it is that is needed.

Dr. FLEMING. To get back to my point, it is our understanding that there are 40,000 a month that is being filed.

Ms. HARMAN. That may be broadly. The people who are filing those declaration requirements may not be my members.

Dr. FLEMING. What about, do you have any idea of the cost? Do you have any cost estimates as to what it is currently to comply, or into the future?

Ms. HARMAN. Well, I think the big, I don't have a dollar number to give new terms of compliance. I think the biggest piece in the Lacey Act, and the exercise of due care, many of those things are things that responsible corporate citizens are already doing. They are asking their suppliers, they are asking their supply chain to verify where their raw material came from. Many companies have strong sustainability statements, and in fact, have those questionnaires.

Dr. FLEMING. Well, if it is being done at the point of declaration, why does it also have to be done again? It seems like, to me, that is a duplication.

Ms. HARMAN. I am not sure I understand your question.

Dr. FLEMING. Yeah, when stuff is imported, there has to be a papers filled out, a declaration.

Ms. HARMAN. Right.

Dr. FLEMING. And then we are talking about the additional filing of documents even after that, so it seems to me that is redundant.

Ms. HARMAN. Well, the primary filing is the declaration. That is where you are identifying what the species and the genus is and where it comes from. The primary documentation is at the point of importation.

Dr. FLEMING. Yeah, any other witnesses would like to respond to that, would have anything more to add to the declaration process, the cost, the paperwork, et cetera?

Mr. REY. I think the only thing that I would add is that that is one of the areas where the consensus discussions have, I think, begun to bear the most fruit. And there are some areas of agreement that have been submitted to the agencies, and that hopefully will be reflected in the report that the agencies transmit to Congress, where the declaration process can be improved.

I am not part of those consensus discussions, so I am not necessarily going to be able to give you the details, but I can provide some of that material for the record in terms of what has already been submitted to the agencies.

Dr. FLEMING. OK. Thank you. My time is up. We have one other Member on the dais—Dr. Harris from Maryland.

Dr. HARRIS. Thank you very much, and thank you very much for holding this hearing, Mr. Chairman, because as you may or may not know, I have Paul Reed Smith Guitars in my district, and when I took a tour through their factory a year ago, the one thing we asked them how we help you with the Federal Government, the only word they said was Lacey.

Anyway, let me ask you. Mr. Gardner, you testified that as far as you know, no individual has had their guitar seized or, you may not have used the term “seized,” but, you know, we live in a strange time, because I don’t know if you read, you know, the EPA regional administrator in Texas the other day said, well, you know, our idea of enforcement is, you know, the same things the Romans used to do. Go into a little town in Turkey, crucify five people, everybody else complies.

The current law doesn’t stop the government from seizing someone’s musical instrument. It is perfectly within the realm of the Administration. If they decide that they want to make a case of someone owning a guitar that may have illegally obtained wood in it, or abalone or some other material, is it your understanding the law certainly would allow the government to do that under the Lacey Act? I don’t care whether it has been done before or not.

Mr. GARDNER. Yeah, obviously it hasn’t.

Dr. HARRIS. The government has the power to do it, don’t they?

Mr. GARDNER. All I know I am not concerned about it. There has been clear statements from both the DOJ and FWS that they were not going after individuals. There is clear history of this not happening and other laws like this, where it is not practical for them to go after individuals with limited resources that they have. This is a law about illegal trading of illegal logging, and is something that is obviously organized-crime oriented and not going after the individual musician who has bought a vintage guitar.

Dr. HARRIS. Sure. Mr. Rubinstein, I am not a lawyer, I am a doctor, but my understanding is, this law could clearly apply to an individual who possesses a musical instrument that has wood that was questionably obtained illegally in a foreign country, is that right?

Mr. RUBINSTEIN. Your understanding is correct.

Dr. HARRIS. So let me get the picture straight because I never even heard of the Lacey law until I visited Paul Reed Smith Guitars. So you have some music lover who wants to have a high-quality guitar, and they go on eBay and they buy—and I searched eBay after I visited the plant because I couldn’t believe how much these

sell for, so I searched them and boy, they are pricey. So someone could buy it, and my understanding of the law is that the seller and the buyer both technically violate the law in that transaction. Is that right? Someone who owns that?

Mr. RUBINSTEIN. That is correct.

Dr. HARRIS. And the penalty is confiscation, but I didn't understand part of your testimony. The way it is written is if they confiscate under it, they don't have to return it at any point? Or—

Mr. RUBINSTEIN. Well, if I could, sir. The penalties include fines and in appropriate cases, imprisonment. The statute has a felony provision and a misdemeanor provision. And the standard of knowledge is different under the two of them. That standard, which is due care, is highly elastic. It seems to have been borrowed, in 1981. If you read the legislative history, it seems to have been borrowed from tort law, more so than traditional American, Anglo-American criminal law, and it creates some problem.

The seizure provisions, though, are something separate, and that goes to the RELIEF Act and its language, and CAFRA, the Civil Assets Forfeiture Reform Act from 2000, which Congress, in reaction to a variety of civil forfeiture laws over the course of 20 years attempted to reform the process to ensure that individuals and companies that had property seized have the right to recover it provided they meet pretty rigorous standard of proof that they are innocent.

In 2005, as I mentioned, the Ninth Circuit essentially held that any property seized pursuant to Lacey is by definition, contraband, which is excluded from the innocent owner provisions in CAFRA. So in 2008, when Congress went ahead and expanded Lacey, it specifically enacted a provision that says we really mean it, that CAFRA, which by its terms, applies to any civil forfeiture, applies also to—

Dr. HARRIS. To the Lacey Act.

Mr. RUBINSTEIN.—to the Lacey Act. But my understanding is that at this point in time, at least the government's position is more in accord with the Ninth Circuit ruling, and as a result, clarification, obviously, at least, in my view, is required.

Dr. HARRIS. So just to get it straight, you could get someone maybe who has the same attitude as that EPA administrator in Texas who says, you know what we want to do, we want to teach guitar owners a lesson. They shouldn't have exotic illegal woods in their guitar. So we are going to take a few of them. We are going to prosecute them. Now, I understand it may just be a misdemeanor, may not even be a felony in that case, but we are going to prosecute a few of them. That can all happen under the current law, is that right?

Mr. RUBINSTEIN. That is right. If I could just for the record though, I want to be clear that the comments in response to your questions are my opinion, not necessarily those of the Chamber ILR.

Dr. HARRIS. Sure, I understand that.

Mr. RUBINSTEIN. The answer to your question is, absolutely.

Dr. HARRIS. Thank you very much. Thank you, Mr. Chairman.

Mr. REY. If I might, this is another area where the consensus discussions I think are bearing some fruit in developing an exemp-

tion for pre-2008 wood. I think there is broad agreement that that should happen. What is now being discussed is how to avoid having that exemption become a broader loophole and create unintended consequences of its own. Because unfortunately, just about every piece of legislation has an unintended consequences, as well as intended ones.

Dr. FLEMING. I would like to have another round. Would that be OK with you, Dr. Harris?

I hear what you are saying, Mr. Rey, and then Mr. Gardner, you said that you were, I think with this question, posed to you, somewhat hypothetically, that you are comfortable that nothing is going to happen, or nothing has happened, and then I hear Mr. Rey talk about, yeah, with every law, we get the law of unintended consequences. It goes along with that, and we just need to fix that.

Well, these amendments were passed in 2008. That is 4 years ago, and I am not aware of anything constructive that has been done to resolve it. That is even, in fact, why we are here, because nothing has been done administratively, apparently, and with regard to your reassurances, Mr. Gardner, I am not reassured at all because we just saw, as Dr. Harris points out, what is happening in the EPA with intimidation. So if that is allowed, then the DOJ, or any other agency can become overly enthusiastic, overly committed in a certain direction, and take advantage of it, and punish innocent Americans. And if we had no other job up here than to at least protect Americans, and to protect the constitutional aspects of American life, then I don't know why we are up here.

So I just have to say that I am not reassured, but I do have a question.

Mr. GARDNER. Would it be possible for me to respond?

Dr. FLEMING. I am sorry, I only have limited time here. Mr. Rutenberg, Ms. Everill, in your professional opinions, have the 2008 amendments been successful in stopping the illegal harvested wood and wood products?

Mr. RUTENBERG. Thank you for asking, Mr. Chairman. Probably, in my opinion, I am not the one with the best data on that, but I would if I had a minute, I would like to amplify on the last point. If I could add on that one, and the first part has to do with knowledge and the second part has to do with some recent court cases.

To be quick, I have been involved with the National Home Builders for 12 years as head of their building materials task force. I am a certified green professional. I serve on a number of conservation boards. I just spent 4 days in class for a masters certificate in green building. I can tell you that as an active builder, I would not know what wood—I could have wood on my job that would be subject to the Lacey Act, and not know. No intentions that come through standard supply channels, Home Depot, Lowe's, 84 Lumber and others. We don't buy them in the gas stations at night off of the back of someone's truck. We, the builders and remodelers and the customers out there would not know when they are in trouble.

So we are very interested in the legal aspects and there are two legal cases recently where EPA has come up. One was a revocation of a 404 clean water permit. Another one had to do with wetlands where people were not given the opportunity to appeal. We were

able to get favorable court rulings, but to your question, there is enforcement going on on other actions that does make me concerned. So it is a point of not knowing what I am looking at, even though I am a trained professional to that point; and two, we are seeing actions by various regulatory agencies that would make me concerned.

Dr. FLEMING. All right, thank you for that, Ms. Everill, did you have anything to add, or additional comments?

Ms. EVERILL. I think what we would add is that while we can't, you know, say specifically this is how much it has impacted illegal logging, we can say it has generated awareness. It has created awareness within the industries, among the retail industry of those—

Dr. FLEMING. Well, I bet it has provided awareness. Everybody is shaking in their boots. Everybody is obviously aware.

Ms. EVERILL. Yes, aware, but I think it is a deeper level of awareness of what a due care program is and what it entails other than asking for a piece of paper of genus and species and country of origin. It is a much deeper program.

Dr. FLEMING. So you really don't know either way.

Mr. REY, you mentioned some statistics. I think you said 22 percent reduction in this and that.

Mr. REY. 22 percent.

Dr. FLEMING. Have you provided that documentation for us?

Mr. REY. Yeah, it is in my statement for the record, and the numbers—

Dr. FLEMING. I know that the numbers are in your statement, but do you actually have the proof that that has occurred? Do you have that document?

Mr. REY. I can submit the Chatham Report for the record of the hearing.

Dr. FLEMING. OK, now what report is this?

Mr. REY. The Chatham Group is an international nongovernmental organization that did the analysis country by country, and we will provide that for the record.

Dr. FLEMING. Who pays them for the work that they do?

Mr. REY. I think that is in the—I don't know myself, but it is in the synopsis of the report.

Dr. FLEMING. OK, so an organization that we have never heard of, that is paid by nobody that we know, has submitted information that you are quoting to us today. We would like to see something a little more solid. Do you perhaps, are there some other authorities that may be better known and better understood and less biased?

Mr. REY. There is some United Nations reports that we can submit.

Dr. FLEMING. United Nations?

Mr. REY. Right, for the record.

Dr. FLEMING. That is definitely an unbiased body.

Mr. REY. Well, some of these are numbers, you know. They are what they are.

Dr. FLEMING. Well, I mean my point here is, we are putting a lot of people through a lot of stuff here. We are taking away livelihoods. We are killing jobs. We are throwing people in prison. We

heard about the 97 months, and we can't really document there is any good results from what we have done.

Mr. REY. No, I disagree. I think the documentation of the results over the past 4 years does exist, and we have saved jobs in the wood products industry domestically, so there have been trade-offs. And what we need to do now is to make sure that as we go forward—

Dr. FLEMING. Can you name the companies for the jobs were saved?

Ms. HARMAN. I just had one in my testimony, Mr. Talbot is sitting in the room.

Dr. FLEMING. Who is that? Can you tell me again?

Ms. HARMAN. Mr. Talbot from Glen Oak Lumber. He had to leave.

Dr. FLEMING. The Lacey Act saved their jobs?

Ms. HARMAN. Well, the Lacey Act has helped to ensure that people are looking for legal sources of raw material, and looking for legally sourced products. And that was referred to in my testimony, related to the uptick in some of the hardwood lumber, or hardwood manufacturing industry, where they have, in fact, seen an increased awareness that—

Dr. FLEMING. Increased awareness?

Ms. HARMAN. The increased awareness that she mentioned has translated into additional orders.

Dr. FLEMING. Increased awareness has caused increased orders. That kind of sounds like a little spin that we have heard before, jobs saved, to me. In any event, I have gone past my time, so I will yield to Dr. Harris.

Dr. HARRIS. Thank you very much, Mr. Chairman. Let me just follow-up a little bit about that, how cumbersome some of these regulations are, and where they could enter in. And I guess, Mr. Gardner, you mentioned in your testimony, Bob Taylor of Taylor Guitars, I guess, implying he was totally supportive of the Lacey Act, but in a—I guess this isn't a forestlegality.org, a blog he wrote last September actually indicates it is not perfect, and he brings up the example of a guitar that is made of, even if it is legitimate today, it is forever. The way the law is written, every single time it changes hands, as he says, that means 40, and I quote from him, "that means 40, 50, or 100 years from now, if a guitar reenters the U.S. borders the "importer," whether an individual or a business will have to attest to its materials, genus, species, country of origin, which of course, is impossible to do."

Is that true? I mean, the way the law is written, is his critique of the law, Mr. Gardner, true, that an instrument if it is reimported 50 years from now, whatever individual reimports it would be subject to the same Lacey requirement?

Mr. GARDNER. I am not a lawyer, but—

Dr. HARRIS. OK, Mr. Rubinstein is that true? You are a lawyer.

Mr. GARDNER. But I want to continue with my statement, if I may.

Dr. HARRIS. Well, I know, but if you can't answer because you are not a lawyer, I will turn to the lawyer.

Mr. GARDNER. Well, you asked me and you know I am not a lawyer so let me answer how—I would like to answer, please, if I may.

Dr. HARRIS. Go ahead and try.

Mr. GARDNER. More concerning than anything to me is whether, if at any point, the wood is sourced from something that is bad for people, bad for the environment, bad for our ethics, then yes, I am—I think it is just fine and well that—I personally would not want to have a guitar in my possession.

Dr. HARRIS. OK now, you had to have listen to my question carefully, because I said, the first time it was made it was made legally. OK, so if you are going to answer the question, you have—you can't—

Mr. GARDNER. If it is found later to be what, illegal?

Dr. HARRIS. No, no, it is just imported later. It is not illegal, I mean, it is imported, and according to Lacey, as soon as it is imported, the new importer, whether an individual or a company, has to certify in a test the genus, species, country of origin under the current law. Now, that is the hypothesis. Mr. Rubinstein, is that the current law under Lacey?

Mr. RUBINSTEIN. As I understand the question, yes.

Dr. HARRIS. OK, so Mr. Taylor, in fact, brings up a good criticism of the law, I think. Because again, 50 years from now, you know, a guitar, a person who wants to have a nice guitar, eBay is international, in case you didn't notice. You can get imports from all around the world. We create a potential criminal.

And Mr. Rubinstein, I want to just ask this question because it is something you said. You said that under the CAFRA, they have to prove that they are innocent in order to get their article back?

Mr. RUBINSTEIN. Yes, as the Civil Asset Forfeiture Reform Act was written it contained a provision that allows an individual to assert an affirmative defense to a forfeiture, in other words, to raise a defense saying that I am not—I should not have my property taken by the government. The government already has it, and then there is the legal proceeding.

Dr. HARRIS. Right. Well, you have to prove you are innocent.

Mr. RUBINSTEIN. Yes.

Dr. HARRIS. It is an interesting concept in America. You have to prove you are innocent. Because again, 50 years from now, that guitar is going to be imported. The person has really no knowledge of what the genus and species is, so the government confiscates it.

Ms. HARMAN. So what is the point?

Dr. HARRIS. Excuse me, you had your 5 minutes, I get mine. The government confiscates it, and then the individual somehow has to prove they are innocent to get their material back. I think I understand it. I am still worried about that—about that administrator in one of these agencies taking that Texas EPA approach. Thank you very much, Mr. Chairman.

Dr. FLEMING. Well, panel, we thank you for your time. You are now dismissed, and we will ask our next panel to step forward. Eileen Sobeck and Kevin Shea.

OK. We are now ready for panel three, includes today Ms. Eileen Sobeck, Deputy Assist Director for Fish and Wildlife in Parks, the Department of the Interior, and Mr. Kevin Shea, Associate Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture.

Briefly, repeating my earlier instructions, and your written testimony will appear in full in the hearing record, so I ask that you keep your oral statements to 5 minutes as outlined in our invitation letter to you and under Committee Rule 4(a). Our microphones are not automatic. Be sure you push the talk button. Be sure that it lights up. We have had problems with that today, and be sure that your mouth is close enough to the microphone.

You will have 5 minutes to give your testimony, and operate under 4 minutes under green, 1 minute under yellow. When it turns red, we ask you to conclude as quickly as possible.

Ms. Sobeck, you are recognized now for 5 minutes to offer testimony of the Department of the Interior on H.R. 3210 and H.R. 4171.

**STATEMENT OF EILEEN SOBECK (H.R. 3210 AND H.R. 4171),  
DEPUTY ASSISTANT DIRECTOR FOR FISH AND WILDLIFE  
AND PARKS, U.S. DEPARTMENT OF THE INTERIOR**

Ms. SOBECK. Thank you very much, and good afternoon, Chairman Fleming, and members of the Subcommittee. I am Eileen Sobeck, Deputy Assistant Secretary for Fish and Wildlife and Parks with the Department of the Interior, and I appreciate the opportunity to testify today on the two bills that would significantly weaken the Lacey Act, H.R. 3210, and H.R. 4171.

The Lacey Act prohibits trafficking and illegally taken fish, wildlife and plants. Its premise is simple but effective. People who take wildlife in violation of a State, tribal or foreign law and then engage in interstate commerce with the wildlife are violating U.S. Federal law. Congress has amended the Lacey Act many times since it was first enacted in 1900. The foreign law component was added in 1935. Penalties and enforcement tools were strengthened in 1981. And then as we know from today in 2008, stronger protections were added for plants, notably timber. The 2008 plant amendments were supported by a broad coalition of trade associations and environmental organizations, and unions, and this unusual, I must say, and robust commitment and support continues today as I think we have heard.

Illegal wildlife trade is a big business. Our law enforcement agents' efforts to stop wildlife smuggling can put them against organized criminal networks conducting high-profit black market trade valued in the billions. The 225 special agents of the U.S. Fish and Wildlife Service work on over 13,000 investigations each year involving complex crimes that target highly endangered species such as elephants, rhinos, tigers and sea turtles, as well as domestic species managed by States, such as deer and striped bass. The number of agents has not changed since the early 1980s, but the illegal trade they combat has grown in sophistication, and the global demand for wildlife products has expanded.

In the face of this battle against global wildlife trafficking, the Lacey Act is absolutely critical. It provides a deterrent to wildlife trafficking through criminal penalties. It gives law enforcement officers the tools to conduct investigations, make arrests, and protect both themselves and members of the public in dangerous situations. The Administration has serious concerns with H.R. 4171 and we oppose this bill in its entirety. H.R. 4171 is an extreme bill that

would eviscerate a century of congressional action that is recognized around the world as a model for effective conservation enforcement.

This bill would eliminate essential authorities in the Lacey Act severely undercutting its effectiveness to enhance conservation internationally and here in the United States. For example, the bill would eliminate all criminal penalties from the Lacey Act. The elimination of potential for jail time, no matter the scope of the violation, or the intent, would rip the enforcement guts out of this law. The deterrent effect of the weak civil penalties that would remain, would be minimal, at best. Wildlife and plant smugglers and traffickers around the world would be celebrating if this bill were enacted.

The bill would also severely impair the capability, and this is a very important point of our law enforcement officers, under H.R. 4171, Federal wildlife law enforcement officers would be unable to obtain search warrants to gather evidence; they could not inspect vehicles and containers; and they would not be able to make an arrest under the Lacey Act even with the clearest evidence in hand. Of greatest concern, H.R. 4171 proposes to disarm Federal wildlife officers. This is dangerous on many levels. These brave men and women regularly encountered armed and dangerous criminals while enforcing Federal wildlife laws, as Congressman Markey indicated. Disarming them creates an unacceptable risk for the officers, their families, and the public. This would, simply put, be unconscionable.

The negative impact of H.R. 4171 on the Lacey Act is severe. If passed, poachers, smugglers and traffickers will gain the upper hand and our partners will lose critical Federal support. We have the strong support and concurrence of our State law enforcement counterparts on this score.

The Administration also has significant concerns with a number of provisions of H.R. 3210. For example, the bill would weaken deterrence by capping civil penalties for first offenses involving plants at only \$250 even for offenses involving commercial scale quantities of illegally harvested timber. This provision would put U.S. businesses that follow the rules at a competitive disadvantage and really flies in the face of logical law enforcement.

While we understand the concerns raised by H.R. 3210, we believe they are adequately addressed in how we implement the law. Our enforcement focus is on commercial trafficking, not on individual owners. There have just been six investigations initiated by the Fish and Wildlife Service relating to the 2008 plant amendment. This is in stark contrast with nearly 4,000 wildlife investigations conducted under the Lacey Act during that same period.

We have not sought or obtained forfeiture of any musical instrument from an individual due to violation of the plant amendments. We believe it is premature to revisit the 2008 amendments and respectfully suggest that Congress wait to consider changes. Thank you for allowing me to testify today.

Dr. FLEMING. Thank you, Ms. Sobeck.

[The prepared statement of Ms. Sobeck follows:]

**Statement of Eileen Sobeck, Deputy Assistant Secretary for Fish and  
Wildlife and Parks, U.S. Department of the Interior**

Good afternoon Chairman Fleming and Members of the Subcommittee. I am Eileen Sobeck, Deputy Assistant Secretary for Fish and Wildlife and Parks, in the Department of the Interior. I appreciate the opportunity to testify before you today on H.R. 3210 and H.R. 4171, bills that would significantly amend the Lacey Act.

The Department of the Interior has serious concerns with each of these bills. As detailed in my testimony, H.R. 3210 would weaken the plant protection provisions of the Lacey Act. H.R. 4171 would remove essential authorities in the Lacey Act, one of the most important and effective conservation laws in the world and in doing so, undercut legal trade in wildlife and plants. In addition, H.R. 4171 would disarm wildlife law enforcement officers in the United States, putting these brave men and women, who already put themselves in harm's way on behalf of the American people, at serious risk.

The U.S. Fish and Wildlife Service (Service) is one of the lead federal agencies for enforcing the Lacey Act, a long-standing law that prohibits trafficking in illegally taken fish, wildlife, and plants. The Service also enforces many other U.S. laws that protect wildlife, including the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act. The Lacey Act complements and strengthens our ability to enforce these other statutes.

The Service's 225 special agents work on over 13,000 investigations each year involving complex, high-impact wildlife crimes. The focus of these wildlife crimes include highly endangered species such as elephants, rhinos, tigers, and sea turtles; rain forests in the tropics; wildlife habitat in the United States; and domestic species like deer and bears that are poached in violation of state laws. Our agents' efforts to stop wildlife smuggling pit them against organized networks and criminals conducting high-profit, black market trade valued in the billions. Our agents are responsible for covering the nearly four million square miles of land that make up this country. They are an extraordinary group focused on combating illegal taking and trafficking of wildlife and wildlife products in the United States. In fact, this group—in terms of numbers of officers—has remained essentially the same since the early 1980s. In contrast, illegal trade has grown in sophistication, the global economy for wildlife products has expanded, and new law enforcement mandates have been enacted.

We have 139 wildlife inspectors stationed at 38 of the more than 400 Customs port of entry. Last year they processed approximately 180,000 declared shipments of wildlife and wildlife products worth more than \$2.8 billion. Wildlife inspectors are our front line defenders utilizing the Lacey Act to help stop the import of injurious species that could devastate our native ecosystems and industries if one of the species were illegally imported or smuggled into the country.

The Service also employs 403 Federal Wildlife Officers who serve as the uniformed police force and conservation officers for the 557 National Wildlife Refuges in the United States. These officers are responsible for maintaining law and order, and protect the safety of millions of visitors on approximately 150 million acres of land and water throughout the United States and its territories. These officers investigate and respond to many thousands of crimes committed on refuges each year, including violent crimes and crimes involving weapons and illegal drugs.

The Service's agents and officers depend on the Lacey Act to do their work. The Lacey Act is the single most effective wildlife law available in the United States. Its prohibitions protect animal and plant resources from rapacious exploitation here and around the world. Its penalties make prison sentences and significant fines a real possibility for hard-core profiteers; reduce financial incentives for wildlife and plant trafficking; and provide real deterrents for wildlife crime. It also supports those businesses that commerce in legitimate wildlife and plant trade here and abroad. Its authorities show that our Nation's commitment to wildlife conservation goes beyond words to encompass action, because it equips law enforcement officers with the tools they need to conduct investigations and bring criminals to justice.

The Administration strongly opposes H.R. 4171 because it would undermine the Lacey Act and facilitate the illegal trafficking of wildlife and plants. H.R. 4171 would tip the already unbalanced scales firmly against law enforcement officers and agents striving to enforce wildlife conservation laws on behalf of the American public.

With respect to H.R. 3210, the Administration appreciates the concerns raised in the bill and believes that many of these concepts are and can be addressed in the way that we implement the current law. However, we are willing to work with the sponsors to discuss how best to sharpen the approach to the concerns raised by H.R. 3210.

### Historical Background

The Lacey Act was the Nation's first federal wildlife protection law. Its passage in 1900 was prompted by growing concern about interstate profiteering in illegally taken game species and the impact of that trafficking on states and their wildlife resources.

The Lacey Act was drafted and shepherded through Congress by Representative John Lacey, an Iowa Republican and early conservationist. The law made it illegal to transport from one state or territory to another wild animals or birds killed in violation of state or territorial law. According to the House Committee Report from the 56th Congress, its "most important purpose" was "to supplement the state laws for the protection of game and birds." It also banned the importation of injurious wildlife that threatened crop production and horticulture in this country. In its original version, the Lacey Act focused on helping states protect their resident wildlife. Defendants charged under its interstate commerce provisions would first have violated a state wildlife law and then taken that unlawfully acquired wildlife across state lines and beyond the reach of its authorities.

Congress expanded the Lacey Act through amendments several times during the law's first century. One of the most significant of these amendments occurred in 1935, when Congress extended the Lacey Act's prohibitions on interstate commerce to include wildlife and birds taken in violation of federal or foreign law. An important example is the 1918 Migratory Bird Treaty Act.

Amendments enacted in 1981 expanded the scope of the statute to: include certain unlawfully harvested fish; increase penalties for trafficking; strengthen tools for enforcement; apply prohibitions on interstate and international trafficking to any type of wild animal; and extend protection to certain wild plants. The 1981 amendments also added tribal laws and U.S. treaties to the list of underlying laws upheld; incorporated strict liability forfeiture provisions consistent with other resource laws; and established criminal felony liability for those buying or selling protected specimens of fish or wildlife that they knew had been taken and transported in violation of an underlying law.

### 2008 Plant Amendments

The most recent amendments to the Lacey Act were passed by Congress and signed into law on June 18, 2008, as part of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246). They expanded the definition of plants covered by the Act, and similarly expanded and clarified the predicate violations that could trigger the Lacey Act.

Under the 2008 amendments, it is unlawful to import, export, sell, receive, acquire or purchase in interstate or foreign commerce any plant that was taken in violation of a federal, state, tribal or foreign conservation law. The statute specifies that the underlying laws that trigger a plant trafficking violation include laws and regulations that:

- protect the plant;
- regulate the (i) theft of plants, (ii) taking of plants from a park, forest reserve, or other officially protected area, (iii) taking of plants from an officially designated area, or (iv) the taking of plants without, or contrary to, required authorization;
- require royalties, taxes or stumpage fees for the taking, possession, transportation or sale of any plant; and
- govern the export or transshipment of plants.

The amendments were supported by the Bush Administration as part of its *Presidential Initiative against Illegal Logging*. The initiative responded to widespread concerns about the economic impacts of illegal logging. Both Republicans and Democrats supported the amendments as a way to protect jobs from unfair and illegal logging practices.

The Lacey Act plant amendments were supported by more than 50 trade associations, non-profits, and unions, representing the entire range of stakeholders, as well as the Bush Administration, Executive Branch agencies, and both parties in Congress. This broad support was driven by the fact that: first, illegal logging practices have a negative impact on U.S. businesses that operate by the rules; and second, illegal logging has a negative impact on biodiversity, indigenous peoples, and the global climate.

In particular, the law received strong support from the U.S. forest products industry. The 2008 amendments help ensure that all businesses, including foreign companies that send their goods into this country, are operating on a level playing field.

The amendments equipped the United States with tools for addressing illegal logging and timber trafficking. They provided a new definition of the term "plant" making it clear that (with some limited exceptions) the prohibitions apply to plant prod-

ucts as well as living plants themselves. Specifically, “plant” was defined as “any wild member of a plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands.” The inclusion of “products” parallels wildlife provisions in the Lacey Act, which cover not only live fish and wildlife, but also products made from them.

The amendments also added a declaration requirement for plant products. This mandate is similar to the requirement for the declaration of wildlife imports and exports established by the Endangered Species Act, which also applies to all wildlife and wildlife products, whether protected under a specific conservation law or not, but covers a larger range of commercial and non-commercial shipments.

The U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS), operating within available funding, has implemented and enforced the amendments with respect to the importation process itself. As in the past, the Service remains responsible for conducting criminal investigations of Lacey Act violations, including those authorized by the plant amendments. APHIS was assigned significant new responsibilities with respect to monitoring trade in plants and plant products under the Lacey Act—responsibilities that include developing and implementing a declaration system and collecting and maintaining plant import data.

### **Importance of the Lacey Act**

Today the Lacey Act makes it unlawful to traffic in fish, wildlife, or plants taken, possessed, transported, or sold in violation of federal, state, foreign, or Native American tribal conservation law, treaty, or regulation. It allows the United States to help states, Tribes, and countries worldwide protect their natural resources by discouraging a U.S. market and U.S. demand for illegally obtained plants and wildlife. The law is a critical cornerstone for resource protection and conservation law enforcement.

Under the Lacey Act, Service law enforcement agents expose illegal guiding operations (i.e., guided hunting trips) profiteering in state, tribal, and federally protected species and pursue cases involving the illegal large-scale commercial exploitation of wildlife and plant resources in violation of state, tribal, or federal law. The Lacey Act provides a unique mechanism for states and Tribes to address crimes within their borders by out-of-state or non-tribal guides and hunters as well as the interstate sale or international export of unlawfully acquired U.S. wildlife or plants. Such sales fuel the market for certain species, putting domestic wildlife and plant populations increasingly at risk. Illegal commercialization of wildlife is a real and present threat to conservation.

On the international front, the Lacey Act provides an essential tool for combating large-scale smuggling and the subsequent interstate commerce in global species protected and regulated under federal laws, international treaties such as CITES, and the conservation laws of other countries. Its provisions give the Justice Department access to powerful enforcement tools which help to bring charges against international organized crime rings and criminals who knowingly and deliberately traffic in the world’s most imperiled species and in its most important natural resources, such as fisheries and timber. Trafficking in illegally harvested wood, for example, is estimated to generate proceeds of approximately \$10 billion to \$15 billion annually worldwide, according to a 2012 report by the World Bank<sup>1</sup>.

The existence and enforcement of the Lacey Act’s foreign law provisions have made the United States a leader and role model for countries around the world—particularly those that, like the United States, have long been major markets for wildlife and plant resources illegally taken in developing countries that struggle to feed their people, let alone protect their wildlife, plants, and forests. Through these provisions, our Nation holds itself accountable for stopping illegal trade in natural resources involving interests in our country, and recognizes and supports the efforts of other countries to level the playing field for legitimate businesses who manage their natural resources responsibly.

### **H.R. 4171**

H.R. 4171, the Freedom from Over-Criminalization and Unjust Seizures Act, would eliminate essential authorities in the Lacey Act, radically changing its nature and severely undercutting its effectiveness to conservation internationally and here in the United States. The statutory structure of Lacey Act evolved over the past century. It reflects the deliberative work of many Congresses, federal enforcement of the Lacey Act by the Service and the National Oceanic and Atmospheric Administration and the experiences of federal, State, Tribal, and foreign governments in im-

<sup>1</sup>Marilyn Pereira Goncales, et al. Justice for Forests: Improving Criminal Justice Efforts to Combat Illegal Logging. Washington, D.C.: World Bank, 2012.

plementing conservation laws and programs that need to expand political borders. H.R. 4171 weakens Lacey Act prohibitions, eliminates Lacey Act criminal penalties, and significantly hampers the law enforcement capability of officers authorized to enforce the Lacey Act.

For these reasons, the Administration strongly opposes H.R. 4171 in its entirety. Specific comments on the provisions of H.R. 4171 follow.

*H.R. 4171 Weakens Lacey Act Prohibitions*

- Section 2(a) of H.R. 4171 would eliminate all violations predicated on foreign law. The Service opposes this provision for the reasons described below.

The Service seeks to conserve fish, wildlife and plants for future generations. We have long recognized that conservation is a global issue. We cannot sacrifice coral reefs around the world and expect to have healthy oceans. We cannot sacrifice migratory birds in the rest of the Americas and expect to see them on their annual migrations through the United States. Americans enjoy seeing gorillas and elephants while on vacation or when they watch their favorite nature program. Many Americans wish to ensure that their grandchildren are afforded the same opportunities.

The Service supports international conservation projects around the globe, such as the Multi-National Species Conservation Funds that help countries conserve rhinos, tigers, elephants, and sea turtles. The Lacey Act foreign law provisions help to ensure that individuals within the jurisdiction of the United States do not undermine these global conservation initiatives. The statute's foreign law provisions recognize the reality that many countries with conservation laws lack the resources or capacity to enforce them within their borders, leaving their wildlife and plants especially vulnerable to outside exploitation. They also recognize that the United States provides a significant market for the trade in illegally taken wildlife, fish, and plants. Since the 1930s, the United States has had a law on the books that makes it illegal to knowingly import wildlife taken in violation of a foreign law. This is both a pragmatic and an ethically sound approach.

For the first time in more than eight decades, H.R. 4171 would do away with all trafficking prohibitions predicated on foreign law, destroying a global alliance for wildlife protection that has benefited species worldwide. H.R. 4171 sends a message to other countries, including long-standing strategic allies and more recent conservation partners, that the United States is no longer a team player when it comes to enforcing conservation laws throughout the world. Indeed, it proclaims an indifference to the toll that international trafficking has taken on species that range from African elephants and Madagascar ploughshare tortoises to South American parrots and Pacific corals and from neo-tropical mahogany to Southeast Asian orchids.

*H.R. 4171 Eliminates Lacey Act Criminal Penalties, Permit Sanctions, and Vehicle Forfeiture*

- Section 2(b) of H.R. 4171 eliminates all criminal penalties—both misdemeanors and felonies. It would eliminate the potential for jail time, no matter the scope of the violation.
- Section 2(b) of H.R. 4171 eliminates permit sanctions for violations of Lacey Act.
- Section 2(c) of H.R. 4171 eliminates the government's authority for forfeiture of vehicles and other instrumentalities used in the commission of an offense.

In addition to the harm that H.R. 4171 would do to U.S. contributions to global conservation, it would also make sweeping changes in the legal consequences for trafficking in state, tribal and federally protected species in the United States and in the Service's authority for enforcing its remaining prohibitions.

H.R. 4171 would eliminate criminal penalties for any Lacey Act violation and removes provisions that authorize the Service to suspend import/export licenses and deny permits to businesses that violate the Lacey Act's anti-trafficking provisions. It also prevents the forfeiture of vehicles and other instruments used in the trafficking. It thus would remove vital deterrents to crime and the prospect of serious punishment and only allow for imposition of more limited civil penalties. In organized schemes involving high-value resources, civil fines are not a sufficient deterrent and become merely an occasional and potential "cost of doing business" for those who stand to profit from conducting illegal activities. Wildlife cases can—and have—involved products valued in the tens of millions of dollars.

Under current law, Service special agents face a substantial burden of proof to secure criminal Lacey Act charges. Investigators must prove that the potential defendant acted with full knowledge of the legal status of the wildlife, plant, or product with respect to its removal from the wild and those transactions that occurred before interstate transport or importation. Criminal penalties only apply to those

who intentionally or recklessly violate the law. Individuals and companies who unintentionally do so are currently subject only to civil liability and a maximum penalty of \$10,000.

Felony penalties do not apply (and would not be sought) against violators unless both investigators and prosecutors believe that it can be proved in court, beyond a reasonable doubt, that the violators knew exactly what they were doing. The Lacey Act provides misdemeanor penalties for persons who, in the exercise of due care, should have known that the wildlife or plant in which they were dealing was illegal.

If H.R. 4171's proposed changes had been in place over the past decade, none of the convicted defendants in Lacey Act cases would have served any prison time or would have had their vehicles subject to forfeiture. No restitution would have been paid to states, tribes, or other groups and no conservation efforts would have been funded with these monies. Repeat or egregious violators would retain and remain eligible for Service permits or licenses, including licenses to conduct commercial trade in wildlife. Even those trafficking in wildlife and plants that are on the brink of extinction would face only limited liability under federal wildlife law. At most, they could be charged with misdemeanor violations.

The reality is conservation law enforcement is already challenged with competing for the attention of federal prosecutors and courts. Without felony provisions, far fewer resource trafficking cases will be brought. H.R. 4171 sends a message that conservation law enforcement is not a priority. It should also be noted that the Lacey Act's felony provisions often provide incentives for violators to plea to offenses with lesser penalties, thereby reducing the burden on courts and prosecutors.

#### *H.R. 4171 Eliminates Law Enforcement Capabilities*

- Section 2(d) of H.R. 4171 eliminates the authorized officers' authority to conduct searches for evidence.
- Section 2(d) of H.R. 4171 eliminates a Magistrate's authority to even issue a search warrant when probable cause of a violation of the Lacey Act exists. In doing so, it strips the Government of its fundamental ability to obtain vital evidence to prove a violation of the law.
- Section 2(d) of H.R. 4171 eliminates the authorized officers' broad authority under the Lacey Act to detain and inspect any vehicle, vessel, or other conveyance and any package, crate or container and its contents being imported or exported.
- Section 2(d) of H.R. 4171 removes law enforcement agents' ability to make an arrest under the Lacey Act even with the clearest, most demonstrable evidence in hand.
- Section 2(d) of H.R. 4171 bars judges from issuing an arrest warrant for violations of the Lacey Act.
- Section 2(d) of H.R. 4171 eliminates the explicit statutory authority of authorized officers to carry firearms under the Lacey Act.

The Lacey Act is not only a cornerstone for the Service's wildlife law enforcement, it is a critically important law for our federal, state and tribal partners. States and tribes regularly ask the Service to open joint investigations into interstate wildlife trafficking predicated on violations of State and Tribal law. But such investigations would make little progress were H.R. 4171 to become law, for special agents who cannot get a federal search warrant, conduct a search, or carry a firearm to protect themselves essentially have no tools for documenting criminal activity.

Removal of the explicit statutory authority for Service law enforcement officers to carry firearms under the Lacey Act is of particular concern. Service law enforcement officers regularly encounter armed and dangerous criminals while enforcing federal wildlife conservation laws. Placing law enforcement officers in the position of being unable to defend themselves or others creates an unacceptable risk.

H.R. 4171 would not only prevent Service law enforcement officers from carrying firearms when enforcing the Lacey Act, it could also remove in its entirety the authority for Service special agents and law enforcement officers to carry a firearm during any enforcement activity. Many of the wildlife protection laws passed after the Lacey Act (including the Migratory Bird Treaty Act, Eagle Protection Act, National Wildlife Refuge System Administration Act, and Endangered Species Act) do not address this issue, likely because of the pre-existing authority under the Lacey Act.

H.R. 4171 would weaken the Nation's access to the law enforcement expertise and manpower that Service special agents and refuge officers provide to U.S. Government efforts to protect Americans from terrorism and help communities across the Nation respond to natural disasters and other emergencies. It would also put these brave men and women in danger.

These armed officers answered the call of a Nation in crisis in the aftermath of 9/11, providing enhanced security at federal facilities and Boston's Logan International Airport and serving as full-time federal air marshals for extended periods. These officers provided security at the Olympic Games in Salt Lake City and Atlanta and for political events in Washington, D.C. They waded through flood waters in the wake of Hurricane Katrina to rescue stranded residents and helped secure the devastated city of New Orleans as it struggled to restore order. They were on the scene just last year serving the people of the Dakotas when rivers in those States flooded homes and farms, threatening lives and livelihoods.

On National Wildlife Refuges, our law enforcement officers are charged by law and regulations, "...to protect fish and wildlife and their habitat and prevent their disturbance, to protect Service lands, property, facilities, or interests therein and to insure the safety of the using public to the fullest degree possible." National Wildlife Refuges have approximately 44 million visitations each year, including 2.5 million hunting and 7.2 million fishing visitations.

In 2011, the law enforcement officers of the National Wildlife Refuge System handled 43,733 reported service calls. Of these calls, 35,200 involved violations of law, including 6 homicides, 5 rapes, 67 burglaries, the seizure of approximately 246,000 pounds of marijuana and 62 kilos of cocaine. Refuge System law enforcement officers apprehended 2,372 undocumented aliens who were either being smuggled as human trafficking or were participating as traffickers themselves. Refuge System law enforcement officers investigated or encountered approximately 26,459 wildlife related crimes on Service lands in 2011.

Refuge System law enforcement officers work all corners of the United States from the northern part of Alaska to the U.S./Mexico border, in Puerto Rico, Guam and Midway Atoll, and in every state in the continental United States. They routinely work alone, in very remote areas, and in situations where support or aid is often hours away.

Refuge System law enforcement officers have statutory authority to arrest under several laws but the Lacey Act is the only law that grants the statutory authority for officers to carry firearms in conducting their duties. It is essential to protect the safety of the public and the law enforcement officers and that this explicit statutory authority is maintained.

#### **H.R. 3210**

H.R. 3210, the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act, calls for a number of specific changes to the 2008 plant amendments to the Lacey Act. The Administration appreciates the concerns raised in H.R. 3210. We believe that many of these concepts are addressed in the way we implement the current law, including an enforcement focus on commercial trafficking, not on individual owners or retailers. In addition, APHIS, working with agencies responsible for enforcing the Lacey Act, has taken and is taking a number of steps to address some of the issues that have arisen in implementation of the Act without undercutting the important purposes of the Amendments. We believe that those processes have and will adequately address the concerns and implementation issues.

However, we are willing to work with the sponsors to discuss how best to sharpen the approach to the concerns raised by H.R. 3210.

The Administration does, however, have significant concerns with H.R. 3210, as written. For example, Section 3(c) would introduce the concept of the "innocent owner" into the Lacey Act for the first time, and would extend this exemption not just to individuals or retailers, but also to forfeitures against companies engaged in the importation of the illegal material. Such companies would have little incentive to exercise due care (the culpability standard for a misdemeanor Lacey Act violation) in buying imported wood or other plant products since the government could only seize and forfeit such contraband when investigators could prove that the Lacey Act violation was knowingly committed. Limiting prosecutions to only those who knowingly violate the law would provide an incentive for importers to be ignorant or claim ignorance of the contents of his or her shipments and undermine the Administration's efforts to combat the trafficking of protected wildlife and the importation of injurious non-native species.

Current law provides the Service's Office of Law Enforcement and the Department of Justice the flexibility to take into consideration mitigating and aggravating circumstances when deciding whether to file formal charges, issue a violation notice, or simply seize a shipment. There is a significant amount of discretion applied on a case-by-case basis. The U.S. Government has a long and positive track record of pursuing fair prosecutions under the Lacey Act.

In addition, Section 4 of H.R. 3210 would also cap civil penalties (and apparently criminal misdemeanor penalties) for first offenses involving plants and plant products at only \$250, even offenses involving commercial scale quantities of illegally harvested raw wood and timber. This change would signal to companies trading in illegal wood or other plant resources that they could risk being caught on at least one more contraband shipment as “a cost of doing business” unless investigators can prove that the Lacey Act violation was deliberately committed. This provision of the bill would weaken deterrents for illegal trafficking. It would also significantly undercut U.S. businesses who follow the rules and exercise due care putting them at a competitive disadvantage.

#### **Conclusion**

In considering H.R. 4171, we urge the committee to weigh carefully the far-reaching negative impact and message passage of these laws will have on efforts to stop illegal trafficking in wildlife and plants; on U.S. conservation partnerships with states, tribes, and other countries; on our collective stewardship fish, of wildlife and plant resources; on businesses here and abroad engaged in the legitimate harvest of, and trade in natural resources; and on the conservation of species here and around the world. With regard to H.R. 3210, we are concerned that the legislation may have unintended, deleterious consequences on the important protections provided to plants under the Lacey Act, but we are willing to work with the sponsors to address the issues raised by the bill.

Mr. Chairman, thank you for the opportunity to testify on these bills. I would be pleased to answer any questions that you and members of the subcommittee may have.

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Dr. FLEMING. Next, Mr. Shea.

#### **STATEMENT OF KEVIN SHEA (H.R. 3210 AND H.R. 4171), ASSOCIATE ADMINISTRATOR, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE**

Mr. SHEA. Thank you, Mr. Chairman. I appreciate the opportunity to be here today. I am Kevin Shea, and I am the Associate Administrator of USDA’s Animal and Plant Health Inspection Service. Our core mission is protecting animal and plant health for agriculture. We also administer the Animal Welfare Act and conduct wildlife damage activities. The 2008 amendments to the Lacey Act gave us a new role. We now administer the Act’s plant import declaration requirement, while our partners in the Fish and Wildlife Service, and the Department of Justice are responsible for enforcement of the substantive provisions.

Prior to the 2008 amendments, the Lacey Act’s plant protection provisions were very limited in scope. The amendments expanded the Act’s coverage to include all plants and plant products, and encompass foreign, conservation, or export laws, as well as Federal and State laws. In addition to the prohibition on illegally sourced plants, the amendments also created a new declaration requirement for importers. With very limited exceptions, anyone importing a plant, or plant product must declare the scientific name of the plant product, the value of the importation, the quantity of plant material being imported, and the country of harvest.

APHIS has been responsible for developing the import declaration form, issuing guidance to help importers comply with the Act, and then actually collecting the completed forms, either on paper or electronically. In implementing this new requirement, we have tried to do so in a commonsense manner, and have made it a priority to gather input from stakeholders all along. We believe that most importers are trying to do the right thing, so we want to have

a process that is as simple as possible for them, but that still allows to us carry out our particular role in protecting the environment and natural resources in accordance with the Act's goals.

I would like to quickly mention five things that we have done to make the declaration requirement work better. First, we have phased in the declaration requirement, rather than having it apply to all possible products at once. We included less complex products first, to make the compliance easier as importers began to learn their obligations under the Act.

Second, we limited the requirement to formal Customs entries; that is, commercial shipments and have not applied it to personal shipments. Third, we have created special use designations to make filling out the declaration form more practical. For example, we have a designation of SPF, that importers can use to indicate that their shipment is comprised of spruce, pine, and fir lumber, a common trade name that represents a small number of possible species.

Fourth, we have proposed a rule that would clarify the statutory exemption for common food crops and common cultivars. We have estimated that under full implementation this would result in about a 1/3 reduction in the number of declarations that would need to be filed.

And finally, we have worked directly with importers when we have identified errors in submitted declaration forms to help them better understand the requirement and what they need to do to comply with the 2008 amendments.

Mr. SHEA. We are also working to improve our ability to analyze data so that we can better assist our Federal partners in the Fish and Wildlife Service. We have upgraded our software and analytical capabilities to allow us to more easily identify errors or patterns of errors with the submitted declarations. As we move forward, we will continue to listen closely to all of our stakeholders, both in the regulated community and our Federal partners. Their valuable input has helped us shape how we have implemented the amendments, and we need everyone's input to make this law work as effectively as we can. Thank you, Mr. Chairman, again, for the opportunity. I would be happy to answer questions.

Dr. FLEMING. Thank you, Mr. Shea.

[The prepared statement of Mr. Shea follows:]

**Statement of Kevin Shea, Associate Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture**

Dear Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify at today's hearing on legislation to amend the Lacey Act. I am Kevin Shea, and I am the Associate Administrator of the USDA's Animal and Plant Health Inspection Service (APHIS).

APHIS has a broad mission that includes protecting U.S. agricultural animal and plant health, administering the Animal Welfare Act, and carrying out wildlife damage management activities. These efforts support the overall mission of USDA: to protect and promote food, agriculture, and natural resources.

**APHIS' ROLE IN THE LACEY ACT**

The 2008 amendments to the Lacey Act, among other things, require importers of plants and plant products to submit an import declaration detailing key information about the plant contents of the items they are importing. APHIS' responsibilities under the Lacey Act are to develop the declaration form, promulgate regulations and guidance related to the declaration, and to collect and review the completed declarations. The U.S. Fish and Wildlife Service and, in some instances, other

enforcement agencies such as the U.S. Forest Service and the Department of Homeland Security, Immigration and Customs Enforcement, are responsible for investigating alleged violations and initiating enforcement actions. The Department of Justice is responsible for judicial enforcement of the Lacey Act.

The Lacey Act makes it unlawful to traffic in fish, wildlife, or plants taken, possessed, transported, or sold in violation of federal, state, foreign, or Native American tribal conservation law, treaty, or regulation. It allows the United States to help states, tribes, and countries worldwide protect their natural resources by discouraging a U.S. market and U.S. demand for illegally obtained sources plants and wildlife. The law is a critical cornerstone for resource protection and conservation law enforcement.

APHIS has worked to implement the declaration requirement in a common-sense manner that is consistent with the statutory requirements, protective of the environment and natural resources, and manageable for the regulated community.

Accordingly, the Agency has:

- Worked with enforcement agencies to phase in enforcement of the declaration requirement in a measured way, gradually adding categories of products that require an import declaration thereby giving industry time to oversee their supply chains for compliance with the Act, and is consistent with available funding.
- Revised the declaration implementation schedule by phasing in products largely based on their degree of processing and complexity of their composition to make compliance easier while importers come to understand their obligations.
- Required import declarations only for formal consumption entries (i.e. most commercial shipments) and not for informal entries (i.e., personal shipments).
- Created special use designations to make it easier for importers to declare certain wood products, such as the “SPF” common trade name designation that indicates the product is comprised of several types of spruce, pine, fir lumber
- Begun developing a rule to define “common food crop and common cultivar,” which is anticipated to make clear that this statutory exemption excludes large numbers of products from the declaration requirement. Our preliminary economic analysis estimates that these exemptions could save industry and the government between \$900,000 and \$2.8 million per year just for the five percent of products that is excluded.
- Solicited feedback from the public, through an Advanced Notice of Proposed Rulemaking, to determine the feasibility of adopting de minimis exclusions from the declaration requirement, which would remove even more shipments from compliance with the declaration requirement.

We have taken great care to listen to our stakeholders, and we have made many changes to the implementation schedule based upon their feedback. For example, the Agency revised the phase-in schedule to temporarily exclude products for which importers indicated it would be difficult, if not technologically impossible, to provide full and accurate information. In response to comments we received through a Federal Register notice, we committed to providing at least six months notice before implementing additional phases under the enforcement schedule. APHIS has not introduced a new phase of the implementation schedule since April 2010.

We have conducted regular outreach, meeting with stakeholders, reaching out to individual importers, and answering questions from the general public. Other examples of our outreach efforts include:

- Maintaining a Lacey Act website with information and guidance on how to comply with the Act.
- Developing a Lacey Act primer to educate importers on APHIS’ role in implementation of the Act, making it publicly available, and distributing it to industry.
- Meeting with businesses and industry at numerous events to discuss the Lacey Act, and what’s necessary for compliance.
- Educating importers about the Act’s requirements and how to properly comply with the import declaration requirement when we observe issues with submitted declarations.
- APHIS Federal partners have conducted outreach to our foreign trading partners, educating them about the 2008 Amendments. Efforts have included meetings with foreign governments, as well as roundtables, seminars, and workshops with private overseas businesses.

We are also considering how to proceed with input received in response to the June 2011 Advanced Notice of Proposed Rulemaking that requested public comments on ways to improve and streamline the administration of the declaration re-

quirement. In particular, the Agency is looking at developing a de minimis exclusion from the declaration requirement based upon the amount of plant material in a product, which would further streamline the declaration process.

In summary, we will continue to implement the 2008 amendments through a careful balancing of the requirements of the Act and the legitimate concerns of the regulated community.

**H.R. 3210, the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act**

H.R. 3210 contains a number of specific provisions that affect the import declaration as well as the enforcement provisions of the Lacey Act. With respect to the enforcement provisions, we agree with our colleagues at the U.S. Fish and Wildlife Service, that these provisions significantly weaken the Lacey Act's ability to protect animal and plant resources from dangerous exploitation. We defer to their testimony and expertise on this matter. There are, however, several items APHIS would like to highlight that deserve attention.

The RELIEF Act would add a new section to the Lacey Act that makes multiple changes to limit the applicability of the 2008 amendments. Among these, it would specify that the Act does not apply to any plant that was imported before May 22, 2008 (the date of enactment of the 2008 amendments) or to any finished plant or plant product that was assembled and processed before that date.

APHIS created special-use designations that importers can use on the declaration form to indicate that a product was made prior to the 2008 amendments, exempting them from having to fully declare all required information.

However, goods manufactured and imported into the United States after the date of enactment are subject to the substantive prohibitions of the Act. We understand that some members of the artisanal musical instrument industry may have stores of wood obtained before May 2008 for which they may no longer have records specifying the information required on the Lacey Act declaration. Some of these industry members have expressed concerns about their ability to comply with the declaration requirement if any of their products are exported and then reimported. However, the proposed exemption of all plants and plant products of pre-amendment origin goes far beyond this declaration issue. In any event, APHIS is only requiring the filing of a declaration for products that enter into the country for formal consumption; musicians or other individuals who travel with their instruments need not file a Lacey Act declaration upon entry into the United States.

The legislation would also provide that the declaration requirement applies only in cases where the product is entered into the country for formal consumption. This is consistent with how APHIS has implemented the Act, and has had broad support from stakeholders. This ensures that individuals carrying personal baggage and effects do not need to file an import declaration.

The bill would require APHIS and other involved Federal Agencies to fully fund implementation and administration of the import declaration from existing funds. The Fiscal Year 2012 appropriation provided the first-ever funding for this purpose: \$775,000. The President's FY 2013 budget requests \$1.5 million for Lacey Act activities and would allow us to begin planning an initial implementation of a web-based procedure to help eliminate the need for paper-based declarations. It is, however, not clear that this level of funding would enable the Agency to carry out all activities contemplated by these amendments.

In particular, the bill's requirement to create a standard certification process for legal imports by individual manufacturers, importers, and retailers could prove expensive and difficult to implement and administer. The sheer number of individual products, individual importers, and individual retailers would make any sort of permitting or certification system massive in scope. Beyond just the administration and processing of certifications, the provision would require substantial resources to ensure accreditation and compliance. It would be difficult to verify the legality of the hundreds of thousands of plant products coming into the country each month. With the size and scope of plants and plant products covered under the Act, the Agency would not be able to adequately certify these types of products within the FY 2013 Budget.

**H.R. 4171, the Freedom from Over-Criminalization and Unjust Seizures Act**

This bill would make a number of changes to the Lacey Act's longstanding enforcement provisions that raise concerns, including the elimination of criminal penalties, removal of all references to foreign laws, and other changes. Because it applies fully to fish and wildlife as well as to plants, and relates to the enforcement of the Act, it is not appropriate for APHIS to comment and we defer to our Fish

and Wildlife Service and National Oceanic and Atmospheric Administration colleagues.

Mr. Chairman, thank you for the opportunity to testify today. We look forward to working with you and your staff to provide technical assistance as you continue to examine this important issue. I would be happy to answer any questions that you or the members of the Subcommittee may have.

Dr. FLEMING. I now recognize myself for questions.

Ms. Sobeck, how many of the foreign laws were triggered by the 2008 amendments?

Ms. SOBECK. I don't have that number. We don't know the exact number of laws that are triggered.

Dr. FLEMING. OK. Can you give me just a range? I mean, are we talking one or two laws, are we talking a thousand, 10,000? Give us some idea.

Ms. SOBECK. I think it would be fair to say that most countries have at least one and probably more laws that relate to—that would be—the amendments.

Dr. FLEMING. You said “both” countries. What do you mean by “both” countries?

Ms. SOBECK. Most countries.

Dr. FLEMING. Oh, most countries, OK. I am sorry. So we know Indonesia has over 500 laws alone, so if you multiply that times the many countries that interact with the United States, you could see where that could easily get into the thousands. Is there any requirement for these countries or our country on their behalf to reveal the laws to those who might be subject to them?

Ms. SOBECK. I am sorry, I am not sure what you mean.

Dr. FLEMING. If I may be affected by my behavior that may trigger a law from another country, and I could be prosecuted in this country, what is available through your agency or any other that puts me on notice to this fact?

Ms. SOBECK. We—both the government, business, and—

Dr. FLEMING. I am not a lawyer in Brazil, so I definitely don't want to be subject to Brazilian law. So how do you help me from that occurring?

Ms. SOBECK. Well, as some of the folks who testified in the previous panel, including Ms. Harman I believe mentioned, the industries themselves, NGO's, the government is trying to help get industry and people who might be affected to be more informed. People speak at conferences, there are educational programs around.

Dr. FLEMING. So it is just on the fly? There is no actual formal attempt? I mean, for instance, the laws, as I understand, that would comply in this situation are affecting in some way, the Lacey Act in Brazil are all written in Portuguese. Is there any, for instance, a clearinghouse where one can go to a single Web site? Is there—have these laws all been translated into English?

Ms. SOBECK. I don't believe—there is not a government-sponsored clearinghouse or list, and there is not a government translation of all of the foreign laws, and as far as I am aware, there is not a comprehensive one-stop-spot provided outside of the government for those laws.

Dr. FLEMING. So you believe that American citizens should be subject to laws of other countries even without any reasonable notice or—for instance, we have, those in our country, we bend over

backwards when we read them their Miranda rights, they are in our country where we speak English, and yet we will ensure that they receive their Miranda rights in their native language, and yet our own citizens are being subjected to laws that originate from other countries under which they can be prosecuted, and the government has taken no care to ensure that those laws are disclosed to them?

Ms. SOBECK. Nobody will be subject to criminal prosecution unless they knew or should have known in the exercise of due care that a foreign law—that wildlife or plants were imported or——

Dr. FLEMING. If your property is confiscated and you go out of business, I would think that is more than just a little slap on the wrist, wouldn't you think?

Ms. SOBECK. Well, you were talking about Miranda rights in the criminal context, and I wanted to make sure that you understood that the——

Dr. FLEMING. I was just giving that as an example. That would apply to civil law as well. I mean, anyone who comes to this country, if they can't speak our language, we ensure that they get proper representation and in their native language, but yet you are telling me that the American citizen in their own country is subject to laws from another country, laws that aren't even available to them in a language they can't speak.

Ms. SOBECK. Mr. Chairman, I am saying that for criminal prosecution, an individual would have to, or a business would have to have exercised due care or have actual knowledge of a foreign law in order to be prosecuted, and also that, again, our focus is on trafficking in commercial operations——

Dr. FLEMING. What about noncriminal?

Ms. SOBECK.—and not on individual end users.

Dr. FLEMING. That is, civil penalties, confiscation of materials and things that may be very expensive could close a business down, subject one to all sorts of secondary penalties, maybe IRS penalties and so forth. You are saying, though, that they are subject to the laws of other countries, languages that they don't necessarily speak, and the government has done nothing to ensure that they are disclosed on these laws beforehand.

Ms. SOBECK. I wouldn't say that the government has done nothing. As I said, we have tried to participate in voluntary information exchange, provide training, speak——

Dr. FLEMING. Very loose and very informally. You have really not done anything with due care and due notice to ensure that all those are made available. I think we have covered this subject adequately. I know where we are on it.

Mr. Shea, APHIS, these are some numbers I understand that come from you actually in your office, 40,000 documents a month, that is where we are today; is that correct, sir?

Mr. SHEA. That is correct.

Dr. FLEMING. Where are we going with that? Will that grow? Or what percent is that of the total?

Mr. SHEA. Of the total amount that could be possible under the Act, we see that number could go as high as 1 million per month.

Dr. FLEMING. OK. So—and what is the cost of the 40 million documents, I am sorry, 40,000 documents, and what would be the cost of a million documents for a month?

Mr. SHEA. It is hard to get that really precisely accurate, but when we did some analysis of this, it appeared that it was costing somewhere between \$38 and \$117 per declaration, depending on the pay rates of the people actually handling these documents for the companies. So there is a range there. And so at 40,000 per month, that is about \$18- to \$56 million per year is what we have estimated, and you could extrapolate that out to higher numbers. We would hope that there would be economies of scale, better compliance as people understand how to do the declaration over time.

Dr. FLEMING. The \$56 million would be for the 40,000; is that right?

Mr. SHEA. That is the high range for the 40,000 mark.

Dr. FLEMING. That is the upper range?

Mr. SHEA. Yeah.

Dr. FLEMING. And so when you get to a million, then you would have to multiply that, I am not sure, 40,000, that is certainly a fraction of a million. So you are talking about probably well into the millions of dollars per year to process that?

Mr. SHEA. Certainly absent any efficiencies of scale or those sorts of things, the numbers would be fairly significant.

Dr. FLEMING. And who would pay for that?

Mr. SHEA. Most of the cost is what the importer bears now to actually fill out the declaration, gather the information for the declaration. Some of that is our cost internally in USDA to collect and process the forms, but the bulk of those costs really are on the importer.

Dr. FLEMING. Right. So perhaps millions or hundreds of millions of dollars of cost to the importer that would go to the business cost, some perhaps to the government, but perhaps most to the business. OK.

And are these documents currently being reviewed, analyzed?

Mr. SHEA. We are reviewing them to the extent resources allow. We only have a few people who work on this. We have only received about \$775,000 in appropriations to work on this, but we are analyzing them to the extent we can. We now have better software tools to do that, which allows us to do a better job with it, but we are analyzing it to the extent we can.

Dr. FLEMING. That is 40,000 documents a month. Have any led to investigations?

Mr. SHEA. We have provided just a few to Fish and Wildlife Service or the Department of Justice, and none of them have led to official investigations.

Dr. FLEMING. OK. Would that be possibly that you just haven't had the personnel to spend the time on the documents to find everything you need to find?

Mr. SHEA. I would think if we were looking at a higher percentage, we would likely find more problems with the form, but I want to emphasize that we think most of the problems with the form so far are just the growing pains of understanding this requirement, that some of the fields aren't filled out properly or left blank, so most of the things we see like that, we try to work directly with

the importer to help them understand for the next time, but certainly over time, we could find things by further analysis. For example, a genus or species is listed and the country harvested doesn't grow that genus or species. So those are the kinds of things we would really be looking hard for over time.

Dr. FLEMING. OK. Well, I am the only one left on the dais, and I think I have had the majority of my questions answered. I do appreciate the witnesses today who have come before us. I would like to thank all of our witnesses for their valuable contributions and testimony. This has been a very productive hearing, I believe. We have made every effort to ensure that it was both comprehensive and balanced. Members of the Subcommittee may have additional questions for our witnesses, and we ask you to respond to these in writing. The hearing record will be open for 10 days to receive these responses. We have also had some submissions into the record, and without objection so ordered.

I want to thank Members and staff for their contributions to the hearing. If there is no further business, without objection the Subcommittee now stands adjourned.

[Whereupon, at 3:54 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

**Statement submitted for the record by Gary J. Taylor, Legislative Director, Association of Fish and Wildlife Agencies, on H.R. 4171, The FOCUS Act**

The Association of Fish and Wildlife Agencies (Association), representing the collective perspectives of the 50 state fish and wildlife agencies all of which are members of the Association, strongly opposes H.R. 4171 and urgently points out that the proposed FOCUS Act would alter the Lacey Act in a significantly negative context. Prior to the 1900 Lacey Act, violations of conservation laws could not be effectively investigated or prosecuted once the unlawfully taken game or wildlife left the jurisdiction where it was illegally taken or killed. The Lacey Act gives the United States Fish and Wildlife Service (USFWS) Special Agents the ability to assist state, tribal, local and other nations in the investigation of fish, game and wildlife crimes that would otherwise go unpunished due to lack of resources, funding, or more often, jurisdictional considerations. The Lacey Act is recognized as one of the most effective federal wildlife laws ever enacted and is based on predicate violations of state, tribal, federal and international laws.

The FOCUS Act proposes to remove the potential of large penalties for felony violations of the Lacey Act where subjects made large sums of money through the unlawful commercialization of illegally taken game or wildlife. The ability to levy large fines serves as a deterrent against the same subjects accepting a lesser penalty as a "cost of doing business." State Wildlife Conservation Officers routinely assist USFWS Special Agents in protecting fish, game and wildlife from this type of exploitation so that these valuable natural resources are available for the lawful consumptive and non-consumptive user alike. The FOCUS Act would endanger this valuable protection of these species that belong to all the citizens of the respective states.

Additionally, H.R. 4171 would remove the authority from USFWS and NOAA Special Agents and Officers to carry firearms while in the performance of their duties. The authority for these Agents and Officers to carry firearms only exist in the Lacey Act. Once again, the proposed amendments found in the FOCUS Act would endanger the state officers if they are assisting a USFWS Special Agent in any type of game or wildlife violation and encounter a deadly force situation. While state officers would indeed have an issued firearm with them in the performance of their duties, a USFWS Special Agent would not. This may be a potentially deadly, problematic situation if only state officers are armed. In fact, every state General Assembly in the United States has authorized full-time state Wildlife Enforcement Officers to carry firearms in the performance of their duties. USFWS Special Agents vitally need this ability. In a study conducted by the FBI of assaults on Conservation Law Enforcement Officers, it was revealed that Agents and Officers enforcing environmental and natural resource laws were nine times more likely to be assaulted with a dangerous weapon when compared to traditional law enforcement officers. The

proposals in the FOCUS Act regarding this issue are unreasonable and potentially decidedly dangerous for the Special Agent and state fish and wildlife agency Wildlife Conservation Officers.

H.R. 4171 raises serious concern from an officer safety perspective. The bill clearly removes the ability of agents to carry firearms and make warrantless arrests. Not only are the states concerned for the safety of the law enforcement agents from NOAA and U.S. Fish and Wildlife, with whom the state officers work routinely, but also the safety of the state officers who depend upon these agents for assistance in conducting joint investigations, as well as serving search and seizure and arrest warrants.

As proposed, H.R. 4171 removes all reference to foreign law as a predicate violation in enforcing the Lacey Act. Many underdeveloped nations around the world possess very rare and valuable plant, animal, and mineral resources which are critical to their economies, and are highly sought in the world market. In many cases these nations lack the governmental resources and structure to protect these treasures and are highly dependent upon more developed and wealthy nations, such as the United States, to provide significant protection and deterrence toward illegal commercialization.

H.R. 4171 would also provide for elimination of the strong criminal penalties which currently exist in the Lacey Act and offer the most significant deterrent available in combating the illegal wildlife and plant trade. Civil penalties alone are merely a cost of doing business. The probability of incarceration and the other societal implications associated with a serious criminal penalty surely gives anyone intent upon compromising the future of our natural resources pause to reconsider.

Striking subsection (b) and the third sentence in subsection (c) (re-designated as (b)), removes many of the investigative tools necessary to conduct these investigations, such as the ability for judges to issue warrants, and the authority of agents to serve arrest warrants, search and seizure warrants, and subpoenas. Without these capabilities, the states' enforcement of the Lacey Act will be highly ineffective, if not impossible. Many of these criminal acts occur over a long time period and the evidence to successfully prosecute these complex cases is rarely immediately available. The execution of search and seizure warrants and service of subpoenas to obtain all of the needed evidence is nearly always essential to a productive outcome.

In summary, this proposed legislation is contrary to the original intent of the Lacey Act and the amendments that have occurred since its enactment, and the Association strongly opposes H.R. 4171. The Lacey Act has been a foundational component to the success of the North American model for wildlife conservation and has served to ensure that the nation's natural resources are not exploited and jeopardized by unlawful acts. It has served as a valuable tool to the individual states of this nation in providing a means whereby violators may be held accountable to the rule of law throughout this country.

Thank you for the opportunity to share the Association's perspectives on H.R. 4171.

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[A letter submitted for the record by Canadian Manufacturers & Exporters and the Canadian Manufacturing Coalition, on H.R. 3210 and H.R. 4171 follows:]

Canadian Manufacturers & Exporters

May 14, 2012

Mr. Harry Burroughs  
House Committee on Natural Resources  
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, D.C. 20515

Via electronic transmission to Harry.Burroughs@mail.house.gov

**Testimony for the record following the subcommittee's hearing on  
H.R. 3210 and H.R. 4171 on May 8, 2012**

Dear Mr. Burroughs:

On behalf of the member companies of Canadian Manufacturers & Exporters (CME) and the Canadian Manufacturing Coalition (CMC), I am pleased to have this opportunity to submit our comments in regard to the 2008 Food, Conservation, and

Energy Act amendments to the Lacey Act. Our comments here will focus on the requirement that importers submit a declaration at the time of importation for certain plants and plant products.

Canada is the largest supplier of plant and plant products to the United States. In fact, virtually all of the U.S. newsprint supply originates from Canada as do forty percent of paper imports and two-thirds of pulp imports. The United States marketplace is the largest destination overall for Canadian exports, but thirty-seven States in the Union point to Canada as their largest customer. Today, our two countries have created the world's largest and safest business relationship in the world. Through various cross-border forums, we have embarked on a vibrant North American competitiveness agenda that has the promise of creating good jobs for our future generations. Our cross-border supply chain is unique in the world in terms of its volume, immediacy and integrated nature of component parts. That vibrant relationship has helped to create over seven million jobs in small and large communities throughout the United States. No longer do we "trade" together, we make things together. As evidence of this, over one-third of shipments crossing our shared border each and every day are comprised of intra-company and intra-industry parts and components. Our jobs are your jobs and your best ideas are ours. It is a unique and highly beneficial relationship.

Our companies share the objective of seeking to combat illegal logging. Canada has adopted advanced sustainable forest management practices that go far beyond the goal of eliminating illegal logging. Moreover, Canada has long prohibited the importation into Canada of any plant, or any part or derivative thereof, which was taken in contravention of any law of a foreign state, through provisions of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* and its regulations. In addition, almost a third of all companies globally enrolled as supply chain security partners with the U.S. Customs and Border Protection (CBP) are Canadian companies. Almost all of our cross-border truck drivers are vetted by CBP and their Canadian counterpart. We bring this to your attention in an effort to underscore that U.S. border requirements affect both Canadian and U.S. businesses and the workers they employ.

Our member companies have joined with their American business partners in expressing concern about the implementation of the Lacey import declaration requirement. Their immediate worry is that the product coverage mandated by the underlying statute will grow to include almost all of the tariff items and given that there currently is no de minimus threshold, products from logs to cosmetics and dashboards of new automobiles will soon be subject to the requirement.

The imposition of what we feel is an unnecessary and burdensome import declaration adds considerable costs to the bottom line of our U.S. business partners. The compliance to file the declaration alone requires 1.5 man hours per declaration, a nine-fold increase over non-Lacey shipments. In 2011, according to officials of the U.S. Department of Agriculture, Animal Plant Health Inspection Service, the vast majority of regulated shipments were imports from Canada. In fact, **every week**, APHIS receives approximately 6,000 such import declarations—5,000 electronically and 1,000 using the paper form.

For these reasons, we would strongly urge the Administration to consider an alternate path forward. U.S. Customs and Border Protection acts as the primary agency at the U.S. border and for the past several years has launched an ambitious re-modernization of their import data collection on behalf of many federal agencies. It is our view that CBP is best equipped with the electronic resources to collect the **necessary** data requirements to provide the U.S. Department of Agriculture, Animal Plant Health Inspection Service, with the important enforcement tools to meet the objectives of the Lacey Act.

Imposing an additional transmission of the same data adds costs for both government and business. Our companies on both sides of the border must compete in a highly competitive global marketplace, but the import declaration in its current form erodes the bottom line for our best corporate citizens. Illegal logging is a shared concern for both Ottawa and Washington. A shared and modern risk management approach is, simply, good public policy.

Sincerely,

Jayson Myers  
President & CEO  
Canadian Manufacturers & Exporters

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[A letter submitted for the record by the National Association of Conservation Law Enforcement Chiefs follows:]

SUBJECT: H.R. 4171—Freedom from Over-Criminalization and Unjust Seizures Act of 2012, or the FOCUS Act Amendments to the Lacey Act.

Robert J. Wittman  
1317 Longworth House Office Building  
Washington, DC 20515

Dear Robert J. Wittman:

I am sending this letter on behalf of the National Association of Conservation Law Enforcement Chiefs (NACLEC). NACLEC represents the executive law enforcement leadership of state natural resource agencies from across the country who are charged with enforcing natural resource protection and public safety laws.

For the reasons outlined below, NACLEC is deeply concerned about H.R. 4171—Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act). The Lacey Act has been effectively applied in every state in protecting our fish and wildlife across the country. If passed, the FOCUS Act will have serious adverse impacts on our ability to protect the natural resources in each of our individual states. It also has significant officer and public safety implications through its proposal to disarm United States Fish & Wildlife Service (USFWS) Special Agents.

The Lacey Act Amendments of 1981, by President Reagan on November 16, 1981, combined the original Lacey and Black Bass Acts into a single comprehensive statute to provide more effective enforcement of state, Federal, tribal and foreign conservation laws protecting fish, wildlife, and rare plants. Like the original acts, the 1981 Amendments were designed to outlaw the interstate traffic of animals killed in their state of origin and to allow for appropriate penalties for those involved in their illegal commercialization. The 1981 Amendments recognized that misdemeanor penalties were insufficient to either provide a deterrent effect or to rate as a priority with federal prosecutors.

The legislative history of the 1981 Amendments includes the following excerpt from the “General Statement of the House”

“A massive illegal trade in fish and wildlife and their parts and products has been uncovered through ongoing investigations by the Department of Justice, the Fish and Wildlife Service, the Customs Service and the Departments of Agriculture and Commerce. The serious consequences of such trade may include the introduction of exotic diseases that threaten the agriculture and pet industries, the creation of new markets for the thousands of species taken in violation of state, Federal or foreign laws and the ultimate threat to the survival of the species itself. The purpose of H.R. 1638 is to provide more effective enforcement tools to the wildlife agencies of the state and the Federal Government to control this trade.”

NACLEC believes that these concerns not only remain today, but are heightened by the increased threats that exotic species present to our native wildlife and challenges all agencies have creating a climate of compliance with fewer resources. The Lacey Act remains an important tool for preventing the illegal importation of exotic species and creating a climate of compliance with laws designed to protect our fish, wildlife and rare plants.

The global trade in wildlife is a multibillion dollar business annually that has illegal elements which in some cases are driving species to dangerously low populations. Those involved in the illegal trade are often a well organized and create black markets and smuggling syndicates to move and trade the world’s rarest plants and animals. It is important we do not lose the potential for criminal prosecutions for fish and wildlife violations that transcend state boundaries. It is an important tool and creates a significant deterrence effect. The proposed downgrading of the Lacey Act to a mere civil enforcement tool presents many concerns. Decriminalization of the Lacey Act will make multi-state investigations difficult if not impossible. At present, violators who cross state lines with illegal fish and game are in violation of the Lacey Act and thereby subject to a Federal search warrant so that evidence may be gathered and a prosecution commenced in Federal courts. If the Lacey Act is decriminalized, violators will not be subject to federal search warrants and may very well be in a “safe harbor” simply by crossing state lines. Our experience is that those involved in the illegal commercialization of fish, wildlife and plants can be sophisticated, well financed and often engaged in other illegal activities. When these ventures cross state lines, as they almost always do, the resources of the USFWS and the enforcement powers allowed under the current Lacey Act are essential to a successful prosecution. The proposed changes will likely take the USFWS out of

the picture and make effective enforcement of interstate violations virtually impossible. The USFWS is an extremely important partner in our conservation law enforcement community, and our collaboration on investigations that transcend state boundaries is a key element in successfully accomplishing our mission.

It is our understanding that the impetus for the proposed changes is a perceived difficulty in knowing when a species is imported into the United States in violation of a foreign law. We respectfully request that you not disrupt an essential enforcement mechanism for domestic fish and game violations based on that concern. There are other alternatives, such as enhanced educational efforts, that can be employed to solve that problem, if it is in fact a problem. This act is proposed as a solution to a problem. However, solving one narrowly focused problem with a sweeping solution that creates bigger problems is not the type of solution the taxpayers expect from government.

Finally, we are concerned with the provision that would remove the specific statutory authorization for USFWS officers to carry firearms. This is very concerning to us. Every state legislature in the country has armed their wildlife enforcement officers, and for good reason. In a study conducted by the FBI of assaults on conservation law enforcement officers, it was revealed that agents and officers enforcing environmental and natural resource laws were nine times more likely to be assaulted with a dangerous weapon when compared to traditional law enforcement officers. If the reason for this change is to limit the ability of USFWS officers to carry firearms, the results would endanger not only the officers of the Service, but also the state officers who work with these officers in dangerous situations, as well as the public we serve. USFWS officers are subject to the same threats as any other law enforcement officer and serve a similar public protection role. Disarming these officers removes their ability to defend themselves, fellow officers, and the public. One only needs to pick up a newspaper or turn on the television to see that on a daily basis we live in a world where the entire law enforcement community needs to be ready to respond acts of terrorism and other threats to public safety on a moment's notice. We believe disarming USFWS agents would significantly undermine public safety, officer safety, and Homeland Security.

Thank you for considering our views on this issue. It is very important to the protection of our fish, wildlife and plants in our individual states, and ultimately nationwide.

Sincerely,

Randy J. Stark—President—Wisconsin  
National Association of Conservation Law Enforcement Chiefs

Alabama—Alan Andress  
Alaska—Steve Bear  
Arizona—Gene Elms  
Arkansas—Jeff Crow  
California—Nancy Foley  
Colorado—Bob Thompson  
Connecticut—Kyle Overturf  
Delaware—Robert Legates  
Florida—Jim Brown  
Georgia—Eddie Henderson  
Hawaii—Mark Young  
Idaho—Jon Heggen  
Illinois—Rafael Gutierrez  
Indiana—Scotty Wilson  
Iowa—Robert Garrison  
Kansas—Kevin Jones  
Louisiana—Winton Vidrine  
Maine—Joe Fessenden  
Maine—Joel Wilkinson  
Maryland—George Johnson IV  
Massachusetts—Aaron Gross  
Michigan—Gary Hagler  
Minnesota—Jim Kourad  
Missouri—Larry Yamnitz  
Mississippi—Steve Adcock  
Montana—Jim Kropp  
Nebraska—Craig Stover  
Nevada—Robert Buonamici  
New Hampshire—Martin Garabedian

New Jersey—Mark Chicketano  
 New Mexico—Chris Chadwick  
 New York—Peter Fannelli  
 North Carolina—Dale Caveny  
 North Dakota—Brobert Timian  
 Ohio—Gary Obermiller  
 Oklahoma—Robert Fleener  
 Oregon—Jeff Samuels  
 Pennsylvania—Richard Palmer  
 Pennsylvania—Jeffrey Bridi  
 Rhode Island—Frank Floor  
 South Carolina—Alvin Taylor  
 South Dakota—Andy Alban  
 Tennessee—Darren Rider  
 Texas—Pete Flores  
 Utah—Mike Fowlks  
 Vermont—Dave LeCours  
 Virginia—Dabney Watts  
 Washington—Bruce Bjork  
 West Virginia—Jerry Jenkins  
 Wyoming—Scott Edberg

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**Statement submitted for the record by Captain Mike Fields, President,  
 National Association of State Boating Law Administrators, on H.R. 4171,  
 The FOCUS Act**

On behalf of the National Association of State Boating Law Administrators (NASBLA) I am writing to express my extreme concern regarding H.R. 4171—The 2012 FOCUS Act Amendments to the Lacey Act.

The National Association of State Boating Law Administrators is a national non-profit organization that works to develop public policy for recreational boating safety. NASBLA represents the recreational boating authorities of all 50 states and the U.S. territories. NASBLA's mission is to strengthen the ability of the state and territorial boating authorities to reduce death, injury and property damage associated with recreational boating and ensure a safe, secure and enjoyable boating environment.

As representatives of the state's on-water law enforcement we have certain concerns regarding the ability of our member states to protect the natural resources as well as the citizenry in their respective jurisdictions.

In specific regards to the global wildlife trade, the Lacey Act remains a vital resource in preventing the illegal importation of exotic species and creating a climate of compliance with laws designed to protect our fish, wildlife and rare plants.

Of even more concern to our members however is the proposed provision that would remove the specific statutory authorization USFWS and NOAA Special Agents and Officers to carry firearms. While the states have all reaffirmed the importance of allowing state law enforcement officers to carry firearms due to the extreme risk of their operating environment, USFWS and NOAA agents are dependent on the language in the Lacey Act for this same protection. State law enforcement officers routinely work with their Federal partners and it is imperative that they all work in coordination and cooperation. Recent studies have shown that environmental and natural resource officers are nine times more likely to be assaulted with a dangerous weapon when compared to traditional law enforcement officers. The safety risks are great and disarming these officers removes their ability to defend themselves, fellow officers, and the public.

NASBLA and our members work in close cooperation with many federal partners and it is the nexus of local, state and federal law enforcement coordination that has greatly improved law enforcement and homeland security efforts in recent years. This legislation would greatly damage that ability to ensure safety of our officers and the general public.

We are generally very supportive of the work of the Committee, particularly when it has related to recreational boating safety, conservation management and the protection of our homeland. These provisions in H.R. 4171 pose a threat to these initiatives and we hope you will consider the dangerous ramifications should they go unamended.

Thank you for your consideration of our position on H.R. 4171.

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[A letter submitted for the record by the Northeast Conservation Law Enforcement Chiefs Association follows:]

Northeast Conservation Law Enforcement Chiefs Association

May 7, 2012

Dear Representative Fleming:

On behalf of the Northeast Conservation Law Enforcement Chiefs Association, NECLECA, who is represented by the State of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Maryland, Virginia, Delaware and New Jersey and the Canadian Provinces of New Brunswick, Nova Scotia, Prince Edward Island and Environment Canada, we are writing to express our strong opposition to H.R. 4171, to amend the Lacey Act Amendments of 1981.

This bill as proposed would seriously and negatively impact our respective states in our ability to protect our valued natural resources. In addition, it has significant officer and public safety concerns with the proposal to disarm United States Fish and Wildlife Service (USFWS) Special Agents.

As you know, the Lacey Act is recognized as the most effective enforcement statute to successfully assist states with the protection of our fish, wildlife and rare plants. Routinely natural resources illegally taken in our states cross state lines and international boundaries. The Lacey Act is the best mechanism used to assist us in investigating these crimes and successfully prosecuting the offenders. Without the Lacey Act, we could not pursue violators across state lines due to our lack of resources, funding and jurisdictional limitations.

In the past, Lacey Act enforcement actions have been applied in each of our states as well as every state in the country. An example of how the Lacey Act was used to successfully protect our wildlife species is a recent investigation and prosecution in the State of Pennsylvania.

Five individuals from outside the State of Pennsylvania were charged with more than 250 counts of violating their laws as a result of killing deer at night, killing deer in closed season and killing deer in excess of season bag limits. Also, the USFWS recently arrested seven individuals of an organized crime ring trafficking in rhinoceros horns. Without this type of effort the continued epidemic of poaching these animals will drive them to the brink of extinction in the wild.

In addition, the Lacey Act also contains statutes that protect our native species and fauna with restrictions on invasive plants and wildlife. The potential public health concerns and economic costs associated with diseases and invasive species within our states should be of great concern to all of us.

The proposed H.R. 4171 removes the statutory authority of United States Fish and Wildlife Officers to carry firearms. These officers face the same threats as any other law enforcement officer throughout the country. Allowing them to be disarmed in today's society is a threat not only to their safety but also to the safety of our officers who often assist them and the very public we all serve.

Today our wildlife species continue to be exploited more than ever because of the financial gains by unscrupulous individuals. There is a prevalent illegal interstate and international trade in fish and wildlife species and their parts and products. It is imperative the Lacey Act provisions continue to exist as written to protect our natural resources for generations to come.

We respectfully request you oppose this legislation as it would not only be detrimental to our natural resources, but is also a public safety issue involving our federal agents. Additionally, it will put dedicated law enforcement professionals on the state and federal level, as well as the public they serve, at risk as they serve daily. If we may be of any further assistance please contact us at your convenience.

Sincerely,

Colonel Martin S. Garabedian  
President  
Northeast Conservation Law Enforcement Chief's Association (NECLECA)

