

D I A L O G U E

The New Frontier of Cross-Border Enforcement

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Editors' Summary: On October 30, 2009, the Environmental Law Institute held its Fall Practice Update, an annual half-day seminar addressing critical issues in environmental law and management. The following is a transcript of one panel discussion from that event. In this panel, senior practitioners discussed the issues involved in cross-border movement of imported items, from parts and components to manufactured goods, the increased enforcement scrutiny at the border, and steps attorneys can take to counsel companies on avoiding enforcement issues. More information on the ELI Fall Practice Update, including recordings, downloads, and related Articles, can be found here: http://www.eli.org/Dinner/practice_update.cfm.

Roger R. Martella: The theme of the ELI [Environmental Law Institute] Fall Practice Update this year is "ELI at 40 Years and the Evolution of Environmental Law." And, as we saw at the ELI Award Dinner last night and at other panels this morning, there have been many evolutions in environmental law in the last 40 years. There has been increased focus on climate change, nanotechnology, stricter regulations, and the intersection of natural resources and the environment. ELI has been tracking all these issues very carefully.

But there is another evolution that may not be quite as obvious: the evolution of environmental enforcement. Even when I started practicing 15 years ago, environmental enforcement was very different. In the first case I had, it was quite straightforward. We could trace drums from one site to another and go after transporters. It wasn't easy, but it was very different than it is today.

Since then, we've seen the evolution of new source review cases that sometimes require a Ph.D. expert just to decipher what these cases are about. We've seen Clean Water Act (CWA)¹ cases examining very academic and philosophical questions under the Act, and I think the next trend here will

be to look at the international ramifications of environmental enforcement.

This panel is going to focus on the enforcement side of global environmental issues. How can you ensure the products you bring into the United States from other countries are compliant with the laws in the United States?

One of the best known examples of this issue was just about two years ago this time; there was a recall of the Thomas the Tank Engine Wooden Toys that contained lead paint. I think 15 million of these little toys were recalled at a total cost of \$30 million to the company. The result was the creation of new consumer protection laws to increase the quality of goods used in toys and consumer products. In California, Proposition 65 relates to the import of products with environmental conditions that don't meet other standards. The Lacey Act at the national level pertains to the import of wood products. There are many other examples.

I have two goals for this panel this morning. We're going to talk first about where the government is going with this emerging trend and second how companies can be prepared to be in compliance.

We're going to begin with the government's perspective. Adam Kushner is the director of the Office of Civil Enforcement, a position he's held since January 2009. Prior to that, Adam was the director of the Air Enforcement Branch at the U.S. Environmental Protection Agency (EPA) since 2003, and before that, was a litigator in the Environmental Enforcement Section at the U.S. Department of Justice (DOJ) for 12 years. Adam, as you probably know, is one of the faces of the Enforcement Initiative at EPA and is going to be sharing up-to-date information with where EPA might be going with international initiatives at the border.

Next to Adam is Tom Carroll, who has first-hand experience litigating these cases at the DOJ. He is a senior attorney in the Environmental Enforcement Section and has first-line management responsibilities on many Clean Air Act Title II cases involving engines and emissions. Tom has been the lead participant in the major mobile source cases.

Joel Gross is a partner at Arnold & Porter, where he's been since August 2000, but prior to that, he was the chief of the Environmental Enforcement Section at the DOJ.

Ron Tenpas is the most recent assistant attorney general in charge of the Environment Division at the DOJ, where he has seen the evolution of these cases come up during his tenure. He is now in private practice, a partner at Morgan Lewis.

1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

I'm going to ask each of the panelists just to give some brief thoughts on their perspectives on this, and then we'll have a roundtable discussion and then turn it over to questions.

I. Import and Export Enforcement Challenges

Adam Kushner: Let me talk to you a little bit about two issues that have merited a lot of attention in the Enforcement Office over the last, I'd say, six or seven years. One involves the import into the United States of noncompliant products, a problem that Roger alluded to—the import of vehicles and engines and equipment that do not meet EPA or Clean Air Act (CAA)² emission standards, and the export of goods from this country to other countries in which they are creating impacts abroad.

First, I want to focus on the mobile source aspects of the CAA. Around 2003, we began to understand, working with our friends at U.S. Customs and Border Protection, that a number of noncompliant goods had been entering the country. As it turns out, most of these goods were motor vehicles and engines. This is a huge universe of equipment. I'm referring to light-duty vehicles, trucks, weed whackers, chainsaws, motorcycles, and ATVs. Over the last seven or eight years, each of these types of products have been imported into this country in either noncompliant form or otherwise illegally. These vehicles and engines are a significant source of emissions in the United States. Mobile source emissions comprise over 58% of the NO_x [nitrogen oxide] inventory and 35% of the volatile organic compound (VOC) inventory. There are huge, huge emissions impacts associated with these mobile sources, along with climate change implications.

In 2003, when I was still in my former position as the Air Enforcement Division director, we had four cases involving illegal imports of equipment from abroad. In 2004, we had seven cases. In 2005, we had 50 cases. Of those 50 cases, 44 of those cases involved the illegal import of goods from China. In 2006, we had 37 cases, 33 of which involved the illegal import of goods from China. In 2007, we had 92 cases involving the illegal import of goods, 64 of which involved the illegal import of cases from China, and so on, and so on.

Every port in this country is seeing import of noncompliant motor vehicles, engines, and equipment. Furthermore, the noncompliance is fairly wide-ranging, including everything from uncertified goods that don't meet the emissions standards to engines with uncertified adjustable parameters, equipment with defeat devices, disassembled equipment that is imported in separate containers and then assembled in this country, etc. Historically we have had few tools to attack this problem.

Importers stand in the shoes of the manufacturers here in the United States. But these importers are undercapitalized. They change identities. They don't have any bonding requirements. There are all sorts of issues associated with identifying these companies and pursuing them. In addition,

once the goods made it into the country, it is very difficult to track them. So, for example, major retail chains throughout this country have been selling, and are continuing to sell, noncompliant goods from China and other countries. It is a sort of perfect storm of trade imbalance and environmental compliance.

One approach we took was to address these problems on a transactional basis (i.e., import-by-import). We'd identify an illegal shipment of illegal product. We'd go out to the port. We'd seize the goods. We'd turn them around (i.e., export the goods) That's resource intensive. We couldn't continue to do this work on transactional or referral bases, so now we're endeavoring to convert these smaller single transaction cases into bigger, multiple transactional cases. Now, when we identify a shipment of a good like ATVs from a particular company, we'll issue that company an information request asking about all of its shipments over the last five years. And what we often determine is that this one event is not an isolated event. It typically is evidence of a pattern and practice of conduct that was obviously redounding to the benefits of the companies that were importing these goods. We are now attacking illegal imports on a much broader scale. So, we're looking at companies' entire activities. We're investigating not only the companies that are importing these goods, but we're then looking at the manufacturers and determining other products they've sold. We now have an electronic database that we can use that was created by Customs that will allow us to track individual shipments. And we're aggressively using our information-gathering tools.

The other thing that we're doing is we're going to the ports and we're hanging out, literally hanging out at the port for days on end. We're doing what we've been calling enforcement blitzes. Last year, we went to three separate ports and spent two weeks at each of these ports. We identified 70 shipments, 90% of which contained noncompliant goods. Further evidence of the pervasiveness of this problem.

Recently, we have embraced retail liability. Since we do not have the authority to pursue manufacturers of noncompliant goods in China, it is important that we go after the retailer of noncompliant goods. We treat this as if there is product liability chain of responsibility with the hope that, by focusing on the retailer and the distributor of these noncompliant goods, private contractual relationships will compel manufacturers in China to produce goods of sufficient quality. The large retailers in this country have the ability, through these contract mechanisms and through presence abroad, to monitor the quality of the goods that they're contracting or manufacturing abroad. We don't have that ability.

We're turning to the free market, essentially. We are compelling the use of contract mechanisms to be certain that goods meet federal standards. In addition, a rule change is going to take effect in January of this year that will require importers to have bonding sufficient to represent the value of the goods that they're importing.

We think we're getting in front of the problem now. We've had some really good recent rule changes. I want to emphasize that our strategy for attacking companies on a wholesale

2. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

basis and from a broad spectrum of activity is really paying off. We were able, just recently, through this Customs database and other information we have, to array the top 10 importers of ATVs and motorcycles into this country. Through our information-gathering tools, we have been able to identify rampant noncompliance among those top 10 importers, and we will be, pursuant to our enforcement authority, engaging them. And when we're done with motorcycles and ATVs, we're going to address other non-compliant products, including weed whackers, lawnmowers, generators, and other non-complying equipment.

I want to emphasize one more issue here, with respect to mobile sources. These aren't power plants but they're significant sources of emissions. I mentioned the emissions inventory information earlier. Well, when I go out into my yard and I use my chainsaw, I'm right on top of that thing. I'm breathing what it's emitting in close proximity. That's true for lawnmowers and weed whackers. How many of you watch your neighbor mow their lawn and see the oil being vaporized and emitted and wafting across your yard? These emissions are real, and they're in close proximity to us.

Let me change subject for a moment and talk about our exports. I don't know how many of you have had a chance to see the *60 Minutes* story on the export of cathode ray tubes. We are exporting our electronic waste, and it is ending up in landfills and in groundwater and contaminating land and water abroad. The *60 Minutes* report correctly emphasized that many Third World countries are receiving our electronic waste. That waste is being disassembled. There is lead in the tubes. There are heavy metals in the component parts. They are being salvaged but not very effectively, and much of the lead and much of the heavy metals are ending up in groundwater and contaminating what are already very scarce drinking water supplies.

We don't have great tools with respect to the stopping of the export of this material. Under the Resource Conservation and Recovery Act (RCRA),³ exporters are required to notify the regional Administrator of EPA of plans to export intact goods for reuse or recycle. If you're going to export goods for disposal or for activities other than reuse and recycle, you not only have to notify EPA, but you also have to notify the receiving country. Well, we're not getting the notices. The receiving countries are calling us after they've received the goods or while the goods are in transit. They already have existing problems, and there is a burgeoning industry, as you might imagine, given all the electronic waste that we generate today as well as through the speculative accumulation of these goods. So, what the Agency is doing now is focusing on honing its tools, identifying new tools, and rethinking how it might approach this issue.

Roger R. Martella: Beyond mobile sources and engines and weed whackers and things like that, is EPA looking at any other priorities, other types of imports?

Adam Kushner: Yes. The import of pesticides and toxic chemicals is a very important issue. If you look at the relative volume of trade over the last 10 years into this country, you would see that pesticides and toxic chemicals into this country have increased many, many fold. As production moves abroad, imports into this country increase, and the same types of issues that I identified with respect to mobile sources exist for those materials, as well.

II. Enforcement Case Studies

Thomas Carroll: I want to talk about a couple of specific examples, one called *United States v. McCulloch Corp.*⁴; we call it MTD and you'll find out why in a second. The other is *United States v. Powertrain, Inc.*⁵ I'm not picking on these two companies in particular. It's just that these are two filed cases, so there are materials that I can refer you to in terms of the complaint, the consent decree that you can look at to see how we plead these cases, and, at least, the one example of how we resolve them through a consent decree.

Let's start with the MTD case. The cast of characters starts with Jenn Feng, a Taiwanese company. It has a subsidiary, McCulloch, and then MTD Products, a U.S. company with a subsidiary, MTD Southwest. Jenn Feng manufactured chainsaws. Its subsidiary obtained a U.S. Certificate of Conformity, which is essentially a one-year permit, roughly a one-year permit to manufacture and import those to the United States. MTD orders these chainsaws for sale through retailers, such as Sears, and actually has its subsidiary, MTD Southwest, identified as the importer of record on U.S. Department of Commerce importation documentation. So, you may say, well, who in that cast of characters is liable for the manufacture and importation? Well, all of them, in our view. It may surprise you that the CAA is quite broad in terms of who it regulates with respect to manufacturing importation of regulated products, such as chainsaws, that have engines that emit pollutants.

For example, the Act defines a "manufacturer" not just as a person that manufactures in the plant, but anyone who causes the manufacture of the good. It also defines an importer and anybody who causes the importation of a product as a manufacturer. So, all of these entities are regulated under the Act, and when the enforcement focus occurs, we're going to be looking at all of them as potential defendants.

In this case, in 2005 and 2006, the chainsaws were imported to the United States. The certificate described them as having catalytic converters. One of the requirements of the Act and the regulations is that if you test an engine with the configuration that you say you're going to manufacture, that test data is given to EPA, and EPA has to be able to test those itself and go back and confirm that, in all respects, the things that you're selling conform to the test engine and the test configuration that you offered EPA to show that they complied with the Act. Well, it turns out that these were manufactured without the catalytic converters. So, in our view, the

3. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

4. Civil Action No. 1:08-cv-0699-RCL (D.D.C. 2008).

5. Civil Action No. 1:09cv-00993-RBW (D.D.C. 2009).

certificate of conformity doesn't cover the items that were actually imported and sold and distributed in commerce. We regard them as uncertified, and that is a violation of the Act, subject to penalties as well as to injunctive relief.

So, in this case, one of the retailers who distributed these brought to the attention of EPA that these chainsaws may not conform to the Act. EPA developed the case and referred it to us and, with EPA, we negotiated a resolution. What are we looking for in these kinds of cases? First, since they are uncertified chainsaws, in our view, they're unlawful for sale in the United States. Some of them were, in fact, sold, so the first remedy we want is to take the inventory that has not been distributed and return it to the country of origin. Not just that, but we want to make sure that the inventory doesn't simply turn around and somehow come back into this country, so we're going to be looking for some sort of mechanism to ensure that these are identified as not lawful for sale in the United States. Typically, that's done through a label that says just that: not lawful for sale in this country.

We also, as Adam mentioned, look for additional measures that the U.S.-based importer will establish to ensure that its suppliers are implementing steps to monitor the foreign manufacturers, to make sure that this kind of thing doesn't happen again. In the contracts for purchase of these things, we want to see requirements that the Chinese or other companies are conducting the appropriate assembly-line testing, are verifying that they comply with U.S. law. We would like to see the U.S. importers, if possible, sending representatives overseas to see that compliance happens before the goods are put on the boat and shipped to the United States. We would like to [see] testing overseas before the goods come here. We would like to see additional testing perhaps when goods arrive here, a sample testing to make sure that the engines comply.

One of the deterrents we have is civil penalties. Furthermore, in this case, since testing showed that the chainsaws were emitting excess pollutants of hydrocarbons and other emissions, we were going to look for offsets so that those excess emissions are somehow offset.

So, in MTD, we did enter into a consent decree. The consent decree required the export of all the chainsaws that were still in the possession of the U.S. importer. We required them to spend about \$5 million to implement projects to offset the illegal excess emissions, required them to conduct emissions tests on other products in their inventory we had concerns about, and to implement a comprehensive program to ensure that their foreign suppliers were meeting U.S. standards before exporting, and that included activities both in the place of manufacture and sample testing when those items arrived here. And McCulloch, MTD Products, Jenn Feng, and MTD Southwest paid a \$2 million civil penalty.

That's one example. The other is *United States v. Powertrain*. Both of these cases are filed here in the District of Columbia. Powertrain, both by itself and through subsidiaries, imported a variety of products, including generators, water pumps, and other pumps. In 2002, it obtained a Certificate of Conformity on the engines that went into all of the

products that it was importing. Powertrain was working with a Chinese company. In later years, it simply rolled over the original Certificate of Conformity, which it's allowed to do if the products continue to conform to the same configuration, have the same emissions characteristics, and are manufactured in the same way.

But, it turns out, the products it was actually importing had engines that were different horsepower and different displacements from those described in the original application for the Certificate of Conformity. As a result, many products that were brought into the country were not covered at all by the certificate. There was some suggestion by the company that the Chinese manufacturer had obtained a Certificate of Conformity, but when we sought out that paperwork, there was a complete mismatch between what was actually being manufactured and imported and what the certificate described. The distribution in commerce of uncertified engines is a violation of the Act. That case is in litigation now. We will pursue it aggressively.

The moral of the story is that if you're representing or advising U.S. clients, you should encourage them to know their suppliers, to get active in ensuring that their foreign suppliers are complying with U.S. requirements, are conducting the required production-line testing, are obtaining Certificates of Conformity (if they are the ones seeking certification), or, if it's a U.S. company that is obtaining the certificate for the U.S. distributor, that a Certificate of Conformity is actually obtained.

If you find a situation where there's noncompliance, consider talking to EPA about it. For example, EPA has negotiated voluntary Stop-Sale Agreements, so that unlawful product in the pipeline doesn't continue to be distributed. If a client has notice of noncompliance and is continuing to sell the products, that's going to be a serious concern to us.

If there is inventory coming into the country and either the Department of Commerce stopped it at the border or your clients have voluntarily stopped it, you might be tempted to re-export. But if it's a product that has been sold and is in consumer hands, be careful, because EPA might want you to conduct testing or have some samples available for EPA to conduct testing to determine whether there are excess emissions. And simply shipping it out of the country and putting that evidence out of EPA's reach might make the situation worse. So, know the regulations. Know your suppliers. Make sure they're complying with the law. If you encounter a problem, talk to EPA. Work things out rather than trying to solve it by shutting off the pipeline, shipping it back, and putting the product out of reach for testing.

Roger R. Martella: When you're dealing in this international enforcement context, do you have any additional challenges in bringing these cases, or do you limit yourself to finding U.S. parties that can be related to these products?

Thomas Carroll: There are some provisions in the regulations that somewhat extend jurisdiction to the foreign manufacturers. For example, with companies that are going to

manufacture overseas or contract the byproducts from overseas, the countries where manufacture is taking place must permit EPA to do production-line testing to verify compliance if they're obtaining a U.S. Certificate of Conformity. So, there is some extension of U.S. jurisdiction overseas. It gets complicated when you're trying to name a company in a U.S. court that doesn't have any presence here. We find that there is often a chain from a foreign manufacturer to a foreign distributor to a U.S. company that may just obtain the certificate (but not actually handle the product) to a U.S. distributor that receives the product and sells it to retailers. So generally, unless a foreign company has a U.S. presence, we would work with U.S.-based companies to ensure that they contract with their foreign suppliers to guarantee everything is done correctly.

III. Protecting U.S. Markets

Joel M. Gross: Having spent the bulk of my career in the government doing environmental enforcement, I used to think that environmental enforcement was an important part of environmental protection. And having been almost 10 years in private practice, I feel even more strongly that that's the case. And I think that the Federal Environmental Enforcement Program, at EPA and the DOJ, which really is a national leader in this, is a vital part of environmental protection in this country. We may disagree from time to time about the borders of particular aspects of environmental enforcement, particularly as they pertain to my clients, but in general, I think we're very much in agreement that environmental enforcement is vital, and not just because it is an important part of environmental protection, but because of its importance to ensuring a level competitive playing field.

That's one very important aspect of what Adam and Tom have been doing: protecting U.S. markets from imports that don't comply with the law. Manufacturers both in this country and reputable importers are, for the most part, very pleased to see this type of enforcement, because it does ensure that those who work very hard, at great expense, to comply with rigorous CAA regulatory requirements aren't competitively disadvantaged by cheaters who don't.

In the global market, the place we now find ourselves, EPA can play an important role in ensuring a level playing field. That is different from a lot of other parts of EPA's enforcement program, such as stationary source enforcement, where EPA's tools are far more limited in ensuring that U.S. manufacturers, with our diminishing manufacturing base, remain competitive with others operating around the world under less stringent or less enforced requirements. I think it is an interesting question, to what extent that should be a factor in EPA's enforcement activities. I would submit that it is something that EPA ought to be thinking about in taking enforcement, particularly in this context.

One could say that when you're dealing with a stationary source, that enforcement does not determine the level of regulatory requirements. That's for the U.S. Congress or for the rulemaking and regulatory process. The job of EPA enforce-

ment is to enforce the law as it is, and to the extent there are issues of competitiveness, those are best dealt with in another context. While I think that there is a certain validity to that point, when you look at the broader picture of enforcement, enforcement, particularly civil enforcement, has become much more proactive. These cases that Adam and particularly Tom just described are unusual in that maybe if they were in some other part of the enforcement scheme, they might be dealt with criminally, because many of them appear to be intentional efforts to violate the law. I think one of the challenges is that there are not specific criminal enforcement provisions in the mobile source part of the CAA, and so that's probably the main reason they're dealt with civilly, but they're an example of a case where we have clear requirements that aren't being complied with.

My second point about import enforcement is that EPA does have, because they work closely with Customs, more authority with less process to the regulated sources than they do in other areas. EPA works closely with the Customs folks, who have the authority to seize things at the border and not let them into the country. So EPA does have, when they work with Customs, the ability to take measures that they couldn't in other areas. I'm not suggesting that's not appropriate. I am suggesting that it's important to have lots of checks and balances. I think the EPA and the DOJ have a history of doing that, but it's very important that authority be exercised carefully and judiciously.

My third point about import enforcement is that if you're advising clients, enforcement is not just an issue for sort of fly-by-night manufacturers or people trying to game the system. It's an issue that all people importing, in this case, CAA-regulated engines into this country, need to pay attention to, because the regulatory scheme is quite precise and it's easy to end up in noncompliance if you don't pay attention. One example is labeling requirements. We've seen a number of cases where engines were certified as meeting CAA requirements. The engines had been through the certification process, but the labels weren't affixed to them in a way that EPA and Customs thought appropriate. The label is supposed to come off in multiple pieces because there is concern that it might be misused and applied to some other engine. So, you can have someone importing perfectly good engines but still run into problems with labeling, resulting in the engines can be seized and impounded and all sorts of problems created.

I'm not suggesting that that sort of compliance isn't important as well. From an enforcement perspective, I think it's also important, and I know this is an issue that Adam and his folks pay attention to, to ensure that in creating a level playing field, we're not creating an unlevelled playing field that becomes protectionist against the reputable manufacturers who are trying to take advantage of opportunities our trade policies allow to utilize U.S. markets. So those are, I think, some issues that are being talked about and should be talked about in this area.

In terms of practice points, particularly for products being imported, I think it's very important that clients be advised to rigorously make sure they know what the rules are and that

they're complying with them, because in other areas if there is an inadvertent mistake, maybe EPA will catch it, maybe not; maybe it will be self-disclosed, maybe not. But here, you have this additional challenge that the engine, to get into this country, is subject to inspection. If the engines wind up being inspected and not meeting EPA and parallel customs requirements, then they won't come into this country, and the cost will far, far outweigh the cost of what it would have taken them to make sure that they were brought in properly.

It's also important to keep in mind that Customs can impose their storage charges and can impose their own penalties. One area of labeling that we've seen is just making sure that when the labels are out on the engines that they're visible when they're put into wherever they're going to be put into. That might not be an obvious thing. It's easy for companies to get it wrong, even with good engines.

IV. Advising Clients

Ronald J. Tenpas: When I start talking to companies about these kinds of things, I sometimes encourage them, instead of worrying about Adam's latest initiative, although that's important, to start with a little broader conception saying, what is disaster for you as a company with respect to government enforcement and compliance? We have a certain level of acknowledgement that given the complexity of various rules and such, it's going to be very difficult to get it 100% right 100% of the time. I think most clients aspire to that, but it's worth starting occasionally with the thought of, let's think about this from one step removed.

When I think of disaster for most companies, at least two possibilities come up pretty quickly. One is some criminal charge being brought to bear against them, and that's disaster, if you're the general counsel, for a couple of reasons. One, your boss, the CEO, probably takes a very dim view of the prospects of being hauled off in handcuffs. It's potentially a disaster because of the reputational impact on the firm. It's potentially a disaster in a much more bottom-line economic way if you're in business with the government. You then run into debarment issues and things like that. The second is a major product discredited, as in the toy example that Roger referred to. Your major product line is not viable in the market because of this general discrediting through something associated with an environmental or health or safety kind of issue.

Starting there sometimes helps clients think a little bit about particular product lines or where they'd most likely run into that kind of scenario. Talking about that is at least a first way of organizing a company's thinking about the most important place to be doing its audits, its reviews, and concentrating some of its compliance efforts.

Where does that feed in with respect to issues at the border? For a lot of companies, this isn't new in the sense that some of these pressures they're facing mirror exactly what they faced with respect to something called the Foreign Corrupt Practices Act. Over the last five years especially, there has been a significant expansion of DOJ enforcement. That's

basically a law that sort of says to U.S. companies: "Don't bribe overseas officials in order to get business, in order to get permits," those kinds of things.

Philosophically, it is rooted in exactly, I think, what Tom and Adam have described as being the enforcement philosophy behind going against domestic compliance. In that arena, the policy objective is, in some sense, sounder and better integrity in government outside the U.S. border. The lever for that has been targeting U.S. companies who are operating in those locations and essentially saying to them, you've got to drive down, at the threat of prosecution here in the United States, controls and procedures to know what's going on either directly within your company or by folks acting in a third-party capacity on your behalf and interactions with both.

For big companies, in a generalized way, this is another application of something that they have been facing. Many of the largest companies are engaged right now in very robust analysis of how they're doing on foreign corrupt practices because there have been big cases with big penalties. Why now, when the statute has been around for 35 years? A lot of enforcement has come along. Some big people have gotten hit pretty hard, and so there are opportunities, I think, for certain folks to say environmental is a piece of that as well. Companies better be thinking about what's happening on their behalf in foreign locations as countries develop more robust environmental regimes and those become potential barriers to trade. They better know what's going on in terms of getting environmental permits and permissions.

This is not just an air/EPA issue. Roger alluded to the Lacey Act a few minutes ago. Roughly a year and a half ago, there was an expansion of the Lacey Act, which prohibits trade in protected plants and animals. The Act was expanded to include timber in the definition of plants. Now, it is against the law to import into the United States any product containing wood that was taken in violation of the source country's laws. Say you're Kmart, and you're selling brooms with wooden handles. If the government can make the case that that wood originated with a log that was illegally taken, you've violated the law, and it's basically strict liability in terms of that product. If the government can make that case, they can come in and seize the product. It's a criminal misdemeanor if that got into your product chain through the absence of due care. It's a felony if that got into your product chain knowingly—if you knew it was illegally sourced and brought it in and sold it. This example is meant to explain that enforcement is not simply an air or water kind of issue. It leads into the natural resources arena, as well.

The problem with the due care regime is a lot of uncertainty about what due care means. Is it enough to tell your supplier: "Give me a letter that certifies the source of your wood product and that it was legally sourced?" Do you need to go beyond that? Say it's a wood desk you're selling and you know it was processed in China. Do you need to go to China to look at where the wood is coming in? Do you need to follow it back a step beyond that?

Those are, I think, the two sides of the compliance challenge that companies face, and to some degree they depend on the line of business and the major product mix. That's what returns me back to that opening advice: What's disaster for you? Is it wise for clients to start by identifying their most important products? What do we basically know about sourcing with respect to those? How do we map that against the general understanding of sources that may have regimes? You can be pretty confident in the integrity of what you've got. Other places, you may be less confident and do some of that big-picture risk analysis before you necessarily start chasing every new initiative or new regulation. You tend to get into the trees, and sometimes looking at the forest is a little more useful.

Roger R. Martella: Have there been any examples of an expansion to criminal liability? Has there been any consideration of that? What would be the type of circumstances where either EPA or the DOJ might consider criminal enforcement?

Adam Kushner: Joel's characterization of Title 2 of the CAA, which pertains to the mobile source provisions, is accurate. There are no criminal enforcement provisions in Title 2, a legacy of one of our more institutional U.S. House of Representatives members. But we have a very robust criminal docket, and the bases for criminal liability may be misrepresentations made to the government, whether it be to Customs or to EPA. And so if you would talk to my counterparts in our Office of Criminal Investigation, if you go ahead and survey the level of activity out there in the U.S. Attorney's Office, you will find there are quite a few criminal prosecutions related to not just the illegal import of motor vehicles and engines and equipment, but also e-waste, pesticides, and other compounds and commodities.

Thomas Carroll: I believe there is a provision in Title 1 of the Act that potentially applies to some Title 2 noncompliance.⁶ I did want to react to Joel's comments about competitiveness and whether enforcement can make an unlevel playing field. Many of the cases that we see are initiated because competitors come to us and say: "We are doing what is required. It costs us a lot of money. Can't you look into this company that we think is not only copying our designs, but also bringing things in that look like our product and selling them much more cheaply because they're not complying with the environmental rules?" Talk to EPA, talk to us if you've got information; if your clients know about situations, let us know. We do pursue those cases. We do take that kind of thing very seriously.

Ronald J. Tenpas: Enforcement often starts with a civil initiative, and one of the things to watch for will be whether those numbers that Adam just cited start to trend down. If

they don't, then I'd happily predict that the reaction within EPA and within the Environment Division will be to turn to criminal penalties. There tends to be a kind of yin and yang between these two things: if there is disappointment or frustration with the results of the civil enforcement program, it then becomes a higher priority in the criminal arena.

Joel M. Gross: One of the dynamics I've seen in advising clients is sometimes they'll say: "Well, if it's just civil enforcement risk, we'll take that risk," and I will point out: "Well, it's not just civil enforcement risk," and they'll say: "Well, where are the criminal provisions of that act?" There are a number of provisions of environmental laws that don't have criminal provisions. When it comes to criminal, you've got 94 U.S. attorneys working very aggressively and expansively. It's just a lot easier to be talking about this before you've done something than after you've done it. Clients who've even one time been through the process of getting a grand jury subpoena tend to not pass those questions the second time without, well, what's the worst case scenario?

Roger R. Martella: Ron, you have mentioned this example of Kmart and the broomstick. And we heard from Adam and Tom talk about, in this case, you can't always go after the manufacturer. You have to go after the importer or some retailer, or even Adam talked about the retail connection. Joel and Ron, what's your reaction to that, the notion that you could have companies responsible who may not have full understanding of what they're selling and how they can protect themselves?

Ronald J. Tenpas: We can have an initial discussion about whether, as a matter of policy, that's good or bad. We can take the Lacey Act as the most recent and easiest example. As an interesting policy argument, is that good or bad that Congress has taken that approach and said anybody in the chain is potentially legally liable? Many clients have a certain amount of disbelief at this regime. I tend not to get very focused on that question, because I'm a lawyer and I say I'm here to help you with what the law is. If you want to try to pursue a change in law, we can talk about the ways that you would go about that. So, I try to move it to a place where they can do something now in a very immediate way.

The first piece of it is always to know your product list and at least the beginnings of your supply chain. You have to know what you've got that puts you at risk, and then you can begin to manage it. From there, it becomes very complicated, particularly under things like a due care standard. What's enough? Even in this area, the legislative history says it's a level of care that the reasonable person would exercise in the circumstances. There are plenty of studies, for example, that show most U.S. and Canadian timber is legally sourced; we have very robust regimes here. So, is it potentially enough if you get a certification that says: "Yes, we get all our timber from the United States and Canada?" I would tell a client I think you can be pretty comfortable with that if you've got also good reason to trust the certification, and that probably

6. See §113(c)(2) of the CAA, 42 U.S.C. §7413 (c)(2) (imposing criminal penalties for specified violations of "this chapter," i.e., the CAA, apparently including the mobile source provisions in Title II of the Act).

ends what you need to do. If you can't get that, then the complications multiply pretty quickly.

The second thing I would observe on that is there is a way in which, at least for certain folks, the market has overtaken the law in this area. There are a number of big retailers who have decided they want to posture themselves as green for market reasons. They're genuinely environmentally concerned and motivated; it's part of a risk management strategy. They've taken this on their own initiative and are driving this down on suppliers, regardless of what they regard their legal exposure to be. The suppliers to big retailers, the importers at record who are actually bringing the broom in and then selling it to the retailers here, are facing that pressure and trying to figure out what to do, because they need to do that to be competitive in the marketplace.

Adam Kushner: Let me make an observation about what Ron just said, because let's face it, the companies that are here in this country that are purchasing these commodities from abroad are in it for one reason only. They're going to make a buck. It's a perfectly legitimate reason. It's the sucking sound from inside our borders as it relates to goods outside our borders that is causing folks to want to bring these goods into this country. Most of these companies now, these large retail chains, have a huge presence abroad. I had the privilege of going to Beijing and Tokyo to talk with a number of U.S. manufacturers through the Chamber of Commerce there. To an entity, they can tell you they have huge quality assurance issues and the reason they are located there, many of them, is to watch the quality of the products that are being manufactured by the manufacturers who exist abroad.

There are two different types of supply chains and you have to keep this in mind. A big retail company may have their own production entity. They may actually own, wholly, a manufacturing outfit and it's easier for them to control the quality of their product. They can apply U.S. standards in that outfit. They can watch it. They have their own employees there. They're present all the time. They've got contracting mechanisms and personnel mechanisms to ensure that the products are what they purport to be. But these same companies also, as Ron was describing, buy through suppliers and through distribution chains where they cannot as readily watch the quality of the product as carefully as if they were controlling the production themselves.

Notwithstanding our very effective consumer protection laws, I would suggest to you that it's the chain of liability that exists for consumer production products that really has caused there to be rampant compliance, and it's the same type of potential liability that should exist in this distribution chain to cause there to be rapid compliance. Tom simply doesn't have the bodies to throw at it. I don't have the bodies to throw at it.

The most effective way to assure compliance in this area is through private contracting mechanisms. The full force of the marketplace should be brought to bear on ensuring that the products that are brought into this country are compliant and safe. Many of these products that we've been talk-

ing about are not just violating CAA standards—they're dangerous.

Thomas Carroll: When we do penalty calculations, we look at economic benefit. Typically in the mobile source cases, you're not talking about major capital equipment in terms of economic benefit or avoided costs. What you're talking about is the failure to hire, train, and have in place an individual whose task it is to know the rules, to educate everybody in the supply chain on what the rules are, and to develop checklists for compliance mechanisms to make sure that the product is checked. That is critical to compliance: people with knowledge, a capital of knowledge rather than equipment.

Ronald J. Tenpas: I just have one comment about the dynamic by which folks like Adam and Tom expand the universe of whom they look to. They don't do it secretly. They announce that these are their priorities. They provide enforcement alerts. One can debate whether retailers would be on notice that they should have been checking into this, but the fact is the way that EPA tends to operate is they don't start out by looking at second, third-tier enforcement targets. They look at the first ones and see if that works, and then they announce what they're going to do.

This is why it's important to pay attention to what EPA is doing, because I assume Adam would say, well, in the first instance, yes, maybe if they started out by going after the retailer several years ago, maybe that would have been unfair. But at this point, they announce their priorities, put out alerts, and talk at conferences. If you are paying attention to where they're putting their resources and you discover you're noncompliant, there are mechanisms through the voluntary disclosure policy to get your shipment or your house in order before Adam's inspectors show up. It would be great if there was a world where you can comply with everything in the first instance. But at the very least, responsible environmental management would be to know where EPA is putting its enforcement resources and being prepared for that and not allowing yourself to be in a position where they practically show up at your door.

V. Questions and Discussion

Audience Member: I'm with an environmental consulting firm that focuses on compliance and risk management in governance. With regard to mobile sources that do not have a certificate of conformity, you've intercepted many of these before they enter commerce, but many of these have already come in and entered commerce and are now in use. So, one of the things I've picked up here this morning is if I'm doing an environmental audit for a client, I should look for these. I'd like to post a scenario and ask how you might suggest a response.

Let's say there is a backup generator at the office headquarters, and the company contracts with a landscaping company to bring in their equipment to mow the lawn out front. Let's also say that no certificate can be found for any of this equip-

ment. If we find out that this equipment is noncompliant, what are the requirements or what's the obligation or best practice of a company?

Adam Kushner: A couple of things: one, we've just entered into a couple of large settlements with some telecommunications outfits that, in fact, had a circumstance in which they had a number of generators located at these telecommunications towers that were noncompliant. I think the generator would be considered a stationary source, so there are other rules that would apply to it. But we have lots of companies that are running around with generators, say, in oil and gas exploration, that are not stationary sources. They're mobile.

I think the best vehicle really for addressing that, to the extent that your clients are interested, would be the Audit Disclosure Program. That's our policing vehicle, which would allow for some dramatic reductions in penalties and maybe no penalties if there wasn't any economic benefit, but more importantly, would assure that these goods were compliant at the end of the day.

The other thing I would be doing is be looking to the supplier of the equipment, at least as to what were the circumstances of purchase and whether they had any obligation, because it may be that part of the solution for the company in a broad way. You would want to go back to the vendor and look at the sale agreements and things like that, because there's a good chance that something like that is not compliant with some kind of warranty, or you'd have some argument along those lines.

Thomas Carroll: If I could just add quickly, if you want to pick up the phone and call Adam's folks and let them know that it can backtrack and see if it's a broader problem with the importer or the manufacturer, we'd appreciate that. Joel mentioned the Department of Commerce seizing goods coming in at the border. One of the reasons that that is an important compliance tool for us is that unlike motor vehicles, where there is a huge registration database and if you do a recall, you can find them, you know who owns them, with this smaller equipment, generators and weed whackers or whatever, a recall is very difficult because you have no idea. Even if you do a recall, you might get a very low response rate. So, stopping them before they could distribute it is an important tool for us.