

16 June 2022

US demand-side measures on commodity-driven deforestation

Contributing authorRick Jacobsen,
US Environmental
Investigations Agency**In partnership with:**

What is the current status and planned timeline of the legislative agenda?

Over the past year, there have been significant US state and federal legislative developments.

FOREST Act and Biden Executive Order

Most notable was the introduction in October 2021 of the Forest Overseas Rule of Law and Environmentally Sound Trade (FOREST) Act, led by Senator Brian Schatz (D-Hawaii) and Representatives Blumenauer (D-Oregon) and Fitzpatrick (R-Pennsylvania).¹ While securing bipartisan support in the Senate remains a major challenge, the FOREST Act may be developing increased appeal “across the political aisle”, as was the case for 2008 amendments to the US Lacey Act prohibiting the trade in illegal timber, which enjoys broad bipartisan and US wood products industry support.

Similarly, the FOREST Act has started to garner support from US producers, most notably among cattle rancher associations concerned about unfair competition from increasing imports of beef from Brazil. In the last year, industry actors including the National Confectioners Association² and the Sustainable Food Policy Alliance³ have issued statements supporting demand-side regulations on deforestation, though this falls short of the level of corporate endorsement seen for the EU regulation.

The likely next step in the Congressional process is a hearing in the House Ways and Means Committee as early as this summer. Avenues for including key FOREST Act provisions in other legislation likely to advance this year or next are also being considered. As the November midterm elections approach, passing significant new legislation will become increasingly difficult.

1. Bill text available here: <https://www.congress.gov/bills/117/congress/house-bills/5508/text?r=5&s=1>
2. <https://candyusa.com/news/confectionery-companies-release-forest-conservation-and-cocoa-supply-chain-framework/>
3. <https://foodpolicyalliance.org/news/sfpa-commends-efforts-to-address-deforestation-in-ag-supply-chains/>

On Earth Day 2022, President Biden signed an Executive Order (EO) that, among other things, commits to halting the trade in illegal timber as required by the Lacey Act, and reducing or halting imports of commodities grown on illegally or recently deforested lands.⁴ The EO refers to legislation and specific measures proposed in the EU regulation and the FOREST Act, signalling the Administration's interest in and potential support for a regulatory approach.

Biden announcements in Glasgow and the AMAZON21 Act

US House Majority Leader Hoyer (D-Maryland) introduced a bill alongside President Biden's commitment to provide \$9 billion towards conserving forests at COP26 – the America Mitigating and Achieving Zero-emissions Originating from Nature for the 21st Century (AMAZON21) Act⁵ – that would authorise this amount and establish a results-based fund overseen by the US Department of State. Funds would still need to be approved during Congress' annual budget appropriations process. In Glasgow, Biden also unveiled a whole-of-government plan to conserve global forests, although the details of specific programmes and actions are still being elaborated.⁶

California and New York State deforestation-free procurement bills

In California and New York, the fifth and ninth largest economies in the world, efforts continue to legislate deforestation-free public procurement mandates. The California bill would require state contractors to carry out supply chain due diligence for deforestation and human rights.⁷ The bill was passed by the legislature but vetoed by the governor (over possible impacts on small business), and failed to advance after reintroduction this year. The lead sponsor has indicated his intention to address concerns and reintroduce in 2023. The New York bill would apply to boreal and tropical forests and also cover degradation of intact forests.⁸ A companion bill would provide support to small businesses to comply with new supply chain traceability and sustainability requirements.⁹ The bills garnered strong support in the state Senate but stalled in the Assembly and are expected to be reintroduced in 2023.

4. <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/22/executive-order-on-strengthening-the-nations-forests-communities-and-local-economies/>

5. Bill text available here: <https://www.congress.gov/bills/117th-congress/house-bill/5830/text?r=28&s=1>

6. https://www.whitehouse.gov/wp-content/uploads/2021/11/Plan_to_Conserve_Global_Forests_final.pdf

7. Bill text available here: https://leginfo.ca.gov/faces/legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1979

8. Bill text available here: <https://www.nysenate.gov/legislation/bills/2021/S5921#:~:text=S5921%20%2D%20Summary,or%20through%20their%20supply%20chains.>

9. Bill text available here: <https://www.nysenate.gov/legislation/bills/2021/s8596>

What is the scope of the legislation in terms of commodity and ecosystem coverage and treatment of illegality?

The FOREST Act would prohibit the import of designated products containing commodities sourced from land illegally deforested after the date of enactment. The bill establishes its own definitions of ‘forest’ and ‘deforestation’. Only if an importer sources a commodity produced on deforested land according to those definitions would they need to then consider whether the deforestation was legal under producer country laws. Illegal deforestation is defined as “deforestation conducted in violation of the law (or any action that has the force and effect of law) of the country in which the deforestation is occurring, including (A) anti-corruption laws; (B) laws relating to land tenure rights; and (C) laws relating to the free, prior and informed consent of indigenous peoples and local communities”.

The FOREST Act would regulate products made ‘wholly or in part’ of covered commodities. The initial list of covered commodities includes cattle, palm oil, soy, cocoa, rubber and wood pulp. This list would be reviewed annually by the Office of the US Trade Representative (USTR), in consultation with other federal agencies, an advisory committee established by the bill including the private sector and civil society, and the public. The term ‘wholly or in part’ would be defined under regulations to be developed by USTR and Customs and Border Patrol (CBP) within one year of enactment. As a result of discussions with the US paper industry, wood pulp will likely be removed from the initial list and continue to be covered by the Lacey Act, which already prohibits the import of illegal wood products, including pulp and paper.

The bill also contains an initial list of products, according to HS code, made entirely or predominantly of the covered commodities described above, that would be subject to import declarations. This list would also be subject to annual review following the same process described above.

While limited to natural forest ecosystems, the FOREST Act would apply a broad definition of ‘forest’, based on FAO definitions, including more sparsely or sporadically wooded ecosystems. A ‘natural forest’ is defined as “a natural arboreal ecosystem that (A) has a species composition a significant percentage of which is native species; and (B) includes – (i) a native tree canopy cover of more than 10 percent over an area of not less than 0.5 hectares; or (ii) other wooded land with a combined cover of shrubs, bushes, and trees of more than 10 percent over an area of not less than 0.5 hectares”. This would include much of the Brazilian Cerrado and Gran Chaco biomes.¹⁰

Conversion of natural forests to tree plantations is considered deforestation, although ‘tree plantation’ is not defined.

10. https://resources.trase.earth/documents/Greens_Proposed-EU-regulation-on-deforestation-&-forest-degradation.pdf

What are the points of (a) common ground and (b) contention by different stakeholders?

There is wide support for the prohibition of commodities produced on illegally deforested land, but some civil society and private sector stakeholders would prefer to see it apply to commodities produced on any deforested land. Similarly, while civil society broadly supports a legality definition addressing FPIC and the land rights of indigenous peoples and local communities, it is recognised that national laws often do not go far enough in protecting traditional or customary rights and best practice international standards should be applied.

Supply chain traceability to the point of production is seen by many civil society groups and some major companies as essential to effective due diligence, particularly when sourcing from high risk areas, but this remains an area of concern for some companies. Some private sector stakeholders have raised concerns about transparency and consultation around the enforcement of US import requirements, although the bill contains provisions designed to address this.

What are the main risks the legislation will not achieve its objectives?

Where the US is a negligible import market for deforestation-risk products, such as soy, it will have limited direct impact. There is also a risk of bifurcation of such supply chains, with products that lack traceability or originating on deforested land diverted to less regulated markets. However, the law would require that all suppliers to an aggregator, such as a palm oil mill or a refinery, are compliant with US import requirements, extending the reach of the regulation across entire supply chains for products for which the US is an important market (e.g. palm oil derivatives).

A significant challenge is the lack of jurisdiction and limited information for US enforcement agencies concerning violations of producer country laws, particularly where local law enforcement is not effective or willing to cooperate. The FOREST Act proposes to require that importers sourcing from high-risk areas supply sufficiently detailed information to US authorities to facilitate enforcement. A formal mechanism for third parties to submit evidence would also be established. Key to this approach would be adequate resourcing of enforcement agencies, especially CBP and USTR, to gather, manage and use information for targeted investigations. The bill authorises an initial \$30 million towards foreign assistance and enforcement, including \$8 million to CBP and \$3 million to USTR.

The bill would establish transparent and consultative mechanisms for identifying high-risk countries, commodities and products, and for regularly reviewing the lists. This will also require adequate resourcing of the lead agencies and consistent engagement by civil society experts. US government engagement with and support for producer countries deemed high risk would also need adequate and consistent resourcing. The Biden administration's \$9 billion commitment towards conserving forests, if realised, would increase the availability of resources.

What are the main barriers to implementation on the ground?

The supply chain traceability and reporting requirements will require the strengthening of data management systems, both by implementing agencies like CBP and by companies. Complex supply chains containing multiple aggregation points and/or independent smallholder farmers will be a particular challenge, but many examples exist of companies addressing these challenges. Traceability systems for certain products like cocoa butter and palm kernel oil are less advanced and will require increased attention as well as possibly more time.

Smallholders may face particular challenges, although the risk of exclusion is lower in sectors such as cocoa and rubber where they comprise the majority of production. It will be important for the US government to prioritise support for producer countries and other stakeholders to help ensure smallholder farmers and organisations have technologies and resources to produce and manage the necessary data.

The three-year timeline for detailed import declaration requirements to come into effect, in addition to the time lag before commodities like palm oil, rubber and cocoa grown on newly deforested land would reach market, give stakeholders a significant time window to develop and implement compliance programmes.

Annex

	EC proposal	US FOREST Act	UK Environment Act – Schedule 17
Overview of prohibition/standard	Commodities or products in scope cannot be placed on EU markets unless they are deforestation- and forest degradation-free (after 31 December 2020), have been produced in accordance with local legislation, and are covered by a due diligence statement.	It will be unlawful to import any product made wholly or in part from a commodity in scope that is produced from land that undergoes illegal deforestation after the date of enactment.	Prohibition on using deforestation-linked commodities and their derivatives that have not been produced in accordance with local laws relating to the ownership and/or use of land. No specific cut-off dates currently defined.
Commodities in scope	Cattle, cocoa, coffee, oil palm, soya and wood products covered under the EU Timber Regulation.	Products "made wholly or in part from" palm oil, soybeans, cocoa, cattle, rubber, and wood pulp.	Cattle (beef & leather), cocoa, coffee, maize, palm oil, rubber and soy could all be within scope, but secondary legislation is necessary to determine this. Introduction could be staged over time.
Forest definition	Using FAO Forest Resource Assessment definition of "forest" to define deforestation. "An area of land greater than 0.5 hectare on which there are trees higher than five metres with a canopy cover of more than 10%".	A "natural forest" is defined as "a natural arboreal ecosystem that (A) has a species composition a significant percentage of which is native species; and (B) includes (in alignment with FAO definitions) – (i) a native tree canopy cover of more than 10 percent over an area of not less than 0.5 hectares; or (ii) other wooded land with a combined cover of shrubs, bushes, and trees of more than 10 percent over an area of not less than 0.5 hectares.	"Forest" defined in alignment with FAO definition as "areas of land of more than 0.5 hectares with a tree canopy cover of at least 10%".
Deforestation definition	The conversion of forest to agricultural use, whether human-induced or not (see definition of "forests" above). Forest degradation is also in scope for wood products. The scope of legislation also includes relevant legislation in producer countries (although the scope of this is not yet clear).	Loss of natural forest resulting from the whole or partial conversion of natural forest to (A) agricultural use or another non-forest land use; or (B) a tree plantation. Only if commodities are grown on deforested land according to the definitions in the bill would importers need to consider legality.	Scope of legislation is defined by compliance with local land use laws, which are not necessarily only relevant for forest ecosystems.

Businesses in scope	All operators (which includes large traders) placing in-scope goods on or exporting them from the EU market would be subject to the regulation. However, reduced due diligence requirements present for small and medium-sized enterprises traders as well as operators and those who are microenterprises who have 24 months to comply, whereas all other operators have 12 months.	Applicable to all importing companies.	Only large companies will be in scope, with the turnover threshold to be set in secondary legislation. Will apply to any large companies using in-scope commodities in the UK no matter their supply chain position. Exemptions for companies handling small volumes.
Domestic commodity production coverage	Yes; production within EU markets, including for exports, is within scope.	No; applies only to imported material.	Requirement for compliance with local laws suggests domestic commodity production would be in scope.
Due diligence expectations	Establishment of a system to identify and obtain information about commodities, assess risk and mitigate. Information supplied must demonstrate no or negligible risk of deforestation, forest degradation and illegality.	Importers must take "reasonable care" (an existing principle in US customs law) to assess and mitigate risks that commodities were produced on illegally deforested land. Customs and Border Protection is instructed to publish within 90 days of enactment guidance on what constitutes reasonable care, which may be commodity-specific if warranted.	Requires the establishment of a system to identify and obtain information about commodities, assess risk of non-compliance with local laws and mitigate risk. Exact details to be outlined in secondary legislation.
Risk benchmarking	Yes; low-, standard- or high-risk sourcing locations to be defined at time of enactment and reviewed periodically. Simplified due diligence processes for low-risk areas, enhanced checks for high risk regions. Benchmarking at national and subnational levels (but granularity unknown at subnational).	Yes; default and high risk, with simplified import declaration requirements for default-risk countries.	No indication that benchmarking will be used.
Supply chain information requirements	Geolocation of plot-level points of production required for sourcing across all risk levels. Additional information must demonstrate that the absence of deforestation and forest degradation and legality requirements are fulfilled. A due diligence statement is required.	Import declaration with point of production (or all possible points) for designated commodities from high-risk countries only (with risk level defined on a commodity-by-commodity basis), identified by the smallest administrative unit of land possible (concession, farm, ranch etc). Additional information is required documenting steps taken to mitigate risks.	Traceability requirements currently unclear; requirements expected to be defined during the development of secondary legislation. Companies must establish and implement a due diligence system to identify and obtain information about that commodity; assess risk that relevant local laws were not complied with; and mitigate risk.

Public reporting requirements	Operators (excluding SMEs) are expected to publicly report on an annual basis on their due diligence processes (including risk assessment and mitigation).	No public reporting required of companies. Import declaration information will later be made public (subject to protections for confidentiality) by Customs and Border Protection.	Companies must provide the regulating authority with an annual report on actions taken by the company to establish and implement due diligence. Expectation that at least parts will be made publicly available.
Penalties	Penalties to be established by Member States, but with should include as a minimum fines (of up to 4% of annual turnover), confiscation of materials, temporary exclusion from public procurement.	Penalties could include seizure and fines, following existing civil and criminal penalties under US Customs Law.	Potential sanctions, including fines with current suggested maximum of £250,000 (but to be defined in secondary legislation).
Audits	"Competent authorities" at Member State level must carry out annual checks covering at least 5% of operators and 5% of quantity of relevant commodities. This moves to 15% for high-risk regions.	Random audits of importer filings carried out by US Department of Agriculture; Customs and Border Protection has broad discretion for auditing and must report annually to Congress on audits and investigations carried out.	Auditing process to be set out within secondary legislation.
Evidence from third parties	"Substantiated concerns" may be submitted to competent authorities by any "natural or legal persons".	Formal mechanism to receive information from outside sources to be established by Customs and Border Protection within six months.	Not specified to date.



Keep connected with Trase for updates on future insights
trase.earth

Do you want to work with us?
 Jolene Tan
 Communications Lead at Trase
j.tan@globalcanopy.org

Trase is a partnership co-founded by the Stockholm Environment Institute and Global Canopy

