Business on the Border
New U.S. and Canadian Consumer Product Safety Laws

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Consumer product safety has received much attention in Canada and the United States over the past few years. Public reaction to high-profile recalls involving unsafe imported goods has lead to the introductions of new laws and policies to protect the public in both Canada and the United States. These new laws have a significant effect on companies doing business on each side of the North American border.

The purpose of this article is to provide an overview of the new Canada Consumer Product Safety Act and the recently revised U.S. Consumer Product Safety Improvement Act. This article will provide essential information about these consumer product safety laws for companies selling products into Canada and the United States.

Canada

Purpose and Legislative Scheme. A number of high-profile consumer product safety issues have led to the enactment of new consumer product safety legislation in Canada. On June 20, 2011, the Canada Consumer Product Safety Act (CCPSA) came into force. Health Canada is responsible for the administration and enforcement of the act, which sets out a comprehensive consumer product safety regime. This article provides essential information about the act for manufacturers, distributors, importers, and retailers who supply consumer products in Canada.

CCPSA is similar to U.S. consumer product safety legislation. It is designed to protect the public by addressing or preventing dangers to the health or safety posed by consumer products imported to or produced within Canada. The act:

- Prohibits activities such as the manufacture, importation, advertisement, and sale of unsafe consumer products.
- Provides for incident reporting, safety measures, recalls, and related matters.
- Establishes significant civil and criminal penalties for noncompliance.

Prohibitions. The act prohibits the manufacture, sale, importation, or advertisement of listed products or products that fail to meet regulatory requirements. Listed products have been deemed to pose a significant risk to consumers (such as baby bottles containing bisphenol A). The act prohibits the manufacture, sale, importation, or advertisement of products that are:

- A danger to human health or safety.
- Subject to a recall order or a voluntary recall.
- Subject to a measure or order imposed under the act that has not been complied with.

Also, the act prohibits misleading labeling or packaging regarding a product's danger or safety certification.

Record Keeping. New document and record-keeping requirements include the following:

- People may be ordered to test products and provide test results to the minister.
- Any person who sells, manufactures, imports, advertises, or tests a consumer product for commercial purposes is responsible for preparing and maintaining documents. In the case of retailers, documents must indicate the name and address of the person from whom they obtained the product and the location where and the period during which they sold the product. In the case of any other person, documents must indicate the name and address of the person from whom they obtained the product and to whom they sold it (as applicable).
- Documents must be retained for six years.

Incident Reports. A person who manufactures, imports, or sells a consumer product in Canada and receives information regarding an event, must provide information when they are aware that an incident has occurred that is related to a consumer product that they supply in Canada. The act defines an "incident" as:

- An occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in a death or in serious adverse health effects;
- A defect or characteristic that may reasonably be expected to result in a death or serious adverse health effects on their health;
- Incorrect or insufficient information on a label or

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in instructions—or the lack of a label or instructions—that may reasonably be expected to result in a death or serious adverse health effects; or
- A recall or measure that is initiated for human health or safety reasons by a foreign entity, specified government, public body, or institution.

Health Canada has listed three questions that are designed to help determine whether an event is a reportable incident:

- Does the event relate to a consumer product that I sell, manufacture, or import in Canada for commercial purposes (including its components or accessories or packaging)?
- Does it meet the criteria of an incident in any of paragraphs 14(1)(a) to (d) of the act?
- Does it indicate an unreasonable hazard posed by the normal or foreseeable use of the product or the foreseeable misuse of the product?

Reporting Deadlines. A manufacturer, importer, or retailer who becomes aware of an incident must provide information to the minister and, if applicable, to the person from whom they received the product, within two days after the day on which they became aware of the incident. A manufacturer, importer, or retailer must provide a written report to the minister within 10 days after the day on which they become aware of the incident. The report must include information about the incident, the product, products that could be involved in a similar incident, and measures that have been taken or proposed regarding those products.

Recalls. The minister can recall a consumer product if the minister believes, on reasonable grounds, that it poses a danger to health or safety. The minister can also impose measures to stop manufacturing, importing, packaging, storing, advertising, selling, labeling, or transporting the product if it is subject to a recall or if a person has not complied with the act or a previous order. The minister may apply for an injunction ordering a person to refrain from doing anything that would result in a commission of an offense.

Information Disclosure. The minister may disclose personal information or confidential business information without consent in some situations, particularly when disclosure is necessary to address a serious and imminent danger.

Enforcement and Penalties. The act is enforced by inspectors. Inspectors have broad search and seizure powers under the act. They may enter any place or conveyance where consumer products or related documents are stored, manufactured, sold, imported, packaged, advertised, labeled, tested, or transported. Consent or a warrant is not required to enter a place other than a dwelling house. Inspectors have powers to seize, photograph, open, move, test, and examine items.

In general, it is an offense to contravene the act. Criminal sentences for the most serious offenses may include a fine of up to $5 million and imprisonment of up to two years. If a corporation commits an offense, its directors, officers, and agents are deemed to be parties to the offense and are liable to punishment. Due diligence is a defense. A person who contravenes the minister's order may be subject to an administrative monetary penalty (AMP). Due diligence is not a defense for AMPs. The maximum penalty is $5,000 for nonprofit organizations—or by any other persons for noncommercial purposes—and $25,000 in any other case.

A person may ask to enter into a compliance agreement with the minister as an alternative to paying a civil penalty. The purpose of a compliance agreement is to ensure that a person invests in compliance and avoids future noncompliance. A compliance agreement may contain various conditions, including a requirement to give security as a compliance guarantee.

United States

Purpose and Legislative Scheme. In August 2008, the Consumer Product Safety Improvement Act (CPSIA) became law in the United States (Pub. L. No. 110-314, 122 Stat. 3016). It revises and enlarges the original 1972 Consumer Product Safety Act (CPSA) (15 U.S.C. §§ 2051–2089). The CPSIA expands both the authority and the resources of the Consumer Product Safety Commission—the federal agency charged with protecting the American public from unreasonable risks of harm involving consumer products.

The CPSIA regulates the manufacture, importation, distribution, and sale of consumer products in the United States. It affects companies of any size that manufacture, import, or export consumer products. The CPSIA focuses on children's products but governs all consumer products through a complex system of rules and regulations. (The commission continues to issue rulemakings and regulations. This article is current as of its writing in September 2011.)

The CPSIA amends the 1972 CPSA in several important ways:

- It expands the scope of specifically regulated products.
- It broadly defines children's products and subjects them to strict lead- and chemical-content limits.
- It requires certification of compliance through stringent presale testing.
- It significantly increases civil and criminal penalties for noncompliance.
- It modifies import and export rules.
- It expands self-reporting and recall provisions.

In August 2011, H.R. 2715 became law (Pub. L. No. 112-28, 125 Stat. 273) and modified portions of the CPSIA. This new legislation gives the commission authority and discretion in how it may enforce the provisions

of the CPSIA. H.R. 2715 retains the core portions of the CPSIA, such as mandatory testing based certification and the public consumer complaint database, but modifies certain burdensome and costly CPSIA rules. The legislation exempts specific products and groups from lead-content and third-party testing requirements, but also allows the commission options to give businesses relief generally from CPSIA mandates.

Prohibitions. Businesses have varying obligations under the CPSIA, but generally they must comply, test and certify, and report. Failure to do so is a prohibited act. Under the statute, no person or entity may:

> sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product . . . [that violates any] applicable consumer product safety rule under [the Consumer Product Safety Act], or any similar rule, regulation, standard, or ban under any other Act enforced by the Commission.

Other "prohibited acts" include the sale or distribution of a product that has been recalled, a defective product that contains a "substantial product hazard," or a product that contains a "banned hazardous substance." "Prohibited acts" further include:

- Failure to report noncompliant products.
- Failure to issue required certificates of testing compliance.
- Failure to provide or maintain required records or information.
- Exportation from the United States of noncompliant consumer products.

Product Testing and Certification. Product testing to insure regulatory compliance is a key principal of the CPSIA. Consumer products must be certified as compliant with specific product safety rules.

Domestic manufacturers and importers are required to provide certification that the product has been properly tested and complies with all applicable rules, regulations, standards, and bans.

Certificates of compliance must accompany the product and be furnished to each distributor or retailer of the product.

Products that do not have required certificates may not be imported into or moved in commerce within the United States.

Children's products must be certified using independent testing by an authorized third-party testing laboratory.

Domestic manufacturers and importers of non-children's products, subject to specific product safety rules, must provide a "General Conformity Certification," based on a test of each product or a "reasonable testing program."

Record Keeping. The CPSIA also regulates and expands record-keeping requirements imposed on businesses in the product supply chain. These include among others, the following requirements:

- Upon request from the commission, every importer, retailer, or distributor of a consumer product must provide essential information on the manufacturer of the product.
- Manufacturers, upon commission request, must identify each retailer or distributor to which the manufacturer directly supplied a consumer product as well as each subcontractor involved in the production of the product or from which the manufacturer obtained a component.
- Manufacturers of children's products must permanently label their products and packaging with information that will enable the manufacturer to identify the location and date of the item's production, including the batch, run number, or other identifying characteristics. The purpose of the rule is to assist in the identification of a product that is recalled.

Reporting. Manufacturers, importers, distributors, and retailers are required to report to the commission information that reasonably supports the conclusion that a product:

- Does not comply with a product safety rule issued under the CPSA.
- Does not comply with any other rule, regulation, standard or ban under any act enforced by the commission.
- Contains a defect that could create a "Substantial Product Hazard."
- Creates an unreasonable risk of serious injury or death.

Reports to the commission must be filed "immediately." Applicable regulations (16 C.F.R. § 1115.14) allow 15 business days to transmit information within a company and to investigate and evaluate whether the information requires a report to the commission. Failure to timely submit a reportable problem is a violation that can result in a civil penalty—irrespective of whether the product is ultimately recalled.

Recalls. While the vast majority of recalls are "voluntary recalls" initiated by a business in conjunction with the commission, the commission has the authority to order recalls of consumer products. The CPSIA enhances the commission's mandatory recall powers. The commission may now order a manufacturer, distributor, or retailer to cease distribution of a product; notify others to cease distribution; give public notice of the defect, or take other actions. The commission can order these actions without a prior hearing if the commission determines the product to be imminently hazardous or is required to protect the public from a substantial product hazard. The commission

must first notify the affected manufacturer and file an action in federal district court.

Information Disclosure. The commission may share information with any "Federal, State, local or foreign government agency" if the agency:

- Agrees to keep the material confidential and used only for official purposes,
- Has a legal basis to maintain the material in confidence, and
- Will use the material for authorized purposes.

The CPSIA also establishes a Publicly Available Consumer Product Safety Information Database. The database includes reports of harm relating to use of consumer products. Consumers, health care professionals, and others may submit reports that are then published on the database and are available through the commission's website at *www.saferproducts.gov*. Manufacturers who are the subject of a report have a brief period of time to comment or object before the report is published.

Enforcement and Penalties. The CPSIA significantly increases both civil and criminal penalties for violations of the law:

- The maximum civil penalty for individual violations increases from $8,000 to $100,000.
- The ceiling on civil penalties for a related series of violations increases from $1.825 million to $15 million.
- Criminal penalties for knowing and willful violations increase from a maximum of one year imprisonment to five years.
- Criminal penalties now include forfeiture of assets associated with the violation.

In addition to enforcement by the commission, the CPSIA adds two other methods of enforcement: (1) State attorneys general in all 50 states can enforce the CPSIA through civil litigation, and (2) "Whistleblower" protection is expanded to protect employees who report employer violations of the CPSIA.

Import/Export Provisions. The CPSIA also has provisions that focus on import/export issues. Noncompliant products refused admission into the United States shall be destroyed and not exported unless the owner, consignee, or importer of record receives permission from the secretary of the treasury to export the product in lieu of destruction.

The commission also may prohibit the export from the United States of any noncompliant product unless the importing country gives the commission appropriate notice of acceptance.

Companies that sell into Canada and the United States must be aware of the new and evolving consumer product safety laws in these countries. Affected businesses should take steps now to implement a compliance plan that addresses the complex laws of both Canada and the United States. The failure to do so can result in significant penalties and costly disruption of business. ✦

