

Broad Consumer Product Safety Laws Become Effective in Canada and Australia in 2011

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Canada and Australia have recently passed new statutes containing consumer product safety and recall requirements that will become effective in 2011. The statutes and accompanying regulations will affect the manufacture, importation, or sale of specific types of consumer products and will affect incident reporting, testing, and recall requirements for consumer products. Many of the new requirements are more stringent than current U.S. consumer product safety laws and will directly impact the procedures U.S. companies apply to coordinate their reporting obligations.

The Canadian Legislation

Canada's legislation, the Canadian Consumer Product Safety Act (the "Canadian Act"), is expected to become effective sometime in the second quarter of 2011. Proposed regulations implementing the Act have been circulated by Canada's consumer product protection agencies-Health Canada and the Ontario Electrical Safety Authority ("ESA"). The agencies have signed a Memorandum of Understanding to "enable cooperative efforts on electrical product issues, recalls and corrective action"; however, it remains to be seen how the overlapping responsibilities will be shared between these two agencies. The Canadian Act will not become effective until the "Proclamation Date," which Health Canada has estimated will be in the second quarter of 2011 when regulations will be finalized.

The Australian Legislation

Australia's new product safety law, the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (the "Australian Act"), became effective on January 1, 2011. The Australian Act is enforced by the Australian Competition and Consumer Commission ("ACCC") and state and territory consumer protection agencies. Similar to Canada, the ACCC and the state and territory consumer protection agencies have signed a Memorandum of Understanding detailing how the consumer protection agencies will enforce Australia's new law.

Requirements Under the Canadian and Australian Acts

The new laws contain a number of provisions that will affect entities that manufacture, import, or sell products in Canada and/or Australia.

Reporting Requirements under the Canadian and Australian Acts

The new Canadian Act imposes broader mandatory reporting requirements for incidents involving

consumer products than the requirements imposed under U.S. law. For example, the Canadian Act requires mandatory reporting of any incidents, in Canada or elsewhere, involving consumer products where the product is associated with an injury or potential injury. Proposed implementing regulations indicate that the law's incident reporting requirements will be triggered "whether or not an actual injury or other health effect has occurred or whether or not the actual injury or other health effect itself was serious." The proposed regulation considers the "potential for injury" or a "near-miss incident" as an indicator that the product poses a health and safety danger and should be reported to the appropriate Canadian agency.

U.S. consumer product safety reporting requirements, on the other hand, are only triggered if a product contains a defect that creates a substantial product hazard or an unreasonable risk of serious injury or death. Canada's legislation, combined with proposed regulations, appears to require reporting of all incidents and/or defects, not just defects that present a substantial product hazard. For example, Canada's proposed regulation would require an entity to report incidents involving fire or other property damage that could have resulted in an individual's death or serious adverse effect on health, even if the incident did not cause death or a serious adverse effect on health.

Under the Australian Act, a manufacturer or importer of a consumer product will be required to report an incident to the appropriate agency if the entity believes that a death or serious injury or illness was "caused, or may have been caused, by the use or foreseeable misuse of the consumer goods." Both the Australian and Canadian Acts require an entity to make an initial report within two days of becoming aware of the triggering incident.

Recall Authority Under the Canadian and Australian Acts

Health Canada has not created proposed regulations regarding a voluntary recall process. The Canadian Act, however, indicates that before an entity can take any corrective action-including voluntary action-to recall a consumer product in Canada, the corrective action will have to be approved by Health Canada. Further, the Canadian legislation provides Health Canada with the authority to order mandatory recalls of a consumer product that the Health Canada Minister believes "is a danger to human health or safety." If an entity refuses to conduct a required recall, Health Canada may carry out the recall at the entity's expense. There are no similar provisions under U.S. consumer product safety laws that would allow the U.S. Consumer Product Safety Commission ("CPSC") to conduct a mandatory recall at an entity's expense.

The Australian Act also provides Australian consumer protection agencies with authority to order mandatory recalls. For voluntary recalls, however, entities conducting the recall in Australia are not required to notify the appropriate authority or receive approval before undertaking the voluntary corrective action. The Australian Act sets forth requirements regarding the content of recall notices in voluntary recalls, but the recall notice may be filed with the appropriate Australian consumer protection agency after it is issued to the public and the voluntary recall has commenced.

Canada's Law Bans Products That Pose an Unreasonable Danger to Human Health or Safety

Canada's legislation prohibits the manufacture, importation, advertisement, or sale of any consumer product that poses an unreasonable danger to human health or safety or has been recalled because the product is a danger to human health or safety. Under the Canadian Act, "danger to human health or safety" is defined as "any unreasonable hazard-existing or potential-that is posed by a consumer product during or as a result of its normal or foreseeable use and that may reasonably be expected to cause the death of an individual exposed to it or have an adverse effect on that individual's

health-including injury-whether or not the death or adverse effect occurs immediately after the exposure to the hazard, and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health."

Canadian Authorities May Order Tests or Studies to Demonstrate Compliance with Canadian Laws and Regulations

The Canadian Act gives Health Canada the authority to order consumer product manufacturers or importers to conduct tests or studies to demonstrate that a product complies with Canada's consumer product safety laws and regulations. Neither the CPSC nor Australian agencies have the authority under those countries respective consumer product safety laws to order manufacturers to conduct tests or studies in this manner.

Recordkeeping Requirements Imposed Under the Canadian Act

Neither U.S. consumer product safety laws nor the Australian Act contain recordkeeping requirements regarding sales of a consumer product. The Canadian Act, however, requires that certain documents, such as when a product was sold and in some instances to whom the product was sold, be retained for six years at a Canadian business location.

Penalties Under the Canadian and Australian Acts

Canada's new law also provides stringent penalties for non-compliance. For example, the Canadian Act allows the Health Canada Minister to impose civil penalties of up to \$25,000 for each violation of the new law. The \$25,000 penalty can be imposed each day the product fails to comply with the Canadian consumer product safety rules. The Act also sets forth substantial criminal penalties for certain violations that include imprisonment up to five years and fines up to \$500,000 for a first offense and \$1 million for subsequent offences.

The Australian law provides civil penalties up to \$1.1 million for noncompliance with mandatory recalls and up to \$16,500 for noncompliance with certain voluntary recall requirements, such as providing notice of the recall to the appropriate Australian agency.

Recommendations

Entities that manufacturer, import, or sell products in the U.S., Canada, and Australia should ensure that they have implemented policies and procedures to comply with the new regulations, particularly in light of the new laws' broad requirements, short reporting time periods, and strong penalties for non-compliance. Systems that can detect safety problems and incidents involving consumer products will be crucial to help an entity comply with the various new requirements, quickly implement corrective action, and, where products are sold in two or more of the countries, help ensure that corrective action plans are coordinated among the countries' consumer protection agencies.

Kelley Drye & Warren LLP

Kelley Drye & Warren's [Consumer Product Safety](#) practice group is experienced in providing advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary, we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies. For more information about this client advisory,

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