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In This Issue

- **Proposed Consumer Product Mandatory Recall Legislation**
- **Appeal Process for Customs Penalties**
- **Voluntary Disclosures Program**

Proposed Consumer Product Mandatory Recall Legislation

As part of an initiative by the Government of Canada to reinforce the safety of food and products consumed in Canada, the *Canada Consumer Product Safety Act* (Bill C-52) was recently introduced. The proposed legislation would impose important new monitoring obligations on industry, as well as provide for government enforcement and oversight measures.

The new measures recognize that the majority of companies have conscientious operations relating to consumer safety in Canada; however, for those companies without such operations, there is a need for new rules. In general, the proposed rules focus on three areas: active prevention, targeted oversight, and rapid response.

Given the current government's minority status, it is not clear whether this legislation will be passed into law before the end of the current Parliamentary session, if at all.

At first glance, the proposed legislation appears to address a gap between the products under the current *Hazardous Products Act* and the need to proactively protect consumers and respond to harmful products introduced to the Canadian market by both importers and manufacturers. Observers note that Bill C-52 provides an opportunity to raise the corporate responsibility bar through a partnership framework involving industry, government, and consumers. The bill in its current format recognizes that industry will be encouraged to comply if it minimally impacts current business practices by harmonizing requirements when possible.

Key Features of the Proposal

What products would be covered? Bill C-52 addresses and prevents dangers to human health or safety posed by consumer products. Under the definitions, a "consumer product" would include its components, parts, and accessories that are available to the public or individuals. Commercial products would be excluded. The legislation further clarifies the scope of the phrase "danger to human health or safety" to include hazards to life or health—both existing and potential—during normal or foreseeable use of the consumer product. Thus, the "dangers" would apply to acute or immediate health incidents as well as chronic effects that may develop over time.

What products are prohibited? In several sections of the bill, prohibitions are provided against the marketing of products that are already prohibited or non-compliant under other government department legislation, fit the description of danger to health and safety, and are non-compliant with correctives measures. Other prohibited products include those that market false, misleading, or deceptive claims, including situations when a product claims it is certified (e.g., CSA approved) when

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in fact it has not undergone safety testing in Canada. In the latter two prohibitions, a distinction is made between manufacturers and importers. Those at end of the supply chain are responsible for knowing the prohibitions and be proactive in protecting consumer health and safety. However, the existing *Hazardous Products Act* would now be expanded to include manufacturers in Canada.

Other Key Aspects

In respect of product claims, the Minister could order manufacturers or importers to provide proof to substantiate the claims in the form of tests and study results, or other information to verify compliance and veracity of the claims. Not only importers and manufacturers but also retailers would be required to expand their filing systems in, what seems to be, support of a product recall. Bill C-52 proposes to require that documents are retained to support the traceability of a product through the supply chain from source to destination, in the former, and from source to geographic area, and the dates of distribution, for the latter. Moreover, these parties would also have a reporting obligation of the supply chain when circumstances arise, and additional detailed reporting obligations to include personal information and confidential business information.

Order Powers

In situations when a product recall is warranted, inspectors under this Act would have the authority to make orders with compliance timelines—such as ordering suppliers to recall a product, to stop the sale of certain products, to re-label or, even, to issue a public advisory. The inspector could also order how a product under recall is to be disposed by a party in the supply chain. In the event that the order is not carried out, the Minister could conduct the recall and bill the expense, for instance, to the supplier.

Compliance and Enforcement

Criminal: Persons who contravene the Act and are found guilty of an offence, upon conviction on indictment could be subject to a fine of not more than CDN $5 million and to imprisonment for not more than 2 years. Persons who contravene the Act and are found guilty of an offence upon summary conviction are subject to a fine of not more than $250,000 and up to 6 months in prison. Subsequent offences in both categories may result in escalations of the fines and term of imprisonments.

Civil: In terms familiar to most importers but perhaps not to manufacturers, compliance and enforcement would be modernized to include a civil penalty regime when the inspector has the authority to issue Administrative Monetary Penalty System (AMPS) penalties. AMPS penalties would serve as the alternative to any criminal prosecutions. The maximum penalty amount would be $25,000. Recipients of penalties can appeal the penalty or, if the penalty assessed is greater than $5,000, apply to enter into a compliance agreement with the government to reduce the penalty amount owing.

Under Bill C-52, a violation would not be considered to be an offence under section 126 of the Criminal Code, which in turn means that a company on the receiving end of any compliance and enforcement action by the government would lack a defence under common law. A person could not use reasonable care (or due diligence) or reliance on existing facts to exonerate him or herself (as stated in subsection 59(1)).

Observers note that more troubling for offenders without common law defences is that each day the company is non-compliant constitutes a new penalty violation. So, the minimum $25,000 penalty could quickly escalate to financially material amounts in a short time period.

Under the legislation, there does not seem to be an appeal mechanism for violations. This essentially could require the recipient to commence an action in the Federal Court of Canada requesting a judicial review. Apart from the costs associated with these actions, Health Canada or the CBSA may take the position that the court is limited to confirming or setting aside the violation. Further, the grounds for review may be limited by the court as it is a review on the record and, therefore, the court can not receive fresh evidence on review.

As it stands now, the regulations in respect of this Act are being drafted. It is anticipated that full implementation would not occur until the summer of 2009, but any additional and widely reported recalls could accelerate the date of implementation.

Appeal Process for Customs Penalties

The process for appealing a customs penalty is provided for in the *Customs Act*. However, the appeal process itself is generally determined by policies and procedures inherent to the Canada Border Service Agency (CBSA).

Civil Penalties

There are three types of civil penalties that the CBSA administers:

- The Administrative Monetary Penalty System (AMPS)
- Seizures
- Ascertained Forfeitures

The AMPS contains a wide range of penalties designed to ensure compliance with Canada's trade and border legislation. Goods that have been unlawfully imported are generally seized by the CBSA or they may issue an ascertained forfeiture. When a seizure is not feasible, then the CBSA may ascertain a dollar amount as forfeit. As AMPS penalties largely replace seizures and ascertained forfeitures for commercial importations and exportations of goods, we will focus on the appeal process for AMPS penalties.

Overview of AMPS

The AMPS imposes monetary penalties for contraventions of the *Customs Act*, *Customs Tariff*, and the regulations pursuant to these Acts. They apply to all commercial clients, including importers, exporters, brokers, carriers and freight forwarders. Their intent is to be corrective rather than punitive. There are several hundred types of contraventions, and each contravention relates to a breach of a specific requirement set out in the legislation. Duty is not part of the penalty amount under the AMPS, and it is accounted and paid for separately on a Notice of Penalty Assessment (NPA).

The amount of the AMPS penalties is determined by the type, frequency, and severity of the infraction, and the importer's contravention history is taken into consideration. The maximum penalty amount for a single contravention is $25,000; however, the total penalty amount assessed

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on a NPA may exceed $25,000 if there is more than one AMPS contravention identified.

Penalties assessed under the AMPS become payable on the day the NPA is served. Although interest is payable on penalties beginning the day following the date of the NPA, no interest will apply if the penalty is paid within 30 days after the date of issue of the NPA.

Civil Penalties – Appeal Process

The *Customs Act* provides for the right to request a decision from the Minister when a penalty is issued. However, the *Customs Act* is silent on the appeal process itself. Generally, the appeal process can be negotiated to conform to legal principles of reasonableness and fairness. The appellant states its case in the form of a written submission. The written submission should focus on the central issues in order to convince the appeals officer that either no infraction occurred, or that the penalty was unnecessary or disproportionate in relationship to mitigating factors.

Examples of mitigating factors are:

- Lack of intent to deceive
- Lack of experience in importing
- An Act of God
- Computer breakdowns
- Reliance upon official statements
- Reliance upon opinions provided by customs advisers

Although customs appeals are typically submitted in hard copy, it may be more advantageous in some cases to discuss the case with the CBSA Appeals Officer. Direct communication with a CBSA representative may provide an opportunity to respond to specific CBSA concerns, as well as provide a forum for supplemental submissions that may be required at a later date.

Although there are several active cases of AMPS penalties currently being appealed, the odds of a penalty being overturned at this stage are very rare.

Section 129.(1) Request for a Minister's Decision

The following persons may, within 90 days after the date of a seizure or the issuance of a NPA, request a decision of the Minister by giving notice in writing to the officer who seized the goods or conveyance or served the notice:

- Any person from whom goods or a conveyance is seized
- Any person who owns goods or a conveyance that is seized
- Any person from whom money or security is received in respect of goods or a conveyance seized
- Any person on whom a notice is served

There are two types of reviews available when an importer does not agree with the findings detailed on the NPA. They are:

- Request for correction of an incorrect NPA within 30 days
- Request for redress (ministerial decision)

When a correction or redress is requested, the payment of the NPA may be deferred until a decision is rendered. However, it is important to note that if it is determined the penalty was assessed correctly, and the NPA was not paid within 30 days, interest will be charged on the outstanding amount at the higher specified rate[1].

KPMG Can Help

In order to avoid AMPS penalties, importers and exporters should be implementing procedures to ensure compliance with all customs requirements. Our Trade and Customs professionals would be pleased to provide an overview of the customs appeal rights that exist and strategies helping to manage such an appeal.

Voluntary Disclosures Program

The Voluntary Disclosures Program (VDP), administered by the Canada Border Service Agency (CBSA), is part of the CBSA's Fairness Initiative. The VDP is intended to promote voluntary compliance with the accounting and payment of duty and tax provisions of the *Customs Act*, *Customs Tariff*, *Income Tax Act*, and *Excise Tax Act* only. It does not affect the *actual payment of duty and taxes*, and it is not intended to be a replacement or substitute for existing corrective mechanisms, such as section 32.2 (2)[2] of the *Customs Act*.

The VDP provides the CBSA with the legislative authority to waive or cancel penalties, in whole or in part, on a voluntary disclosure, thereby encouraging importers and exporters to come forward and correct inaccurate or incomplete information, or to disclose information that has not been previously reported.

By coming forward to voluntarily disclose past omissions or errors, an importer or exporter may reduce their exposure to monetary penalties that would otherwise be imposed under AMPS. Importers with qualifying cases are typically only required to pay the duties and taxes owing, plus interest. The interest charge applicable under the VDP is calculated at the prescribed rate and not the higher specified rate.

Valid Disclosure Conditions

Voluntary disclosures are not intended to deal with repetitive problems caused by an importer's failure to exercise "due diligence" in their dealings with customs related business. Also, the VDP will not reduce the amount of duty owing, or the amount of interest owing on any outstanding duties.

The CBSA will only review and appraise disclosures that it considers "valid".

"A disclosure is considered 'valid' if it:

- *Is voluntary – the client initiates the disclosure voluntarily and not as a result of knowledge of current enforcement and/or verification activities*
- *Is complete*
- *Would have involved at least one applicable monetary penalty*
- *Is reviewed against the following specific Customs program criteria:*
    1. *Existing corrective and/or adjustment mechanisms do not apply*
    2. *A finding that the disclosure was not initiated to avoid legal obligations, and/or the disclosure does not form part of, or continue a pattern of, non compliance."*[3]

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Voluntary disclosures may be made in person or in writing, to the CBSA at the nearest customs office where the importer's books and records are kept, and must show that the four conditions, referenced above, have been met. Once a voluntary disclosure has been submitted, the CBSA expects access to all books of account, records, documents, and any other required information for review. When the CBSA has completed their review, the disclosure is processed and a Detailed Adjustment Statement is issued for the monies due.

In the event the CBSA denies the voluntary disclosure, importers have the option of requesting a review of the decision prior to the processing of the paperwork and the application of penalties and interest.

No-name Voluntary Disclosures

One of the appealing features of the VDP is that importers who are uncertain whether they should make a voluntary disclosure are entitled to discuss their situation on a no-name or hypothetical basis with an officer responsible for handling voluntary disclosures. A no-name disclosure is a request for advice that provides the un-named importer or exporter with insight into the outcome of making a disclosure, before any identification is required.

Customs Client Services will assess and respond to a written request for a no-name opinion based on the information that has been provided in the disclosure. Customs is bound to the opinion given, for a period of 60 calendar days after the date of the opinion, provided, that all details have been supplied by the importer in the written request. The opinion is subject to change should any new details come to light during the actual disclosure review, as well as amendments or changes in the applicable legislation.

If the importer chooses to proceed with the actual voluntary disclosure based on the written opinion received, the effective date of disclosure is the date the request was received.

The CBSA cannot make a full and final response to a voluntary disclosure until the name of the importer is given and all the facts have been provided. Where a VDP is denied, the CBSA may proceed with an assessment. For this type of situation, an importer is likely subject to penalties, interest at the specified rate, and prosecution, if applicable.

KPMG Can Help

For no-name disclosure requests, we highly recommend that an importer or exporter hire a representative to communicate with the CBSA. KPMG can provide assistance in establishing the "validity" of a voluntary disclosure and submitting the disclosure on behalf of the importer.

1 The specified rate is 6 percent more than the prescribed rate of interest.

2 (2) Subject to regulations made under subsection (7), an importer or owner of goods or a person who is within a prescribed class of persons in relation to goods or is authorized under paragraph 32(6) (a) or subsection 32(7) to account for goods shall, within ninety days after the importer, owner or person has reason to believe that the declaration of origin (other than a declaration of origin referred to in subsection (1)), declaration of tariff classification or declaration of value for duty made under this Act for any of those goods is incorrect,

(a) make a correction to the declaration in the prescribed form and manner, with the prescribed information; and

(b) pay any amount owing as duties as a result of the correction to the declaration and any interest owing or that may become owing on that amount.

3 The Canada Border Services Agency's document entitled Customs Voluntary Disclosures Program, Information for Clients, dated December 21, 2001.

More Information?

For more information on any of these subjects, or any trade or customs issue, please contact one of KPMG's Trade and Customs professionals:

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