

# REPORTING CONSUMER PRODUCT SAFETY ISSUES TO REGULATORY AGENCIES WORLDWIDE

THE U.S., CANADIAN AND AUSTRALIAN EXPERIENCE AND RECENT TRENDS IN CIVIL PENALTY PAYMENTS

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Companies that make or sell consumer products may have had occasion to ask themselves, "What would we do if the government notified us that one of our products was defective and that the product would have to be recalled?" The answer to that question would be a resounding, "Wrong question!" Instead of waiting for the government to knock at the door, consumer product companies must self-report safety issues that could potentially lead to product recalls, and may face claims for significant civil penalties if they fail to act in a timely manner.

In the United States, and in several foreign jurisdictions, companies that manufacture, import, distribute or sell consumer products each have an independent affirmative obligation to notify the government when they receive information that may suggest a safety issue has arisen with respect to their products. Although safety investigations and recalls can be instigated by the government, a company that waits to hear from the government before reporting safety information risks the imposition of steep penalties, potentially up to \$15 million. This article will focus on the reporting obligations imposed by the Consumer

Product Safety Commission (CPSC) and regulatory bodies of two other countries when safety issues arise involving consumer products, and recent trends in the increased monetary penalties sought for violations of these obligations.

## WHAT CONSUMER PRODUCT SAFETY ISSUES ARE COMPANIES REQUIRED TO REPORT IN THE U.S.?

In the United States, the Consumer Product Safety Commission (CPSC) is an independent federal agency created by Congress in 1972. It has jurisdiction over more than 15,000 types of consumer products used in and around the home, in sports, recreation and schools. These include virtually all household consumer products except automobiles and other on-road vehicles, tires, boats, alcohol, tobacco, firearms, food, drugs, cosmetics, pesticides, medical devices and watercraft, which are regulated by other entities such as the National Highway Transportation Safety Administration (NHTSA); the Bureau of Alcohol, Tobacco and Firearms (ATF); the Food and Drug Administration (FDA); and the U.S. Coast Guard (USCG).

Companies that import, manufacture, distribute or sell consumer products within the United States must be aware of their affirmative obligations relative to information they are required to collect, maintain, evaluate and report regarding



safety issues and be aware of the substantial possible adverse consequences of a company's delinquency with respect to these obligations. Among other things, the CPSC regulations require companies to monitor and analyze engineering data, quality control data, production data, safety-related production or design changes, product liability suits, claims for personal injury or damage, test data, consumer and retailer complaints, returns and warranty claims, and information received from the CPSC or other governmental agencies.

Under the CPSC regulations, the obligation to report safety issues to the CPSC is broader than the obligation to recall a product. The regulations explicitly advise companies that any doubts as to whether a company should report a product safety issue should be resolved in favor of reporting to the Commission.

Manufacturers, importers, distributors and retailers are required to report to CPSC under Section 15(b) of the Consumer Product Safety Act (CPSA) within 24 hours of obtaining information which reasonably supports the conclusion that a product does not comply with a safety rule issued under the CPSA, or contains a defect which could create a substantial risk of injury to the public or presents an unreasonable risk of serious injury or death. Companies, therefore, must prospectively analyze available data to determine if a product presents a risk that could occur in the future, while the CPSC, in deciding whether to seek penalties for failing to timely report safety issues, will analyze the timeliness of a company's reports and other actions retrospectively, based on what actually did occur. At times, the CPSC may have the benefit of hindsight that was entirely unavailable to the company when the company was determining whether or not it had a reporting obligation.

#### **WHAT ARE THE RISKS IF A COMPANY FAILS TO TIMELY REPORT SAFETY ISSUES?**

Even if a product safety issue is reported to the CPSC, the CPSC may seek to impose civil penalties based on allegations that the report should have been filed sooner than it was actually filed. In 2008, the Consumer Product Safety Improvement Act (CPSIA) increased the maximum amount of civil penalties the CPSC may seek from \$1.8 million to \$15 million. The CPSC, therefore, can now seek civil penalties in the amount of up to \$15 million if a company fails to timely report safety issues that should have been reported more promptly.

The factors that the CPSC must con-

sider in determining the amount of civil penalties to seek are the nature, circumstances, extent and gravity of the violation; the nature of the product defect; the severity of the risk of injury; the number of defective products distributed; and the appropriateness of the penalty to the size of the business involved and such other factors as appropriate. The CPSC is also required to consider how to mitigate undue adverse economic effects on small businesses.

In the past few years, the dollar amount of civil penalties paid by firms to resolve CPSC allegations of untimely safety issue reporting has increased. In fiscal year 2011, for example, the CPSC reported that ten firms had paid civil penalties for failing to timely report hazards. Seven of these penalties were \$450,000 or less and the other three were under \$1 million. By contrast, in the first half of fiscal year 2012, there have been eight reports of firms paying civil penalties for failing to timely report safety issues. Seven of the eight firms paid \$400,000 or more. Three of the eight firms paid \$1.1 million, \$1.3 million and \$1.5 million, respectively. Raising the "cap" on possible civil penalties, thus, may have emboldened the CPSC to seek increasing levels of monetary payments to resolve allegations of untimely reporting.

#### **WHAT CONSUMER PRODUCT SAFETY ISSUES ARE COMPANIES REQUIRED TO REPORT IN CANADA?**

Canada has recently implemented the Canada Consumer Product Safety Act. This law in part requires companies to report individual safety-related events involving consumer products. Under this Act, companies that manufacture, import or sell consumer products in Canada must report to Health Canada within two days after becoming aware of certain types of safety-related incidents or occurrences. An occurrence may be considered a potentially reportable incident if it involves product mislabeling, missing instructions, a defect, a product characteristic or an occurrence, involving a product in Canada or elsewhere, that may have been expected to result in serious adverse health effects. Recalls that occur in other jurisdictions also must be reported to Health Canada. Failure to timely comply with these requirements exposes a company to possible enforcement proceedings and penalties up to \$25,000 per day. Criminal penalties for certain violations could include imprisonment up to five years and fines up to \$500,000 for a first offense and \$1,000,000 for subsequent offenses.

#### **WHAT CONSUMER PRODUCT SAFETY ISSUES ARE COMPANIES REQUIRED TO REPORT IN AUSTRALIA?**

Australia has a similar statute, the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (ACL) that requires companies to report serious injuries, illness or death associated with consumer goods. This law applies to a broader class of suppliers of consumer goods and services related to the consumer goods and requires all participants in the supply chain including importers, manufacturers and retailers as well as repairers and installers to report within two days of becoming aware of an incident that occurs, in Australia or elsewhere, in which any person "considers that a death or serious injury was caused or may have been caused by the use or foreseeable misuse of the consumer goods." Under the Australia law, a "serious injury" is an "acute physical injury or illness requiring medical treatment or surgical treatment by, or under the supervision of, a qualified doctor or nurse." Injuries that do not require treatment by a medical professional are not reportable. Civil penalties for failing to comply with certain notice requirements can be up to \$16,500.

#### **WHAT SHOULD A COMPANY DO?**

To minimize the risk of penalties, companies should implement programs and procedures to regularly and routinely monitor incident data and other quality and safety data to identify safety issues reportable to the CPSC under Section 15(b). Companies that import or sell products in Canada and Australia should also ensure that procedures are in place to help to identify product related incidents and circumstances that may require that reports be sent to Health Canada or the Australian Competition & Consumer Commission. While consumer product companies may not welcome the thought of notifying government officials of potentially negative information about their products, the alternative approach of waiting for the government officials to make first contact when a safety issue arises presents substantially more unwelcome potential risks and costs.



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