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What's In Store

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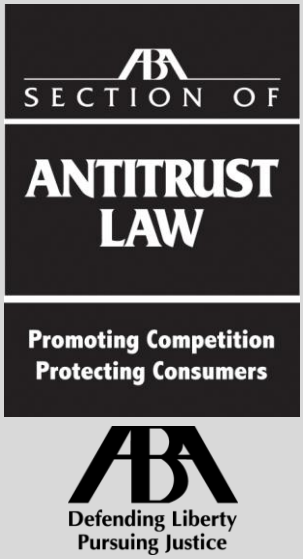

From the Editors

Welcome to the Spring 2011 edition of ***What's In Store***. We hope when you're reading this on your favorite mobile device as you make your way to Washington, DC to join us at the 59th Antitrust Law Spring Meeting. Each year, the Spring Meeting's programming addressing consumer protection issues has grown – and this year is no exception. Experts from private practice, in-house counsel, and federal and state law enforcement agencies will discuss the latest in environmental marketing, data protection and privacy in the context of franchising, hot issues in advertising substantiation, what to expect from the new Consumer Financial Protection Bureau, and much more. If you're able to attend, please look for us at the Wednesday evening welcome reception.

In this edition of ***What's In Store***, we lead off with The Consumer Protection 7, our series of interviews with a consumer protection star – this time with Andrea Levine, the Director of the Council of Better Business Bureau's National Advertising Division. You'll find other cutting-edge content, including a review of the multi-state settlement with DirectTV, an analysis of Federal Trade Commission freeze orders and who they bind, and a comparison of the privacy reports issued by the FTC and the Department of Commerce. In addition, this issue reflects what your clients already know: that today's consumer marketplace recognizes no national borders. Thus, you'll find an analysis of online behavioral advertising from the Canadian perspective, an overview of the new Canadian consumer products safety law, and an introduction to INDECOPI, Peru's consumer protection authority. We end with a personal note on a "first encounter" with deception by Steve Baker, the Director of the FTC's Midwest Regional Office.

Enjoy the newsletter – and we hope to see you at the Spring Meeting.

Lydia Parnes and Lesley Fair

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and an ability to re-identify consumers from purportedly "anonymous" data. *See* FTC STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING (2009), *available at* http://ftc.gov/os/2009/02/P085400behavadreport.pdf; Health Breach Notification Rule, 16 C.F.R. § 318 (2009) (requiring notice to an individual where an entity has a reasonable basis to believe data may be linked to that individual).

[4] "First-party" marketing is a company marketing to its existing customers and users. The FTC proposes that the concept only include the collection of data from a consumer with whom the company interacts directly for purposes of marketing to that consumer.

[5] Deep packet inspection generally refers to the ability of an Internet service provider ("ISP") to inspect the contents of transmissions carried out over its network, including examining the contents of e-mail messages and web sites visited.

Canada's Regulatory Regime for Consumer Product Safety Gets New Teeth

By Teresa Dufort and Myriam Seers

Teresa Dufort is a partner in McMillan's Litigation Group and Co-Leader of the firm's Product Liability Defence and Regulatory Group. Myriam Seers is an associate in the Litigation and Dispute Resolution Group at McMillan. Both are based in McMillan's Toronto office.

U.S. companies whose consumer products are sold in Canada should be aware of major changes to Canada's regulatory regime for consumer product safety that will take effect in June. Canada's federal government passed the new Canada Consumer Product Safety Act (CCPSA) in December 2010.[1] When it comes into force on June 20, 2011, the CCPSA will impose several new requirements on manufacturers, distributors, importers, and retailers of consumer products in Canada, including mandatory incident reporting in very short time frames, new record-keeping requirements, and compliance with inspections and mandatory recalls.

Failure to abide by these new requirements could attract criminal sanctions for both companies and individuals, with no upper limit on the fines that may be imposed in the case of certain breaches.

Administration and Enforcement

The CCPSA will be administered and enforced by Health Canada, the Canadian regulatory agency that is already responsible for some aspects of consumer product safety under the Hazardous Products Act, the CCPSA's predecessor. Health Canada also regulates the safety of food, drugs, medical devices and cosmetics, among other products.

Scope of the CCPSA

The CCPSA applies in respect of "consumer products," which are defined as:

> a product including its components, parts or accessories, that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, including for domestic, recreational and sports purposes, and includes packaging.[2]

This definition is potentially broader than the definition of "consumer product" in the U.S. Consumer Product Safety Act (CPSA). Among other things, Health Canada has stated that even if a product is intended for commercial use, if it is generally available to consumers through the Internet or rental stores, they will regard it as a "consumer product." U.S. companies should therefore be aware that certain products that are not subject to the CPSA may be subject to the CCPSA. The CCPSA excludes certain products that are separately regulated, including food, drugs, controlled substances, natural health products, plants, seeds, cosmetics, medical devices, motor vehicles, and firearms.[3]

Regulation of Electrical Consumer Products

Electrical consumer product safety is already the subject of extensive regulation by the province of Ontario's Electrical Safety Authority (ESA). Though its legal reach is Ontario, its practical reach is Canada-wide. Since electrical consumer products

are not excluded from the CCPSA, there is considerable potential overlap between the two regimes especially with regard to mandatory reporting. The ESA and Health Canada are discussing how to eliminate that overlap and it is expected that guidance on that point will be in place before the CCPSA comes into force in June. The expectation is that ESA will take primary responsibility for all electrical consumer products except electrical toys, which will remain with Health Canada.

Trigger for Regulatory Action

The phrase "danger to human health or safety" is used throughout the CCPSA to define prohibitions and the threshold for regulatory action. It is very broadly 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 an 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.[4]

Prohibited Activities

The CCPSA prohibits the manufacture, importation into Canada, advertising, and sale (or lease) of a consumer product that:

- is a "danger to human health or safety";
- is the subject of a recall or "measure" ordered under the CCPSA or of a voluntary recall because the product is a danger to human health or safety; or
- does not meet the requirements for that product set out in the regulations.[5]

Products subject to specific regulations under the CCPSA will include toys, children's sleepwear, strollers, cribs, cradles, carpets, tents, and carbonated beverage glass containers. Some new regulations will be made under the CCPSA, while some regulations currently existing under the Hazardous Products Act will be continued under the CCPSA without amendment.

The CCPSA also prohibits the packaging or labeling of a consumer product in a manner that creates an erroneous impression that the product is not a danger to human health or safety when it is, or that it complies with safety standards or regulations when it does not.[6]

The manufacture, importation, advertising, or sale of certain products is prohibited altogether. These products are listed in a schedule to the CCPSA, which will replace the list of "Prohibited Products" under the Hazardous Products Act, the CCPSA's predecessor. The schedule includes a list of expressly prohibited products, such as baby walkers mounted on wheels and lawn darts with elongated tips.

Recalls and Other Measures

The CCPSA gives the Health Minister new power to order a recall where he or she believes, on reasonable grounds, that a consumer product is a danger to human health or safety.[7] There is an express post-recall reporting requirement, although it is expected that Health Canada will continue with its current practice of requesting the completion of an online recall effectiveness form within 60 days of initiating the recall.

The Health Minister will also have the power to stop the manufacturing, importation, packaging, storing, advertising, selling, labeling, testing, or transportation of a consumer product or to order any other measure that the Minister considers necessary to remedy a non-compliance with the CCPSA.[8]

These powers may be invoked even where there is a lack of full scientific certainty that there is a danger to human health or safety. The preamble to the CCPSA expressly states that a lack of full scientific certainty is not to be used as a reason for postponing measures where the impact on human health could be serious or irreversible.

Inspections and Mandatory Testing

The CCPSA gives Health Canada inspectors broad examination, testing, analysis, and seizure powers.[9] They will also have the power to order manufacturers and importers of consumer products to conduct tests or studies on a consumer product, to provide documents related to those tests and studies and to compile any information required to verify compliance with the CCPSA.

Mandatory Incident Reporting

Manufacturers, importers, and sellers of consumer products must report to Health Canada and to the person from whom they received the product all information in their control regarding an "incident" within two days of becoming aware of the incident.[10]

Manufacturers and importers must provide a more comprehensive report within ten days, which must be in writing and include information about the product involved in the incident, any products that they manufacture or import that to their knowledge could be involved in a similar incident and any measures they propose be taken with respect to those products.[11]

"Incident" is defined in the CCPSA as:

- an occurrence in Canada or elsewhere;
- a defect or characteristic; or
- incorrect or insufficient information on a label or in instructions, or the lack of a label or instructions

that resulted or may reasonably have been or be expected to result in an individual's death or serious adverse effects on their health, including a serious injury.[12]

"Incident" also includes a recall or other measure initiated by a foreign entity or provincial government for human health or safety reasons.

Health Canada published a draft guidance on mandatory reporting last fall (the Draft MR Policy) inviting stakeholder comment and is expected to publish a new draft in the next few weeks. The aim is to have the final guidance document in place by May 2011.

The CCPSA does not specifically define "defect" for the purposes of the mandatory incident reporting requirement but the Draft MR Policy suggests that "[a] defect or characteristic may include a fault, flaw, or irregularity – in any step from conception, design, manufacturing and packaging to handling and delivery to the customer – that causes weakness, failure or inadequacy in form or function that may reasonably be expected to result in an individual's death or in serious adverse effects on their health."

The Draft MR Policy provides that the company becomes "aware" when a "responsible person" becomes aware of an incident involving a consumer product the company supplies in Canada. A "responsible person" is the directing mind of an organization, who through the exercise of due diligence, should become aware of an incident.
A person may become aware through:

- direct notification by a consumer (via complaints or lawsuits), government, NGO, standards body, or supplier;
- receipt of expert reports, test reports, scientific or epidemiological studies; or
- any other form of direct notice that provides sufficient detail.

Health Canada has said that there is no onus to go out and actively seek such information. Obligations

to acquire "awareness" are limited to what the company learns in the ordinary course of business.

Where reporting is required, Health Canada has developed an incident reporting form (not yet published) that may be submitted through its website or by email, fax, or mail.

Confidential Business Information

The Health Minister will have the power to disclose confidential business information to foreign governments in relation to a consumer product without the consent of and notice to a company. Before the information may be disclosed, the foreign government must agree to keep the information confidential and to use it only for the purpose of carrying out functions related to human health or safety or environmental protection.

If disclosure of the information is essential to address a serious and imminent danger to human health or safety, the Minister may disclose confidential business information to the public without the consent of and without prior notice to a company although notice must subsequently be provided within one business day.[13]

Record-Keeping Requirements

The CCPSA requires that all persons who manufacture, import, advertise, sell, or test a consumer product for commercial purposes maintain documents identifying from whom they obtained the product and to whom they sold it and, in the case of retailers, the location where and the period during which the product was sold. These documents must be maintained for six years after the end of the year to which they relate and must be maintained at the company's place of business in Canada, though companies can obtain from Health Canada an exemption from the requirement to keep them in Canada.[14]

Offences and Penalties

Companies and their directors, officers and employees may be held criminally liable for contravening the CCPSA, with criminal penalties including fines ranging from $250,000 to $5 million to "an amount in the court's discretion," and terms of imprisonment of up to five years.[15]

In addition to criminal sanctions, the CCPSA creates an "administrative monetary penalty" regime for the violation of recall orders or other measures ordered by the Health Minister. The penalties for these violations will be specified in CCPSA regulations that have not yet been published.[16] There will be no "due diligence" defense for individuals under the administrative monetary penalty regime.[17]

Summary

In short, the days of enjoying a relatively benign regulatory environment for consumer products in Canada will soon be over. Come June 2011, companies whose products are sold in Canada will have to start paying attention to record keeping. They will also need to focus on product safety occurrences and other potential "incidents," assessing whether they meet the definition of the latter, and if they do, ensuring mandatory reports are timely filed in very tight time frames. There will likely be a painful period of uncertainty for both the regulator and industry as interpretations of the new legislation develop. For companies used to dealing with Canada as a regulatory afterthought, room will have to now be made on the front burner.

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[1] Canada Consumer Product Safety Act, S.C. 2010, c. 21 ["CCPSA"]
[2] CCPSA, s. 2
[3] CCPSA, s. 4(1) and Sched. 1
[4] CCPSA, s. 2
[5] CCPSA, ss. 7 and 8
[6] CCPSA, ss. 9 and 10
[7] CCPSA, s. 31(1)
[8] CCPSA, s. 31
[9] CCPSA, s. 21
[10] CCPSA, s. 14(2)
[11] CCPSA, s. 14(3)
[12] CCPSA, s. 14(3)
[13] CCPSA, ss. 16 and 17
[14] CCPSA, s. 13

[15] CCPSA, s. 41
[16] CCPSA, ss. 49 and 50
[17] CCPSA, s. 59

CONSUMER PROTECTION IN PERU

By Patricia Sarria

Patricia Sarria is an executive attorney with the Consumer Protection Commission of Peru's National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), where she specializes in consumer and business education and the development of cases against companies that don´t comply the rules of the Code. In addition, Ms. Sarria completed a fellowship in the Federal Trade Commission's Bureau of Consumer Protection.

Editor's Note: Many thanks to Yasmin Tavakoli, an attorney with the Washington office of Kelley Drye, for her assistance in translating this article.

Introduction: Peru's Law No. 29751, Code of Consumer Protection and Defense

On October 2, 2010, Law No. 29571 of the Code of Consumer Protection and Defense took effect in Peru. This new statute is ground-breaking in that it establishes standards of consumer protection within the framework of Article 65 of Peru's Constitution.[1] Likewise, for the first time the Code establishes public policies obligating the State to execute safeguards for protecting the rights of consumers.

Considering that the economic mode in Peru is a Social Market Economy, the Code's norms must usually be applied to guarantee free enterprise in commerce and industry, thus orienting the action of the State to the sustained development of the Peruvian economy.

The first public policy established by the Code is that the Peruvian State will protect the health and security of consumers through an appropriate updated regulatory framework that encourages the participation of public and private entities and promotes the creation of standard regulations for the production and commercialization of products and services. Thus, the Peruvian State – through institutions established to further those policies – will oversee compliance with the Code and the promulgation of regulations necessary for its application.[2]

The Code recognizes the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) as the national authority of consumer protection in Peru. Therefore, INDECOPI monitors compliance with the Code, without disrupting the autonomy of other organizations that comprise Peru's system of consumer protection, e.g., the Regulatory Agencies of Public Services of Peru.

The Code establishes as public policies consumers' right to be informed by producers or suppliers and the defense of their economic interests. In addition, the Code guarantees prompt and efficient mechanisms for the resolution of conflicts. One innovation of the Code is the creation of an expedited procedure for controversies regarding small sums, offering a resolution to parties within 30 business days.[3]

Another important public policy is the duty of the Peruvian State to implement education and training programs for consumers to inform them of their rights, enabling them to make informed decisions. The Code also establishes that these consumer education programs must be included within Peru's school curriculum.[4] This policy reflects the importance of educating children about making informed consumer decisions – whether they're buying treats with their own spending money or receiving educational services paid for by their parents.